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FLOW OF COMMERCE, FLOW OF TRAFFIC

Carl S. Bjerre[*]

> *"[W]e are interested not only in preventing collisions but in speeding traffic."*
>
> — *Fuller and Perdue*[1]

This article takes a broad-brush look at some fundamental commercial law principles, from perspectives that are unconventional and even quite fun, but nonetheless, I would suggest, illuminating and important.

One of my perspectives is an analogy between commercial law and transportation planning, which is simply the branch of urban planning devoted to the art and science of setting up the circulation of vehicles and people: in a word, the flow of traffic. Intuitively, it is easy to see analogies between the flow of commerce and the flow of traffic, but in this article, I seek to pin these intuitions down in a sustained and disciplined way. My other principal perspective builds on the first, by moving from analogy to the cognitive theory of metaphor. I will show that the domains of commercial law and transportation planning partake of some of the same metaphors, while also suggesting some important metaphors within commercial law itself. Much of the article can also be seen as a reflection and elaboration on the pithy remark by Lon L. Fuller and William R. Perdue, Jr. that appears in my epigraph.

The perspectives provided here may help us in the commercial law field to better understand at a high level of generality what our law reform projects have been seeking to achieve for the past quite a few decades, even on principles and topics that in most other ways are already as familiar to us as bread and butter.

I. INITIAL PARALLELS

Commercial law and transportation planning are both complex and artificial systems, each designed for a high-level purpose that is closely analogous to that of the other. Both systems' purpose is to permit the coordination of vast numbers of individuals, most of whom are strangers to each other and pursue their own self-interest, but who nonetheless interact in a complex matrix of vital ways. Both systems manage to provide this

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* Kaapcke Professor of Business Law, University of Oregon School of Law. Thanks to Neil Cohen for having sparked these reflections, inadvertently over a dinner many years ago. Thanks also to the participants in the Brooklyn Law School symposium called "Commercial Law Harmonization: Past as Prologue," particularly Susan Block-Lieb, Tim Schnabel and Ted Janger; to Andrea Coles-Bjerre; and to Professors Rebecca Lewis and Marc Schlossberg of the University of Oregon School of Planning, Public Policy and Management. Thanks to Joel Buytkins for highly valued research assistance. All errors are the author's own.

1. Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 61 (1936).

complex coordination in a way that generates a kind of emergent unity or cooperation that, on the whole, can be expected to generate a form of aggregate social well-being. Simplifying greatly for the moment, in transportation planning (or, more narrowly, traffic planning), people are able to get where they want to go, and in commercial law, parties are able to rely on their transactions moving forward.

Both systems must strike a delicate balance between being facilitative and being regulatory. The self-interested actions of the individuals in the system will represent an infinite variety of potentially idiosyncratic choices, and both systems seek to support these choices in a bespoke manner to the extent possible; and yet the law of large numbers means that the individuals' choices will also fall into strongly recurrent patterns that both systems seek to promote, even at the cost of interfering with the idiosyncratic choices. In transportation planning, there is little desire to dictate for its own sake whether Person A must go to Point X as opposed to Point Y or Z, but the system also seeks to manage patterns such as the rush hours of many persons each day from the suburbs to downtown and back. In commercial law, transactions for, say, the supply of goods to businesses can have infinite nuances, but the system also isolates a number of patterns for those transactions and imposes differing pattern-based requirements. The English architectural critic, Reyner Banham, beautifully encapsulates the dilemma of both fields by referring to the "great debate between private freedom and public discipline that pervades every affluent, mechanized urban society."[2]

Further, both systems are part of the non-natural, human-constructed built environment.[3] This goes without saying in the case of the roads, sidewalks, and bus or light rail facilities of transportation planning. But the "built" nature of commercial law is also important to bear in mind because it affects even the field's most basic tenets. Consider as one example the *nemo dat* principle.[4] As a teaching matter it is highly effective to lead students down an initially wrong path in which they think that of course no one gives

2. PETER REYNER BANHAM, LOS ANGELES: THE ARCHITECTURE OF FOUR ECOLOGIES 198 (1971).

This debate is currently quite active in the field of transportation planning, with a traditionalist and largely engineering-based viewpoint seeking to facilitate automobile traffic on one hand, and newer voices urging thorough-going city-based social change on the other. *See infra* note 57. Fuller and Perdue, publishing their article so many decades ago, could not have known that this debate lay in the field's future, and hence their analogy uncritically accepts speeding (and otherwise facilitating) the traffic as a noncontroversial social benefit in a way that today's thoughtful observers would not.

3. The term built environment originated in the field of anthropology. *See* THE MUTUAL INTERACTION OF PEOPLE AND THEIR BUILT ENVIRONMENT : A CROSS-CULTURAL PERSPECTIVE (Amos Rapoport ed., 1976). It has since become common across academic fields in reference to aspects of the physical environment that are artificial or engineered. Sebastian Moffat and Niklaus Kohler, *Conceptualizing the Built Environment as a Social-Ecological System*, 36 BLDG. RSCH. AND INFO. 248 (2008).

4. *Nemo dat quod non habet*, or no one gives what they do not have.

what they don't have; what could be more crashingly self-evident; if a person reaches into their pocket and has no currency, then they cannot give someone else any currency. The effectiveness comes from then exploding that preconception by showing students a negotiability rule in which one person – sometimes even a thief, let alone a purchaser that is subject to infirmities of title – can transfer to a downstream party the rights of an upstream party.[5] Commercial law constructs these rules based on the goals that the field has chosen for certain transactional contexts. The field is pragmatic as opposed to logically deductive, which constitutes the abstract parallel to the physical world's dichotomy of built as opposed to natural.[6]

Moreover, the transportation planning system and the commercial law system are both so pervasive in modern life that they go largely unnoticed. Colin Clark, a mid-20th century Oxford professor and later a government official in the transport and agriculture fields, wrote that even food, clothing, and shelter are only non-fundamental "end-products,"[7] and that humans cannot live as humans without the benefit of a variety of more basic developments that include, in his view, transportation. He describes a system of transportation as being

> a necessity which, like the respiratory system of the body, *we take entirely for granted* as long as it is working well – our imagination just fails to tell

5. *E.g.*, U.C.C. §§ 2-403(1), (2), 3-306, 7-502(a)(1), (2), 8-303(b), 9-330, 12-104(e) (AM. L. INST. & UNIF. L. COMM'N 2022). Conferring negotiability on virtual currency and similar assets, as now reflected in U.C.C.C. § 12-104(e), was one of the principal motivations behind the U.C.C. revision project that culminated in the 2022 amendments. *E.g.*, Unif. L. Comm'n, *A Summary of the 2022 Amendments to the Uniform Commercial Code* (July 21, 2022) (on file with author).

6. A similar point can be made about the seemingly fundamental first-to-file-or-perfect priority rule of U.C.C. § 9-322(a)(1) (AM. L. INST. & UNIF. L. COMM'N 2021). "Of course first in time should be first in right," a student's common sense says, until the student is shown that by "first" we mean a highly constructed amalgamation of events and relationships, usually involving not only the grant of rights (complete with its potentially surprising *nemo dat* violations as described in the text) but also a statute of frauds and the correct filling out of a piece of paper or other record under the elaborate rules of Article 9, Part 5 Subpart 1 and Part 3 Subpart 1. (Nor does the amalgamation end there; one must also add the reliance element of U.C.C. § 9-338. This article discusses the centrality of reliance to commercial law separately *infra* in Part III.)

Moreover, part of Fuller and Perdue's own article characterizes the ordinary contract remedy of expectancy damages as similarly, in effect, "built":

> In the assessment of damages the law tends to be conceived, not as a purposive ordering of human affairs, but as a kind of juristic mensuration . . . . [But in fact,] the things which the law of damages purports to "measure" and "determine"—the "injuries", "items of damage", "causal connections", etc.—are in considerable part its own creations, and . . . the process of "measuring" and "determining" them is really a part of the process of creating them . . . . In actuality the loss which the plaintiff suffers (deprivation of the expectancy) is *not a datum of nature* but the reflection of a normative order.

Fuller & Perdue, *supra* note 1, at 52–53 (emphasis added).

7. Colin Clark, *Transport: Maker and Breaker of Cities*, 28 THE TOWN PLAN. REV. 237 (1958).

> us what would happen if it broke down. Without some form of transport indeed it is hard to conceive human life at all.[8]

Similarly, Jim Rogers, the Reporter for revised Article 8 of the Uniform Commercial Code (U.C.C. or Code), wrote that the statute's subject matter was "a bit like the utility systems of a building,"[9] and elaborated on the comparison as follows:

> When they are working right, *no one notices them*; as they age, it takes more and more effort to keep them working… One of the things that it means when we say that a system "works" is that people can figure out how it works and can do so quickly in times of emergency.[10]

Similar points could be made throughout the U.C.C. and other branches of commercial law. U.C.C. Article 2 might be the most obvious example, with most buyers and sellers (both consumer and business) engaging in transactions with attention only to what Karl Llewellyn called the deal's "dickered terms," taking for granted even their own boilerplate, let alone the law's treatment thereof and the law's implied terms.[11]

II. DEEPENING FULLER AND PERDUE'S ANALOGY

In the excerpts above, both Clark and Rogers couple the invisibility of their respective systems with the question of whether those systems are "working well" or "working right." The same idea was also implicit in Llewellyn's above discussion of assent to dickered terms plus "the broad type of transaction." For those of us who spend time thinking about commercial law reform, the conceptual infrastructure of even a routine transaction is fine-grained and complex; however, for most users of the commercial law system, routine transactions are routine precisely because they need little or no thought – and the reason that they need so little thought is that they are almost

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8. *Id.* (emphasis added). Clark goes on to defend that proposition by referring to even nomadic societies depending on baskets or other implements to transport their possessions. *Id.*

9. James S. Rogers, *Policy Perspectives on Revised U.C.C. Article 8*, 43 UCLA L. REV. 1431, 1448 (1996).

10. *Id.* at 1448–49 (emphasis added).

11. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960):

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.
>
> [. . .] There has been an arm's-length deal, with dickered terms. There has been accompanying that basic deal another which, if not on any fiduciary basis, at least involves a plain expression of confidence, asked and accepted, with a corresponding limit on the powers granted [. . .].

Id. at 370–71.

always non-problematic. The same is true of traffic, in which people are often said to commute to and from work or drive down the highway "on auto-pilot." Without denying the occasional case of things going wrong and without minimizing the sometimes terrible consequences, the fact that the users of both the commercial law and the transportation planning systems have the luxury of usually paying them so little attention is a testament to their success.

This is another way of saying that both systems are self-executing. No one seeks official permission to turn left, even across a busy boulevard; and by the same token, in the tremendous majority of instances, commercial law's property rights establish themselves automatically upon private parties' invocation of the system's rules. Professors Hart and Sacks were eloquent on this point, using terms that could just as easily have been written about traffic as about law:

> The overwhelming proportion of the things which happen and do not happen in American society pass without any later question. Many of these acts and omissions are the result of decisions which people make in the exercise of a private discretion, accorded to them by official recognition of a private liberty. Still others are in conformity, conscious or unconscious, with officially formulated arrangements conferring private powers or declaring private duties.[12]

And while it would be fascinating to anchor this point in authoritative statistics about, for example, the number of traffic stops carried out by police officers, per million car-miles driven per day,[13] the point is not subject to question in either field even without the statistics.

At a deeper level, both systems face a dilemma between facilitating the vast number of unproblematic transactions and preventing the much smaller number of problematic ones. Even a traditionally based model of transportation planning must balance rapidity and throughput of traffic, on one hand, with the safety that comes from controls and measures such as "traffic calming," on the other. In commercial law, the parallel dilemma is very nicely illustrated by the Article 8 provision that generally insulates a securities intermediary, or broker or other agent that deals with a financial asset at the entitlement holder's or principal's direction, from liability based

12. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 286 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994); *see also id.* (referring to the "billions upon billions of events and non-events which in one or another of these fashions stir no later question"); *id.* at 123 (stating an important function of a self-applying system's remedial provisions is to help "induce compliance in a sufficient number of cases to keep the arrangement in good working order" and keep it from "break[ing] down entirely").

13. Teasing out reliable data along these lines appears to be much harder than it sounds, for several reasons. Large urban police departments are reluctant to disclose exactly how their resources are deployed; questions about institutional racial or other socio-political biases may cast shadows of doubt on the legitimacy of some patterns of the traffic stops; and extraneous factors like city or town revenues may affect the interactions as well.

on an adverse claim.[14] The section includes a narrow exception for collusion, as opposed to notice or knowledge of the adverse claim, and in explaining the narrowness of this exception, the Official Comments explain:

> The aspect of the role of securities intermediaries and brokers that Article 8 deals with is the clerical or ministerial role of implementing and recording the securities transactions that their customers conduct. Faithful performance of this role consists of following the instructions of the customer. *It is not the role of the record-keeper to police whether the transactions recorded are appropriate*, so mere awareness that the customer may be acting wrongfully does not itself constitute collusion.[15]

A similar point about problematic versus unproblematic transactions is often made using the vivid language of the human body's own systemic well-being: a medical student should not try to learn anatomy by hanging around a hospital's trauma ward.[16]

Fuller and Perdue, in the section of their article that includes my epigraph, analogize traffic planning and the facilitating of transactions, explicitly although only in passing. In fact, they deploy the analogy at the very heart of their principal argument that contract law's concept of expectancy damages is best explained by the law's purposive orientation toward protecting reliance. The authors first spend a moment establishing the point that when a contract is breached, expectancy damages are a good approximation for the aggrieved party's actual reliance losses (which are often hard to prove, as in the case of reliance that takes the form of forgoing other contract opportunities).[17] They then first introduce the key image of a

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14. U.C.C. § 8-115 (AM. L. INST. & UNIF. L. COMM'N 2021). Article 9's system of notice filing for non-possessory secured transactions is another manifestation of similar tensions. *See* U.C.C. § 9-502 cmt. 2 (AM. L. INST. & UNIF. L. COMM'N 2021).

15. U.C.C. § 8-115 cmt. 5 (emphasis added) (AM. L. INST. & UNIF. L. COMM'N 2022). A questionable Eleventh Circuit case, Amegy Bank Nat'l Ass'n. v. Deutsche Bank Alex.Brown, 619 F. App'x 923 (11th Cir. 2015), dramatizes the stakes between the two standards. For discussion of that case, *see* Carl S. Bjerre, *Investment Securities*, 71 BUS. LAW. 1311, 1311–14 (2016).

16. *See, e.g.*, Jeanne L. Schroeder, *Sense, Sensibility and Smart Contracts: A View from a Contract Lawyer*, 49 UNIF.COM.CODE L.J. 251, 261–62 (2020) ("[I]t is [. . .] a cliché among transactional lawyers that to try to learn about contracting by only reading cases is like trying to learn about health by only visiting a hospital trauma ward where medicine is a remedial practice").

I seem to recall that this trauma ward formulation originally came from Karl Llewellyn, and in any case a story is told about Llewellyn that makes the same point using less visceral imagery:

> [H]is preoccupation was always with patterns of practice, both in their daily operation and as illuminated by crises. After meetings of Code committees he could be seen in the bar cross-examining distinguished bankers or businessman tenaciously . . . . His questions tended to be specific, guided principally by a concern with function and process. "If I were a cheque and I arrived in your bank where would I go? . . . What would be done to me first? Why? . . . ."

WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 316 (2d. ed. 2012).

17. In the authors' example:

stop-light in order to illustrate a relatively peripheral idea (namely that measuring damages by expectancy even when the aggrieved party has not actually relied on the contract can function as an advance deterrent against breach).[18] And then in the crucial passage, Fuller and Perdue return to the stop-light image to make the powerful broader point that reliance is a socially and economically indispensable value, even in the absence of any breach, let alone any losses caused by a breach:

> [T]here is no need, however, to restrict ourselves by the assumption, hitherto made, that the rule can only be intended to cure or prevent the losses caused by reliance. A justification can be developed from a less negative point of view. It may be said that there is not only a policy in favor of preventing and undoing the harms resulting from reliance, but also a policy in favor of promoting and facilitating reliance on business agreements. *As in the case of the stop-light ordinance we are interested not only in preventing collisions but in speeding traffic*. Agreements can accomplish little, either for their makers or for society, unless they are made the basis for action. When business agreements are not only made but are also acted on, the division of labor is facilitated, goods find their way to the places where they are most needed, and economic activity is generally stimulated.[19]

> Physicians with an extensive practice often charge their patients the full office call fee for broken appointments. Such a charge looks on the face of things like a claim to the promised fee; it seems to be based on the "expectation interest". Yet the physician making the charge will quite justifiably regard it as compensation for the loss of the opportunity to gain a similar fee from a different patient. This forgoing of other opportunities is involved to some extent in entering most contracts, and the impossibility of subjecting this type of reliance to any kind of measurement may justify a categorical rule granting the value of the expectancy as the most effective way of compensating for such losses.

Fuller & Perdue, *supra* note 1, at 60.

18.

> "[T]he rule measuring damages by the expectancy may also be regarded as a prophylaxis against the losses resulting from detrimental reliance . . . . The rule enforcing the unrelied-on promise finds the same justification, on this theory, as an ordinance which fines a [person] for driving through a stop-light when no other vehicle is in sight."

Id. at 61.

19. *Id.* (emphasis added). The political science concept called social trust is closely tied to the legal concept of reliance. One definition of the concept of social trust is "a 'standing decision' to give most people—even those whom one does not know from direct experience—the benefit of the doubt." Wendy M. Rahn and John E. Transue, *Social Trust and Value Change: The Decline of Social Capital in American Youth, 1976-1995*, 19 INT'L SOC'Y OF POL. PSYCH. 545, 545 (1998). As applied even to strangers who might be encountered in traffic, by contrast to persons whom one knows from continuing interactions, social trust is characterized as "thin" rather than "thick." ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 136 (2000).

Incidentally I do not here quarrel with Professor Craswell's argument that social policy is a more elemental and supple tool, both for pedagogy and for analysis of judicial decisions, than the classic three-fold Fuller & Perdue remedial classification taken on its own terms. *See* Richard

And this point that common-law expectancy damages can speed the traffic is an equally clear analogy, I suggest, for the U.C.C.'s own pervasive choices to facilitate unproblematic business transactions. In fact, speeding the traffic in this sense has been one of the Code's dominant objectives since its inception.[20]

To begin to see this, we can first notice a few particular examples and then some more general Code building blocks. The most obvious U.C.C. kinship with Fuller and Perdue's expectancy damages is the set of remedies that sellers and buyers have under Article 2 for breach.[21] But to broaden the focus from there, also helping to speed traffic short of breach and short even of performance being due, are Article 2's provisions on anticipatory repudiation[22] (drawn from the common law),[23] and on adequate assurance of performance[24] (from which the common law has drawn).[25] Both of these rules directly foster moment-by-moment reliance by parties to a contract, based on the insight that a party's confidence in their transaction entails not just the party's ultimate success in obtaining what is sought, but also their continuing confidence along the way that the ultimate success will be forthcoming.[26] Returning to the analogy of transportation planning, Banham intriguingly

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Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 106–107 (2000). Indeed remedies in general as distinct from what Hart and Sacks call "primary provisions" are somewhat beside the point of the present article. *See* HART & SACKS, *supra* note 12, at 122.

In connection with Craswell it is also worth noting at least two strong kinships between his article and the passages of Fuller and Perdue on which the present article focuses. First, Fuller and Perdue's image of speeding the traffic (which is explicitly linked to division of labor and wealth maximization in the passage just quoted above) accords closely with the one of the several social policies that Craswell's article emphasizes, namely economic efficiency. And second, Craswell shares Fuller and Perdue's skepticism of legal notions that are "not a datum of nature," *see* Craswell, *ante*, applying that skepticism to Fuller and Perdue's own reliance interest.

20. By contrast, as initially noted *supra* note 2, in the field of transportation planning as opposed to commercial law, the value of literally speeding the traffic has become quite controversial during the decades since Fuller and Perdue first articulated their then-unproblematic analogy. For further discussion, *see infra* note 57.

Facilitating the flow of traffic continues to be a focus of, among others, transportation engineers, who increasingly apply technological means in order to design speed limits or active traffic control measures. *E.g.*, Beverly Kuhn et al., *Evaluation of Variable Speed Limit Pilot Projects for Texas Department of Transportation*, 15 TRANSP. RSCH. PROCEDIA 676 (2016). At another end of the debate, progressive theorists tend to argue that the level of social trust associated with high levels of automobile traffic is lesser than that associated with other modes of transportation. *E.g.*, Em Friedenberg, *Designing Trust: Building Social Trust Through Urban Design* 3 (2018), *available at* https://www.emfriedenberg.com/_files/ugd/d0db9b_36c991499f65476b8fadf09c05bcf56b.pdf.

21. *See generally* U.C.C. Article 2, Part 7.

22. *See* U.C.C. § 2-610 (AM. L. INST. & UNIF. L. COMM'N 2022).

23. *See* RESTATEMENT (SECOND) OF CONTRACTS § 253 (AM. L. INST. 1981).

24. *See* U.C.C. § 2-609 (AM. L. INST. & UNIF. L. COMM'N 2022).

25. *See* RESTATEMENT (SECOND) OF CONTRACTS § 251 (AM. L. INST. 1981).

26. "[T]he essential purpose of a contract between commercial [actors] is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain." U.C.C. § 2-609 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 2022).

identifies a Los Angeles "ecology" called "Autopia" in which freeway driving demands "a high level of attentiveness" and "extreme concentration" that, although it "seems to bring on a state of heightened awareness that some locals find mystical," is overall an "incredibly demanding man/machine system."[27] Banham elaborates that coping with "the [unforgiving] topology of the intersections"[28] requires a "constant stream of decisions,"[29] and David Nye adds that the driver's purportedly mystical state of mind is actually

> not that of reverie but of an intense absorption in continual movement that leaves no time or spare mental energy for contemplation. The freeway driver is constantly trying to avoid an accident and is always in a state of imminent danger. One false move, one careless fellow driver, one blowout or one moment of inattention can lead to maiming or death.[30]

Banham's and Nye's vision presents quite a stark contrast with the kind of moment-by-moment confidence that the Article 2 provisions are designed to provide – but the Banham and Nye vision is the exception that proves the rule. Generally, the American sensibility of driving, so thoroughly integrated into the culture to the point that it is celebrated in songs and movies, is a carefree one of sovereign confidence and independence.[31]

Broadening still further, parties' continuing moment-by-moment confidence even in transactions that have not been completed is substantially promoted by third-party credit support and various forms of property rights. On third-party credit support, Professor Jeanne L. Schroeder captures the dynamics of commercial law's traffic-like goal of mutually coordinating

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27. BANHAM, *supra* note 2, at 196–97, 199.

28. *Id.* at 201.

29. *Id.* at 199.

30. DAVID E. NYE, RETHINKING THE AMERICAN CITY: AN INTERNATIONAL DIALOGUE 6, 8 (Miles Orvell & Klaus Benesch eds., 2014).

31. The classic articulation is from Walt Whitman:

> Afoot and light-hearted I take to the open road,
> Healthy, free, the world before me,
> The long brown path before me leading wherever I choose.

WALT WHITMAN, *Song of the Open Road, in* LEAVES OF GRASS AND SELECTED PROSE 118 (John Kouwenhoven ed., 1950). In the age of the automobile Whitman's "brown path" has been replaced by gray asphalt, but the spirit is the same:

> On the road again
> Goin' places that I've never been
> Seein' things that I may never see again
> And I can't wait to get on the road again.

WILLIE NELSON, ON THE ROAD AGAIN (Columbia Records 1979).

In fact Banham's own vision concludes with the point, at least partially sardonic, that many Los Angeles freeway drivers are "relaxed and well-adjusted characters without an identity problem in the world, for whom the freeway is not a limbo of existential *angst*, but the place where they spend the two calmest and most rewarding hours of their daily lives." BANHAM, *supra* note 2, at 204 (italics in original).

strangers when she observes that letters of credit "*enable[]* actors to act as though they trust each other *even though* they are strangers . . . ."[32] Similar points could be made about the provisions for accommodation parties and indorsers in U.C.C. Article 3, and the influence there of the Restatement (Third) of Suretyship and Guaranty.[33] Turning to property rights, of course virtually all of U.C.C. Article 9 is devoted to providing and carefully allocating these, but the good-faith purchase rules in Article 9 and throughout the Code should be briefly singled out as especially significant here. Good-faith purchase rules have at their core the policy of, in Fuller and Perdue's words, "promoting and facilitating reliance"[34] and hence confidence in transactions. Almost all of the good-faith purchase rules are limited to parties who acquire the property in question "for value"[35] (in addition to acquiring it in good faith or a variation thereon such as lack of notice, and by purchase[36]), and this giving of value by the acquirer is the clearest form of reliance on the property, for example paying a purchase price for it or lending against it.[37] Indeed, in order to promote reliance by some parties, the good-faith purchase rules undermine it in others: an upstream party's "security of ownership" is made vulnerable to a downstream party's "security of purchase" in the name of the latter's presumably greater reliance.[38]

U.C.C. Section 9-332 is an exception to this legal pattern of good-faith purchase, in that it provides for a transferee of money or of funds from a deposit account to take free of a security interest with no requirement of taking for value (as well as no requirement of taking by purchase). But this exception exists because commercial law chooses to *presume* reliance by transferees of such property:

> Although the giving of value usually is a prerequisite for receiving the ability to take free from third-party claims, where payments are concerned the law is even more protective. Thus, Section 3-418(c) provides that, even where the law of restitution otherwise would permit recovery of funds paid by mistake, no recovery may be had from a person "who in good faith changed position in reliance on the payment." Rather than adopt this standard, this section eliminates all reliance requirements whatsoever. Payments made by mistake are relatively rare, but payments of funds from

32. Schroeder, *supra* note 16 (emphasis in original).

33. RESTATEMENT (THIRD) OF SURETYSHIP AND GUAR. (AM. L. INST. 1995). *See generally* Neil B. Cohen, *The Calamitous Law of Notes,* 68 OHIO ST. L.J. 161, 173–74 (2007).

34. Fuller & Perdue, *supra* note 1, at 61.

35. Value is defined in U.C.C. § 1-204 (AM. L. INST. & UNIF. L. COMM'N 2022) and a bit more narrowly in U.C.C. § 3-303(a) (AM. L. INST. & UNIF. L. COMM'N 2022).

36. *See* U.C.C. § 1-201(b)(29) (AM. L. INST. & UNIF. L. COMM'N 2022).

37. *See, e.g.*, Steven L. Harris & Charles W. Mooney, Jr., *A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously*, 80 VA. L. REV. 2021, 2059 n.109 (1994).

38. *See generally* Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605 (1981). Most of the Article 9 super-priorities are similarly oriented around strength of reliance. *E.g.*, U.C.C. §§ 9-324, 9-327(1), 9-328(1), 9-330.

> encumbered deposit accounts (e.g., deposit accounts containing collections from accounts receivable) occur with great regularity. In most cases, unlike payment by mistake, no one would object to these payments. In the vast proportion of cases, the transferee probably would be able to show a change of position in reliance on the payment. This section does not put the transferee to the burden of having to make this proof.[39]

The fact that Section 9-332 presumes reliance rather than requiring the giving of value brings it directly in line with Fuller and Perdue's linkage of contract law's expectancy interest to the promoting and facilitating of reliance. The economy-expanding effects that result from parties relying on their transactions, write Fuller and Perdue, "would be threatened"[40] if recoveries were limited to the amount of proven reliance:

> The difficulties in proving reliance and subjecting it to pecuniary measurement are such that the business[person] knowing, or sensing, that these obstacles stood in the way of judicial relief would hesitate to rely on a promise in any case where the legal sanctions was of significance to him. *To encourage reliance we must therefore dispense with its proof*.[41]

Here too, traffic planning follows a parallel pattern, as we all know from daily life. Drivers on highways or other heavily trafficked roads are given the right to proceed with confidence and rapidly to their destination, in reliance on a lack of cross-traffic even without having to prove such reliance. In any individual instance, most drivers who might be asked for such proof could doubtless provide it – but in systemic terms, the very fact of asking drivers to supply the proof would deter them from taking that road in reliance on the rapidity in the first place.

III. BEYOND ANALOGY TO METAPHOR

Until now this article has used the simple rubric of "analogy" – that is, comparison based on one or a few common features – to examine Fuller and Perdue's link between the speeding of traffic and the fostering of confidence in commercial transactions. A deeper point is that the link between the two ideas is even stronger, because it is based not just on analogy but on metaphor.

Most of us were taught in high school English classes that metaphor is a rhetorical or poetic device, specifically an embellishment of otherwise literal language in which one thing is discussed in terms that literally belong to

39. U.C.C. § 9-332 cmt. 3 (AM. L. INST. & UNIF. L. COMM'N 2022). As a result, even a garnishing creditor can receive the rule's protections, provided that the creditor becomes a transferee. *E.g.*, Orix Financial Services, Inc. v. Kovacs, 38 Cal.Rptr.3d 900 (Cal. Ct. App. 2008). Article 9 singles out money and funds from a deposit account for this treatment because of such property's nature and function: it is designed to flow freely. See *infra* notes 52-56 and accompanying text.

40. Fuller & Perdue, *supra* note 1, at 61.

41. *Id.* at 62 (emphasis added).

another. For example, a poet might call fallen snow a blanket and describe its folds or its comforts, or a historian might call a nation that welcomes immigrants a melting pot and describe its flavors. On this view, metaphors provide colorful literary expressivity, but they are irrelevant to ordinary language and are not particularly profound. By contrast, in recent decades cognitive theorists have argued that metaphor is a mental mechanism that is integral to the mind's construction of concepts. Metaphor does not, then, merely express already-formulated thoughts in an interesting way (the theory explains); rather, it helps to determine or discover those thoughts in the first place.[42] Metaphor is conceptual rather than just linguistic. Almost invariably, the terms used in a metaphor are drawn from physical experience (the "source domain," like the melting pot), and the idea that those terms are used for describing is abstract (the "target domain," like the coming together of diverse heritages). People imaginatively develop ideas about the abstract target based on their knowledge of the physical source. More than sharing just a similarity or two as in an analogy, the abstract target and the physical source in a metaphor have systematic and pervasive similarities that those who study language can exhaustively spell out or "map."[43]

In this article's main case, speeding traffic is physical and literal, while enabling parties to move forward with their transactions is abstract. More specifically, traffic planning deals with physical cars and the like, moving from a physical source point, along a physical path, to a physical goal. By contrast, innumerable other experiences in human life, and not just in commercial law, involve nothing like a physical source, path, or goal, but are nonetheless spoken of – and thought of – metaphorically as if they did. This is a fundamental pattern of thinking known in linguistics as the source/path/goal image schema.[44] Highly disparate activities are routinely

42. A number of years ago I explored the metaphorical nature of a different and equally fundamental concept from contract law, namely mental capacity. *See* Carl S. Bjerre, *Mental Capacity as Metaphor*, 18 INT'L J. FOR THE SEMIOTICS OF L. 101 (2005).

43. In this connection it is helpful to distinguish a metaphor, as conceptual phenomenon, on one hand from the particular metaphorical expressions that instantiate or give verbal expression to a metaphor, on the other. Metaphorical expressions are particular figures of speech, and metaphors are the more general structures that, independent of any particular articulation, underlie and animate a particular metaphorical expression. *E.g.*, GEORGE LAKOFF, *The Contemporary Theory of Metaphor*, *in* METAPHOR AND THOUGHT 2023 (Andrew Ortony ed., 2d ed. 1993).

Many metaphorical expressions, like the ones in the accompanying text above, are standardized and therefore immediately familiar to a hearer or reader; but some metaphorical expressions are "novel extensions," newly invented by the speaker or writer and nonetheless immediately understood by the hearer or reader. *See infra* note 47.

44. Simplifying for current purposes, an image schema is a recurrent pattern in actions or occurrences that evidently help to structure human thought. E.g., MARIA M. HEDBLOM, IMAGE SCHEMAS AND CONCEPT INVENTION: COGNITIVE, LOGICAL, AND LINGUISTIC INVESTIGATION (2020); FROM PERCEPTION TO MEANING : IMAGE SCHEMAS IN COGNITIVE LINGUISTICS (Beate Hampe, ed., 2005); Maria M. Hedblom, Oliver Kutz, and Fabian Neuhaus, *Choosing the Right Path: Image Schema Theory as a Foundation for Concept Invention*, 6 J. OF ARTIFICIAL GEN. INTEL.21

conceptualized in source/path/goal terms, ranging from legal argumentation, to having a romantic relationship, and even life itself.[45]

Metaphors based on the source/path/goal pattern are particularly common for activities that are purposive, such as carrying out plans and, specifically, business transactions.[46] Without any poetic intention at all, people routinely speak of transactions having "goals," "shortcuts," and regulatory "roadblocks"; as overcoming "obstacles" or needing to "go back to square one"; and as "moving forward" whether speedily or slowly.[47] Fuller and Perdue were not merely poetically ornamenting an otherwise literal idea; it seems likely that they were reaching, probably subconsciously, for a natural metaphorical way in which to conceptualize the carrying out of transactions.

The idea of reliance, which is at the core of the Fuller and Perdue passage and even the title of their article, is itself an abstract idea that grew metaphorically from a physical source domain. The words *rely* and *reliance* today usually mean to depend on a person or thing with full trust or

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(2015); Oliver Čulo and Gerard de Melo, *Source-Path-Goal: Investigating the Cross-Linguistic Potential of Frame-Semantic Text Analysis*, 54 INFO. TECH. 147 (2012).

45. As source/path/goal examples with reference to legal argumentation, we say that they "start" from a premise, "reach" a conclusion, are liable to "wander" or "skip a step" "along the way," and might need to be "walked through slowly" or "run through quickly."

Source/path/goal examples with reference to having a romantic relationship are everywhere, for example the lyrics to an old Carpenters song which include:

> So many roads to choose
> We'll start out walkin' and learn to run . . .
> Sharing horizons that are new to us
> Watching the signs along the way . . .

THE CARPENTERS, WE'VE ONLY JUST BEGUN (A&M Records 1970).

And a source/path/goal example with reference to life itself is the opening verse of Dante's Inferno: "Midway in the journey of our life I found myself in a dark wood, for the straight way was lost." DANTE ALIGHIERI, INFERNO 1-3 (Charles S. Singleton trans. 1970).

46. Fuller and Perdue refer to contracts being "made the basis for action" in the sentence immediately following their "speeding traffic" analogy. *See* Fuller & Perdue, *supra* notes 1 and 16 and accompanying text.

47. As novel extensions within the same metaphor, parties to a transaction might remark for example that their deal "really took a sharp left turn," or that the tax lawyers are insisting on "some kind of giant roller-coaster loop-the-loop," etc., and the meaning would be easily understood even if those particular metaphorical expressions had not been known before.

Farmers Insurance runs a television advertisement that shows two drivers who have arrived at a four-way stop-sign intersection at the same time and are unsure who is supposed to go first. The drivers are polite to each other, but their mutual annoyance is clear. One calls out, "It's your turn." The other says, "No buddy, it's your turn!" The first replies, "I appreciate you so much. So much . . . . *Go*!" And in the meantime, a third driver has arrived at the intersection too. The third driver scornfully exclaims, "Come on!," and drives on through, while the first two remain stuck with each other. *See* Farmers Insurance, *Safe Driving Standoff* (Feb. 28, 2022), https://www.youtube.com/watch?v=wFiPl96pCus.

The ad is almost perfectly designed as a novel extension of this article's basic transactions-as-traffic metaphor, specifically the part of the metaphor that links difficulties in a transaction to unclarity of its governing rules. *See* Rogers, *supra* note 9 and accompanying text (making the point that a system does not adequately "work" unless people can figure it out within the needed time-frame).

confidence,[48] but they derive from words meaning "to reassemble," "to bind together again," and "to rally," as applied in contexts like groups of combatants.[49] These earlier meanings are physical, and today's usual meaning is abstract, and in retrospect one can see how today's meaning seems to have developed metaphorically from the earlier meanings. In fact, linguists argue that much of any word's changes in meanings over time is based in metaphor.[50] Going back to Part I above, the perspective of the older meanings of *rely* and *reliance* directs our attention to one of the deep-seated similarities between transportation planning and commercial law: both fields bring people together, and coordinate them while still allowing independent action, for the sake of collective strength in accomplishing shared high-level goals.

A traffic system that is working well, in the sense of enabling drivers to rely on it,[51] enables traffic to flow. By the same token, a commercial law system that is working well, in the sense of buyers, sellers, borrowers, lenders, payors and payees being able to rely on the system, enables commerce to flow. "Flow" applies in a literal sense only to fluids,[52] so the word is metaphorical in the contexts of both traffic and transactions. Nonetheless, flow in the traffic context is somewhat more literal than flow in the transactional context, again because of the physical versus abstract nature of the two fields.[53] And as one further indicator of metaphor's power and pervasiveness, this article can come to a close by pointing out how strikingly often financial concepts are discussed in terms of liquid and flow. Businesspersons manage their "cash flow," and complex transactions are sometimes accompanied by a "flow of funds" memo; agents, lenders and equity providers are paid according to their position in a deal's "waterfall"; a party may or may not have "liquid" assets; bank accounts may be "frozen" and a party may not remain "solvent"; obligations under a swap tend to "wash

48. *Rely 6.a*, OXFORD ENGLISH DICTIONARY, https://www.oed.com (last visited Sept. 5, 2022).

49. *Id.* ERIC PARTRIDGE, ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH 557 (discussing rely), 354 (discussing ligament) (1983).

50. *See, e.g.*, EVE SWEETSER, FROM ETYMOLOGY TO PRAGMATICS 9 (1990) ("If a word once meant A and now means B, we can be fairly certain that speakers did not just wake up and switch meanings on June 14, 1066. Rather, there was a stage when the word meant both A and B…").

51. Clark, *supra* note 7 and accompanying text.

52. In fact, the terms flow and fluid both derive from earlier words for river. PARTRIDGE, *supra* note 49, at 223.

The closely related metaphor of a stream of commerce is at work in personal jurisdiction cases; *see, e.g.,* Asahi Metal Ind. Co., Ltd. v. Superior Ct. of California, 480 U.S. 102 (1987); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

53. Regarding the flow of a unified noun like "traffic" as opposed to "cars," a cognitive phenomenon distinct from metaphor is also at work. The mind transitions easily and often subconsciously between understanding a given phenomenon as being, on one hand, whole or integral and without internal divisions (a "mass," such as traffic) and, on the other hand, divisible collections of smaller components (a "multiplex," such as cars). *See* Andrea Coles-Bjerre, *Bankruptcy Theory and the Acceptance of Ambiguity*, 80 AM. BANKR. L.J. 327 (2006) (discussing the Bankruptcy Code's indeterminate treatment of preferential payments on partially undersecured debt and developing this mass/multiplex framework).

back and forth"; a person who was formerly "flush" may now be "tapped out"; an order that pulls funds from an account is a "draft";[54] paper money is called "currency" because of its practical and legal qualities of flowing as if in a current;[55] interest rates "float" and one person may informally "float" another a small loan; and liens or charges "float" as well.[56] Each of these metaphorical expressions coheres with the others, and together they give an indication of how thoroughly a metaphor can be "mapped."

IV. POSSIBLE FURTHER ASPECTS

The comparison between transportation planning and commercial law has numerous other potentially helpful facets that must be left for others. What is the right allocation of authority among local, state, national and international authorities? Are the planning bodies and their systems able to respond to present needs or must they take retrospective comfort in having solved the problems of previous decades? What is the right balance between facilitating individual choices on a bespoke basis and promoting heavily recurrent aggregate patterns? Are the stakes of interest groups transparent and frankly addressed? How should the related distributional controversies be addressed?

The invitation to this Symposium posed a forward-looking question: "What should we do next?" Questions like those can be answered at very broad or at very specific levels, neither of which this particular article has attempted.[57] Rather, I hope to have brought some large-scale clarity and

54. A draft is related to the action of drawing or pulling, and the word can be used in settings as varied as horses, race cars, a chilly stream of air in a room, and the forced enlistment of soldiers. But the meaning of pulling beer from a tank or barrel is surely dominant these days, and has been in use for centuries. See OXFORD ENGLISH DICTIONARY, *supra* note 48, draught *n.* V.14.a.

55. *See* Miller v. Race, 1 Burr. 452, 97 Eng. Rep. 398, 401 (K.B. 1758) (Mansfield, L.) ("It has been quaintly said, 'that the reason why money can not be followed is, 'because it has no earmark:' but this is not true. The true reason is on account of the currency of it: it can not be recovered after it has passed in currency"). This point incidentally helps us to see that it is not just a fanciful image to call a negotiable instrument as a "courier without luggage," *see* U.C.C. § 3-104(a)(3) (AM. L. INST. & UNIF. L. COMM'N 2022) (no "other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money"). An early and still live meaning of *courier* is "a messenger who runs," and *current* in the sense of water is also derived from running. PARTRIDGE, *supra* note 49, at 125.

56. In this context United States and English law differ in interesting ways on the relationship of "attachment," a clearly related additional metaphor that I will explore in a future article. *See, e.g.*, HUGH BEALE, MICHAEL BRIDGE, LOUISE GULLIFER & EVA LOMNICKA, THE LAW OF SECURITY AND TITLE-BASED FINANCING (3d ed. 2018). The same article will also address the metaphorical underpinnings of the concept of perfection.

57. Relatively briefly, though, and in keeping with this article's overall exercise in the drawing of parallels, it bears noting that the forward-looking question is answered on its broad level in very different ways by the transportation planning field compared to the commercial law field.

Transportation planning is full of urgent and large-scale ferment, with the field's professionals as well as the public at large calling for major reevaluation of foundational premises. That this ferment is urgent does not mean that it is solely recent. Six decades ago, Lewis Mumford noted that "[a]ll the mistakes that had been made in the railroad building period" were replicated

perspective to an anterior question, also indispensable for the health of the commercial law field and too often neglected, namely: "What have we been doing?" As part of that perspective, we have had the Uniform Commercial Code for roughly three quarters of a century, and – coincidentally or not – one behemoth of transportation planning, the Interstate Highway System, dates from the same era.[58]

During all of those decades, the fields of transportation planning and commercial law have knit society together in their distinct but highly congruent and powerful ways. Each system fosters coordination and – recalling the link of *rely* to ideas like *reassemble* and *rally* – even fosters a form of very high-level social unity. By social unity I do not mean to suggest

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with the "new type of locomotive" called an automobile. LEWIS MUMFORD, TECHNICS AND CIVILIZATION 237 (1961). He continued:

> Main highways cut through the center of towns, despite the congestion, the friction, the noise, and the dangers that attended this old paleotechnic practice. [. . .] Had anyone asked in cold blood – as Professor Morris Cohen has suggested – whether this new form of transportation was worth the yearly sacrifice of 30,000 lives in the United States alone, to say nothing of the injured and the maimed, the answer would doubtless have been no.

Id.

In the current era, a former Commissioner of the New York City Department of Transportation wrote that transportation is "one of the few professions where nearly 33,000 people can lose their lives in one year and no one in a position of responsibility is in danger of losing his or her job." JANETTE SADIK-KHAN AND SETH SOLOMONOW, STREETFIGHT: HANDBOOK FOR AN URBAN REVOLUTION 29 (2016). Law professor Gregory Shill develops these dire facts in detail and writes, "The consensus view now is that system design, rather than an emphasis on education and enforcement, is the most effective solution." Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 518 (2020).

These questions of system design rapidly grow to affect foundational social assumptions, as explored in JONATHAN LEVINE, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE (2006) (probing the interdependence of transportation planning and land use, and disputing the premise that these fields present a dichotomy between free markets and planning). *See also* Gregory H. Shill, *The Future of Law and Transportation*, 106 IOWA L. REV. 2107 (2021) (introducing a symposium issue examining legal aspects of transportation policy "through the lens of multiple substantive areas of law, including land use, tax, traffic, vehicle design, consumer and public finance, and state and local government—all with keen sensitivity to economics, politics, race, and culture as reflected in the law"); HENRY PETROSKI, THE ROAD TAKEN: THE HISTORY AND FUTURE OF AMERICA'S INFRASTRUCTURE 41–81 (2016) (discussing the historical evolution of the Interstate Highway System, including passage of the Federal-Aid Highway Act of 1956, as well as the Manual on Uniform Traffic Control Devices); Sara C. Bronin & Gregory H. Shill, *Rewriting Our Nation's Deadly Traffic Manual*, 135 HARV. L. REV. F. 1 (2021) (criticizing the impending revision of the same Manual); NIGEL TAYLOR, URBAN PLANNING THEORY SINCE 1945 157–69 (1998) (discussing Kuhnian paradigm shifts in post-war urban planning generally).

By contrast, in commercial law there are few if any calls for drastic change of direction, let alone for the purpose of making fundamental social changes. One might say that the status quo is being given the benefit of the doubt in commercial law, even while being denied it by strong voices in transportation planning. *See, e.g.,* Harris and Mooney, *supra* note 37. And in particular, the foundational values of systemic reliance on which this article focuses have not been subject to broadly based professional or theoretical skepticism.

58. *See* PETROSKI, *supra* note 57, at 41–52; Henry Petroski, *On the Road*, 95 AM. SCIENTIST, Sept.-Oct. 2006, at 396 (earlier version of same discussion).

any facile interpersonal harmony or lack of self-interest; on the contrary, the parties interacting in both systems routinely pursue mutually opposed interests, and these are just as foundational to the two systems as the high-level social unity. But both systems establish "rules of the road," so to speak, which do a remarkable job of accommodating the varying interests while also shaping them into a structure that facilitates mutually beneficial reliance and flow.