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LETTERS OF CREDIT AS SIGNALS

Comments on Ronald Mann's 'The Role of Letters of Credit in Payment Transactions'

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Why would buyers and sellers transact with each other through a third party that charges a significant fee for its services and that typically is authorized to make payment notwithstanding noncompliance with the very prerequisites that it has been engaged to monitor? This is the puzzle that Ronald Mann's provocative and nuanced article purports to explain.[1] Under the traditional story about the esoteric world of letters of credit, these transactions allow distant buyers and sellers to circumvent obstacles that would otherwise frustrate long-distance transactions. The traditional story explains that these credits induce buyers to approve payment prior to receiving conforming goods because the transactional structure provides buyers with documents that testify conforming goods are en route. Similarly, credits induce sellers to ship goods prior to payment because that same transactional structure assures that payment is forthcoming from a credible and creditworthy source.[2] Mann suggests that the story is incorrect or at least incomplete. For him, the real function of the letter of credit is to solve informational asymmetries concerning the parties involved in the transaction by allowing an issuer with superior information to verify a buyer's legitimacy to the distant seller or to the buyer's government.

I find the claim that letters of credit fill informational gaps highly plausible. Indeed, I take it to be wholly consistent with the traditional story that banks are asked to issue letters of credit because they have an informational advantage about the financial status of their customers, the applicants. It is less clear to me that what the beneficiary learns from the issuer's conduct should be vaulted into a primary explanation for letters of credit. I want, therefore, to raise two issues with respect to the story that Mann tells us. One issue concerns his substantive claims about the role of letters of credit. The second is more directly related to the general theme of this conference and re-

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1. *See* Ronald J. Mann, *The Role of Letters of Credit in Payment Systems*, 98 MICH. L. REV. 2494 (2000).

2. *See* CLAYTON P. GILLETTE ET AL., PAYMENT SYSTEMS AND CREDIT INSTRUMENTS 560-61 (1996).

flects on how Mann's article may be refined, validated, or refuted by empirical work that has not yet been done.

Let me begin with the substance of Mann's claims. Mann first informs us that discrepancy rates in letter-of-credit transactions belie the traditional story that payment is made only when there is strict compliance with the documents required under the credit. In fact, he discovers, discrepant documents are not only common, but are also typically waived. These are fascinating findings, notwithstanding that Mann indicates that the phenomenon is well appreciated by those in the letter of credit industry.[3] At first glance, they seem wholly inconsistent with the traditional story, which appears to rely so heavily on seller compliance with the exacting terms of the credit.

On reflection, however, we should perhaps be less surprised at the frequency of discrepancies and less certain of what their existence signifies. In the first instance, the level of compliance required for payment may be more flexible than its textbook statement suggests. Mann reviews international transactions, presumably governed by the International Chamber of Commerce Uniform Customs and Practices. That document provides as the standard for compliance not the "strict compliance" language of the U.C.C., but rather a requirement that "[c]ompliance of the stipulated documents . . . be determined by international standard banking practice. . . ."[4] The U.C.P. standard, therefore, arguably provides more flexibility than the U.C.C.'s requirement that an issuer honor a presentation that appears "on its face strictly to comply with the terms and conditions of the letter of credit."[5] One might predict that the vague standard of the U.C.P. would be more susceptible to claims by issuers that discrepancies exist. In close cases, issuers have incentives to classify documents as discrepant rather than complying because their conservative conclusion can easily be overridden by a customer where the customer considers discrepancies to be minor.[6] Conversely, an issuer that liberally interprets the require-

3. *See* Mann, *supra* note 1, at nn.3-4.

4. I.C.C. UNIF. CUSTOMS & PRACTICES FOR DOCUMENTARY CREDITS art. 13(a) (1993).

5. U.C.C. § 5-108(a) (1995). What may be most noteworthy about that clause is the refusal of James J. White, the Reporter for the revision of Article 5, to split the infinitive.

6. Ronald Mann disagrees with this assertion. *See* Mann, *supra* note 1, at 2502 n.32. He suggests that bankers would want to avoid an appearance of unduly strict document examination because it undermines their desire to portray themselves as committed to the letters of credit they issue. He also suggests that if I am correct, bankers should want vague standards, whereas they in fact desire objective ones. I think that response misconstrues my claim. I am not making a normative claim about what bankers want. I would agree that bankers should want a precise standard so that they can make payment decisions with minimal investigation and without becoming experts in the underlying business of their customers so as to be able to discern minor from major discrepancies. Indeed, I take it that the intervention of banks was largely responsible for the inclusion of a strict compliance standard in revised Article 5 of the U.C.C. My claim, however, is a positive one — a prediction that, given the standard in the U.C.P., banks have incentives to err in favor of discrepancy and allow their customer to make the ultimate payment decision. While I agree that banks may

ments under the credit risks complaints from a customer with whom the issuer has an ongoing relationship and who regrets that the bank has paid. Of course, that same narrow interpretation of compliance will cause similar arguments between banks and beneficiaries who contend that the variations do not constitute discrepancies under Article 13. But presumably banks would prefer the latter arguments to the former, because they want to obtain reimbursement from their customer and they have more at stake with respect to repeat business with the customer than with the foreign beneficiary.

But even if we anticipate discrepancies, does it follow that the letter of credit transaction is not intended primarily as a mechanism for assuring payment? Let me suggest an explanation more in keeping with the traditional story. Keep in mind that while Mann asserts that the traditional story involves assurance for sellers that payment is forthcoming, that account provides a parallel assurance for the buyer — the documents indicate that goods conforming to the contract have been shipped. This assurance is what ultimately makes the letter of credit beneficial to both parties, as opposed to a mere guaranty of payment, which would benefit the seller without providing any assurances of product quality to the buyer.

One would imagine that the great majority of transactions are completed without any deviation from expected product quality, even if there is a discrepancy in the underlying documents. Indeed, that is precisely what Mann discovers. The great majority of discrepancies he reports appear to entail little risk of seller default on the quality of the goods in the underlying contract. Departures from expected product quality are the least frequent discrepancies that he reports.[7] But if that is the case, then neither the existence nor the honor of discrepant documents should be surprising. From the buyer's perspective, there is little need to insist on strict compliance with the technical terms of the credit as long as the discrepancy does not portend ultimate delivery of nonconforming goods. From the seller's perspective, once it is confident that it has shipped conforming goods, there is little need to invest much in ensuring strict compliance as long as minor discrepancies can be corrected and documents resubmitted in the rare case of an intransigent buyer.[8]

be concerned about their reputation for willingness to stand behind their credits, they must also be concerned about their reputation for being supportive of their customers. It is, after all, likely to be the customer who selects the bank to participate in the letter-of-credit transaction. My claim is only that, as between the conflicting desire to be seen as supportive of customers and the desire to pay questionable credits, banks have incentives to choose the former.

7. *See* Mann, *supra* note 1, at 2504 tbl.1. There he reports that incorrect shipment accounts for 4% of the discrepancies and partial shipment for 2% of the discrepancies.

8. I do recognize that this claim applies literally only where the discrepancy can be corrected at low cost and thus may not apply where the letter of credit will have expired by the time of the resubmission. *See id.* at 2511 n.55. Nevertheless, it would be interesting to dis-

While this scenario suggests that applicants and issuers do not always rely on the rights that they have to delay payment and that beneficiaries do not heavily invest in ensuring conformity to obtain payment, it does not suggest that those rights are of insufficient value as a background entitlement to justify the letter of credit agreement. Asserting one's rights, after all, is not costless. A beneficiary that attempts strict compliance must monitor its agents more closely than one who is willing to rely on the ultimate willingness of the buyer to accept the goods and pay for them. An issuer that refuses to pay simply invites a subsequent presentation (as long as it can be done while the credit is still open), a re-examination of the documents, and an opportunity to annoy the presenting bank or beneficiary. These costs are worth incurring only if they are exceeded by the expected value of noncompliance. If it is unlikely that payment will be withheld or that nonconforming goods will be delivered, the costs of strict compliance may simply be too high given the expected costs that would otherwise result.

Think, in these terms, of the analogous situation in which buyers of goods simply fail to assert valid claims against sellers with whom they transact repeatedly. Sellers may simply believe that a nonconformity is too small to warrant disruptions in the relationship or to justify other costs of resolving the dispute. That strategy, however, need not bind the buyer when a seller strategically fails to deliver goods that deviate from contract requirements in a more significant way.[9] Nor does the failure to assert one's right entail that the right was irrelevant or unimportant to a party in the first instance. It suggests only that incurring the cost of asserting the right in the particular case is not warranted.

Nevertheless, the remarkably high rate of discrepancy that Mann finds does demand some explanation, and if his theory is as plausible as the expected-value theory, there may be little reason to favor the

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cover the rate at which offers to cure are accepted as long as conforming goods have been delivered. If waivers of time limits are common in such cases, then the seller who is confident of ultimately receiving payment even after technical expiration of the credit may be less attentive to its terms.

9. See Southern Concrete Serv., Inc. v. Mableton Contractors, Inc., 407 F. Supp. 581, 584 (N.D. Ga. 1975), *aff'd without published opinion*, 569 F.2d 1154 (5th Cir. 1978), where the court noted:

> [C]ontracts may not be strictly adhered to .... Lawsuits are costly and they do not facilitate good business relations with customers. A party to a contract may very much prefer to work out a renegotiation of a contract rather than rest on its strict legal rights. Yet, the supplier or purchaser knows that he may resort to those enforceable contract rights if necessary.... The defendant here may be correct in its assertion that contracts for the sale of concrete are often subject to renegotiation, but that fact alone does not convince the court that the parties here did not contemplate placing on the buyer the risk of variation in quantity needs.

For a provocative discussion of when failure to assert a right properly leads to abandonment of that right, see Omri Ben-Shahar & Avery Katz, Reliance on the Non-Enforcement of Legal Entitlements (2000) (unpublished manuscript, on file with author).

traditional story over Mann's alternative. The latter interpretation, however, is subject to its own objections. Mann's proffered explanation for using the letter of credit is that its issuance provides an "implicit verification of the applicant's reliability and probity."[10] The applicant "rents" the issuer's reputation to provide the beneficiary with information concerning the applicant's credibility that the beneficiary cannot easily obtain directly.[11] I interpret this claim essentially as a costly signaling story.[12] Legitimate, creditworthy applicants incur the significant cost of obtaining a letter of credit in order to distinguish themselves from less credible buyers. Because intermediary issuers have significant information about applicants and have their own reputational interest in providing accurate signals, less credible buyers cannot mimic the behavior of credible buyers. Hence, sellers rely on the costly signal to decide with whom they will do business.

Let me raise a series of problems with this interpretation, not necessarily to debunk it, but to suggest, consistent with the theme of this conference, how it may be empirically confirmed or refuted. First, note how this arrangement differs from the standard signaling story. There, an intermediary can be used to sort relatively high quality from relatively low quality actors in a market that contains both types of participants, but in which it is very costly ex ante for potential traders to distinguish which participant belongs to which type. This informational gap creates an opportunity for an intermediary to develop an advantage in screening the participants in the market and in separating relatively high quality types from relatively low quality types. The intermediary can provide that information in the form of a valuable signal to prospective traders who want to deal with participants of a particular quality.[13] Thus, intermediaries, by indicating creditworthiness of successful applicants, do serve the very certification function that Mann attributes to issuers of letters of credit.

But here the similarity to the letter-of-credit transaction ends. The primary or sole role of the intermediary is to signal the status of the market participant who is being evaluated. Provision of the costly signal through an intermediary does nothing to alter the obligation of that participant. Sellers of goods, for instance, may obtain a Good Housekeeping seal to signal the quality of their products, but the seller remains the primary party to whom the buyer looks for performance of the contract. Standard & Poor's rates the quality of municipal

10. Mann, *supra* note 1, at 2521.

11. *See id.*

12. *See generally* A. MICHAEL SPENCE, MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES (1974).

13. *See id.* at 60-61.

bonds, but it is not required to make payments of the bond issuer's principal and interest.

Matters are quite different in the letter-of-credit transaction. Once the seller/beneficiary receives the issuer's letter of credit, it should be indifferent as to the creditworthiness of the buyer or the "credibility of the applicant/buyer's promise to make payment when the seller ships the goods."[14] Recall that letters of credit incorporate the independence principle by which the contract between the beneficiary and the issuer is wholly separate from the sales contract between the beneficiary and the applicant.[15] Once the credit is issued, the issuer is the party from whom the seller expects to receive payment on presentment of complying documents. The issuer, in turn, is entitled to obtain reimbursement from the applicant/buyer. For Mann, the act of issuance serves as a signal of the buyer's legitimacy. But that very act renders the buyer's legitimacy irrelevant to the seller, who now looks principally to the issuer for payment, regardless of any defalcation by the buyer. What the issuer offers the beneficiary is not a traditional signal of buyer credibility, which becomes superfluous as long as the issuer is solvent, or even a guarantee, but a displacement of the buyer as the primary obligor.[16]

This is not to say that the act of issuance provides no information about the applicant. After all, banks may for their own purposes monitor their customers, and thereby both implicitly vouch for the buyer and indicate a capacity to forestall any buyer opportunism that might otherwise materialize. Thus, beneficiaries may view issuers as providers of a useful service. But those benefits appear to arise as by-products of the issuer's self-interested activity rather than as the primary motivation for entering the letter-of-credit transaction. Indeed, the natural inclination of issuers, which seems to be the basis for much of letter of credit law, is just the opposite of Mann's inference that banks assist beneficiaries. Instead, beneficiaries fear collusion between a bank and its customer at the expense of the beneficiary. The case law is replete with situations in which banks appear to interpret the rules about timing for approval and compliance in favor of their customers. Doctrines of waiver and estoppel in letter of credit law

14. Mann, *supra* note 1, at 2521.

15. *See id.* at 2500.

16. One might contend that the signal consists of the issuer's belief that this seller will not unreasonably withhold authorization to pay the credit. But that seems inconsistent with Mann's story that at least some issuers must pressure recalcitrant sellers to authorize payment. *See id.* at 2527. While Mann effectively demonstrates that banks do not wish to deal with opportunistic applicants, it remains unclear whether the likelihood of gamesmanship is sufficiently high to warrant the costs of a letter of credit or whether the benefits that sellers receive from bank monitoring is a by-product of a more important function of the credit.

have thus emerged from a concern that issuers will too zealously protect their customers at the expense of beneficiaries.[17]

Moreover, traditional signaling theory suggests that the letter of credit may be a relatively poor source of information. First, the signal is opaque. Mere issuance of a letter of credit makes no distinction between the applicant who barely qualifies and the applicant whose creditworthiness is beyond reproach. Compare this on/off system to more robust signaling systems such as graded ratings of securities by intermediaries, different warranty periods for goods, and different levels of investment in education at institutions of different quality. Nonetheless, Mann's research provides an interesting possibility for a more refined signaling system. He indicates that fees for letters of credit vary significantly from market to market and from customer to customer, with "better" customers paying less.[18] If by "better," he means more creditworthy, rather than simply the existence of some other relationship with the issuer, then the percentage of the sale that the applicant pays the bank could provide information about creditworthiness to the seller. It would be interesting to know, therefore, whether that information is communicated to the seller. If it is not, then it would appear that the parties have missed a relatively inexpensive means of making a signal more transparent. Indeed, given its value, failure of the issuer to convey that information would cast some doubt on the proposition that signaling was the primary objective of the credit.

Second, the letter of credit seems to be a needlessly expensive signaling device. Signaling theory does entail some investment in order to indicate quality. But it does not follow that the signal be as costly as possible. One would imagine that high-quality purchasers themselves, who might more readily monitor others within their trade, would seek to solve informational asymmetries and signal their identity to diffuse sellers in order to avoid classic "lemon" problems by which their value is diluted by inclusion in a group of low-quality purchasers.[19] That is precisely the function that is typically played by trade associations, which are capable of monitoring members and thus certifying or self-licensing their qualifications to potential transactors who wish to distinguish among participants in the trade.[20] Alternatively, one would anticipate the development of less costly intermediaries, not simply

17. *See, e.g.*, Full-Bright Indus. Co. v. Lerner Stores, Inc., 818 F. Supp. 619 (S.D.N.Y. 1993) (estopping a bank from asserting beneficiary noncompliance where the bank had delayed in part to consult with customer).

18. *See* Mann, *supra* note 1, at 2499.

19. The classic analysis of the problem is in George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 448 (1970).

20. *See* SPENCE, *supra* note 12, at 60-61; Daniel B. Klein, *Trust for Hire: Voluntary Remedies for Quality and Safety*, *in* REPUTATION 97, 124-25 (Daniel B. Klein ed., 1997).

the Dun & Bradstreet reports that Mann implies are not heavily utilized, but more refined investigations that solve the apparent collective action problem arising from the geographical diffusion of buyers and sellers.

Mann discounts the availability of alternatives by suggesting that information about buyers in foreign countries is difficult to obtain. That statement certainly resonates, but it is a comparative claim that should vary from country to country. Some countries with thick markets will have relatively robust and readily available information about buyers. Others will not. The thicker the information, the less reliance there should be on either letters of credit or on the sellers' need for strict compliance with those credits. So let us return to the main theme of our conference. There is a testable hypothesis here. If Mann is correct, then we would expect that foreign sellers will invest less in strict compliance and will demand fewer letters of credit when dealing with buyers from countries with reliable information than when dealing with buyers located in countries where credible information is less accessible.[21]

Finally, think of the capacity of issuers to send a meaningful signal to cure informational asymmetries. Mann claims that the signal is amplified through the reputation of the issuer. But this argument seems to belie the collective action problem that, for Mann, explains the need for the letter-of-credit transaction in the first instance. Recall that Mann's story begins from the premise that sellers cannot monitor purchaser creditworthiness because buyers are too numerous and diffuse. Banks, according to this story, step into the breach because banks are concerned about their reputations and thus will induce recalcitrant customers to permit payment. Issuers can effectively play this role, Mann suggests, because they are less numerous. Thus, sellers can more readily monitor the conditions and reputations of issuers than those of diffuse buyers.

I fear that this story bears too much weight. The availability of reputational sanctions demands that two conditions be satisfied. First, those who deal with the party whose reputation is at stake must be able to offer credible information about misbehavior. Second, prospective transactors who would benefit from the reputational information must be able to receive it. Mann's theory, therefore, requires that a seller who is disappointed with an issuer's performance be able to broadcast the basis for dissatisfaction in a manner that informs other

21. Mann does, in fact, discover that there is more compliance by U.S. exporters to less-developed countries. *See* Mann, *supra* note 1, at 2509. The problem with this datum, however, is that it is completely consistent with the expected value explanation for the traditional story. Banks and buyers in less developed countries might be viewed as more willing to act strategically in the face of minor discrepancies, and judicial enforcement of the letter of credit as more susceptible to bias in favor of the domestic buyer. Thus, the expected value of investing in compliance increases.

sellers and induces them to rely on that information. But in the context with which Mann is concerned, sellers are as diffuse as buyers. And within a particular industry, the same firms that are likely to be buyers in one transaction will be sellers in another. If geographical diffusion of the parties is the cause of the informational problem about buyers, sellers should suffer equal difficulties communicating with each other about banks, notwithstanding their low numbers. Mann's story thus requires some explanation as to why banks would fear that failure to honor discrepant presentments made by noncustomer sellers in foreign countries will tarnish their reputation. What mechanism explains how frustrated sellers will be able to impose reputational sanctions on banks that act opportunistically? If the network of sellers is sufficiently robust to impose those sanctions, then why isn't that same network sufficiently robust to generate reliable and cheaper information about the buyers themselves?[22]

Perhaps the solution is resolved by looking at a fourth party in the letter-of-credit transaction — the confirming or advising bank. These entities are themselves repeat players with other banks and thus can monitor the reputation of the issuer and convey relevant information to sellers who might otherwise be unaware of the issuer's prior dealings. They can thus fill the informational void that would otherwise prevent sellers from effectively sullying the reputation of banks reluctant to honor appropriate presentations. But that possibility, too, provides us with a testable hypothesis. Not all letter-of-credit transactions involve confirming or advising banks. If issuers are concerned about their reputations, and if adverse information about an issuer can be broadcast widely where other banks know about it, then we might expect issuers to be less demanding of compliance where a confirming or advising bank is involved.

This brings me to my second point — the implications of Mann's article for the general question of empirical research in commercial law. I mean no disrespect for Mann when I say that one of the most endearing characteristics of the legal professoriate is also one of its major failings. That is the notion that we law professors are generalists and therefore have the capacity to perform any academic task. The reality is that few of us are trained as empiricists. The hubris of

22. Ronald Mann claims to be "puzzled" by the argument, which he attributes to me, that "a system that can impose reputational sanctions on banks should be able to impose reputational sanctions on buyers as well." *Id.* at 2524 n.99. My argument is actually the converse. I am asserting that a system that *cannot* impose reputational sanctions on buyers because of problems of numbers and geographical diffusion will similarly be unable to impose reputational sanctions on banks. The source of the reputational enforcement against banks would be gossip among sellers. But if sellers are as numerous and diffuse as buyers (and are typically the same parties in different transactions), then the same constraints that inhibit communication about buyers should inhibit communication about banks. The relatively small number of banks should be irrelevant if there is no effective way for those who claim to have been wronged by banks to communicate with each other.

doing empirical work without formal training is therefore a matter as to which we should pay some attention. Since I am also not trained as an empiricist, I am reluctant to try to say too much about the design of Mann's study. I do, however, want to point out how his thesis entails additional testable hypotheses that are, as yet, unexamined.

Consider Mann's assertion that letters of credit are used for verification purposes. The fact that verification is required to cure informational asymmetries suggests that sellers who have adequate information about their buyers will be less in need of a letter of credit than sellers who do not. Issuers presumably obtain information from their applicants by virtue of a continuing relationship with them. But sellers may also be in continuing relationships with their purchasers. Thus, if Mann's explanation is correct, we should expect letter-of-credit transactions in initial sales contracts between a given buyer and seller, but a reduction of the use of this device in subsequent transactions between the same buyer and seller. Nothing in Mann's study reveals whether that scenario is, in fact, accurate. Of course, a finding of a negative correlation between ongoing relationships and the use of credits does not discount the likelihood that these mechanisms are used to assure payment. Sellers engaged in repeat play may also feel less uncertain about payment than sellers engaged in a one-shot transaction. But failure to find this correlation would at least raise suspicions about the verification argument that Mann puts forth.

Consider next Mann's alternative hypothesis that letters of credit are used to verify the authenticity of the underlying transaction. As Mann indicates, letters of credit are likely to be used for these purposes only where the purported buyer is located in less economically stable countries. Letters of credit in these circumstances, Mann suggests, can serve as a constraint on money laundering or other evasion of local currency controls.[23] If that is the case, then we should see higher rates of letter-of-credit usage where the buyer is located in a country with a weak or unstable currency than where the buyer is simply a stranger to the seller. If we fail to find a greater rate of usage, then it may be that this verification procedure is also a useful byproduct of the letter of credit, but not necessarily a primary motivation for its use.

Finally, I am concerned with whether the methodology underlying Mann's empirical research taints the result he obtains. Mann generates his information about the rationale of buyers and sellers for using credits from a series of interviews with bank officials involved in the process of issuance and enforcement. From this select group, he obtains evidence that perhaps should not be surprising, given the source. He discovers that banks provide useful services in the commercial

23. *See id.* at 2530-31.

world. They engage in supererogatory acts of monitoring customers, they close accounts when they perceive opportunistic behavior by customers, they pressure customers to authorize payments for minor discrepancies, they diligently read *The Economist* to discern the reputation of others in the industry.[24] These are all valuable and interesting findings. But coming from officials of American financial institutions, they also exude an aroma of self-serving pronouncements that call their veracity into question. After all, what would we expect banks to tell us about the use of a device that they find profitable?

Perhaps a similar inquiry of applicants as to why they are willing to use letters of credit and of beneficiaries as to why they insist on them would confirm the unique and valuable role of the issuers. Perhaps not. The point is that reliable empiricism demands that the relevant inquiries be made of all parties to the transaction.

None of this denies the provocative nature of Mann's claims. His informed speculation causes us to reconsider the traditional story of letters of credit. I am tempted to conclude that one who challenges the traditional story bears the burden of proof and that neither the descriptive claims that Mann offers nor the data he has collected carry that burden. But resting on ultimate allocation of burdens strikes me as uncharitable. Mann's arguments may not lead us to reject the traditional story. But they plausibly demonstrate the need to find a compelling justification for that story and intimate the kinds of empirical inquiries that would be necessary to support it. Even if we ultimately find that the traditional story withstands the resulting scrutiny, Mann's skepticism performs the valuable service of forcing us to do the harder work.

24. *See id.* at 2523 n.92.