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THREE METAPHORS OF NORM MIGRATION IN INTERNATIONAL CONTEXT

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INTRODUCTION: INTERNATIONAL NORM ENTREPRENEURSHIP

Two metaphors constantly recur in the activities and scholarship of those who promote a regime of global legal norms¹: harmonization and transplantation.² More recently a third has also found scholarly favor: viral propagation.³ Whichever metaphor is adopted, however, and regardless of whether the field is public law and judicial institutions (notably, international human rights and the rule of law),⁴ environmental

* F.R. Scott Professor of Law, McGill University. This essay is a revised version of the keynote address presented at the symposium *Ruling the World: Generating International Norms*, held at Brooklyn Law School, October 24, 2008. I should like to thank my United Nations Commission on International Trade Law (“UNCITRAL”) colleagues Michel Deschamps, Richard Kohn, Jean-François Riffard, Uwe Schneider, Harry Sigman, Ed Smith, Catherine Walsh, and Steve Weise for many helpful conversations over the years about international commercial law reform. I am especially grateful to Neil Cohen for his friendship and generosity in sharing his insights into the themes I develop here. The Editors of the *Journal* have been most gracious in assisting me with the task of turning my symposium paper into the present Article. I trust the reader will judge that any errors of fact or interpretation (responsibility for which lies with me alone) have been made “in good faith and in a commercially reasonable manner.”

1. In this Article, I focus on international norm migration as involving the conscious efforts of norm entrepreneurs, be they States acting individually or collectively (e.g., the International Institute for the Unification of Private Law (“UNIDROIT”)), the agencies of which States are members (e.g., UNCITRAL), or private organizations (e.g., the National Conference of Commissioners on Uniform State Laws). For a discussion of the difference between intended norm migration and unintentional norm migration, see Finn Makela, *The Drug Testing Virus*, 43(3) *REVUE JURIDIQUE THÉMIS* [R.J.T.] (forthcoming 2009) (Can.) (examining the northward migration of U.S. legal norms concerning employee drug testing to Canada).

2. Both *harmonization* and *transplantation* have been staples of comparative law discourse since the mid-1970s. See, e.g., Marc Ancel, *From the Unification of Law to Its Harmonization*, 51 *TUL. L. REV.* 108, 114–17 (1976); W.J. Kamba, *Comparative Law: A Theoretical Framework*, 23 *INT’L & COMP. L. Q.* 485, 501–04 (1974); Alan Watson, *Legal Transplants and Law Reform*, 92 *LAW Q. REV.* 79, 79–84 (1976).

3. Perhaps the most insightful discussion of the *viral propagation* metaphor in legal circles is the unpublished manuscript by Spencer Weber Waller, *The Law & Economics Virus 1* (2008) (unpublished manuscript) (available at <http://ssrn.com/abstract=1017882>).

4. See generally *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* (Erik Jensen & Thomas Heller eds., 2003) (bringing together empirical studies of legal and judicial reform from across Asia, Europe, Latin America, and the United States); *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed., 2006); Judith Resnick, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 *YALE L.J.* 1564 (2006) (exposing American federal-

law, labor law, or the structural components of the trading economy,⁵ a single conclusion typically follows. Western law, particularly in its common law reflections, and specifically in its U.S. common law instantiations, is not just the best available earthly representation of the possibilities; it is the Platonic ideal-type.⁶ Yet as far as I am aware, the assertion has not actually been put to a meaningful empirical test in many of the above fields. It remains a canon of the faith-based international law reform congregation, to which even disciples of reality-based constituencies are required to pay tribute.

My own field of interest, secured transactions law, is not immune from this type of theological proselytizing. Again and again one hears that the latest revision of Article 9 of the U.S. Uniform Commercial Code ("UCC") is the dialectical endpoint of centuries of experimentation with regimes of security on movable property.⁷ As such, Article 9.3⁸ is necessarily superior to all other models for modernizing the law of commercial

ism as a both an excuse for evading transnational dialogue and a port of entry for norm migration in the context of international human rights).

5. See generally BOAVENTURA DE SOUSA SANTOS, TOWARDS A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995) (critiquing modern norms as incapable of generating progressive laws for regulating the global economy).

6. The literature exploded following HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000). But compare Daniel Berkowitz et al., *Economic Development, Legality and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003) (arguing that the mode in which the borrowed law was initially transplanted and received is a more important determinant of effective legal institutions than the supply of law from a particular legal family), with Sigrid Quack, *Agency Legal Professionals and Transnational Law-Making: A Case of Distributed Agency*, 14 ORGANIZATION 643 (2007) ("[I]n the face of weak or 'loose' government at the international level, the development of transnational legal norms follows a pattern of dispersed rule-setting that is manifested in the common law system and led by legal practitioners in large law firms and an internationalized legal profession.").

7. See, e.g., Heywood Fleisig, *Secured Transactions: The Power of Collateral*, 33 FIN. & DEV. 44 (1996); Heywood Fleisig & Nuria de la Peña, *Law, Legal Institutions and Development: Lessons of the 1990s for Property Rights, Secured Transactions, Business Registration, and Contract Enforcement* (Oct. 2003), reprinted in WORLD BANK, GLOBAL INSOLVENCY DATABASE http://siteresources.worldbank.org/GILD/ConferenceMaterial/20260806/CEAL_Legal_Lessons%20-%20formatted.pdf. Two recent volumes provide a good conspectus of challenges and developments in the North Atlantic trading block. See SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW (Eva-Maria Kieninger ed., 2004), and the essays in Part I of the collection in particular; GERALD MCCORMACK, SECURED CREDIT UNDER ENGLISH AND AMERICAN LAW (2004).

8. In order to differentiate the versions of Article 9, I borrow the protocols of computer programs and characterize these official versions as Article 9.1, Article 9.2, and Article 9.3.

financing worldwide and should serve as a template for both national law and transnational legal norms.⁹

The failure to test this apostolic creed against the data provided by rigorous scholarly inquiry is, I argue, a fundamental flaw in contemporary international norm entrepreneurship, especially in those fields of business and commercial law where various versions of “economic analysis” reign supreme.¹⁰ In the City of God, there may well be an exact coincidence between the ideal and the actual, between norm and action; in the City of Man, a somewhat more attenuated relationship is invariably present.¹¹

There is another, procedural defect in the argument for universal legal norms that usually escapes the notice of law reformers. Global norm entrepreneurs do not take sufficiently seriously their privileged metaphors. Because these metaphors are familiar in popular conversation and because they seem, at least superficially, to plausibly characterize the processes for generating transnational legal norms, they lose their anchorage in the knowledge fields from which they arise. Divorced from their disciplinary contexts, these metaphors become rhetorical slogans,¹² mere ciphers.¹³ If ever international law reformers were to engage carefully with any one of their harmonization, transplantation, and viral

9. Typical of the Article 9 literature in this respect is Boris Kozolchyk & Dale Beck Furnish, *The OAS Model Law on Secured Transactions: A Comparative Analysis*, 12 SW. J. L. & TRADE AM. 235 (2005).

10. E.g., Kenneth W. Dam, *Credit Markets, Creditors' Rights and Economic Development* (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 281, 2006), available at http://www.law.uchicago.edu/Lawecon/WkngPprs_251-300/281-kd-credit.pdf.

11. I have considered this theme in two recent unpublished conference papers. See Roderick A. Macdonald, *Exporting Article 9*, Presentation at the Jefferson School of Law Conference on Globalizing Secured Transactions (Mar. 14–15, 2008) (on file with author) [hereinafter Macdonald, *Exporting Article 9*]; Roderick A. Macdonald, *Distinguishing “Interest” From “Position”*: Negotiating the Modernization of Secured Transactions Law in International Trade, Presentation at the Institute of Law and Finance, Johann Wolfgang Goethe Universität, Frankfurt, F.R.G. (Apr. 30, 2008) (on file with author).

12. Metaphor as rhetorical device—a memorable way to make a point that could be made otherwise—is the most usual deployment of metaphors in legal scholarship. Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229 (1994). Hibbitts is one of very few scholars who have theorized the use of metaphors *about* law by contrast with metaphors *in* law.

13. I am, of course, making a broader claim about metaphors in legal discourse. Following Finn Makela, *A Viral Model of Legal Norm Migration* (Nov. 14, 2008) (unpublished thesis, University of Montreal) (on file with author), I argue that “every metaphor is a submerged model.” For an extended development, see Roderick A. Macdonald & Jonathan Widell, *Office Politics (Again)!*, 20 CAN. J.L. & SOC. 1, 5–8 (2005).

propagation metaphors and examine their disciplinary detail in music, botany, and genetics respectively, they would, I believe, be much less optimistic about deeming North American legal artifacts like Article 9.3 transcendent (that is, good for all times and all places).¹⁴

In support of this claim, I extrapolate from my experiences over a twenty-year period as a *national* law reformer in two civil law jurisdictions, Quebec and Ukraine,¹⁵ and from lessons learned during the past six years as an *international* law reformer privileged to serve as a member of the Canadian delegation to UNCITRAL Working Group VI: Secured Transactions.¹⁶ I draw parallels between these three experiences and the three metaphors I have identified in an effort to show how global norm entrepreneurs selectively choose (and selectively attend to the features of) their metaphors in order to validate their often unrealistic expectations about the receptivity of States to proposals for legislating international legal norms as domestic law. The reform process in Quebec was driven by the rhetorical logic of *harmonization*, in Ukraine by the rhetorical logic of *transplantation*, and at UNCITRAL by the rhetorical logic of *viral propagation*.¹⁷ In none of these cases, however, was significant effort invested in deriving a viable model of norm migration from these metaphors. In none did norm entrepreneurs rely on a theory that would

14. Too often when borrowed across disciplines, metaphors are stripped of their nuance, their equivocation, and their politics. See generally PAUL RICOEUR, *THE RULE OF METAPHOR: MULTI-DISCIPLINARY STUDIES OF THE CREATION OF MEANING IN LANGUAGE* 65–133 (1977). The point is further elaborated in J. DOUGLAS PORTEOUS, *LANDSCAPES OF THE MIND: WORLDS OF SENSE AND METAPHOR* (1990). The general point about metaphors in law is also developed by Waller, *supra* note 3, at 6–7.

15. Between 1985 and 1989, I served on a Ministerial Working Group charged with drafting articles for what became Book VI: Prior Claims and Hypothecs of the CIVIL CODE OF QUÉBEC [C.C.Q.], R.S.Q., ch. 64, arts. 2644–2802 (1991) (proclaimed in force Jan. 1, 1994). In 2003 and 2004, I served as an external Consultant to the World Bank and assisted in the drafting of what became the Ukraine Law on Securing Creditors' Claims and the Registration of Encumbrances Law No. 1255-IV, Nov. 18, 2003, Vidomosti Verkhovnoyi Rady Ukrainy [V.V.R.] [Official Bulletin of the Supreme Council of Ukraine] 2004, No.11, p.140 (Ukr.) (proclaimed in force Jan. 8, 2004), available at <http://zakon.nau.ua/eng/doc/?uid=3020.360.0> [hereinafter Charge Law].

16. See Working Group VI, 2002 to Present: Security Interests, http://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html (last visited Apr. 19, 2009) [hereinafter 2002 to Present: Security Interests].

17. In the oral presentation of this Article, I also used these three metaphors more generally to explore the framing of the three panels of the Symposium, thereby illustrating their analytical power. International organizations (panel I) are habitually engaged in an endeavor that can be captured by the metaphor of *legal transplants*; transnational epistemic communities (panel II) are constituted in a logic of *harmonization*; and the notion of an evolution from global soft law to global hard law (panel III) evokes an image of *viral propagation*.

have enabled them to judge the success or failure of their work against a template of testable hypotheses.¹⁸

To put the matter slightly differently, whether the law reform objective is to generate international legal norms located within the legal regimes of States or to generate international legal norms located within the system of international or transnational commercial law, the endeavor is similar. The fundamental questions of norm creation and norm migration do not change simply because the scope and scale of the legal order in question differ.¹⁹

Before discussing these experiences in detail, I should like to enter two caveats. First, my observations about the metaphors and practices of global law reform are to be understood analytically, not polemically. All three metaphors carry with them symbolic baggage. Without further specification, the idea of harmonization resonates positively—harmony is preferable to disharmony. Without further specification, the idea of transplantation is rather neutral—positive perhaps, if a life-saving organ transplant, less positive if it involves the introduction of a foreign species that destroys an indigenous habitat. Without further specification, the idea of viral propagation evokes a negative consequence—a viral disease pandemic. I ascribe no such symbolism to these metaphors. In this Article, my aim is simply to reflect on how effectively these metaphors capture the mode of norm migration at issue.

My second disclaimer pertains to the substantive field of inquiry. My reflections on the manner in which international norm entrepreneurs have promoted the reform of secured transactions law are in no way intended to denigrate Article 9.3 or its predecessors. Article 9 in all its versions is a remarkably successful legislative endeavor, and its key policies are widely acknowledged as capturing the central premises and core principles that should be pursued in any reform of secured transactions.²⁰ Still, success (even extraordinary success) in one domestic legal order is

18. On the importance of modeling metaphors, see MAX BLACK, *MODELS AND METAPHORS: STUDIES IN LANGUAGE AND PHILOSOPHY* (1962).

19. The point has long been standard currency among legal pluralists, although its impact in the field of international commercial law reform is minimal. On norm migration in a legal pluralistic context, see the essays in *LE DROIT SOLUBLE: CONTRIBUTIONS QUÉBÉCOISES À L'ÉTUDE L'INTERNORMATIVITÉ [SOLUBLE LAW: QUEBEC'S CONTRIBUTIONS TO THE STUDY OF INTERNORMATIVITY]* (Jean-Guy Belley ed., 1996) [hereinafter *SOLUBLE LAW*].

20. This is confirmed by the principles many international organizations have identified as key to secured transactions reform. For one attempt to state these principles cogently, see WORLD BANK, *PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS* (Apr. 2001), http://www.worldbank.org/ifa/ipg_eng.pdf [hereinafter *WORLD BANK, PRINCIPLES AND GUIDELINES*].

no guarantee of success elsewhere. Such success does, however, provide a good benchmark for inquiring into the conditions for successful law reform and the why and how of mitigated success.

Article 9 remains an enigma for many jurists outside common law North America. Jurists from States that have not adopted the basic private law institutions of Western Europe typically find the esoteric vocabulary and conceptual structure of Article 9 to be curious.²¹ Those trained in the civil law find Article 9 to be slightly schizophrenic in design. After all, none of its key structural features are conceptually new: the idea of a security right as a nonpossessory charge on property is far from foreign to the civil law tradition.²² But the sweeping up of title transactions into the general concept of security, particularly in cases involving vendors that retain title to the property sold, suggests incoherence. How can one be both the owner of property and the titulary of a security right in the same property?²³ Of course, one must be careful not to overstate these points. On the one hand, many States have not adopted basic institutions of Western law, whether because of political theory (in socialist regimes), theology (in Islamic republics) or traditions (in some Asia-Pacific nations). Jurists from each can be expected to have their own differentiated reactions to Article 9, deriving from the particular assumptions of their different legal regimes. Moreover, the civil law tradition, like the common law tradition, is not a monolith. It would be incorrect to affirm that the secured transactions regimes in Quebec, France, Germany, Italy, and various States in Central Europe and Latin America are equally hospitable to the underlying logic of Article 9.²⁴ Even less are

21. Roderick A. Macdonald, Presentation at the AALS Conference on Commercial Law at the Crossroads: Have I Got a Law for You . . . (June 14–17, 2005), outline available at <http://www.aals.org/2005midyear/commercial/RoderickMacdonaldOutline.pdf>.

22. Classical Roman law knew of the nonpossessory charge—*hypotheca*—on movable property fourteen centuries before the chattel mortgage emerged in common law countries. See R.W. LEE, *THE ELEMENTS OF ROMAN LAW* 175–78 (4th ed. 1956). The prohibition on the hypothecation of movables was a later development that did not fundamentally alter the civilian concept of hypothecation as a debtor-in-possession charge on property. See Pierre Crocq, *L'évolution des garanties du paiement: de la diversité à l'unité* [*The Evolution of Payment Guarantees: From Diversity to Unity*], in 2 *MÉLANGES CHRISTIAN MOULY* [A COLLECTION OF ESSAYS IN HONOR OF CHRISTIAN MOULY] 317 (1998) (Fr.).

23. For a comprehensive discussion of the problem, see JEAN-FRANÇOIS RIFFARD, *LE SECURITY INTEREST OU L'APPROCHE FONCTIONNELLE ET UNITAIRE DES SÛRETÉS MOBILIÈRES: CONTRIBUTION À UNE RATIONALISATION DU DROIT FRANÇAIS* [THE SECURITY INTEREST OR THE FUNCTIONAL UNITARY APPROACH TO SECURITY ON MOVEABLE PROPERTY: CONTRIBUTION TO A RATIONALIZATION OF FRENCH LAW] (1997) (Fr.).

24. For a subtle treatment of the diversity of different legal traditions, and the diversity within such traditions, see H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (2d

they equally hospitable to the particular mechanisms by which this logic is reduced to the specific legal norms of Article 9.3.²⁵

In both substance and form, Article 9 is the necessary product of a common law regime that never fully developed the generic concept of a security right as a “legal cause of preference,” embracing consensual and nonconsensual hypothecations, charges, liens, and possessory pledges. Substantively, and consistent with the evolution of the common law mortgage over land, Article 9 relativizes title according to the purposes of its deployment: a creditor’s or vendor’s ownership does not comprise the full prerogatives of ownership where title is used to secure the performance of an obligation. In form, Article 9 does not set out a general concept by which the “essential” characteristics of the various transactions it regulates may be identified. So, for example, it does not define the generic idea of a “security right.” While Article 9 does incorporate the definition of a “security interest” provided in Section 1-201(35),²⁶ this definition is under-specified. Consequently, many types of transactions that could be functionally understood to create a security interest have been excluded from the scope of Article 9 by judicial interpretation.²⁷ At the same time, many types of transactions that are not functionally secured transactions under the opening sentence of the definition

ed. 2004). See also H. Patrick Glenn, *A Concept of Legal Tradition*, 34 QUEENS L.J. 427 (2008).

25. Commentators generally acknowledge that Article 9.3 is much more responsive to the particular features of secured financing in the United States and that its detailed rules and definitions diminish its suitability as a template for international secured transactions reform. See, e.g., Ronald C.C. Cuming & Catherine Walsh, *Revised Article 9 of the Uniform Commercial Code: Implications for the Canadian Personal Property Security Acts*, 16 BANKING & FIN. L. REV. 339 (2000).

26. U.C.C. § 1-201(35) (2001) (“‘Security interest’ means an interest in personal property or fixtures which secures payment or performance of an obligation. ‘Security interest’ ‘includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. ‘Security interest’ does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 2-401, but a buyer may also acquire a ‘security interest’ by complying with Article 9. Except as otherwise provided in Section 2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a ‘security interest,’ but a seller or lessor may also acquire a ‘security interest’ by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 2-401 is limited in effect to a reservation of a ‘security interest.’ Whether a transaction in the form of a lease creates a ‘security interest’ is determined pursuant to Section 1-203.”).

27. Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175 (1983). This article remains one of the best explorations of this theme.

of Section 1-102(35) have been added to the scope of Article 9; and many legal devices not caught under any conceivable definition of a security interest are included within the regulatory framework of Section 9-109(a).²⁸

The discomfort of jurists outside common law North America with Article 9 can also be traced to its pragmatic, remedy-oriented structure and its highly-detailed, fact-driven drafting style—both features that particularly grate upon those who appreciate the notion of a code.²⁹ For many, Article 9.3 in particular is the antithesis of a code; it is anti-conceptual, written in a technical style, and not integrated within a syncretic frame of private law such as a civil code.

To shed light on the source of these misgivings about Article 9, I should like to conclude this Introduction by situating the law of secured transactions within its broader intellectual context.³⁰ Conceptually, the *genus* security right (including the *species* security interest) can only be fully understood within the regime governing the compulsory enforcement of obligations (or what in common law systems is conventionally called debtor-creditor law). In contemporary Western legal traditions, whether Continental civil law or Anglo-American common law, four principles underpin debtor-creditor law. The first principle, which we now take as a given, but which really only achieved its status as a principle in the nineteenth century with the abolition of debtor's prison, is that judgments are to be executed against property, not persons. The second principle is that the preferred creditor's remedy for nonperformance of an obligation is not to coerce specific performance, but rather to seek performance by equivalence, in the form of a judicial determination of money damages. The third principle (the common pledge of creditors) is that the entire patrimony of a debtor is liable for these debts. That is, the law presumes that what people own secures what they owe, and that any creditor is entitled to seek satisfaction of an unperformed obligation by seizing and selling however much of its debtor's exigible estate is required to satisfy the debt. The fourth principle is now understood in common law systems more as a feature of insolvency law, although in civil law systems it remains a feature of debtor-creditor law. Should the assets of a debtor be insufficient to pay all creditors with unpaid obligations, the money received from the sale of these assets will be

28. See U.C.C. § 9-109(a)(2)-(4) (2000).

29. On the key features of a code as a juristic technique, see QUEBEC CIVIL LAW: AN INTRODUCTION TO QUEBEC PRIVATE LAW 98-111 (John E.C. Brierley & Roderick A. Macdonald eds., 1993).

30. For an elaboration of this context, see PIERRE CROCQ, PROPRIÉTÉ ET GARANTIE [PROPERTY AND SECURITY] (1995) (Fr.).

distributed ratably (*pari passu*) among these creditors, unless the law gives their claim a priority status (a preference).

Once these features of debtor-creditor law are clearly articulated it is easier to grasp the basic logic of a security right and to see why an Article 9 security interest is only one species of the larger genus. This logic can be expressed as follows:

A security right is constituted by (1) the specific and purposive affectation of property (2) to the satisfaction of a debt, (3) in a manner that improves the legal situation of an ordinary creditor (4) by attenuating the principle that an insolvent debtor's entire estate is the common pledge of creditors in which all creditors share *pari passu*.³¹

A security right may be consensual or nonconsensual. It may be a right in corporeal or incorporeal property. It may affect individual assets or a universality. It may attach to movable or immovable property. It need not be a right in assets, but may simply be a right in their proceeds. It need not generate an execution preference. It need not involve the rendering of assets into money. It may involve the direct payment of the debt by substituted performance.³²

Of course, simply noting these features of the generic concept of a security right does not, in any meaningful sense, tell us how they may be instantiated in any particular legal regime. Nor does it tell us how legal ideas circulate or the mechanisms by which international norm entrepreneurs seek to sell their product in a globalized economy. These are the issues I address in the three following Sections of this Article.³³ I consider in turn the dominant metaphors that capture the objectives of each of the three secured transactions law reform endeavors with which I have been associated over the past three decades.³⁴ While the discussion is

31. This definition is drawn from Roderick A. Macdonald & Jean-Frédéric Ménard, *Credo, credere, credidi, creditum: Essai de phénoménologie des sûretés réelles [A Phenomenological Study of Security on Property]*, in MÉLANGES OFFERTS AU PROFESSEUR FRANÇOIS FRENETTE: ÉTUDES PORTANT SUR LE DROIT PATRIMONIAL [ESSAYS IN HONOR OF PROFESSOR FRANÇOIS FRENETTE: STUDIES IN PATRIMONIAL RIGHTS] 309 (2006) (Can.).

32. Doctrinal commentators in France have been particularly thoughtful in working through the subtleties of the generic idea of a security right. See, e.g., JACQUES MESTRE ET AL., *DROIT COMMUN DES SÛRETÉS RÉELLES [COMMON LAW OF SECURITY ON PROPERTY]* 1–10 (1996) (Fr.); Michel Cabrillac & Christian Mouly, *DROIT DES SÛRETÉS [SECURITIES LAW]* 1–19 (6th ed. 2002) (Fr.).

33. I have discussed many of these points in two other recent articles. See Roderick A. Macdonald, *Article 9 Norm Entrepreneurship*, 43 CAN. BUS. L.J. 240 (2006) [hereinafter Macdonald, *Norm Entrepreneurship*]; Roderick A. Macdonald, *In Praise of the Hypothecary Charge*, 7/8 DECITA 287 (2007).

34. In this Article, I do not address the complementary question of whether there can (and should) be international legal norms that are proper to an international legal order

broadly cast, I pay particular attention to issues of scope: how does each law reform project address the deployment of title to secure the performance of an obligation?³⁵ My conclusion raises the more general issues of formalism and functionalism as strategies of international law reform and situates the endeavor within the larger context of ethical theory.

I. HARMONIZATION: THE NAIVETY OF EQUAL TEMPERAMENT

My first example, meant to illustrate the use and abuse of the metaphor of *harmonization* by international commercial law norm entrepreneurs, is drawn from the process of civil code revision in Quebec.

Exactly what does the metaphor of harmonization imply?³⁶ For most jurists it means reforming the law of one State to bring it into accord with the law of another State. The assumption is that there already exists a desired theme or melody, and that some discordant melody needs to be rewritten so that it is in harmony with the existing, desired theme. Other jurists see the challenge as bilateral. Harmonization implies that the existing theme or melody may have to be changed in order to better accommodate the harmonic efforts of others. Here, the assumption is that the goal is to find the best set of policies and principles (whether or not there is actually an existing legal regime that reflects these policies and principles) and to adopt these policies and principles as the guiding motifs for legislative drafting in all receiving States. In both hypotheses, however, there is a presupposition that harmony rather than discord is desirable, and that harmony will always produce substantive compatibility.³⁷

conceived as such, and that derive their first-order legitimacy from legitimating structures other than States. That is, I do not consider either so-called *legislated* international legal norms deriving from international treaties and conventions or *nonlegislated* international legal norms deriving from practice, contract, or everyday interaction. For a brief discussion of the theoretical ground for such developments in the idea of legal pluralism, see Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism*, 15 ARIZ. J. INT'L & COMP. L. 69 (1998).

35. A broad overview of the alternatives in common law and civil law regimes may be found in Michael G. Bridge et al., *Formalism, Functionalism, and Understanding the Law of Secured Transactions*, 44 MCGILL L.J. 567 (1999).

36. According to the Oxford English Dictionary, "harmonization" is the "action or process of harmonizing"—meaning the reduction to harmony or agreement; reconciliation. See Oxford English Dictionary Online, Harmonization, http://dictionary.oed.com/cgi/entry/50102729?single=1&query_type=word&queryword=harmonization&first=1&max_to_show=10 (last visited Apr. 19, 2009).

37. For an extended discussion of harmonization through law reform, see Martin Boodman, *The Myth of Harmonization of Laws*, 39 AM. J. COMP. L. 699 (1991). I leave aside collateral issues such as whether it is necessary to achieve rhythmic coherence as

A. The Process of Civil Code Revision in Quebec

To test the utility of the harmonization metaphor I commence with several observations about the unique socio-political context of Quebec commercial law. An initial point is that Quebec is a predominantly French-speaking jurisdiction in a commercial law world dominated, until recently even in Quebec, by English. Moreover, except in matters of constitutional and public law, Quebec is a civil law jurisdiction, but finds itself surrounded by States having common law legal systems. Third, even though its political economy and governance institutions would place it among States characterized in the United States as verging on socialist, in comparison with most European States, Quebec would be seen as having a relatively unregulated North American market economy. Again, notwithstanding a significant operative overlay of common law-influenced federal commercial law in matters such as banking, bankruptcy, negotiable instruments, interest regulation, and intellectual property, basic conceptions of property and obligations have retained the central features of the French civil law tradition. Fifth, this private law of property and obligations is expressed in the style and form of the Napoleonic (*Code civil français*), not the German (*Bürgerlichesgesetzbuch*) codification. Finally, Quebec's Civil Code Revision Office ("CCRO") began a process of modernizing its private law in the 1950s—that is, at the same time the UCC enactment project was getting off the ground in the United States—even though the CCRO submitted its report and Draft Civil Code ("DCC") only in 1977,³⁸ and the reformed Civil Code of Québec ("CCQ") did not actually come into force until 1994.³⁹ These six features bear greatly on how the specific reform of secured transactions took shape in Quebec.

When the provincial government published the DCC in 1978, the inspiration of Article 9 was evident in the Title on Security on Property.⁴⁰ Throughout the previous decade, the CCRO Committee on Security on Property had sought, in modernizing the 1866 Civil Code of Lower Can-

well, and whether harmonization implies the possibility that reform might involve a "variation" on the primary theme.

38. See CIVIL CODE REVISION OFFICE, 2 REPORT ON THE QUÉBEC CIVIL CODE (1977) (Can.) [hereinafter REPORT ON THE CCQ].

39. On that lengthy process of codal reform, see QUEBEC CIVIL LAW: AN INTRODUCTION TO QUEBEC PRIVATE LAW, *supra* note 29, at 84–97.

40. The Chair of the Committee on Security on Property, Yves Caron, often acknowledged the influence of Article 9. See, e.g., Yves Caron, *L'Article 9 du Code Uniforme de Commerce peut-il être exporté? Point de vue d'un Juriste Québécois [Is Article 9 of the Uniform Commercial Code Exportable? Viewpoint of a Quebecois Jurist]*, in ASPECTS OF COMPARATIVE COMMERCIAL LAW 374 (J. Ziegel & W. Foster eds., 1969).

ada ("CCLC"), to harmonize Quebec commercial law with Article 9.2 and its Canadian derivatives, the Personal Property Security Acts.⁴¹ Sensitive to the nationalist political undertones of Quebec's ongoing "Quiet Revolution," the Committee carefully avoided the word "unification"⁴² in elaborating its proposals. It did, however, expressly adopt the general conception of a security interest found in Article 9. The DCC was submitted just following the election of a government committed to withdrawing Quebec from the Canadian Confederation. As a result, other matters (including a sovereignty referendum) took precedence, and the CCRO proposals languished for almost a decade. In early 1985, however, once again following an election, the new non-separatist government announced that enacting a reformed Civil Code would be a priority. A number of expert committees were formed to consider the text of the DCC.

Between 1985 and 1989, I served as a member of a Working Group of the Quebec Ministry of Justice charged with examining the CCRO's recommendations relating to security on property and the registration of rights. Because the DCC dealt with security on both movable and immovable property, the representatives of the legal professions on the Working Group included both commercial and real estate practitioners, and more importantly, both advocates (lawyers) and notaries. While the former in each pairing were generally favorable to the DCC proposals, the latter expressed five major concerns. First, in extending the concept of the hypothec to movables (especially to universalities of present and future movables), the DCC appeared to attenuate significantly the principle of the hypothec's "specific affectation" and the requirement of a notarial deed to constitute a hypothec. Second, in characterizing all forms of movable security as hypothecs, the DCC undermined the particularity of rules governing the creation, third-party effectiveness, priority, and enforcement of the existing panoply of movable security devices—pledges, assignments of receivables, corporate trust deeds, floating charges, special nonpossessory pledges, transfers of property in stock, etc.—a detailed knowledge of which constituted much of the expertise and intellectual capital of the profession. Third, the DCC proposed broadly opening secured credit to consumers by permitting debtor-in-possession security over movable property. Fourth, the DCC proposed an

41. See REPORT ON THE CCQ, *supra* note 38, at 346–72.

42. Curiously, among Quebec jurists, there seems less resistance to the specific word (independent of its conceptual content) when associated with international organizations like UNIDROIT, the International Institute for the Unification of Private Law, than with a national organization like the ULCC, the Uniform Law Conference of Canada in English, but *La conférence pour l'harmonisation des lois au Canada* in French.

extended conception of real subrogation for security rights that would mirror the Article 9 proceeds rule. Finally, the DCC adopted a functionalist logic for rationalizing transactions (including all title transactions) intended as security through a mechanism it labeled the “presumption of hypothec.”⁴³

More than anything else, it was the presumption of hypothec that raised the suspicion of doctrinal heresy. Despite the care of the CCRO to use the expression harmonization, many jurists saw the specter of unification in this proposal. Part of the difficulty lay in the fact that the presumption of hypothec idea departed from the procedural logic that had previously driven secured transactions reform in Quebec. That is, rather than follow a well-known regulatory technique, according to which particular formalities for creation, third-party effects, and enforcement of security were overlaid on existing transactions,⁴⁴ the idea of the presumption of hypothec was to adopt an unfamiliar deeming logic, under which even title transactions would be legislatively recharacterized as hypothecs (implying that title would vest for all purposes in a debtor, who would be deemed to have granted a security right to the creditor).⁴⁵ So,

43. CIVIL CODE REVISION OFFICE, 1 DRAFT CIVIL CODE [D.C.C.], arts. 281–85 (1977) (Can.). The CCRO described its work as involving the horizontal and vertical integration of security rights. Vertical integration was meant to signal that different rules for creation, third-party effectiveness, priority, and enforcement of existing security rights would be brought together in a common frame; horizontal integration was meant to signal that all legal devices serving to secure the performance of an obligation would be considered security rights. See Yves Caron, *La Loi des pouvoirs spéciaux des corporations et les recommandations de l'office de révision du Code civil sur les sûretés réelle* [*The Special Corporate Powers Act and the Civil Code Revision Office's Recommendations on Security on Property*], in W.C.J. MEREDITH MEMORIAL LECTURES: LEGAL ASPECTS OF CORPORATE DEBT FINANCING 82 (1976).

44. For example, this was the approach taken in 1938 with the amendment of Articles 1535 et seq. of the Civil Code of Lower Canada, and in 1964 with the addition of Articles 1040a-1040e to the CCLC. The technique is widespread, and can be found, most evidently, in statutes like the Consumer Protection Act, R.S.Q. c. P-40.1, s. 15 (2009). Paradoxically, this is a law reform technique more familiar to the common law (consider equity's maxim “once a mortgage always a mortgage”) and, even more paradoxically, was exactly that adopted by the drafters of Article 9.

45. The differences between the “substance of the transaction” approach of Article 9 and the deeming logic of the “presumption of hypothec” are reviewed in Roderick A. Macdonald, *Faut-il s'assurer d'appeler un chat un chat? Observations sur la méthodologie législative à travers l'énumération limitative des sûretés, 'la présomption d'hypothèque' et le principe de 'l'essence de l'opération'* [*Is It Always Better to Make Sure That We Call a Cat a Cat? Observations on Legislative Method in Relation to the Numerus Clausus of Security Rights, the “Presumption of Hypothec,” and the Principle of the “Substance of the Transaction”*], in MÉLANGES GERMAIN BRIÈRE 527 (Ernest Carparos ed., 1993) (Can.) [hereinafter Macdonald, *Observations*]. Paradoxically, in view of

for example, installment sellers would be deemed to be secured creditors, and installment purchasers would be deemed to be owners who had granted vendor's security; buyers under a sale with a right of redemption would be deemed to be lenders, and sellers under a right of redemption would be deemed to be borrowers.

After almost four years of study and debate, the Working Group came to the conclusion that it would not take the DCC as the starting point for its recommendations to the Minister. It proposed an entirely different legislative framework—the *Avant-projet de loi* of 1989—that harkened back to the logic of the CCLC.⁴⁶ For present purposes, the most profound change was the decision to abandon a general presumption of hypothec. The CCQ did enact a presumption of hypothec in so far as traditional security devices were concerned, recasting and recharacterizing all forms of existing security as hypothecs; however, it did not extend this rationalization to title security.⁴⁷ Instead, it proposed a transaction-specific, and not altogether identical, regulation of only some title devices, those that are the most common, installment sales, sales under resolutive condition, sales with a right of redemption, finance leases, and security trusts.⁴⁸ At the end of the day, the text of Book 6 of the CCQ, Prior Claims and Hypothecs, was derived directly from the recommendations of the ministerial working group and its *Avant-projet de loi*, not from the proposals contained in the DCC.⁴⁹ Understanding why this occurred is instructive for assessing the limits of the metaphor of harmonization in international commercial law reform.

In my view, there were two key factors at play: ideology and ignorance. Ideologically, the DCC proposals were interpreted as entirely too much of a break from the civil law tradition. Ironically, this interpretation derived more from the CCRO's presentation of its recommendations, which considered security on property a new departure meant to

the resistance to the presumption of hypothec idea, this technique is a more accurate reflection of traditional civil law methodology.

46. The *Avant-projet* was never enacted but was introduced into the National Assembly as Bill 106 of 1989. For discussion of the process, see Roderick A. Macdonald, *The Counter-Reformation of Secured Transactions Law in Quebec*, 19 CAN. BUS. L.J. 239 (1991) [hereinafter Macdonald, *Counter-Reformation*].

47. See C.C.Q., R.S.Q. arts. 2674, 2660, 2664–65 (1991). In other words, the CCQ adopted the concept of vertical integration of security devices as proposed by the CCRO, but did not at the same time adopt the concept of horizontal integration of security devices.

48. The regulation of these different devices in the CCQ is discussed in detail in Macdonald, *Observations*, *supra* note 45, at 572–91.

49. The process by which the *Avant-projet* was then translated into Book 6 of the CCQ is discussed in Roderick A. Macdonald, *Change of Terminology? Change of Law?*, 23 REVUE GÉNÉRALE DE DROIT 357 (1992).

modernize, rationalize, and harmonize Quebec law with laws being enacted by other North American jurisdictions, than from the actual content of the regime it proposed. So, for example, because the DCC was described as being compatible with Article 9, the Minister of Justice and others immediately (and incorrectly) declaimed the presumption of hypothec as a common law incursion into the civil law. As noted, however, the presumption of hypothec was a typically civilian way of addressing a problem that Article 9 had dealt with in a procedural, pragmatic, and characteristically Anglo-American fashion.⁵⁰ The orthodox civil law approach has been to deploy characterization as a regulatory tool.⁵¹ So, while one might describe the Article 9 approach as “if it quacks like a duck and it walks like a duck, *treat it like a duck*,”⁵² the DCC approach could be described as “if it quacks like a duck and it walks like a duck, *it is a duck*.”⁵³ Unfortunately, the Minister and his advisers incorrectly believed that the presumption of hypothec was an example of U.S. legal imperialism aimed at unification of law; and in the name of harmonization, they proposed a regime that conceptually followed the logic of unification (even if this was unconscious) while rejecting an approach that sought a genuine harmonization respectful of the civil law tradition.

50. While Article 9.1 clearly did not operate a recharacterization of title security—that is, it did not for all purposes deem a title-reservation sale to involve an outright sale with a vendor’s mortgage back—but merely imposed a regulatory overlay for issues of creation, third-party effectiveness, enforcement, and priorities, it is an open question whether Article 9.3 and judicial interpretation have now effectively transformed the idea of a security interest into a deeming provision of the type envisioned under the presumption of hypothec. See Bridge et al., *supra* note 35, at 621–26.

51. A classic example of the approach can be found in the manner in which courts treated attempts to overcome the traditional prohibition on the hypothecation of movables. See CIVIL CODE OF LOWER CANADA [C.C.L.C.] art. 2022 (Sharp 1889). Where parties deployed a double sale mechanism—outright sale by the borrower to the lender combined with an installment sale from the lender back to the borrower—Quebec courts consistently declared these transactions to be disguised “movable hypothec” and refused enforcement to the lender. See, e.g., *Rousseau v. Bélanger* [1952] B.R. 772 (Qué.).

52. The principle flows from § 9-109(a), “Except as otherwise provided in subsections (c) and (d), this article applies to: (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract.” U.C.C. § 9-109(a) (2000). See also *id.* § 1-201(35) (2001) (“‘Security interest’ means an interest in personal property or fixtures which secures payment or performance of an obligation.”).

53. D.C.C. art. 281 (Can.). (1) No person may assert a right to property in order to secure payment of an obligation, except by way of hypothec. (2) Any stipulation the effect of which is to preserve or confer a right to property in order to secure payment of an obligation is a stipulation of hypothec. (3) It may only preserve or confer a hypothec in favour of the creditor, subject to the formalities required for constitution and publication of hypothecs.

The second factor leading to rejection of the DCC was related less to notions of legal and conceptual integrity than to "facts on the ground." Because much of the Quebec commercial law of the 1950s to 1980s was contained in extra-codal statutes enacted as exceptions to the regime elaborated in the CCLC, at the time the DCC saw the light of day, Quebec private law legal culture was neither familiar with nor amenable to the assumptions underlying the CCRO proposals. That is, atavisms of Civil Law thinking, uninfluenced by decades of modernization in commercial legislation, colored the general professional reception of the DCC. On the basis that it constituted a radical departure from existing law, several jurists opposed the very idea of a regime of security on property aimed at facilitating consensual transactions where (1) the principle of *numerus clausus* of multiple distinctive transactions was not respected; (2) creditors would be permitted to take nonpossessory security over all manner of movable assets—corporeal and incorporeal, specific assets and universalities, present and future assets—granted by all manner of debtor (including those not carrying on an enterprise); (3) creditors could exercise self-help enforcement remedies; and (4) the supervisory role of courts would be *ex post facto*, rather than *ex ante*. Close comparison of the DCC with existing Quebec commercial practices, of course, belies each of these presuppositions.⁵⁴

Not surprisingly, therefore, the CCQ remains an incomplete reform. The most glaring deficiencies can be located in two main areas. Most importantly, the regime governing title transactions remains poorly worked out. Although the DCC proposal to enact a presumption of hypothec was not pursued in the CCQ, the National Assembly could not simply ignore the problem posed by extensive use of title-security such as installment sales. So, using the blueprint that it sketched out in the CCLC, the National Assembly decided to maintain a distinction between title transactions and security devices and to overlay the former with a number of procedural mechanisms meant to protect a debtor's equity. But this approach was *ad hoc*, and no attempt was made to comprehensively think through the implications of this bifurcated approach. The CCQ does not conceptualize all title transactions as instantiations of one of four logical types: vendor title retention (e.g., sale under suspensive

54. For a detailed discussion, see Macdonald, *Norm Entrepreneurship*, *supra* note 33. Perhaps, strategically, the CCRO could have been more accommodating of these concerns. For example, it could have proposed a new term like *security right* to embrace the existing inventory of security rights denominated as pledges, hypothecs, trust deeds, fiduciary transfers of property-in-stock, conditional assignments, sales with a right of redemption, retention-of-title devices, and financial leases, rather than relabel all these devices as *hypothecs*.

condition, installment sale, or lease), vendor title resolution (e.g., reversion of thirty-day goods, or resolutive clauses), creditor acquisition and retention of title (e.g., sale with a right of redemption, double sales, or sale leaseback), and creditor title-suspensive acquisition or transfer of title (e.g., giving-in-payment clauses). Instead, it identifies the paradigmatic (and most familiar) device among the various specific transactions falling within each of these logical types, and imposes, apparently upon this device alone, certain procedural mechanisms. As a result, the legislature implicitly invited inventive parties to create transactions falling just outside the scope of the regulated type—a maneuver that, absent judicial sensitivity to excessive formalism, permits the regulatory regime to be easily subverted.⁵⁵ It would be possible to solve most of these problems by implementing a single functional approach for true security and a four-fold functional approach for title transactions falling within each of the four categories.

The second deficiency is that the CCQ was not conceived with the financing practices of a 1990s commercial economy in mind. One might say that the CCQ more closely resembles Article 9.1 of 1954 than it does Article 9.3. Thus, while the CCQ contemplates the hypothecation of share certificates, securities, negotiable instruments, incorporeal business assets, intellectual property, debentures, partnership shares, investment, and mutual funds and like assets, its regulatory regime is rudimentary. The CCQ contains no special priority rule like that found in Article 9, which privileges “publicity by possession” over “publicity by registration” in respect of negotiable instruments, securities, and documents; nor does it provide for “publicity by control” in respect of deposit accounts.⁵⁶ Another indication of the Code’s uneasy relationship with contemporary commercial finance can be found in its enforcement regime. The procedures for realizing upon security are heavily laden with *ex ante* controls, reflecting the kinds of considerations that might properly come into play in relation to security on immovable property, but that are less appropri-

55. For example, even though sales under suspensive condition produce almost identical consequences to installment sales, the former are currently unregulated while the latter are closely assimilated to the hypothec for the purposes of registration, enforcement upon default by the purchaser, and priorities. C.C.Q. arts. 1745–49. A similar nominalistic legislative strategy was pursued in Articles 1040(a)–(e) of the CCLC (which was added in 1964 by An Act to Protect Borrowers Against Certain Abuses and Lenders Against Certain Privileges, S.Q. 1964, ch. 67, art. 1), with predictable consequences. It was only with the decision of a nine-member bench of the Quebec Court of Appeal in *Nadeau v. Nadeau*, [1977] C.A. 234 (Qué.), that courts stopped reading these Articles as a closed list of regulated transactions and began to interpret them as implying a general principle.

56. Part of this may be explained by commercial financing practices in Canada. See Cuming & Walsh, *supra* note 25.

ate in a regime of security on movables.⁵⁷ But, just as Article 9 has been subject to adjustment, one might presume that similar adjustments will occur with the CCQ.⁵⁸ Still, the story of its initial enactment has much to teach about how the metaphor of harmonization can illuminate (and occlude) the process of international commercial law reform.

B. The Logic of Harmonization

Let me now return to the rhetoric that underlies appeals to harmonization in international commercial law reform: unification is bad; harmonization is good.⁵⁹ As a legal pluralist, I have no difficulty with the first affirmation. But I should like to go further by marking the limits of the harmonization metaphor. With very few exceptions, global norm entrepreneurs believe that harmonization is an appropriate metaphor to describe the process of achieving comity in secured transactions law. Is it? What guidance does it really give as to how to effectuate international commercial law reform?

Consider the following illustration.⁶⁰ The key harmonic principles of Western music are derived from ratios: unison = 1:1; octave = 2:1; fifth = 3:2; fourth = 4:3; major third = 5:4. In theory, if you start with any note and tune through the circle of fifths, you should get back to where you began (e.g., A–E–B–F#–C#–A♭/G#–E♭–B♭–F–C–G–A), and this progression of twelve fifths should produce the same note as seven octaves. However, it does not. 3:2 to the twelfth power equals 129.746; 2:1 to the

57. Currently, by contrast to the immediate possession regime of UCC Article 9, CCQ Article 2758 requires an enforcing creditor to give a twenty-day (or, in the case of consumer transactions, thirty-day) prior notice of an intention to exercise a hypothecary recourse against movable property. Where a debtor is carrying on an enterprise and the property is susceptible to rapid deterioration, the prior notice may be dispensed with altogether. In such cases, the notice would be post-possession and would be intended merely to inform the debtor and third parties of the specific realization recourse that the creditor intends to pursue.

58. So, for example, the National Assembly has just enacted amendments to the CCQ to provide for the third-party effectiveness of hypothecs over intermediated securities to be obtained by control. See *An Act Respecting the Transfer of Securities and the Establishment of Security Entitlements*, R.S.Q. 2008, c. 20, s. 136 (2008) (adding Articles 2714.1–14.7 to the CCQ).

59. For comprehensive studies grounded in this metaphor and published by the Department of Justice, Canada, see *THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUEBEC AND CANADIAN BIJURALISM*, available at <http://justice.gc.ca/eng/dept-min/pub/hfl-hlf/table.html>. Compare this with the critical perspective of Arthur Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40 AM. J. COMP. L. 683 (1992).

60. The illustration is taken from ROSS W. DUFFIN, *HOW EQUAL TEMPERAMENT RUINED HARMONY (AND WHY YOU SHOULD CARE)* 15–45 (2007).

seventh power equals 128.000. The dissonance with octaves is worse if we take the progression cycle of major thirds.

To overcome these dissonances musicians developed the theory of temperament. That is, because the triad C–E–G \sharp (an augmented chord in the key of C major) is not the same as the triad C–E–A \flat (an augmented chord in the key of A \flat major), a violin must be slightly retuned depending on the particular key in which a piece is being played. The four violin strings, if played open, will not sound exactly right in all keys. Yet, even though tuning to a particular key with a perfect instrument (for example, a stringed instrument that permits strings to be stopped precisely where a violinist wishes, by contrast with a fretted instrument like a guitar that predetermines where strings are stopped) will resolve most of these dissonances, it will never overcome the root dissonance produced when octaves are compared with major fifth and major third cyclical progressions. With nonperfect instruments such as pianos, the problem is worse since each note is given a fixed cycles per second regardless of the key in which one plays. That is, even though pianos are constructed so that C \sharp and D \flat are played by touching the same key, neither is an exact reflection of, say, the major fifth in the key of G \flat (D \flat) or the major third in the key of A (C \sharp).

This accommodation to the practical limits of the piano does not mean, however, that the tonal difference, for example, between C and C \sharp /D \flat , C \sharp /D \flat and D, D and D \sharp /E \flat , needs to be the same. Dividing the octave into twelve equally-spaced tonal units (equal temperament) is only one way of tuning an instrument. Over the past half a millennium, some 150 different methods for tempering instruments have been devised. None are exact.⁶¹ And none can overcome the dissonance produced because the mathematical ratios by which we produce octaves, major fifths and major thirds cannot be reconciled, even when an instrument is tuned for a single key. While something akin to perfect harmony may be imagined in a single key (except for the discords at either end of the circle of major fifths or generally in relation to major thirds), and an instrument tuned to play almost perfect harmony within a narrow octaval range,⁶² it can be

61. A pianist can tell by hearing, for example, “Mary Had a Little Lamb” played successively in the keys of D \flat and G what adjustments to equal temperament the piano tuner had made. For example, the tuner may have slightly modulated the note F \sharp /G \flat so that it shades towards the F \sharp , with the consequence that when the song is played in D \flat it sounds slightly more discordant than when the piano is tuned so that the F \sharp /G \flat note is equidistant from F and G.

62. That is, the small differences that appear when a full cycle of fifths or thirds is compared with octaves are barely perceptible when a piece is played entirely within a two- or three-octave range.

neither played nor imagined where a piece changes keys. In fact, the only perfect harmonies available are those of unison and its mirror, octave.

The central question for international law reformers who like the musical metaphor, therefore, is not simply one of harmonization.⁶³ It is also one of temperament: what tuning (legislative) compromises do we make in order to achieve something like harmony, and why do we make these choices in the places that we do? Before we naively throw around metaphors that sound good when stripped of their complexity in the field from which they arise, or conversely, before we abandon these metaphors because they do not seem to provide the simple rhetorical punch we wish, we should consider whether those field-specific complexities may actually *help* us to better understand the law reform project to which we are applying the metaphor. More precisely, a richer understanding of the metaphor of harmonization enables us to attend to three important temperament variables: instrument, key, and range.

I believe that these variables, and the fundamental hypotheses about secured transactions law reform in relatively developed commercial economies they illuminate, are nicely illustrated by the CCQ reform process. A first point is this: there can never be perfect harmony regardless of how closely two States may resemble each other. Each State is an *instrument*, with its particular manner of tuning and its particular built-in harmonic compromises. The more stable the political and legal environment (as in a fretted or valved instrument), the more the doctrinal atavisms of conservative legal scholarship and traditional legal practice are able to derail reforms that threaten acquired intellectual capital by invoking the specter of unification and by purporting to defend the presumed essence of the existing legal order. The rejection of the presumption of hypothec in Quebec can be seen as evidence that imperfect instruments (fretted guitars, valved trumpets, or holed clarinets) should not be transformed into perfect instruments (unfretted violins, or slide trombones), since tuning compromises are inherent to the instruments themselves.⁶⁴

63. I adopt fully the critique of harmonization as a goal for law reform advanced by Boodman, *supra* note 37, and pursue the general logic of that critique in developing the idea of temperament.

64. This is not to say that no accommodation is possible. Experienced players can retune their instruments or more pragmatically stretch strings to modulate pitch. Experienced law reformers can do likewise, in the manner suggested in the paragraph following this footnote. In Quebec, a useful comparison might be drawn between two monographs written by and for practicing commercial lawyers, and two monographs written by professors for students. For the former, see JOHN B. CLAXTON, SECURITY ON PROPERTY AND THE RIGHTS OF SECURED CREDITORS UNDER THE CIVIL CODE OF QUEBEC (1995); LOUIS PAYETTE, LES SÛRETÉS RÉELLES DANS LE CODE CIVIL DU QUÉBEC [SECURITY ON PROPERTY IN THE CIVIL CODE OF QUEBEC] (2d ed. 2001) (Can.). For the latter, see PIERRE CIOTOLA,

Secondly, the richest harmonies are often contrapuntal and call forth an extended *tonal range*. They work because they provide an alternative melody, which follows its own logic and thematic development. Unfortunately, the more that entrenched local norm entrepreneurs have successfully exercised political power in the past, the more likely it is that they will defeat proposals for legal reform that threaten to disrupt existing spheres of influence by opening up market sectors to new actors. The rejection of non-vendor purchase-money security interests can be seen as instantiating the point that the broader the tonal range of a legal concept, the less acute the contrapuntal harmonies may be.⁶⁵

Thirdly, all temperaments privilege certain *keys* (whether major or minor), certain melodic progressions, and certain dominant instruments (for example, violins, trumpets, clarinets, guitars, and saxophones). Following the general themes of Donald Black,⁶⁶ even when legislative tempering *ex ante* fails to protect these previously dominant instruments, the choice of key can significantly influence the manner in which any particular piece of music is played and the relative harmonics of the performance. The rejection of an extensive proceeds rule is an example of the dialectical quality of true harmony reflected in different keys.⁶⁷

From the perspective of 2009, the drafters of Book 6 of the CCQ managed to produce a remarkably successful law reform product. Without the benefit of any other civil law precedent, they were able to achieve

DROIT DES SÛRETÉS [THE LAW OF SECURITIES] (3d ed. 1999) (Can.); DENISE PRATTE, PRIORITÉS ET HYPOTHÈQUES [PRIORITIES AND HYPOTHECS] (2d ed. 2005) (Can.). The former are much more attuned to experimentation and making things work in practice; the latter to explicating and defending the presumed intellectual heritage of Quebec civil law.

65. Article 2954 of the CCQ provides that the hypothec of the vendor of movables will outrank a prior registered hypothec over a universality of future property charging the type of asset sold, but does not extend the vendor's hypothec to nonvendor acquisition financiers. While Article 9 purportedly applies the temporal priority rule to all purchase-money security interests ("PMSIs"), in fact the primacy of title reemerges in Section 9-324(g), which gives vendor PMSIs priority over even prior-registered lender PMSIs.

66. DONALD BLACK, *SOCIOLOGICAL JUSTICE* (1989).

67. U.C.C. § 9-102(64) (2000) defines "proceeds" to include numerous items that in traditional civil law thinking would not be captured by the theory of real subrogation. Insurance monies, damages payments, replacement property, and receivables arising upon disposition (see paragraphs A, D, E) are of this character; but fruits, revenues, dividends, products, and the offspring of animals or of reseeded plants (see paragraphs B, C) are not. The approach of the CCQ permits debtors to fractionate new property from existing assets while maintaining the creditors' rights in initially encumbered assets, accessions, manufactured property, commingled property, and true proceeds. For a discussion of these distinctions in relation to security rights, see Roderick A. Macdonald, *Fruit Sal- ad*, 38 *REVUE GÉNÉRALE DE DROIT* 405 (2008).

both modernization and rationalization of the law of secured transactions in a manner that embraced corporeal and incorporeal movable property, consensual and nonconsensual security, possessory and nonpossessory security, execution preferences, non-judicial enforcement, and a notice-filing publicity regime, while at the same time regulating the major title transactions deployed to secure the performance of obligations. If there are still unresolved issues, they do not revolve around the failure to implement the presumption of hypothec as recommended by the CCRO. Rather, they reflect a failure to recall the wisdom of temperament. Simply because the CCQ was tempered to preserve title security ought not to have meant that it had to be tempered so that harmony would be achieved only by certain instruments, played in certain keys over a limited tonal range.

II. TRANSPLANTATION: THE VULGARITY OF LEGAL HORTICULTURE

My second example, drawn from the process of secured transactions reform in Ukraine, illustrates the use and abuse of the metaphor of *transplantation* by international commercial law norm entrepreneurs.

Again, I begin by asking what exactly the metaphor of transplantation implies.⁶⁸ For most jurists it means reforming the law of one State by importing into it the law of another State. The assumption is that there is a relative autonomy of legal artifacts that permits them to be easily transferred from one context to another. Other jurists see the challenge as more contextual. As law is a product of social forces, there will always be the need for adaptation, whether *ex ante* or *ex post*. Here, the assumption is that acculturation is a central feature of successful legal adaptation. In both hypotheses, however, there is a presupposition that transplantation is beneficial and that the biological precautionary principle, which proposes that transplants may be harmful assaults on biodiversity, is inapplicable.⁶⁹

68. According to the Oxford English Dictionary, "transplantation" is "the action of transplanting"—meaning the removing of a plant from one place or soil and planting it in another. See Oxford English Dictionary, Transplantation, http://dictionary.oed.com/cgi/entry/50256486?single=1&query_type=word&queryword=transplantation&first=1&max_to_show=10 (last visited Apr. 12, 2009).

69. For an extended discussion, see William. Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995); Pierre Legrand, *The Impossibility of "Legal Transplants,"* 4 MAASTRICHT J. EURO. & COMP. L. 111 (1997); J.M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003); David Nelken, *Legal Transplants and Beyond: Of Disciplines and Metaphors*, in COMPARATIVE LAW IN THE 21ST CENTURY 19 (Andrew Harding & Esin Orucu eds., 2002).

A. The Development of the Charge Law in Ukraine

To test the utility of the transplantation metaphor, I begin with the efforts of the government of Ukraine since independence in 1989 to enact a modern secured transactions regime. In the 1990s, the Ukraine Ministry of Finance and the World Bank signed an agreement establishing the Rural Finance Project. This initiative went well beyond rural finance and was intended to provide Ukraine with a basic legislative infrastructure governing areas as diverse as mortgage law, land registration, secured transactions, debenture lending, insolvency, bankruptcy, corporate finance, securities regulation, and so on. In relation to security on movable property, the idea was to modernize the law along the lines of the core principles enunciated by the World Bank and the Model Law on Secured Transactions of the European Bank for Reconstruction and Development (“EBRD”).⁷⁰ This modernization was to be accomplished by enacting a new secured transactions law that reformed the rules set out in both the Civil Code of Ukraine (“CCU”) and a more recently adopted Pledge Law and that, for the first time, permitted debtor-in-possession pledges of movables.

Early in 2003, in a first reading the Ukraine Parliament adopted a secured transactions law prepared as part of the Rural Finance Project by the Center for the Economic Analysis of Law (“CEAL”).⁷¹ This law was largely a copy of a similar statute adopted in Romania several years earlier,⁷² a law that was itself little more than a transcription of Article 9.⁷³

70. See WORLD BANK, PRINCIPLES AND GUIDELINES, *supra* note 20; EUR. BANK FOR RECONSTR. & DEV., MODEL LAW ON SECURED TRANSACTIONS (2004), available at <http://www.ebrd.com/pubs/legal/secured.pdf>.

71. For further information about the legislative reform projects, see: Center for the Economic Analysis of Law, <http://www.ceal.org> (last visited Apr. 19, 2009).

72. Law Regarding Some Steps to Speed Up Economic Reform, Law No. 99, May 26, 1999. This law was a project of the World Bank (International Bank for Reconstruction and Development), and is presented and discussed in Nuria De la Peña & Heywood W. Fleisig, *Romania: Law on Security Interests in Personal Property and Commentaries*, 29 REV. CENT. & E. EUR. L. 133 (2004). As well as serving as the model for the initial secured transactions law in Ukraine, Article 9 (as instantiated in Romanian law) inspired the Law Amending the Civil Code, Notarial Law and Other Laws, adopted by the Slovak Republic on August 19, 2002, and the Law on Registered Charges on Movable Assets, Law No. 57/2003, adopted by the Republic of Serbia on May 30, 2003, available at <http://www.ebrd.com/country/sector/law/st/core/pledge/serbia.pdf> (unofficial English translation provided by the Serbian Ministry for International Economic Relations). For discussion of the former law, see EUR. BANK FOR RECONSTR. & DEV., GUIDE FOR TAKING CHARGES IN THE SLOVAK REPUBLIC (2003), available at <http://www.ebrd.com/pubs/legal/slovak.pdf>.

73. It is important to signal that there are important differences of opinion about the possible role of Article 9 in international secured transactions reform. Some see in it a

After the first reading, broad consultations with relevant stakeholders revealed that the proposed legislation was unlikely to take root in Ukraine. In part, this was because it did not cohere with basic civil law principles. But a more important factor was that, in conception, style of drafting, scope, and ambition, it had little resonance with either Ukrainian legal culture or on-the-ground practices. The World Bank then contracted with two local lawyers to revise the law for presentation to the Parliament for a second reading in July. I was asked to comment on an early version of the revision and then to come to Kiev to assist the lawyers in fine-tuning the draft and to consult with other professionals—bankers, business leaders, public officials, and lawyers—who had taken a special interest in the project.⁷⁴

These consultations led to a number of policy conclusions about the form and content of the redraft. Given that a second, post-socialist Civil Code had only recently been enacted, we felt we could not insert the reform directly into the CCU. Moreover, the Pledge Law that the Ukraine Parliament had also recently enacted modified many provisions of the Civil Code. Consequently, we determined that the new law would have to be drafted as a targeted overlay upon these two existing enactments and that it would only address a few key issues: the scope of security rights; certain *inter partes* and third-party effects of security; publicity; priorities; and enforcement.⁷⁵

Second, given that broad contractual experimentation with all types of nonpossessory rights in movable property was rampant in the legal profession, even in domains well outside the traditional compass of secured transactions law, we felt that the new law should seek to provide some transparency about all nonpossessory rights in movables. Consequently,

ready-made template; others, a flexible set of principles and institutions; still others, an inventory of “best practices” from which States might reasonably pick and choose depending on other law then in force. Much of the difficulty with the transplantation efforts of certain international organizations is that the “model laws” being proposed are, as in the case of Ukraine, typically offered on an all-or-nothing basis. See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 31–32 (1998).

74. By the time I became associated with the project, it had already been decided that the North American regime of security on movable property to be imported as a model was that of Quebec and not Article 9. Indeed, my involvement (as an English-speaking Quebec professor of civil law as well as common law secured transactions) was probably predicated upon this basic policy decision.

75. While we took the approach of Article 9 as a general template, we did not purport to modify basic rules relating to the creation of security rights or the basic pre-default rights and obligations of parties, which continued to be governed by the CCU and the Pledge Law.

we proposed a publicity, priority, and enforcement regime to embrace not just traditional consensual security rights, title transactions, ordinary assignments, consignments, and long term leases, but also all nonconsensual security rights and all interests in movables that encumber an owner's rights (for example, usufructs) whether or not intended or deployed as security.⁷⁶

Third, given a widespread perception of unreliability and delays within the civil justice process, we felt the need to provide for the possibility of a complementary (alternative) regime of private arbitration, which would also directly produce enforceable third-party effects and be combined with significant *ex ante* debtor-protection mechanisms to forestall aggressive foreclosures and realizations. Consequently, we concluded that (1) the term "court" should be defined broadly so as to include accredited private arbitrators, (2) creditors should be required to give prior notice of their intention to enforce their security, and (3) creditors should be entitled to enforce it judicially without having to proceed through the state execution service.⁷⁷

Fourth, we felt that the primary need of Ukraine was for a regime that dealt with security over equipment, inventory, and receivables. Consequently, we thought that the legislative framework should be designed primarily with these assets in view. Even though drafted so as to govern security rights in all manner of movable property, it was not so finely tuned as to provide detailed regulation of security on second-generation incorporeal rights, negotiable documents, deposit accounts, and intellectual property.⁷⁸

Taking these factors into account, while still attempting to accommodate concerns about imposing unknown legal concepts as a derogatory overlay to the CCU and the Pledge Law, we concluded that we could not simply "fix" the CEAL draft, but would have to begin afresh. An entirely

76. In coming to this decision we were mindful that, for analogous reasons, Section 9-109(a)(3)-(4) extended coverage to all consignment transactions, whether intended as security or not, and sales of payment intangibles. In the Canadian Personal Property Security Act law, the extension goes even further, embracing as well all "leases of more than [twelve] months." See *Personal Property and Security Act*, R.S.O. 1990, c. P-10, 2.2(c).

77. Article 2 of the Charge Law, *supra* note 15, defines "court decision" as including a "decision, decree, and order of a court, a commercial court, an arbitration tribunal, a foreign court or arbitration." Article 27 provides for advance notice, and Article 30 provides for nonjudicial creditor enforcement.

78. *But see id.* art. 16 (on priority given to creditors in possession of securities subject to a security right); *id.* art. 33 (on enforcement against money or securities). Nor did the law seek to address security over immovables, or even basic principles governing immobilization (attachment) or mobilization (crops, trees, mines, oil and gas, etc.).

new law, entitled Law on Securing Creditors' Claims and the Registration of Charges ("Charge Law"), that was more in line with the existing conceptual structure of domestic law was drafted in June 2003, enacted in September 2003, and proclaimed in force in January 2004, and became fully effective when the computerized registry was made operational in August 2004.⁷⁹

Because law reform through legal transplants is a common strategy in the field of secured transactions, especially when States are seeking not just to modernize or rationalize existing law, but to radically change an entire legal regime, it is possible to identify a number of particular features that shape success or failure in this endeavor. Indeed, the experience in Ukraine nicely illustrates why attending to economics, social practices, legal structures, and political decision-making is a prerequisite to successful commercial law reform and, concomitantly, why the metaphor of transplant needs to be understood more richly than is currently the case.

To begin, notwithstanding almost seven decades of "socialist legality," civil law conceptual distinctions between real rights and personal rights and between owing and owning remained central in legal thinking. In particular, jurists in Ukraine were not prepared to adopt a unitary "substance of the transaction rule" that would attenuate these distinctions for publicity and enforcement purposes. While the need to regulate title transactions was accepted, attachment to the idea of ownership, which had been suppressed for a long time, prevented its conceptual relativization for purposes of secured transactions law.⁸⁰ As a result, and in order to prevent strategic instrument choice by debtors and creditors, the Charge Law was elaborated around a newly-minted generic concept, "charge."⁸¹ A charge was defined broadly to include traditional security rights in a debtor's assets (secured charges); other consensual limitations on an owner's rights, whether or not securing the performance of an obligation (contractual charges); and nonconsensual limitations on an owner's rights (public

79. For a detailed discussion of the features of the law as it was enacted, see RODERICK A. MACDONALD, COMMENTARIES ON THE LAW OF UKRAINE: ON SECURING CREDITORS CLAIMS AND REGISTRATION OF ENCUMBRANCES, at pt. II (2004) (Ukr.) [hereinafter MACDONALD, LAW OF UKRAINE].

80. The reaction to the "law and economics" approach reflected in the initial proposals by CEAL is strong evidence that certain concepts have untouchable status in particular States at particular times: law is not simply an independent variable, and legal doctrine is not fungible. For an excellent analysis of this point, see Peer Zumbansen, *Comparative Law's Coming of Age? Twenty Years After Critical Comparisons*, 6 GERMAN L.J. 1073 (2005).

81. The Ukrainian word for "charge" is sometimes translated alternatively as "encumbrance," with no intended difference in meaning.

charges).⁸² In addition, rather than explicitly denominating a single security device and repealing existing CCU and Pledge Law devices like possessory and nonpossessory pledges, the Charge Law simply provided for a number of mandatory rules relating to scope, publicity, priorities, and enforcement on various existing legal institutions.⁸³ Finally, although these formalities roughly track those of ordinary security, the charge regime differentiates certain rights and recourses according to the character of the transaction in question—that is, where title is located at any particular moment in the transaction—in order to acknowledge the specificity of conditional ownership and to ensure a functional equivalence of outcomes.⁸⁴ In other words, in keeping with its civil law heritage, the Ukraine Charge Law acknowledges the difference between title devices and security devices by conceptually grouping all manner of title transactions (installment sale, sale under resolatory condition, sale with a right of redemption, giving-in-payment clause) together on the one hand, and conceptually grouping all manner of security devices (pledges, rights of retention, hypothecs) together on the other. The Charge Law has the additional merit of comprehensively tracing out the specific consequences of this conceptual grouping within the framework of title transactions, rather than

82. Charge Law, *supra* note 15, art. 4 (Types of Encumbrances). Thus, the Charge Law has broader coverage than both Article 9 and the CCQ. Unlike Article 9, but like the CCQ, it includes nonconsensual security devices; unlike the CCQ, but like Article 9, it includes consignments, ordinary leases, and outright assignments of receivables; and unlike both Article 9 and the CCQ, it includes all limitations on an owner's rights, including lesser proprietary interests like usufructs and leases, and public encumbrances like servitudes and state liens.

83. Thus, the Charge Law conceives the concept of "charge" the way Article 9 conceives the concept of "security interest." The term is a linguistic shorthand for the recharacterization of disparate legal institutions for the specific purposes of the Charge Law, but does not imply the creation of a new legal institution for any other purpose (save perhaps bankruptcy, to the extent Ukraine bankruptcy law may later be amended to recognize the notion of a "charge").

84. Thus, one has to be careful with vocabulary in describing the effect of the Charge Law. Here is an example of an operational difficulty caused by the way that "chargor" and "chargee" are defined. In ordinary security, and in cases where a creditor has a contingent future ownership right, the chargor is the debtor; but where there is an installment sale or a lease, the chargor is the creditor, since the encumbrance falls upon the property of the creditor. It follows that if the seller were to sell under an installment sale, it would be a chargor, but if it were to transfer title and take a charge over the property sold, it would be a chargee. During deliberations about the law, it was suggested that the definitions should be linked to who has physical detention of the encumbered asset. But adopting this approach would mean that a pledge in possession would be a chargor, where a pledgee in cases where the pledgor retained possession would be a chargee. Given the decision to include all proprietary rights (including principal real rights) under the regulatory regime, these ambiguities of terminology are inevitable.

leaving some types of title security unregulated, some only partially regulated, and some confusingly regulated.⁸⁵

A second issue facing law reformers was to decide the mechanics by which the Charge Law could be rendered operational. Some of the instincts and practices of a market economy and some of the basic conceptions of the rule of law were not reflected in Ukraine's property, contracts, and judicature regimes. Moreover, the uneven sophistication of the legal profession and judiciary in matters of secured financing argued against conferring substantial discretion upon courts to police *ex post* "good faith and commercial reasonableness" and argued in favor of *ex ante* "bright line non-waivable structuring rules" and mandatory, fill-in-the-blank contractual forms. Finally, it was important to account for how the enforcement system worked in practice. Considerable collateral reform was required in order to rework the system of judicature so as to permit consensual realization. Because it routinely took three to four years to obtain a money judgment and a further year to obtain enforcement, and because there was no expedited procedure to obtain interim and interlocutory orders, the law provided for alternatives to the public enforcement mechanisms.⁸⁶

Notwithstanding this general overhaul of the law of security on movable property, the Charge Law remains an incompletely achieved reform. From a contemporary vantage point, there are probably two areas where further improvements might be made. As a stand-alone, first-generation secured transactions law, the Charge Law mainly targets basic business and consumer property—corporeal movables such as equipment and inventory, accounts receivable, and consumer durables. Once experience with the law accumulates, one might imagine that it will undergo an evolution similar to that of Article 9; rules relating to deposit accounts, intellectual property, letters of credit, and other specific transactions will be inserted into its general framework, and the entire law will probably be inserted into the UCC.

Moreover, it would probably be expedient for lawyers, registrars, and judges to become more familiar with the new regime, and to gradually replace the *ex ante* regulation of creditor recourses with a structure that gives greater scope for party autonomy, subject to *ex post facto* judicial review on a standard of good faith and commercial reasonableness. And

85. The points raised in this paragraph reflect important differences between the Quebec and Ukraine regimes that exhibit not only the different socio-economic-political-legal cultures of the two countries, but also the fact that the Charge Law is an improved, second-generation statute that irons out some of the wrinkles that persist in first-generation civil law modernization regimes like that of the CCQ.

86. Charge Law, *supra* note 15, art. 27.

in doing so, the law might streamline the publicity regime so that it is minimalist in its informational requirements and permits direct remote access for filing and searching. This said, in comparison with the pre-reform law and with the CEAL draft, the Charge Law must be counted as a success. Moreover, the story of its enactment offers many lessons about how the metaphor of transplantation can contribute to a better understanding of international commercial law reform. To these lessons I now turn.

B. The Logic of Transplantation

The transplantation metaphor is another favorite of those involved in international commercial law reform: for many the mantra is grafts are bad, transplants are good.⁸⁷ Here again, I have no difficulty with the first affirmation. But I find that the transplant metaphor is typically misapplied. In my view, it is better to talk of the “circulation” of legal ideas and the “irritation” they inevitably cause,⁸⁸ two metaphors that immediately suggest the paradoxes of inter-normative transfers.⁸⁹ Nonetheless, given the prevalence of the transplant metaphor, I should like to suggest how careful attention to the nuances of horticulture and botany might actually assist in understanding processes of international commercial law reform.

Recall the fundamental distinction in botanical sub-disciplines between those that consider a plant as an organism separate from the milieu in which it grows and those that see a plant as dependent upon its milieu.⁹⁰

87. As noted, the use of the metaphor in law can be traced to Watson, *supra* note 2. Since then it has had remarkable currency among comparative lawyers. The metaphor has not gone unchallenged, however, especially by “comparative functionalists” writing in the tradition of legal sociology. See, e.g., Pierre Legrand, *What ‘Legal Transplants’?*, in ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest, eds., 2001); David Nelken, *Towards a Sociology of Legal Transplants*, in ADAPTING LEGAL CULTURES, *supra*; Edward M. Wise, *The Transplant of Legal Patterns*, 38 AM. J. COMP. L. SUPP. 1 (1990); William Twining, *Generalizing About Law: The Case of Legal Transplants*, The Tilburg-Warwick Lectures: General Jurisprudence (Nov. 2000–May 2001) 1, available at http://www.ucl.ac.uk/laws/jurisprudence/docs/twi_til_4.pdf. For brief histories of the debate, see Richard G. Small, *Towards a Theory of Contextual Transplants*, 19 EMORY INT’L L. REV. 1431, 1432–39 (2005).

88. Teubner, *supra* note 73, at 12.

89. For discussion of this theme, see Roderick A. Macdonald, *Les Vieilles Gardes: Hypothèses sur l’émergence des normes, l’internormativité et le désordre à travers une typologie des institutions normatives* [*Old Guards: Thoughts on the Emergence of Norms, Inter-normativity and Disorder Through A Typology of Normative Institutions*], in SOLUBLE LAW, *supra* note 19, at 233, 233–72.

90. For brief introductions to the distinction, see generally JAMES D. MAUSETH, BOTANY: AN INTRODUCTION TO PLANT BIOLOGY 10–13 (4th ed. 2008) (on “Plants Versus

In the former group can be ranged anatomy, physiology, genetics, and taxonomy—or should we say legal concepts, legal institutions, legal rules, and legal classification? In the latter may be ranged elements of ecosystem analysis, soil, climate, existing flora and fauna, etc.⁹¹ As applied to law, this type of analysis focuses on economic, legal, social, political, and pragmatic components of a functioning system.⁹² While these analogies are helpful, much may also be gained by exploring how botany understands the mechanics of successful transplantation. Here the lexicon includes as exogenous objectives beauty and gene diversity; and as endogenous objectives photosynthesis, reproduction, symbiosis, and evolution. In law we translate these concerns by asking how acculturation can be facilitated through administrative precedents and formularies, case reports, doctrinal commentary, and formalized legal education.

And so arises the central question for international law reformers seeking to introduce countries that heretofore have not had economies in which security on movable property formed a significant part of the legal universe to the universe of Article 9: what counts as success in legal transplantation? To measure success, we should consider a more nuanced metaphor of transplantation that accounts for three key botanical variables: physiology and genetics, ecosystem analysis, and time.

Typically jurists have taken a reductionist approach to the question of success: either the transplant survives, or it dies. Botanists tell us, however, that a finer-grained evaluation framework is possible: (1) transplants can only be measured as successful or unsuccessful depending on the objectives sought to be accomplished through the transplant; (2) even when those objectives are fully attained, a transplant may produce pernicious consequences in other domains; (3) the perspectives and aspirations of the evaluator impact how the data is collected and interpreted; (4) the time period during which the evaluation takes place affects the assessment; (5) success or failure often depends on how one evaluates the transplant's subsequent adaptations to its milieu; and (6) different criteria are deployed depending on whether the transplantation is organic,

the Study of Plants”); MURRAY W. NABORS, *INTRODUCTION TO BOTANY* (2004) (highlighting four major themes: plants and people, conservation biology, evolution, and biotechnology).

91. See generally WALTER LARCHER, *PHYSIOLOGICAL PLANT ECOLOGY: ECOPHYSIOLOGY AND STRESS PHYSIOLOGY OF FUNCTIONAL GROUPS* (4th ed. 2003) (examining the science of plant life as affected by various abiotic and biotic factors).

92. I have attempted to address each of these components in Macdonald, *Norm Entrepreneurship*, *supra* note 33; Roderick A. Macdonald, *Unitary Law Re-form, Pluralistic Law Re-substance: Illuminating Legal Change*, 67 *LA. L. REV.* 1114 (2007) [hereinafter Macdonald, *Illuminating Legal Change*].

natural, and voluntary, or disjunctive, artificial, and involuntary.⁹³ Once again, the inescapable conclusion is that, before we vulgarly take on board complex metaphors from other disciplines, or conversely, before we abandon these metaphors because they do not seem to provide the simple rhetorical punch we wish, we should attend to the deep theory of the disciplinary knowledge we seek to appropriate as our own.

With this theoretical background in view, I should now like return to the CCU. The central question for international law reformers who like the botanical metaphor, therefore, is not simply one of transplantation.⁹⁴ It is also one of acculturation: when selecting legal institutions to transplant, what *ex ante* compromises do we make, and what *ex post* adjustments are we willing to tolerate? And why do we make these choices in the places that we do? Before we naively throw around metaphors that sound good when stripped of their complexity in the field from which they arise, we should consider whether those field-specific complexities may actually help us to better understand the law reform project to which we are applying the metaphor. The richer understanding of the transplantation metaphor permits me to explore three hypotheses about secured transactions law reform in States with economies in transition.

First, all transplants imply more than the insertion of a clean species into new soil. Unlike the grafting of material from plant onto plant, transplanting involves attentiveness to physiology and genetics. Following the general themes of Geoffrey Samuels,⁹⁵ one might conclude that the more the legal architecture of the transplant resembles the architecture of cognate legal institutions, the greater the chances of survival and adaptation. However, even when commercial law reform is accompanied by *ex ante* reforms, for example, to bankruptcy law, debtor-creditor law, and sales law, the climate, the character of the ambient soil, and other features of the ecosystem will generate *ex post* adaptive strategies.⁹⁶ As applied to Ukraine, in order to overcome strategic behavior by creditors and debtors, it was necessary to define the generic category of “charge” to

93. This inventory is derived from ROBERT LEO SMITH & THOMAS SMITH, *ECOLOGY AND FIELD BIOLOGY* (6th ed. 2001).

94. I adopt fully as a goal for law reform the critique of transplantation advanced by Nelken, *supra* note 69, and I pursue the general logic of that critique in developing the idea of acculturation.

95. Geoffrey Samuels, *Can Gaius Really Be Compared to Darwin?*, 49 INT'L & COMP. L.Q. 297 (2000) (differentiating legal and zoological structural taxonomies).

96. See generally Roderick A. Macdonald & Hoi Kong, *Patchwork Law Reform: Your Idea Is Good in Practice, But It Won't Work in Theory*, 44 OSGOODE HALL L.J. 11 (2006).

include all consensual and nonconsensual encumbrances on an owner's rights.

Second, there can never be a perfect transplant, regardless of how similar the political economies of two States may be. All transplants are exogenous. All require ecosystem analysis. The less the political and legal environment is stable, the less entrenched legal interests are likely to derail substantive reforms that threaten acquired intellectual capital.⁹⁷ That is, the greater the specific character of the climate, the soil, and native flora, the harder it is to neutralize local difference. In this light, it is impressive how quickly the legal profession and business and financial establishments have adapted to the new law, and how quickly pressure has arisen to develop detailed rules relating specifically to deposit accounts, intellectual property, letters of credit, and so on.

Third, and conversely, all transplants have consequences for surrounding flora and fauna. No transplant is limited in its effects to the soil immediately surrounding it. Some of these consequences are immediate; some make themselves felt through time. Much of the Western theory of secured lending is inapplicable and unworkable in countries like Ukraine. Commentators who would make law subservient to market rationality tend to downplay the extent to which principles of domestic law—from the constitution, to rules of judicature and civil procedure, to family law, to tax law—influence the shape and operation of commercial law regimes. It is not possible to enact fine-grained legislation relating to security on movable property until there is broad consensus on and acceptance of the basic objectives and institutions of a modernized secured transactions regime. This said, it remains to be seen whether it will take Ukraine half a century and two major rewrites (as has been the case with Article 9) to achieve a secured transactions law that meets the strictures of critics.

From the perspective of 2009, the Charge Law can also be seen as a remarkably successful enactment. There is evidence that, as a modernized and rationalized regime of security on movable property, it has contributed to enhanced credit availability and commercial activity. As it is well adapted to the social, economic, political, and legal environment into which it has been projected, jurists suggest that the Charge Law has

97. While formally, the rejection of the CEAL draft in Ukraine and the rejection of the DCC in Quebec appear to be motivated by similar atavistic responses, the differences between the two processes were substantial. Most notably, even though expressed in the language of "preserving the purity of the civil law tradition," the Quebec rejection was actually more the rejection by the profession's conservative elements of the substance of the reform being proposed, than the rejection of the conceptual form in which it was presented. By contrast, the Ukraine rejection did not center upon the substance of the proposed reform, but its mode of expression.

taken root and has generated calls for further reforms to facilitate the granting of security over intangibles and other commercial instruments. The drafters were able to reform the law with minimum conceptual disruption to the existing legal regime. As such, the endeavor in Ukraine offers a model of how the logic of modernization can be pursued in civil law jurisdictions transitioning from socialist economies to market-based economies. If there are still unresolved issues, they do not revolve around the failure to adopt fully the model of Article 9 functionalism. Rather, these issues illustrate how a vulgar concept of transplantation can color our evaluation of a law reform's success or failure. Simply because the receiving ecosystem altered the *ex ante* physiology of the transplant, as reflected in the Charge Law, does not mean that, over time, these *ex post* adaptive strategies will not be successful in generating further reform.

III. VIRAL PROPAGATION: THE EPIDEMIOLOGY OF NORMATIVE PANDEMICS

I take my third example from the recent work of UNCITRAL's Working Group VI: Secured Transactions. This example is meant to illustrate the usefulness of a newer metaphor for the migration of international commercial law norms—viral propagation.

Once more, I begin by asking what exactly the metaphor of viral propagation implies. The relative novelty of the metaphor in international commercial law reform means both that it is not as well developed as other metaphors, and that strong counter-currents have not yet emerged.⁹⁸ For most jurists the viral metaphor connotes an unplanned and unconcerted mechanism by which norms self-perpetuate and self-propagate. In this version of norm migration, the memetic idea is directly applied to law and is subject to the same critiques as memetics.⁹⁹ Other jurists deploy the viral metaphor more as a rhetorical device than as a conceptual tool. Here, the assumption is that there are mappable affinities between

98. The viral propagation metaphor is occasionally deployed in other human fields, such as memetics and marketing. See, e.g., RICHARD DAWKINS, *THE SELFISH GENE* 203–15 (1976); Jeffrey Rayport, *The Virus of Marketing*, *FAST COMPANY*, Dec. 1996, at 68, available at <http://www.fastcompany.com/magazine/06/virus.html>. The first usage is rhetorical, while the second use claims prescriptive bite and has, therefore, been subject to critique. See Mark Jeffreys, *The Meme Metaphor*, 43 *PERSP. BIOLOGY & MED.* 227 (2000).

99. While the legal literature is small, it is powerful. See, e.g., Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Perspective*, 39 *JURIMETRICS* 291, 302–16 (1999); Jeffrey Evans Starke, *Pushing Evolutionary Analysis of Law or Evolving Law: Design Without a Designer*, 53 *FLA. L. REV.* 875 (2001).

the transmission of viruses to human organisms and the transmission of ideas to legal systems.¹⁰⁰ Both hypotheses, however, presuppose that no matter how viral (that is, unplanned and self-perpetuating) international law reform may be, the relevant sites of normative transmission will always be the official law of States.¹⁰¹

A. *The UNCITRAL Legislative Guide*

To test the utility of the viral propagation metaphor I begin with the efforts of UNCITRAL's Working Group VI to produce a Legislative Guide on Secured Transactions ("Legislative Guide" or "Guide"), which is aimed at States seeking to modernize their secured transactions laws.¹⁰² From the outset, the rationale for the project was stated in relatively uncompromising terms. Secured credit is a good thing, and therefore States should establish legal regimes to facilitate the growth of secured credit in

100. See, e.g., Richard Michael Fischl, *The Epidemiology of Critique*, 57 U. MIAMI L. REV. 475 (2003) (discussing the critical legal studies outbreak); Gil Grantmore, *The Phages of American Law*, 36 U.C. DAVIS L. REV. 455 (2002) (using the biological analogy to describe terrorism and the American security and law enforcement response).

101. Even Waller, *supra* note 3, makes this assumption; compare it, however, with the work of Makela, *supra* note 1, who imagines deploying the metaphor to explore norm migration in a legal pluralist perspective. On the legal pluralist point, see also Macdonald, *Illuminating Legal Change*, *supra* note 91, at 1116, 1119–21 (exploring "several dimensions of law making in a global world" through the metaphor of light and color).

101. Even Waller, *supra* note 3, makes this assumption; compare it, however, with the work of Makela, *supra* note 1, who imagines deploying the metaphor to explore norm migration in a legal pluralist perspective. On the legal pluralist point, see also Macdonald, *Illuminating Legal Change*, *supra* note 91, at 1116, 1119–21 (exploring "several dimensions of law making in a global world" through the metaphor of light and color).

102. Between 1968 and 1980, UNCITRAL considered various projects to study security interests, propose core principles, and develop uniform rules for secured transactions, but all were abandoned because of a failure to achieve consensus as to their scope, utility, or feasibility. See UNCITRAL, *Earlier Projects Relating to Security Interests*, http://www.uncitral.org/uncitral/en/uncitral_texts/security_past.html (last visited Apr. 20, 2009). After Working Group VI completed its work on the Convention on the Assignment of Receivables in International Trade, G.A. Res. 56/81, U.N. Doc. A/RES/56/81 (Jan. 31, 2002), it was charged by the Commission to begin work on preparing a Legislative Guide to Secured Transactions. This Guide was meant to complement the work of other international organizations—e.g., the IMF, World Bank, EBRD, ADB, OAS, *L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires* ("OHADA"), and UNIDROIT—many of which had already produced documents entitled "core principles of secured transactions," model laws, or international conventions, such as the UNIDROIT Convention on International Interests in Mobile Equipment (Nov. 16, 2001), available at <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf>.

their economies.¹⁰³ Initially, there was an (unstated) assumption that only certain countries would benefit from attending to the recommendations of the Legislative Guide, although a broader framing of the project's utility emerged as the deliberations of the Working Group proceeded. Indeed, the final document provided in its first paragraph: "[t]he *Guide* is intended to be useful to States that do not currently have efficient and effective secured transactions laws, as well as to States that already have workable laws but wish to modernize these laws and harmonize them with the laws of other States."¹⁰⁴

While delegates from most States broadly agreed with the proposition that inadequate access to business credit often impeded entrepreneurial activity, some were less convinced that *secured* credit as such was the primary palliative for this inadequacy. On the whole, concern was not expressed in the skeptical "not net efficiency" language of U.S. law and economics scholars,¹⁰⁵ but rather as uncertainty that secured commercial financing credit was a greater social good than employment insurance, health care, worker's compensation, pensions, and supplier-based trade

103. The literature, particularly the law and economics literature, is extensive. See, e.g., Ross Levine, *Financial Development and Economic Growth: Views and Agenda*, 35 J. ECON. LIT. 688 (1997); Anthony Saunders et al., *The Economic Implications of International Secured Transactions Law Reform: A Case Study*, 20 U. PA. J. INT'L ECON. L. 309 (2000).

104. UNCITRAL, LEGISLATIVE GUIDE ON SECURED TRANSACTIONS (2007) (final text submitted for publication), available at <http://www.uncitral.org/pdf/english/texts/security-ig/e/final-final-e.pdf> [hereinafter FINAL LEGISLATIVE GUIDE]. By the end of the deliberations of the Working Group, four main targets of legislative reform were identified: (a) developed economies with what were deemed to be relatively efficient, effective, and functioning regimes (e.g., Canada, New Zealand, the United States); (b) developed economies with what were deemed to be inefficient secured transactions regimes (e.g., Australia, France, Germany, the United Kingdom); (c) economies in the course of development with secured credit-unfriendly regimes (e.g., many Latin American States; many States in central Europe); (d) economies that are of all three above types but not based on "market principles" (e.g., many Islamic republics).

105. Since Alan Schwarz first raised the question whether secured transactions law was efficient, the debate has attracted continued scholarly interest. For one light-hearted contribution, see Richard L. Barnes, *The Efficiency Justification for Secured Transactions: Foxes with Soxes and Other Fanciful Stuff*, 42 U. KAN. L. REV. 13 (1993). See also David Carlson, *Secured Credit as a Zero Sum Game*, 19 CARDOZO L. REV. 1635 (1998).

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credit.¹⁰⁶ More significantly, delegates from many States bristled at the paternalistic suggestion (often originating in delegations from States with so-called developed economies) that the point of the exercise was to allow States with economies “in course of development” to benefit from the experience, insight, and expertise on offer.¹⁰⁷ Other delegates (notably those from civil law States with functioning, although not recently reformed, secured transactions regimes) also felt that the logic driving the project was insensitive to models of secured financing other than Article 9. In addition, some European States with modernized non-Article 9 regimes saw the project as an attempt to drive a wedge between them and their traditional “client States” in matters of law and trade. Finally, as the project drew near to completion, other European States perceived a threat to their predominance in financial markets and sought to modify the Legislative Guide to protect existing distributions of economic power. Throughout the Working Group process, these tensions and cleavages were never far from the surface.¹⁰⁸

Despite these reservations, however, various macro-facts and macro-norms of international trade led delegates to Working Group VI to conclude that modernizing secured transactions regimes to produce efficient, effective, accessible, low-cost commercial credit was a worthwhile endeavor.¹⁰⁹ First, States that are resource rich are frequently cash poor;

106. For a discussion of the hedonistic logic of secured transactions in the frame of Aristotelian distributive justice, see Macdonald, *Counter-Reformation*, *supra* note 46. *But cf.* Ronald J. Mann, *Bankruptcy and the Entitlements of Government: Whose Money Is It Anyway?*, 70 N.Y.U. L. REV. 993 (1995).

107. The Final Legislative Guide addresses this concern by introductoryly stating that it is designed to assist States at various stages of development. FINAL LEGISLATIVE GUIDE, *supra* note 104, ¶ 1. Looking ahead towards implementation, however, Vijay Tata, Chief Counsel at the World Bank, has cautioned that the Guide should not be used prescriptively as a proxy for a participatory, deliberative legislative process within States. Rather, “[t]he very complex debates about policies and the costs and benefits of various legislative designs that took place in Vienna and [New York] in the preparation of the Guide, will and should be replayed in greater detail and with greater specificity in the reforming countries.” Vijay Tata, *The Role of Multilaterals in the Promotion of Modern Securities Law*, Remarks at the Congress to Celebrate the Fortieth Annual Session of UNCITRAL (July 10, 2007), *available at* <http://www.uncitral.org/pdf/english/congress/Tata-revised.pdf>.

108. This is, obviously, my own interpretation of interventions made at Working Group sessions reported in the sessions and related documents. For a complete accounting of the activities of Working Group VI on the Legislative Guide project, see 2002 to Present: Security Interests, *supra* note 16.

109. The current empirical literature appears to suggest that the effect of security is not primarily that it serves to reduce the *cost* of credit. Rather, the absence of effective security rights simply means that credit is *unavailable*. See SECURED TRANSACTIONS REFORM AND ACCESS TO CREDIT (Frédérique Dahan & John Simpson eds., 2008)

States that are cash rich are somewhat less frequently resource poor (or have more available cash than they do borrowers seeking credit for entrepreneurial purposes). Hence, legal regimes should facilitate economic cooperation among States under conditions of political equality. Second, the production of tradable goods often takes place in States with low labor costs, where local manufacturers do not own the intellectual property reflected in the products they produce. Hence, legal regimes should facilitate the cooperative engagement of production across trade boundaries even when the assets produced are themselves not destined for export. Third, much of international sales law involves the delivery of already charged assets into States lacking developed regimes of nonpossessory security over movable property. Hence, legal regimes should display sufficient comity so that the cross-border delivery of assets does not comprise the security of an export creditor's rights. And finally, the international market for trade in securities and other incorporeal rights is often distinct from the international market for manufactured property. Hence, legal regimes need to facilitate the aggregation and disaggregation of securities and receivables so that they may be financed separately from the production at their origin.

These facts on the ground and the normative consequences they imply, along with my experience at UNCITRAL, convince me of the foundational principle that should drive the modernization of secured transactions law: internationalization is a two-way street. From this principle two corollaries may immediately be derived. First, a number of so-called advanced economies with so-called modernized secured transactions regimes (for example, the United States and Canada) will have to further reform their secured transactions laws (especially in connection with cross-border insolvencies) in order to be successful in the international sphere. The second corollary is that sellers and lenders from so-called developed economies need purchasers and borrowers from so-called developing economies just as much as these purchasers and borrowers need them. In brief, notwithstanding the rhetoric that "secured credit transactions" are a good thing because developing countries need capital inflows, it is equally the case that cash-rich developed economies need safe harbors for their capital outflow.¹¹⁰

110. The point has not often been raised in connection with what is euphemistically characterized as the subprime crisis, although business debtors from developing countries are now paying the price for the profligacy of institutional lenders. On the one hand, the very existence of subprime mortgage loans is a classical example of the consequences of too much credit chasing too few good risks. On the other hand, the reckless repackaging of high-risk domestic receivables supposedly backed by appreciating assets has drawn investment away from entrepreneurs in States with under-developed secured transactions

When the Legislative Guide was first mooted in the late fall of 2001, there was a consensus among the group of experts convened by UNCITRAL that the Guide should begin with a restatement of the core principles of an efficient and effective secured transactions law. At that time, two members of the group were charged with drafting a brief presentation of these core principles. One argued for a set of key objectives and core principles that more or less tracked those already identified by other international organizations and that focused uniquely on the promotion of secured credit.¹¹¹ The other proposed a more comprehensive set of principles meant to contextualize secured transactions within the general law relating to the compulsory performance of obligations.¹¹² Although the issues presented by both perspectives remained throughout the process of drafting the Guide, the group of experts quickly decided to recommend to the Working Group that it adopt a series of core principles based on existing documents in international circulation, and Working Group VI accepted this recommendation at the outset of its deliberations.

What, then, were the basic features of the UNCITRAL approach, and how were they actually put into practice? First the project was to develop a legislative guide, not a model law or a convention. In fact, however, Working Group VI hoped that its Guide might achieve uptake, and so its recommendations were quite detailed and cast precisely in the form of text that could be pasted without much difficulty into a draft law. Second, Working Group VI aimed to produce a legislative guide that would assist States with a broad range of economies, social practices, and political priorities. In fact, however, many of the Guide's proposals assumed a market economy with a number of correlative financial and

laws that, in fact, are less likely to default than domestic borrowers formally issuing apparently secured debt.

111. For examples of the core principles identified by other international organizations, see ASIAN DEV. BANK, 2 LAW AND POLICY REFORM AT THE ASIAN DEVELOPMENT BANK 2000 (2000), available at [http://www.adb.org/Documents/Others/Law_ADB/lpr_2000_2.asp?p=lawdev#contents_\(comprising_a_major_study_on_secured_transactions_law_reform_in_India,_Indonesia,_Pakistan,_the_People's_Republic_of_China,_and_Thailand\);](http://www.adb.org/Documents/Others/Law_ADB/lpr_2000_2.asp?p=lawdev#contents_(comprising_a_major_study_on_secured_transactions_law_reform_in_India,_Indonesia,_Pakistan,_the_People's_Republic_of_China,_and_Thailand);) Frédérique Dahan & John Simpson, *The European Bank for Reconstruction and Development's Secured Transactions Project: A Model Law and Ten Core Principles for a Modern Secured Transactions Law in Countries of Central and Eastern Europe (and Elsewhere!)*, in SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW, *supra* note 7, at 98–116; Pascale DeBoeck & Thomas Laryea, *Development of Standards for Security Interests and Enforcement of Claims* (2003), <http://www.imf.org/external/np/leg/sem/2002/cdmf/eng/pdb.pdf>; WORLD BANK, PRINCIPLES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS (REVISED DRAFT) (2005), available at <http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRPrinciples-March2009.pdf>.

112. For a brief outline of this larger context, see *supra* text accompanying notes 25–32.

judicial institutions typical of a North American economy. Third, the stated ambition of Working Group VI was to set out “best practices” for secured financing, wherever these were to be found.¹¹³ In fact, however, the Guide by and large adopted the basic principles of modernization instantiated by Article 9: (a) a unitary, functional approach to scope; (b) nonpossessory security over present and future property; (c) an extended concept of proceeds; (d) a notice-filing registry system; (e) non-judicial enforcement; (f) equal protection for acquisition financing whether offered by sellers or lenders; and (g) special rules governing third-party effectiveness, priority, and enforcement of certain intangible assets, including receivables, bank accounts, independent guarantees, negotiable instruments, and negotiable documents.¹¹⁴

In view of these divergences between the ambitions of the Working Group and the manner in which these ambitions were actually translated into recommendations, it is worth reflecting on whether the initial statement of the Guide’s core principles may have truncated discussion of alternatives to Article 9. Recall that the overall objective of secured transactions regimes was said to be promoting availability of low-cost credit in order to facilitate the successful operation and expansion of domestic businesses and improve their ability to compete domestically and in the global marketplace. Compare the “[k]ey objectives of an effective and efficient secured transactions law” as set out in Recommendation 1, taking note of the manner in which the title is phrased, with the draft proposal that the group of experts did not recommend to Working Group VI.¹¹⁵ The key objectives expressed in the Legislative Guide focus on the design of an “efficient and effective” secured transactions law:

(a) To promote low-cost credit by enhancing the availability of secured credit[;]

....

113. U.N. Conf. on Int’l Trade Law [UNCITRAL], Working Group VI on Sec. Interests, *Draft Legislative Guide on Secured Transactions*, ¶ 2, U.N. Doc. A/CN.9/WG.VI/WP.2/Add.1 (Feb. 12, 2002) [hereinafter *Draft Legislative Guide*] (“The focus of the Guide is on developing laws that achieve practical economic benefits for States that adopt them. The Guide seeks to rise above the differences among legal regimes to suggest pragmatic and proven solutions that can be accepted and implemented in States having divergent legal traditions.”).

114. See FINAL LEGISLATIVE GUIDE, *supra* note 104, at Recommendations 8–9; Recommendation 13; Recommendation 19; Recommendations 32–33; Recommendation 142; Recommendations 178, 187–88; Recommendations 23–28, 48–53, 101–09, 114–16, 117–30, 167–77, respectively.

115. See *supra* text accompanying note 17.

(b) To allow debtors to use the full value inherent in their assets to support credit[;]

....

(c) To enable parties to obtain security rights in a simple and efficient manner[;]

....

(d) To provide for equal treatment of diverse sources of credit and of diverse forms of secured transactions[;]

....

(e) To validate non-possessory security rights in all types of asset[;]

....

(f) To enhance certainty and transparency by providing for registration of a notice in a general security rights registry[;]

....

(g) To establish clear and predictable priority rules[;]

....

(h) To facilitate efficient enforcement of creditors' rights[;]

....

(i) To allow parties maximum flexibility to negotiate the terms of their security agreement[;]

....

(j) To balance the interests of all affected persons[; and]

....

(k) To harmonize secured transactions laws, including conflict-of-laws rules[.]¹¹⁶

With the sole exception of principle (j), all of these objectives are internal to the logic of a secured transactions regime itself and aim at achieving transactional efficiency.

Consider how these key objectives and core principles might have been alternatively formulated had the ambition been to provide States with guidance on not only the secured transactions regime, but also how it should be successfully implemented. The following were presented to the group of experts in the fall of 2001, under the title "Core Principles of

116. FINAL LEGISLATIVE GUIDE, *supra* note 104, ¶¶ 46–59.

Modern Regimes of Security Rights,” a title that did not explicitly refer to economic efficiency as an overriding value.¹¹⁷ The principles aimed at several objectives:

- (1) To balance efficiency and justice, the regime should aim at making credit available at the lowest possible cost, in a manner that respects the fundamental political and social goals of the society in question.
- (2) To achieve coherence with public policy, the regime must reflect a fair balance between legitimate public policy goals being pursued by States as reflected in their regulation of basic concepts of status, property, and obligations and the opportunistic goals of individual creditors and debtors as reflected in the idea of freedom of contract.
- (3) To achieve a comprehensive regulatory framework, the regime of security should be comprehensive as to all the elements of the security nexus—debtors, creditors, obligations, collateral—in order to (a) minimize regulatory uncertainties or unfair inequality of access to the regime; (b) avoid creating inadvertent gaps; (c) ensure the best integration possible of competing regulatory regimes; and (d) promote competition on the cost of credit among purveyors of credit to businesses.
- (4) To reflect a functional design, a regime capable of granting security, eligible collateral, pre-default rights and obligations, and secured creditors’ recourses, and upholding a general theory of publicity of secured rights should apply, regardless of the origin or form of the security right in order to prevent debtors and creditors from artificially manipulating their status, the character of their obligation, or the legal nature of their assets so as to either escape or fall under the regulatory regime.
- (5) To promote party autonomy, the logic of the regime should be as simple as possible, with the legislature deciding questions having to do with definition and distribution of entitlements in the regime from an “ideal-type” perspective that maximizes the efficiency potentialities of a consensual regime of secured transactions.
- (6) To provide for intelligible rules, since the point of the regime is to permit debtors and creditors to plan their affairs in reasonable legal security, (a) the regime’s rules should be drafted in a manner that is intelligible to non-lawyers; (b) imperative rules should limit or prohibit choices only for reasons of unfairness or perverse distribution of burdens upon the parties to the transaction or third parties; (c) the regime should avoid making superficial distinctions of form where there are essential identities of substance; (d) the regime should not mandate an

117. These alternative core principles were derived from the core principles guiding the reform of the secured transactions law in Ukraine. See MACDONALD, *LAW OF UKRAINE*, *supra* note 79, at 17–24.

implied intent either by creditors or debtors, and legal fictions should be purged; (e) the regime should not presume outcomes (e.g., a commercially reasonable price upon realization) that can actually be determined by the operation of market principles.

(7) To achieve internal coherence, the rights created should reflect the legitimate interests and expectations of debtors, creditors, and third persons, given the underlying logic of a regime of security on property, by (a) structuring incentives to encourage performance by debtors; (b) structuring incentives to encourage responsible behavior by creditors; (c) designing the regime to discourage illegitimate third-party interference.

(8) To maximize realization value, the regime should structure incentives so that the value of the collateral is maintained prior to default, and should be designed to avoid inefficient formalism in post-default enforcement by providing debtors, creditors, and third parties with incentives to maximize realization value.¹¹⁸

Of all the policy differences that were manifest throughout the deliberations of Working Group VI, two were present from the outset and preoccupied the Working Group up until its very final sessions. The first was the question of title security, including most pointedly the seller's retention-of-title transaction; the second, closely allied to this, was whether the Guide should recommend a comprehensive filing regime in order to obtain third-party effectiveness of nonpossessory rights.¹¹⁹ Initially, delegates from many States expressed resistance to the functional approach of Article 9. As in the reform process in Quebec and Ukraine, they felt that title security was of a different genus than true security.¹²⁰ Over the course of its deliberations, however, the Working Group reached a consensus that the primary difficulty lay not with title security in general, but with the retention-of-title transaction specifically. The delegations came to accept that lender transactions, such as sales with a right of redemption, fiduciary transfers of title, retroactive giving-in-payment

118. *Id.*

119. In the chronological order of the Working Group sessions, the issue of registration actually came up for resolution first (in what is now Chapter IV), since consideration of retention-of-title transactions was deferred to acquisition financing (what is now Chapter IX). But the concern about registration was essentially about the necessity for registration of retention-of-title devices rather than an opposition to the concept of notice filing *per se*.

120. This concern was expressed primarily by many civil law States in Africa, Europe, and Latin America, although it also found resonance with delegations from States having other legal traditions, but not those from common law States (with the exception of the United Kingdom).

clauses, and foreclosure agreements, were in fact secured transactions and could properly be included within the Guide's general functional definition.¹²¹

Nonetheless, the process almost broke down over how to deal with retention-of-title transactions. In the end, the Working Group decided that it would adopt a dual approach. To begin, the overall frame of the Guide would be cast in the language of a functional approach; then, in so far as a particular type of security right was concerned, acquisition financing, two approaches were permitted: a unitary approach that tracked the Article 9 model, and a non-unitary approach that preserved not only the Article 9 model, but also separate retention-of-title type transactions (a seller's reservation of ownership and financial leases) as long as they produced functionally equivalent results.¹²² Interestingly, this dual approach—assimilating lender title transactions to security rights and preserving retention-of-title transactions as a separate category—is also adopted by the just released Draft European Civil Code, Book IX on “Proprietary Security in Movable Assets.”¹²³

While some delegations regret the compromise over acquisition financing, all in all it must be said that the Legislative Guide is a significant achievement, judged both on its intellectual merit and as the output of a lengthy process of negotiation. This process, moreover, has much to teach about how the metaphor of viral propagation can assist in managing consensual, international commercial law reform such as that undertaken by UNCITRAL.

B. The Logic of Viral Transmission

Let me develop this point by exploring the nuances of the third metaphor deployed by international commercial law reformers, viral propagation.¹²⁴ The metaphor of virus provides a rich point of entry for examin-

121. The deliberations of the Working Group are nicely tracked in the Commentary section of the FINAL LEGISLATIVE GUIDE, *supra* note 104. On title transactions generally, see *id.* ch. I, ¶¶ 45–112 (on “Scope of application, basic approaches to security and general themes common to all chapters of the Guide”), and for retention-of-title particularly, see *id.* ch. IX, ¶¶ 13–84 (on “Acquisition financing”).

122. See *id.* at Recommendations 8–9, 178–202.

123. See ULRICH DROBNIG, STUDY GROUP ON A EUR. CIVIL CODE, PROPRIETARY SECURITY IN MOVEABLE ASSETS 1–13 (2009) (elaborating on the Draft Common Frame of Reference, bk. IX, § 1: scope of application articles, IX-1:101 (general rule), IX-1:102 (security right), IX-1:103 (retention of ownership devices: scope), and IX-1:104 (retention of ownership devices: applicable rules)).

124. I use the viral metaphor purely descriptively and not normatively. In this usage, I follow Waller, *supra* note 3. Much of the account of the next four paragraphs relies upon this unpublished article and from Makela, *supra* note 1.

ing how Article 9 thinking has become a pandemic in international commercial law reform. However, in order to derive the full benefit of the virus metaphor, it is important first to attend carefully to the subtleties of epidemiology. How do viruses actually propagate themselves?

One of the reasons why viruses have become such a powerful metaphor is their association with the technology of knowledge transmission through computer programs. Biological viruses are also found everywhere, constantly attaching themselves to host cells via their protein. At this point, the virus is able to exploit the nucleus of the host cell to assist its reproduction, which then migrates outwards to another host. Of course, to propagate themselves viruses need to be transmitted. Hence the importance of studying "vectors of transmission." Some viruses are relatively benign, but very easily transmitted—the common cold, for example. Others are particularly vicious, but relatively difficult to transmit—the HIV virus, for example. But whether a virus becomes a pandemic also depends on the nature of the host population to which it is spread. If the host is relatively immune to such infections, even a malignant virus propagated by multiple effective vectors of transmission may not result in infection. The host's resistance to a virus may be founded on its own inherent biological properties or may be enhanced by inoculation with an effective vaccine.¹²⁵ As Guido Calabresi reportedly said in explaining why CLS had not infected Yale Law School, "[People] with Cow Pox do not contract Small Pox."¹²⁶ By contrast, if the immune system is weak, a virus may kill the host before it has the chance to reproduce itself and infect others.

A further structural factor influencing the spread of a virus is the context within which the host lives. So for example, the influence of the relative density of susceptible hosts is inversely proportionate to the strength of the transmission vectors. Isolated hosts are less susceptible to viral transmission than densely arranged hosts. Here is a final reflection. Because viruses are so active, they can often mutate, and host immune systems that have successfully resisted one viral strand can often fall prey to a new mutated strand. Alternatively, viruses may remain dormant for years following infection, before ultimately manifesting themselves in a variant form.

This brief canvass of viral epidemiology hardly scratches the surface of what might be learned from the metaphor and how the metaphor may be used to generate a model of norm migration. It does, nonetheless, suggest

125. See generally TERI SHORS, UNDERSTANDING VIRUSES 140–89 (2008) (on host resistance to viral infections).

126. Fischl, *supra* note 100, at 478.

some variables that will affect international norm entrepreneurs' propagation of particular legal ideologies, such as Article 9.

First of all, a legal ideology will be most effectively propagated when it infects a field of law organized around a few broadly accepted assumptions. The barrage of essentially identical "key objectives" and "core principles" promulgated by well-endowed entrepreneurs since the mid-1980s can be seen as an essential precondition to UNCITRAL's decision to ask Working Group VI to take on the Legislative Guide project twenty years after the last of several failed attempts to move onto this terrain.

Second, a legal concept or regime is most likely to infect a decision-making body where authority (in particular, law-making authority) is highly centralized, hierarchically organized, and legislatively rather than judicially driven. This is the case, for example, with Ukraine, but not Quebec, where competing legal professions prevent the State from imposing a singular law reform agenda and where, notwithstanding codification, courts play a role akin to that played by courts in common law jurisdictions.

Third, propagation will be most successful where there are multiple recombinant interests—vectors of transmission—to sustain contact in diverse settings: uniform law organizations; model laws; international agencies (e.g., UNIDROIT and UNCITRAL); international financial organizations with tied grants (e.g., the World Bank and IMF); treaties and conventions; regional trading blocs; vestiges of colonialism; scholarly round tables on best practices involving law professors, graduate students, and private economic actors; and the conscription of powerful interest groups.

Fourth, countries that are relatively isolated, geographically or intellectually, are less susceptible to viral transmission than densely arranged countries with relatively open intellectual frontiers. On the one hand, one may cite Albania, Myanmar, and Zimbabwe as States relatively unlikely to spread a law reform virus; on the other hand, one may cite most post-communist States of Central Europe, and States that belong to the OHADA, *Mercado Común Sudamericano*, and Association of Southeast Asian Nations as likely targets for explosive transmission once one State becomes infected.

Fifth, propagation is diminished where hosts have been ideologically inoculated against the virus, usually by precommitments said to be grounded in socio-cultural factors. These factors may be defensive (a strong host), or offensive (an inoculation by a modest form of the virus that successfully propagates itself in resistance to more virulent forms). Examples of the former would include the reaction of Germany to the

acquisition financing regime of Article 9, and the latter would include the reaction of the United Kingdom to any proposal that threatens to diminish the role of the City in international finance, especially the financing of receivables.

How then might we understand the viral metaphor in relation to the UNCITRAL project? It is important to identify the ideological points of resistance among Member States. One was the reaction to an extended concept of proceeds combined with security on future assets and universalities, which led to a perceived overprotection of a first secured creditor's rights. Another was the attempt to restrain policy choices by States that had nonmarket-driven social welfare programs and that did not externalize the cost of excessive credit onto the bankruptcy market. A third was the suspicion of special rules designed to favor the purveyors of financial proxies for asset-backed lending, bank accounts, receivables, negotiable documents, and so on. And a fourth, where compromise was ultimately reached, involved recognizing the special character of retention of a vendor's ownership rights in relation to a financing lender's rights. Given these points of resistance and the States that were more vocal in articulating them, the viral metaphor suggests that the propagation of Article 9 ideology through the Legislative Guide may be less pandemic than desired. The viral metaphor also suggests that, had there been greater sensitivity to implementation in the articulation of key objectives (the legal, social, political, and economic contexts of law reform) and the necessary steps to ensure propagation (attentiveness to those especially vocal and organized in their interests), the chances of widespread infection would have increased. Finally, the viral metaphor points to a paradox in the processes of international agencies like UNCITRAL. Viral propagation presumes, at least initially, a one way migration: the infection of Working Group VI by the Article 9 virus. But viruses can also mutate. To the extent that a mutant virus may emerge in the new host, the initial host may be re-infected by the mutant strain. The conditions under which North American common law States are susceptible to re-infection will depend on the same considerations of viral propagation that initiated the original pandemic.

From the perspective of early 2009, and despite the cautionary remarks of the previous paragraph, the UNCITRAL Legislative Guide looks like it could be a relatively successful endeavor of international norm migration. I have argued above that the context of commercial law reform encompasses a broad range of factors besides the general structure of the domestic legal regime. For this reason, it is important to be clear about the economic, social, and political conditions presupposed by existing secured lending regimes, so that the policy goals sought to be achieved

through modernization can be realized in practice. We must be modest in our claims, because we have only an incomplete understanding of which modernized secured transactions regimes are successful, and somewhat more troubling, because it is not at all clear that we possess the criteria that will enable us to judge whether a particular law reform project has succeeded or failed. In acknowledging the depth of our ignorance on these issues, we can appreciate why, ultimately, our choice of metaphors matters: metaphors (like core principles) frame analysis, exposing and occluding political choices, and defining possibilities for action as well as the sites where action is most likely to be effective.¹²⁷

CONCLUSION: VIRTUE ETHICS IN INTERNATIONAL LAW REFORM

My experiences with reforming secured transactions regimes in Quebec and Ukraine provided an important background for my later participation in UNCITRAL's Working Group VI: Secured Transactions. As the UNCITRAL project evolved over the past seven years, it seemed to me that Member States have learned an important foundational lesson. To the surprise of many who have hitched their wagon (intellectually, and more importantly, emotionally) to Article 9, there are no conceptual features of the civil law tradition preventing the enactment of a functionally-integrated secured transactions regime that achieves the same goals as Article 9 and does so in an equally efficient manner.¹²⁸ Further, there are no conceptual features of the Islamic law tradition or of any other legal tradition (including diverse chthonic legal traditions)¹²⁹ preventing the realization of a functionally-integrated secured transactions regime that achieves the same goals as Article 9 and does so in an equally efficient manner.

Of course, for many the learning curve has been steep. On the one hand, some from advanced commercial economies tend to be patronizing of States with advanced commercial economies that do not agree on the "perfection" of Article 9. Their learning curve is moral. Whatever U.S. jurists may think of American exceptionalism and the mission of the United States to bring about a commercial *pax Americana*, it is far from

127. The discussion in C.S. Bjerre, *Mental Capacity as Metaphor*, 18 INT'L J. SEMIOTICS & L. 101 (2005), develops this point further.

128. For a comparison of unreformed and reformed common law approaches to the definition of a security interest, with unreformed and reformed civil law approaches to the same issue, see Bridge et al., *supra* note 35.

129. On different Islamic approaches to secured transactions law, see Nicholas H.D. Foster, *The Islamic Law of Real Security*, 15 ARAB L.Q. 131 (2000); Mark J. Sundahl, *Iraq, Secured Transactions, and the Promise of Islamic Law*, 40 VAND. J. TRANSNAT'L L. 1301 (2007), especially sec. IV.

clear that this ambition is shared around the world. On the other hand, some from other States tend to be quite defensive about existing legal regimes and unwilling to question the legal “way it is,” which they learned several decades earlier as law students. Their learning curve is also moral.

More generally, in accounts of modernization, it is now time to give up claims to universalism in favor of more differentiated analyses and prescriptions for particular times and particular places. We need to locate our evaluations of commercial law reform within a better understanding of how local entrepreneurial networks and credit institutions function on the ground. The history of successive revisions to Article 9 illustrates the point. Its initial design was meant to respond to a particular set of problems faced by common law jurisdictions in the middle decades of the twentieth century, and the revisions since then have continued to be responsive to locally specific problems.¹³⁰

These observations about Article 9 are not meant to sound a note of pessimism about the possibilities of international norm migration. Rather, they invite discussion about a larger ontological point. Much of our current thinking about generating international legal norms, especially as reflected in the metaphors of harmonization, transplantation, and viruses, follows from the manner in which Western legal culture conceives law. Central to both common law and civil law traditions is the belief that law is fundamentally propositional: law as rules and justice as following rules. Hence the commitment to law reform as a matter of simply, one, “enacting a regime of rules,” and, two, “getting the rules right.” My happy experience as President of the Law Commission of Canada and my equivocal experiences in other law reform settings suggest otherwise.¹³¹ Reforming law by changing rules will never solve legal problems. The best one can

130. For an argument that successive revisions to Article 9 have had the effect of making it even less universal in potential application, and consequently less suitable as a template for international law reform, see Macdonald, *Exporting Article 9*, *supra* note 11. See also Edward S. Cohen, *Constructing Power Through Law: Private Law Pluralism and Harmonization in the Global Political Economy*, 15 *REV. INT'L POL. ECON.* 770 (2008); Cuming & Walsh, *supra* note 25.

131. Compare Roderick A. Macdonald, *Recommissioning Law Reform*, 35 *ALTA. L. REV.* 831 (1997) (Can.), and Roderick A. Macdonald, *Jamais deux sans trois . . . Once Commission, Twice Reform, Thrice Law*, 22 *CAN. J.L. & SOC'Y.* 117 (2007), with Macdonald & Kong, *supra* note 95, and Macdonald, *Illuminating Legal Change*, *supra* note 92.

hope for by changing the rules is to substitute a better class of questions for the suboptimal questions that might currently shape legal reflection.¹³²

The attempts to modernize the law of secured transactions illustrate this larger point. The initial ambition of Article 9 was to achieve, as far as possible, a unitary and comprehensive regulation of consensual devices deployed to secure the performance of an obligation. As Grant Gilmore observed, the primary targets of the reform were inventory financing (where manifold title-based institutions were utilized) and receivables financing (where the law was still largely stuck in judge-made rules developed in the mid-nineteenth century).¹³³ The mechanism was the “substance of the transaction principle.”¹³⁴ Today, however, given the increasing specialization of rules relating to different types of collateral, it is far from certain that the idea of a general regime of security interests still exists under Article 9.3. In addition, the regime in Quebec reveals that it is possible to enact multiple functional regimes, distinguishing not only between true security and title security, but also among subsets of title security. And again, as the Charge Law of Ukraine reveals, it is possible to enact a dual functionality, regrouping all true security under one functional system and all title security under a single, complementary functional system. Finally, as the UNCITRAL Legislative Guide and the Draft Common Frame of Reference (“DCFR”) reveal, it is possible to enact a regime that sweeps all true security and all title security into a single functional regime, with the exception of reservation-of-title transactions like financial leases and retention-of-title sales. Nothing about the idea of functionalism dictates which of these regulatory strategies is optimal. It is worth noting, however, the enactment dates in chronological order: Article 9.1, 1962; the Civil Code of Québec, 1994; Article 9.3, 2000; the Ukraine Charge Law, 2004; and both the UNCITRAL Legislative Guide and Book IX (Proprietary Security in Movable Assets) of the DCFR, 2008. To what extent do these differences reflect particularity—not only in space, but also in time? Perhaps now is the moment to abandon the quest for transcendent (good-for-all-places-and-all-times) law reform.

132. See Roderick A. Macdonald, *Triangulating Social Law Reform*, in *DESSINER LA SOCIÉTÉ PAR LE DROIT [MAPPING SOCIETY THROUGH LAW]* 119 (Ysolde Gendreau ed., 2004) (Can.).

133. Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 *GA. L. REV.* 605, 620–21 (1981).

134. *Id.* The development of Article 9’s functional approach, defining security rights based on the economic substance of the transaction, is discussed at length in GRANT GILMORE, 1 *SECURITY INTERESTS IN PERSONAL PROPERTY* (1965) (1999), chs. 9–10.

If this is the case, the central question then becomes the following: how does one achieve a better class of questions in law reform projects? In my view this is not a matter of propositional ethics, whether Kantian or utilitarian. It is a matter of what Aristotle called *phronesis*. *Phronesis* means "moral sensitivity, perception, imagination and judgment informed by experience."¹³⁵ For Aristotle the capacity to be sensitive to the particularities of a given situation is a necessary condition for moral agency. Even if universal moral principles were to exist, they would not be self-applying. The moral agent displaying *phronesis* is never relieved of the responsibility for making decisions. As moral agents we must therefore constantly reassess what it is we think we know. This, in turn, means cultivating openness to and reciprocity with others. One site of inter-subjective communication is allegory. The strength of allegory is that it captures the minutiae of moral life, permitting context to be conveyed, often with explicit metaphor referents.¹³⁶ It is, in this sense, a vehicle for *phronesis*, a form of expression that does not allow for a final, propositionalized message that is separable from the story itself, easily transmissible, formulaic, and universalized.

As law reformers (moral agents), how do we translate this sense of *phronesis* into actions and justifications for action in an inter-dependent world? In all my commercial law reform experiences over the past decades, Working Groups have conducted their affairs under "ideal-type" assumptions that States, businesses, and people are rational, "wealth-maximizing," economic actors. Of course, such assumptions are methodological hypotheses and should not be taken as "truth claims." Unfortunately, at times, these Working Groups (and I) lost sight of this and became prisoners of our own internal logic. As a consequence, we did not attend sufficiently to an important pragmatic question that normally drives law reform in bodies charged with enacting legal norms, whether the project involves is domestic legislation or transnational constructs like conventions, model laws, or legislative guides. The question is this: how should reform be designed so that it will receive broad uptake from as many countries as possible (and having been taken up, will actually work in these countries)? After thirty years, I have come to the conclusion that the objective is not to design a legal regime that is the equivalent of a high-

135. Stanford Encyclopedia of Philosophy Online, Virtue Ethics, <http://plato.stanford.edu/entries/ethics-virtue/> (last visited Apr. 19, 2009).

136. Allegory may be defined as "a narrative, whether in prose or verse, in which the agents and actions, and sometimes the setting as well, are contrived by the author to make coherent sense on the 'literal,' or primary, level of signification, and at the same time to signify a second, correlated order of signification." M.H. ABRAMS, A GLOSSARY OF LITERARY TERMS 5 (7th ed. 1998).

performance F1 racing car, which requires expert drivers, expert mechanics, and relatively high maintenance costs. Rather, it is to design a legal regime that is the equivalent of the Volkswagen “Beetle”—a serviceable, predictable, easy to acquire, and easy to maintain vehicle that fulfills basic transportation purposes.

In making this claim I do not mean to insinuate that some States are “better” than others; nor do I even mean to insinuate that some legal regimes are, by definition, “better” than others. My claim is different and flows from the recognition that legal regimes are only partly autonomous from their socio-economic political contexts. Every State will aim to enact a regime that works best for it, with the consequence that if one wants to negotiate a secured transactions regime that works across the world, it cannot be based on the assumptions, practices, and economic structures of a very small set of States with developed commercial regimes.

Let me now return to Aristotle and to virtue ethics. Moral perception is a precondition of moral judgment. The implication is that knowledge is a kind of sight: if we cannot see, we cannot know; likewise, if we cannot know, we cannot see. Moral knowledge depends on insight. Success in norm migration, like success in law itself, is open to different interpretations by different people at different times in different places. Law is not a hierarchically organized projection of power from law giver or judge to law subject; nor is it, in the international context, the projection of ideology by dominant States upon subordinated States. Law is both a constant process of interaction between citizens and officials, and in international affairs, a constant process of adjustment among States conceived in dyadic interaction. If we are genuinely committed to “generating international legal norms,” then we can do no better than attend to Aristotelian wisdom: far from ruling the world, we will first be seeking to rule ourselves.

