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WITTGENSTEIN AND THE CODE: A THEORY OF GOOD FAITH PERFORMANCE AND ENFORCEMENT UNDER ARTICLE NINE

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INTRODUCTION

Continued arm chair abstraction . . . already threatens to
issue in sterility.

—Karl Llewellyn*

All theory of interpretation—like all theory itself—is an in-
terpretation as good or as bad as its ability to illuminate the
problems we discover or invent and its ability to increase the
possibilities of good action.

—David Tracy**

Over the course of the last decade, legal scholarship has increas-

* K. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* at ix (1930).

** D. TRACY, *PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE*
9 (1987).

ingly focused on issues of interpretation.¹ Legal scholars are occupied—some might say preoccupied—with the relevance to law of interpretive strategies, particularly those of a continental orientation.² Whether or not this turn of events is to be applauded is a question that only time can answer; this particular theoretical invigoration of legal scholarship is simply too recent a phenomenon to be definitively characterized. But, while we cannot yet assess the long-term merits of this particular turn in scholarship, we are not precluded completely from characterizing at least some of its effects.

Professor and former Dean Harry Wellington recently described the influx of (largely interpretive) academic methodologies into legal scholarship as creating a "two cultures" phenomenon.³ The two cultures he identifies, that of the academic and that of the practitioner, are separated by both methodology and discourse.⁴ While it is true that social science approaches to law⁵ may provide a source of support for ideological causes,⁶ the same cannot be said of the methods and analyses drawn from philosophy or literary criticism. This leads to what Wellington sees as the problem exhibited by the "two cultures" phenomenon: the acontextual nature of academic scholarship.⁷ The prob-

¹ Richard Weisberg dates one of the founding dialogues, that between lawyers and literary scholars, from the Modern Language Association (MLA) Special Sessions on Law and Literature in 1976-78. See Weisberg, *Text Into Theory: A Literary Approach to the Constitution*, 20 GA. L. REV. 939, 939 (1986).

² Excellent collections of articles on the recent turn to interpretation in legal theory are found in symposia on interpretation. See 58 S. CAL. L. REV. 1 (1985); *Law and Literature*, 60 TEX. L. REV. 373 (1982).

³ See Wellington, *Challenges to Legal Education: The "Two Cultures" Phenomenon*, 37 J. LEGAL EDUC. 327 (1987).

⁴ In Wellington's words:

On the one hand, [the] methodology [of the academic] is apt to mirror the style of political and moral philosophy, and accordingly, appear to the practitioner as overly general and abstract, insufficiently particularistic and attentive to institutional considerations.

[Another] factor is vocabulary: law teachers talk differently from practicing lawyers. In the Sterling Law Buildings and elsewhere one hears heated conversations about hermeneutics, externalities and deconstruction.

Id. at 327.

⁵ The law and economics movement is one such approach. See *id.* at 328.

⁶ Tort and insurance law reform are examples. See *id.* at 328.

⁷ Wellington states the problem this way:

But there is a striking fact about much of this interesting and important legal literature: it is noncontextual. It does not come to grips with the stuff of adjudication; that is, jurisdiction (or procedure in the large sense), power (or, as Robert Cover calls it in his posthumously published article, "violence"). Nor does it come to grips with the fact that lawyers argue cases to win, not to establish true principles of interpretation, and that majority opinions are desperately negotiated documents and not the carefully crafted work of a philosopher.

lem is one of translation: "much useful academic work has less impact than it should and it means that too few are doing the applied work that should be an important part of the mission of law schools."⁸

Wellington identifies a real problem. As legal academics follow their scholarly agenda down the path to heightened theoretical purity, they move further away from the group that most of their students will join: the practicing bar.⁹ To mitigate the harsh effects of the "two cultures" phenomenon, Wellington advocates "a more structured curriculum"¹⁰ in the law schools. Whatever the merits of this proposal, it does not preclude the reorientation of legal scholarship back toward concrete problems of law.¹¹ This is particularly true in the case of theories of interpretation, given that their advocates are concerned with the meaning of language. In fact, any theory of legal interpretation must "make sense" of legal practice. If it does not, we should discount the theory's explanatory power and, thus, its value.¹²

Id. at 329.

⁸ *Id.*

⁹ This problem is exacerbated by the "scorn" that many legal academics feel toward practicing attorneys. *See id.*

¹⁰ *Id.* at 330.

¹¹ This orientation should not be seen as a rejection of theoretical—as opposed to "practical"—approaches to legal interpretation. The position taken here is complementary to Llewellyn's pragmatic blend of theory and practice. On the importance of Llewellyn's jurisprudence for understanding the Code, see Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 354-75 (1988) (examining the methodological consequences of Llewellyn's work); Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987) (detailing Llewellyn's influence on the Code). *See generally*, A. HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* 37-59 (1978) (discussing American legal realism). On realism generally, see R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 19-40 (1982) (stressing a pragmatic rather than a historical approach to jurisprudence); W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 87-152 (1973) (providing an intellectual biography of Llewellyn); Bechtler, *American Legal Realism Reevaluated*, in *LAW IN A SOCIAL CONTEXT* 1, 20-30 (T. Bechtler ed. 1977) (discussing the theories, concepts, and critiques of American realism, and assessing its impact on our present jurisprudence); Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195 (1980) (critiquing legal realism); White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1013-26 (1972) (discussing the emergence of realism as the dominant strain in American legal thought). For a different view of realism, one that sees its methods as useless in statutory interpretation, see Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180 (1986-87) ("I argue that when these terms ['legal formalism' and 'legal realism'] are given a useful definition, it becomes apparent that they [the terms and their referents] have no fruitful application to statutory (or constitutional) interpretation.").

¹² Ronald Dworkin assesses the theories of conventionalism, legal pragmatism, and law as integrity along these lines. With respect to each he asks the following questions:

First, is the supposed link between law and coercion justified at all? Is

The present article is an attempt to close the gap between theory and practice.¹³ It presents a general theory of legal interpretation¹⁴ in

there any point to requiring public force to be used only in ways conforming to rights and responsibilities that "flow from" past political decisions? Second, if there is such a point, what is it? Third, what reading of "flow from"- what notion of consistency with past decisions- best serves it?

R. DWORKIN, *LAW'S EMPIRE* 94 (1986).

¹³ Don Herzog has recently issued this call in a similar vein. See Herzog, *As Many as Six Impossible Things Before Breakfast*, 75 CALIF. L. REV. 609, 630 (1987).

We need more legal studies that aren't narrowly internalist renditions of doctrine, but that don't try to reduce doctrine to an epiphenomenal reflex of economics, or anything else. We need more legal studies that aren't obsessed with the drama of appellate review. Instead we need richly theoretical ways to explore the interaction of law and other social institutions. Some CLS writers are on their way to doing that. My advice, not that anyone's beating down my door for it, would be that they drop their mechanical polemic against liberalism, and that they don't insist ahead of time that the analysis be radical. The analysis may well be radical often enough to satisfy our most critical critics. Be that as it may, legal scholarship that drew on the likes of Weber, Marx, and Simmel to place law in broader social contexts would be a terrific contribution.

Id. at 630.

¹⁴ This interpretive theory was first advanced in the form of a commentary on the intractable nature of many of the current interpretive debates within legal academia. See Patterson, *Interpretation in Law—Toward a Reconstruction of the Current Debate*, 29 VILL. L. REV. 671, 686 (1984) ("Through regularity of application, in light of a consistent purpose, the multifarious applications of a concept come to be seen as constitutive of its meaning.").

Although it is later identified as "purposive," see *infra* notes 59-60 and accompanying text, and with due regard for the limitations of labels, the theory sails under the flag of conventionalism. The conventionalism advanced here recognizes that law, like language and ethics, is a performative activity that one learns by doing. See Eisele, *Must Virtue Be Taught?*, 37 J. LEGAL EDUC. 495, 501 (1987) ("Since performative knowledge is taught performatively and not didactically, we teach virtue by doing virtue, by acting virtuously. In this respect, virtue is like language. Both are inheritances that are learned, and earned, through use. Virtue, like language, is taught by example." (footnote omitted)).

In the context of political theory, conventionalism's intellectual pedigree runs from Aristotle through Hobbes and Locke and finds its best contemporary expression in the writings of Michael Oakeshott. See M. OAKESHOTT, *ON HISTORY AND OTHER ESSAYS* 119-64 (1983); M. OAKESHOTT, *ON HUMAN CONDUCT* 108-84 (1975); Oakeshott, *The Concept of a Philosophical Jurisprudence*, 3 POLITICA 203, 345 (1938). See also Eisele, *The Activity of Being a Lawyer: The Imaginative Pursuit of Implications and Possibilities*, 54 TENN. L. REV. 345 (1987).

From the jurisprudential perspective, conventionalism's tenets are few. It embraces the virtues of the rule of law. Like the legal positivism of Hart, the perspective here advanced "regards the existence and content of the law as a matter of social fact whose connection with moral or any other values is contingent and precarious." Raz, *Authority, Law and Morality*, 68 THE MONIST 295, 295 (1985); see J. RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210-29 (1979) (exploring the meaning of "the rule of law" and its ability to guide the behavior of its subjects); see also R. MOLES, *DEFINITION AND RULE IN LEGAL THEORY: A REASSESSMENT OF H.L.A. HART AND THE POSITIVIST TRADITION* 176-202, 259-72 (1987) (criticizing the epistemological weaknesses in Hart's positivism and calling for a broader context for argu-

the context of a particular statute, the Uniform Commercial Code ("the

ments of legal justification); cf. J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270-76 (1980) (articulating eight conditions for the "Rule of Law"). But see Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 313-18 (1985) (enumerating rule of law virtues).

Contemporary ethical theory recognizes the central role of purpose in the approach to ethical theory as one form of practical reasoning. See K. BAIER, *THE MORAL POINT OF VIEW: A RATIONAL BASIS OF ETHICS* 85-106 (1958) (Ethics is choosing "the best thing" to do.); L. BECKER, *RECIPROCITY* 317, 319 (1986) ("[M]oral reasoning, like practical reasoning generally, has serviceable criteria of logical validity and soundness—which are to be understood in terms of the purposes of the activity one is reasoning about."); A. GEWIRTH, *REASON AND MORALITY* 37-41 (1978) (discussing purposiveness as a generic feature of action); S. TOULMIN, *AN EXAMINATION OF THE PLACE OF REASON IN ETHICS* 216 (1961) ("[O]ur understanding of [a] concept depends on there being a certain human background, a situation in which people are doing things that satisfy some recognisable need. In each case, the recognition of the human need met by the actions is the means of answering our questions about 'purpose.'"). The pertinent literature on moral practices includes ANSCOMBE, *On Brute Facts*, in 3 G.E.M. ANSCOMBE, *THE COLLECTED PHILOSOPHICAL PAPERS OF G.E.M. ANSCOMBE: ETHICS, RELIGION AND POLITICS* 22, 22-25 (1981) (the moral content of one's acts and transactions is a function of the context in which such acts and transactions take place); R. BEARDSMORE, *MORAL REASONING* 3 (1969) (examining the processes of reasoning by which moral judgments are justified); D. PHILLIPS & H. MOUNCE, *MORAL PRACTICES* 46-51, 119-24 (1970) (investigating the philosophical issues regarding the relationship between facts and values); J. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 50-53 (1970) (analyzing the distinction between brute and institutional facts); see also N. MACCORMICK & O. WEINBERGER, *AN INSTITUTIONAL THEORY OF LAW: NEW APPROACHES TO LEGAL POSITIVISM* 127-44 (1986) (discussing law, morality, and positivism); Arnold, *Institutional Aspects of Law*, 42 MOD. L. REV. 667, 667-69 (1979) (discussing precision and vagueness in different aspects of the law).

On matters of legal interpretation, conventionalism stands firm against efforts to erode the distinction between legislation and adjudication, recognizing, with the critics of liberal legalism, that justice exists only where cases are decided "under law." See R. UNGER, *KNOWLEDGE AND POLITICS* 89 (1975) ("[T]he possibility of some sort of distinction between legislation and adjudication is precisely what defines legal justice."). As argued, see *infra* note [59], conventionalism is not blind to problems of interpretation, attention to which lies at the center of modern jurisprudence. But unlike some critics of conventionalism, see, e.g., Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177, 183-96 (1985) (stressing the importance of limited interpretation through disciplining rules), the perspective advanced here holds that the law requires nothing beyond the reality of its own practices to solve problems of interpretation. See M. OAKESHOTT *Political Education*, in M. OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 111, 113 (1962) [hereinafter *RATIONALISM*] ("[T]o understand an activity is to know it as a concrete whole; it is to recognize the activity as having the source of its movement within itself.").

This in no way entails a static conception of law. On the contrary, the process of interpretation is always dynamic and forward looking. See Becker, *Analogy in Legal Reasoning*, 83 ETHICS 248 (1973) (advancing a distinction between dynamic and static analogy). A recent, impressive effort along these lines is Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) ("The dialectic of statutory interpretation is the process of understanding a text created in the past and applying it to a present problem."); see also H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1157 (tent. ed. 1958) ("The meaning of a statute is never plain unless it fits with some intelligible purpose."); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons*

Code”), and assess that theory in light of an interpretive problem arising in a particular context, Article Nine. To present the general theory, this article resorts to several interpretive methodologies that have been the subject of recent academic discussion.¹⁵ At all times, the effort is directed at solving a particular problem within the context of a general theory. Of course, the measure of the project’s success is the theory’s ability to shed light on the doctrinal problem it addresses.

Article Nine, the doctrinal context for the interpretive approach advanced here, is itself the subject of frequent judicial interpretation.¹⁶ While the subject of interpretation is very much the focus of current academic debate, in law and elsewhere, very little exists in the way of analytic process for interpreting either the Code or Article Nine. This state of affairs is regrettable, if for no other reason than that the subject of Code interpretation was of such central concern to its chief architect, Karl Llewellyn.¹⁷

The present article advances a theory of legal interpretation that argues for the conceptual reconstruction of a central principle of contract law: the obligation of good faith. Despite a plethora of commentary on the recently enlarged role of good faith in the “lender liability” context,¹⁸ little has been accomplished in the analytical reconstruction

About How Statutes Are to be Construed, 3 VAND. L. REV. 395, 400 (1950) (“If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.”). See generally R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 87-102 (1975) (discussing legislative purpose). For a brief review of conventional approaches to statutory interpretation, see G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 214-16 (1982).

¹⁵ See *infra* notes 56-68 and accompanying text.

¹⁶ See Clark, *U.C.C. Survey: Secured Transactions*, 42 BUS. LAW. 1333, 1333 (1987) (“As always, article 9 was the most heavily litigated portion of the Uniform Commercial Code during the past year.”(footnote omitted)).

¹⁷ See W. Twining, *supra* note 11, at 321-40; see also G. GILMORE, *THE AGES OF AMERICAN LAW* 81-86 (1977) (discussing Llewellyn’s theoretical position and its embodiment in the Code); Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 628-30 (1975) (discussing realist interpretation of the Code); Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 813-15 (1962) (recalling Llewellyn’s crucial role in the development of the U.C.C.).

¹⁸ See, e.g., A.B.A. DIV. FOR PROF. EDUC., *EMERGING THEORIES OF LENDER LIABILITY* (H. Chaitman ed. 1985 & Supp. 1987); A. CAPPELLO & F. KOMOROSKE, *LENDER LIABILITY* 123-46 (1987); Coffey, *The Expansion of Lender Liability in Florida*, 40 U. FLA. L. REV. 85 (1988); Ebke & Griffin, *Lender Liability to Debtors: Toward a Conceptual Framework*, 40 SW. L.J. 775, 795-98 (1986); Flick & Replan-sky, *Liability of Banks to Their Borrowers: Pitfalls and Protections*, 103 BANKING L.J. 220, 222-24 (1986); Granoff, *Emerging Theories of Lender Liability: Flawed Applications of Old Concepts*, 104 BANKING L.J. 492, 493-99 (1987); Kitada, *Emerging Theories of Bank Liability- The Breach of the Covenant of Good Faith and Fair Dealing*, 103 BANKING L.J. 80, 84 (1986); Weissman, *Lender Liability: The Obligation to Act in Good Faith and Deal Fairly*, J. COM. BANK LENDING, Dec. 1986, at 2.

of good faith. Part I closely scrutinizes the reigning paradigm of good faith, the "excluder analysis," and finds it wanting. It concludes that the conceptualization of good faith as an "excluder" is unworkable and should be abandoned.

Part II offers a new approach to the problem of conceptualization generally and good faith in particular. Drawing upon, among other sources, the later philosophy of Ludwig Wittgenstein, a "purposive" approach to legal interpretation is recommended as a prelude to the reconstruction of the content of the good faith principle. The strength of a purposive approach to interpretation is then given a context by consideration of a specific doctrinal problem: the enforceability of anti-waiver clauses in security agreements. Part III explores the specific contours of the problem presented by anti-waiver clauses. Three judicial approaches to handling the question of the enforceability of anti-waiver clauses are analyzed in Part IV and shown to be inadequate. Part III ends by demonstrating the analytical superiority of the reconstituted principle of good faith in explaining the parameters of the problems posed by anti-waiver clauses.

This Article's central claim is that the content of the obligation of good faith is, by current understandings, insufficiently detailed and methodologically flawed. To use the good faith standard to its fullest possible extent we must first invigorate the concept with positive meaning;¹⁹ we have to give it content. The source of this content is outside the Code, but resort to it is in a manner mandated and contemplated by the Code's drafters.²⁰

In addressing the limited problem of anti-waiver clauses, I hope to suggest a broader reading of Article Nine than commentators and courts usually give. Put succinctly, proper interpretation of Article Nine requires the incorporation of much that is found neither within its four corners, nor in the remainder of the Code. I hope to demonstrate that Article Nine is best viewed not merely as a tight set of interconnected rules for the regulation of secured financing, but as one venue within which competing conceptions of the proper role of conduct in the contractual process are articulated and debated.

¹⁹ Professor Summers claims that good faith lacks what he refers to as "positive meaning," *see infra* note 29, content-specifiable apart from other concepts. I disagree with that contention and argue for the proposition that the meaning of good faith is specifiable apart from other notions. This is all one should impart to the phrase "positive content."

²⁰ *See* U.C.C. §§ 1-102, 1-103 (1987).

I. GOOD FAITH

A. Good Faith as an "Excluder"

Few concepts in modern contract law have received as much attention as "good faith."²¹ Commentaries on this subject form two distinct lines of analysis: conceptualization²² and specific application.²³ Conceptualization, the theoretical foundations of good faith, will be the concern of this section; I will argue that our current understanding of good faith is impoverished and in need of reconceptualization.

Before advancing the argument for a new substantive content to good faith, it will be helpful to review the arguments supporting the current, prevailing view. The most influential perspective on the topic of the proper conceptualization of good faith is that of Professor Robert Summers. For twenty years, most courts and many commentators have accepted Summers' "excluder analysis" as the best statement of the meaning of good faith under the Code.²⁴ While Summers' analysis has not been free from criticism,²⁵ his detractors have failed to identify key

²¹ For a review of the literature and leading cases, see E. FARNSWORTH, *CONTRACTS* § 7.17, at 526-34 & 526 n.3 (1982).

²² See Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 207-16 (1968) [hereinafter Summers I]. Summers reaffirms the cogency of his analysis of good faith as an "excluder" in Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 818-21 (1982) [hereinafter Summers II].

²³ See, e.g., Kornblum, *Recent Cases Interpreting the Implied Covenant of Good Faith and Fair Dealing*, 30 DEF. L.J. 411, 413-31 (1981) (analyzing the impact of six recent decisions by the California Supreme Court and Courts of Appeal); Reiter, *Good Faith in Contracts*, 17 VAL. U.L. REV. 705 (1983) (stating implications of good faith requirements).

²⁴ See, e.g., Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497, 498 (1984) (critiquing Summers, but noting that the RESTATEMENT (SECOND) OF CONTRACTS §205 (1981) adopted Summers' conceptualization of good faith); Campbell, *Contracts Jurisprudence and Article Nine of the Uniform Commercial Code: The Allowable Scope of Future Advance and All Obligations Clauses in Commercial Security Agreements*, 37 HASTINGS L.J. 1007, 1033 n.113 (1986) (citing Summers as having written the leading article on good faith in performance).

²⁵ A recent comment identifies three key limitations of the excluder analysis:

1. Each case must be decided on an ad hoc basis without the benefit of predetermined guidelines;
2. The ad hoc nature of the excluder analysis encourages forum shopping in diversity cases; and
3. The theory offers what is essentially a "bootstrap" model. Decisions that label conduct as "bad faith" have precedential weight, notwithstanding the fact that there is no logic to the decision.

See Comment, *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.: Tortious Breach of the Covenant of Good Faith and Fair Dealing in a Noninsurance Commercial Contract Case*, 71 IOWA L. REV. 893, 899-901 (1986); see also *infra* note 53 and accompanying text (stressing ability of language to focus on important, rather than

conceptual errors in his argument. Identification of these errors requires a wider perspective on the issue of legal interpretation generally and on interpretation of the Code in particular. But before turning to this task, the details of Summers' excluder analysis must be elucidated.

Summers' essential contention is that good faith "has no general meaning or meanings of its own."²⁶ Good faith merely "serves to exclude many heterogeneous forms of bad faith."²⁷ A lawyer litigating the question of whether a party has acted in good faith, must ask

[w]hat, in the actual or hypothetical situation, does the judge intend to rule out by his use of this phrase? Once the relevant form of bad faith is thus identified, the lawyer can, if he wishes, assign a specific meaning to good faith by formulating an "opposite" for the species of bad faith being ruled out.²⁸

How might one define good faith other than as an excluder? What

unimportant, facts). The "bootstrap" argument is also noted in Stankiewicz, *Good Faith Obligation in the Uniform Commercial Code: Problems in Determining its Meaning and Evaluating its Effect*, 7 VAL. U.L. REV. 389, 400 (1973).

²⁶ Summers I, *supra* note 22, at 196.

²⁷ *Id.*

²⁸ *Id.* at 200 (footnotes omitted). Summers offers the following list as a representative example of his methodology for finding the meaning of good faith:

Form of Bad Faith Conduct	Meaning of Good Faith
1. seller concealing a defect in material that he is selling	fully disclosing facts
2. builder willfully failing to perform in full, though otherwise substantially performing	substantially performing without knowingly deviating from specifications
3. contractor openly abusing bargaining power to coerce an increase in the contract price	refraining from abuse of bargaining power
4. hiring a broker and then deliberately preventing him from consummating the deal	acting cooperatively
5. conscious lack of diligence in mitigating the other party's damages	acting diligently
6. arbitrarily and capriciously exercising a power to terminate a contract	acting with some reason
7. adopting an overreaching interpretation of contract language	interpreting contract language fairly
8. harassing the other party for repeated assurances of performance	accepting adequate assurances

Id. at 203 (footnotes omitted).

approach to discerning the meaning of good faith is ruled out by the excluder analysis? In reviewing the issue some twenty years after first presenting the excluder analysis, and in the course of reaffirming the cogency of his approach to good faith, Professor Summers rejected an alternative approach to the excluder analysis, that of "necessary and sufficient conditions." He wrote:

In my view, good faith in the general requirement of good faith in ordinary moral dealings, and in the general case law of contract up to the late 1960s, was most felicitously conceptualized as an "excluder." That is, it was not appropriately formulable in terms of some general and positive meaning—through the specification of a set of necessary and sufficient conditions, for example; rather, it functioned as an excluder to rule out a wide range of heterogeneous forms of bad faith.²⁹

The approach to discerning the meaning of legal concepts through the specification of necessary and sufficient conditions³⁰, which Summers rejects, has been largely discredited by many twentieth century philosophers.³¹ As Wittgenstein, a philosopher whom Summers cites with approval, put it:

The idea that in order to get clear about the meaning of a general term one had to find the common element [necessary and sufficient conditions] in all its applications has shackled philosophical investigation; for it has not only led to no result, but also made the philosopher dismiss as irrelevant the concrete cases, which alone could have shed light on the usage of the general term.³²

If the "necessary and sufficient conditions" approach to meaning is rejected, then there seems to be little alternative to Summers' excluder analysis. In the next section of this Article, however, I will argue for an alternative conceptual framework of good faith that improves upon the

²⁹ Summers II, *supra* note 22, at 819.

³⁰ The *locus classicus* for the philosophical theory of essences is the dialogues of Plato. On the Platonic model, "knowing the meaning" of a concept means being able to specify the essential characteristic(s) shared by each application of the concept. See PLATO, *Laches*, in 4 THE DIALOGUES OF PLATO 87, 105 (B. Jowett trans. 3d ed. 1892) [hereinafter DIALOGUES] ("What is that common quality which is called courage, and which includes all the various uses of the term . . . ?").

³¹ For a recent collection of papers on current alternative trends in epistemology, see NATURALIZING EPISTEMOLOGY (H. Kornblith ed. 1985).

³² L. WITTGENSTEIN, PRELIMINARY STUDIES FOR THE "PHILOSOPHICAL INVESTIGATIONS" GENERALLY KNOWN AS THE BLUE AND BROWN BOOKS 19-20 (1969).

excluder analysis in ways both theoretical and practical. But first, I want to consider some of the shortcomings of the excluder analysis that any alternative formulation of the concept must avoid.

B. *The Failure of the Excluder Analysis*

Summers bases his conceptual support for his excluder analysis on the work of the English linguistic philosopher J.L. Austin,³³ as well as Roland Hall.³⁴ On the two occasions that Summers has discussed excluders,³⁵ he supports his characterization of good faith as an excluder by quoting a passage in which Austin discusses the word "real" as an excluder.³⁶

[A] definite sense attaches to the assertion that something is real, a real such-and-such, only in the light of a specific way in which it might be, or might have been, *not* real. "A real duck" differs from the simple "a duck" only in that it is used to exclude various ways of being not a real duck—but a dummy, a toy, a picture, a decoy, &c.; and moreover I don't know *just* how to take the assertion that it's a real duck unless I know *just* what, on that particular occasion, the speaker has in mind to exclude. This, of course, is why the attempt to find a characteristic common to all things that are or could be called "real" is doomed to failure; the function of "real" is not to contribute positively to the characterization of anything, but to exclude possible ways of being *not* real—and these ways are both numerous for particular kinds of things, and liable to be quite different for things of different kinds. It is this identity of general function combined with immense diversity in specific applications which gives to the word "real" the, at first sight, baffling feature of having neither one single "meaning", nor yet ambiguity, a num-

³³ See J.L. AUSTIN, *SENSE AND SENSIBILIA* 70-71 (1962).

³⁴ See Hall, *Excluders*, 20 *ANALYSIS* 1 (1959), reprinted in *PHILOSOPHY AND ORDINARY LANGUAGE* 67 (C. Caton ed. 1963). Summers mentions, by way of contrast with the views of Austin and Hall, the treatment of "voluntary" given by Aristotle and H.L.A. Hart. See Summers II, *supra* note 22, at 818-19, nn.35 & 37 (citing 3 ARISTOTLE, *NICHOMACHEAN ETHICS* (M. Otswald trans. 1962) and Hart, *The Ascription of Responsibility and Rights*, 49 *PROC. ARISTOTELIAN SOC'Y.* 171, 180 (1949)).

³⁵ See Summers I, *supra* note 22, at 201-02; Summers II, *supra* note 22, at 818-19. Summers suggests that other concepts in the law, including equality, fairness, and justice, "probably yield best to an excluder analysis." Summers II, *supra* note 22, at 819.

³⁶ See Summers II, *supra* note 22, at 819.

ber of different meanings.³⁷

The point that Summers claims is being made by Austin is that excluders have no general meaning of their own, and serve merely "to rule out various things according to context."³⁸ As far as it goes, this is correct. Summers takes Austin's very narrow point, however, and gives it an odd twist. From Austin's demonstration of the way excluders draw their life from other notions (e.g., "real" has meaning because it is tied to "duck" in "real duck"), Summers draws the conclusion that the excluder term is not merely *different* from the term which gives it life but that the excluder term is the *opposite*³⁹ of that with which it is joined.

³⁷ J.L. Austin, *supra* note 33, at 70-71. But see Bennett, "Real," in SYMPOSIUM ON J.L. AUSTIN 267-83 (K. Fann ed. 1969) (discussing four distinct ways in which "real" may be used).

³⁸ Summers II, *supra* note 22, at 818. Austin was making the further point that the *context* of any usage of the word "real" is crucial to understanding its meaning. As Ian Hacking puts it: "One important reason for urging this grammatical point is to discourage the common idea that there *must* be different kinds of reality, just because the word is used in so many ways." I. HACKING, REPRESENTING AND INTERVENING: INTRODUCTORY TOPICS IN THE PHILOSOPHY OF NATURAL SCIENCE 33 (1983). Professor Hall makes just the same point in discussing the predicate "bare." He states:

It may not be clear why "bare" is an excluder and "red" not, since it might be maintained that "red" could be defined as "not-green, not-blue, etc." If someone knows the meaning of the word "red" he must understand me quite regardless of the context when I say "That light is red." But unless he knows from the context or is specially told by me, when I say "That man's head is bare", he won't understand me even though he knows the meaning of the word, because he won't know what I am intending to rule out. He won't know whether it is covering, camouflage, hair, protective apparatus, or just adornment, that the man lacks. So whereas "red" would be a genuine predicate even if it *could* be defined negatively, "bare" is an excluder because it *must* be defined negatively.

Hall, *supra* note 34, at 5.

That is why Austin emphasized that the meaning of the word "real" is "liable to be quite different for things of different kinds." J.L. AUSTIN, *supra* note 33, at 71. This is consistent with Austin's entire approach to philosophical problems of linguistic meaning. See generally K. GRAHAM, J.L. AUSTIN: A CRITIQUE OF ORDINARY LANGUAGE PHILOSOPHY 152-63, 188-94, 218-28 (1977) (discussing Austin's approach to problems of perception, truth, and action). To anticipate the argument for a reconstructed conception of good faith, see *infra* notes 137-96 and accompanying text. It is important to remember that, for Austin, disclosure of the meaning of a concept was a matter of "giving the purpose, point and interest in responding in the way implied by using that concept." *Id.* at 29.

³⁹ See Summers I, *supra* note 22, at 202. Summers' move is understandable in light of Austin's use of the word "negative" in making the point that it is the negative use that "wears the trousers." But it is important to see that Austin's framework is not correlative in the way Summers renders it with the positive/negative dichotomy. This is transparently clear in Summers' list. See *supra* note 28. A long line of commentary on conceptualization along the lines taken by Summers runs back to Heraclitus. See 2 F. HAYEK, LAW, LEGISLATION AND LIBERTY 36 (1976); see also ARISTOTLE, NICHOMACHEAN ETHICS 1129a 17 to 1129b 12 (M. Ostwald trans. 1962) ("[W]e often gain knowledge of (a) a characteristic by the opposite characteristic, and (b) of charac-

Austin's argument is not concerned with oppositions but rather with linguistic curiosities that produce conceptual confusion.⁴⁰ In his attempt to formulate good faith as an excluder, Summers has obscured the main point of Austin's treatment of excluders. The source of Summers' confusion is brought to light by a more complete picture of Austin's analysis of excluder terms.

All excluders are, as Austin put it, "substantive-hungry."⁴¹ By their nature, excluder terms are parasitic⁴² on another term, but for the existence of which, the excluder term would not be a "trouser-word" (would have no life). The reason the excluder analysis will not work

teristics by those things in which they are exhibited."); E. CAHN, *THE SENSE OF INJUSTICE: AN ANTHROPOCENTRIC VIEW OF LAW* 13 (1949) ("Why do we speak of the 'sense of injustice' rather than the 'sense of justice.'"); HONORÉ, *Social Justice*, in *MAKING LAW BIND* 193, 195 (1987) ("Though fairness is not the same as justice, unfairness entails injustice."); J. LUCAS, *ON JUSTICE* 4 (1980) ("Injustice wears the trousers."); J.S. MILL, *UTILITARIANISM* 52 (O. Piess ed. 1957) ("[J]ustice, like many other moral attributes, is best defined by its opposite."); WOOZLEY, *Injustice*, 7 *AM. PHIL. Q.* 109, 110 (1973) ("[I]t is not the absence of justice that we get excited about, the absence of justice where it should be present. Failure to be just, not merely not being just, is what matters, and failure to be just is injustice.").

Elizabeth Wolgast shares the view that like good faith, "justice is not an original notion from which injustice is derived but vice versa, and this fact is what makes it so difficult to say what justice is." E. WOLGAST, *THE GRAMMAR OF JUSTICE* 132 (1987). However, unlike Summers, Wolgast finds the key to conceptualization not in injustice but in human responses to injustice which are "a serious lead to the grammar [in the Wittgensteinian sense] of the term." *Id.* at 132 n.11. It is in investigating the grammar of injustice that Wolgast finds the conceptualization of justice as an "excluder" (defining the positive by the negative) wanting:

Even under the impetus of acting against injustice, are we sure there is necessarily a net gain when an effort is made to redress it [the same question can be asked about bad faith], or might there be a net loss? . . . I propose that the abhorrence of wrong is a primary and central notions for morals, but it does not imply that there is any correlative just response.

Id. at 132-33, 146 (emphasis added). Wolgast's point is that injustice is not the opposite of justice. You do not create conditions of justice merely by eliminating injustice. The connection with the good faith/bad faith discussion is clear: you cannot find out what good faith is simply by finding its opposite. The remainder of this Article is an attempt to demonstrate this.

⁴⁰ See J.L. AUSTIN, *supra* note 33, at 64 ("['R]eal' is not a normal word at all.").

⁴¹ *Id.* at 68-69.

⁴² Ian Hacking reads Austin the same way:

'Real' is called a trouser-word because of negative uses of the words 'wear the trousers.' Pink cream is pink, the same colour as a pink flamingo. But to call some stuff real cream is not to make the same sort of positive assertion. Real cream is, perhaps, not a non-dairy coffee product. Real leather is hide, not naugahyde, real diamonds are not paste, real ducks are not decoys, and so forth. The force of 'real S' derives from the negative 'not (a) real S'. *Being hungry for nouns and being a trouser-word are connected.* To know what wears the trousers we have to know the noun, in order that we can tell what is being denied in a negative usage.

I. HACKING, *supra* note 38, at 33 (emphasis added).

for good faith is that *both* good faith and bad faith are "substantive hungry": they are each parasitic notions that require host concepts. The excluder analysis cannot work without the existence of a substantive notion upon which the excluder term does its work. Summers never supplies the substantive host, and for that reason alone his claims for the "felicity" of the excluder analysis cannot be sustained.

In making his case for the excluder analysis, Summers fails to separate the need for clarification of a fuzzy concept from concepts that are totally parasitic on other notions.⁴³ As we see in Austin's treatment of the concept "real," the word has meaning only in relation to other concepts (which are themselves substantives). If "good faith" were an excluder, it would have meaning only in relation to other legal concepts, but in Summers' analysis, it does not. Consider the following:

Real (Good faith) Duck (Variant meanings of bad faith)

In order for the excluder analysis to work with a concept like good faith, Summers needs an analogue⁴⁴ to the excluder term "real" in "real duck." He does not supply one. Instead, he claims that good faith "takes on specific and variant meanings by way of contrast with the specific and variant forms of bad faith which judges decide to prohibit."⁴⁵ But this simply will not work: there must be some concept (a substantive) upon which good faith is parasitic in just the way that "real" is parasitic on "duck."⁴⁶ It makes no more sense to say that

⁴³ We can at this point get a glimpse of the logical error of the excluder analysis. "Good faith" must be parasitic on "bad faith" in the same way that "real" is parasitic on "duck." The problem is that while we have no trouble seeing that "duck" denotes something in the world, the same cannot be said of "bad faith." "Bad faith" denotes nothing in the world because we don't know [the excluder analysis doesn't reveal] what *point* is being made in characterizing a state of affairs as "acting in bad faith." We need to know the point of the characterization before we can employ the excluder analysis. But if we know what "good faith" is, we don't need the excluder analysis to tell us what it is "to act in bad faith."

⁴⁴ It is neither necessary nor required that the analogue be an object noun. An act such as "performance" would suffice. What is important, and indeed lies at the heart of my criticism of Summers' view, is that the analogue have positive content.

⁴⁵ Summers I, *supra* note 22, at 202.

⁴⁶ The *negative* use, "not a real duck," "wears the trousers" because the meaning of "real duck" is not readily apparent. There are three separate notions: (1) not; (2) real; and (3) duck. How does this work with good faith? (1) bad faith; (2) good faith; (3) ??????. This analysis seems to require three terms, not two. Summers supplies only two. Moreover, he claims that one term (good faith) can be defined in terms of the other (bad faith). Ian Hacking's point about all this is well-taken:

Real telephones are, in a certain context, not toys, in another context, not imitations, or not purely decorative. This is not because the word is ambiguous, but because whether or not something is a real *N* depends upon the *N* in question. The word 'real' is regularly doing the same work, but you have to look at the *N* to see what work is being done. The word 'real'

"good faith" is the opposite of "bad faith" than it does to say that a decoy is the "opposite" of a real duck.⁴⁷ But that is precisely the claim that Summers makes.

Summers' reading of the philosophical sources for the excluder analysis notwithstanding, there are other reasons for rejecting the excluder analysis. The core excluder analysis logic is that courts cannot know in advance when conduct of a party amounts to bad faith unless identical conduct has been identified previously in that jurisdiction or by another court whose reasoning is regarded as persuasive.⁴⁸ But how can courts reason about good faith when good faith cannot be identified outside the narrow designation provided by case law? How, in the absence of some forward-looking logic of the concept of good faith, can that concept be employed unless the case under consideration is significantly similar to one in which the meaning of good faith has been established? Summers would have us look back and then extrapolate ahead:

A judge who appreciates the implications of the excluder analysis should, in working with precedents, refuse to adopt restrictive definitions of good faith; rather, he should focus on the forms of bad faith ruled out in previous opinions and work from these opinions either directly or by way of analogy.⁴⁹

The flaw in Summers' analysis is that he believes that the excluder analysis provides judges with sufficient material from which to fashion analogies between old and new instances of bad faith.⁵⁰ But how can a court, or an attorney advising a client, know which similari-

is like a migrant farm worker whose work is clear: to pick the present crop. But what is being picked? Where is it being picked? How is it being picked? That depends on the crop, be it lettuce, hops, cherries or grass.

I. HACKING, *supra* note 38, at 33.

⁴⁷ In addition to a decoy, other potential "opposites" exist for a "real duck." A painting of a duck, a duck on which taxidermy has been performed, a toy mechanical duck, or even a cartoon of a duck (such as Daffy or Donald Duck), could be considered an "opposite." In effect, a phrase such as "a real duck" incorporates too many parameters for a single opposite to exist.

⁴⁸ On the subject of persuasive precedent, see BRONAUGH, *Persuasive Precedent*, in PRECEDENT IN LAW 217, 217-47 (L. Goldstein ed. 1987).

⁴⁹ Summers I, *supra* note 22, at 206-07.

⁵⁰ For an argument that no adequate theory of analogical reasoning has yet been advanced, see Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 80-87 (1985) (noting that advocates for analogy as a model for judicial reasoning have failed to develop an adequate theory that can account for significant features of judicial justification). But see M. EISENBERG, *THE NATURE OF THE COMMON LAW* 83-103 (1988) (providing an extensive discussion of reasoning by analogy in the context of a broad theory of precedent).

ties are important between a present case and a past decision unless there are criteria for identifying relevant similarities of the present case with past decisions?⁵¹ The logic of the excluder analysis leads to the unacceptable conclusion that only cases with extremely similar fact patterns have value as precedent.⁵² For without some way of tying precedents together under a positive conception of good faith, courts and lawyers cannot know in advance if a party to a lawsuit has or has not violated the obligation of good faith.

Professor Steven J. Burton, with whom Professor Summers has debated the conceptualization issue, puts the criticism this way:

We want our language to call our attention to the facts that matter —those that legitimately establish significant similarities with or significant differences from the precedents. . . . [W]e want our language to “call[] the relevant facts to the foreground of the totality of the circumstances,” leaving the rest in the background. We want to know which facts shall count for more than their truth because they are legally significant.⁵³

We want to establish relevant similarities in order to ensure that our commercial law jurisprudence is consistent with the ideal of the Rule of Law.⁵⁴ Professor Summers appreciates the importance of this ideal,⁵⁵ but the excluder analysis fails to live up to it. Using the excluder analysis, we cannot know the meaning of good faith in advance. To free ourselves from the limitations of the excluder analysis, we must replace it with a conception of good faith that has substantive criteria that are themselves the product of an argument that reveals the point or purpose

⁵¹ The identification of relevant similarities is the essence of reasoning by analogy. See Murray, *The Role of Analogy in Legal Reasoning*, 29 UCLA L. REV. 833, 852 (1982) (“[I]t is the relevance and significance, not just the quantity, of the similarities between two analogies that determine the worth of the analogy.”); see also E. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1948) (stating that the finding of similarities or differences between factual patterns is the key step in the legal process); J. RAZ, *supra* note 14, at 204 (1979) (“Argument by analogy is essentially an argument to the effect that if a certain reason is good enough to justify one rule then it is equally good to justify another which similarly follows from it.”).

⁵² This should not be read as suggesting that the discernment of “relevant similarities” is a simple matter. See J. LUCAS, *supra* note 39, at 44 (“We cannot lay down in advance an exact and exhaustive list of features which characterize those cases which are to be accounted like cases and are to be treated alike. It is only when faced with new cases and having to decide about them that we come to realize the relevance of new factors.”).

⁵³ Burton, *supra* note 24, at 509 (footnote omitted).

⁵⁴ See R. DWORKIN, *supra* note 12, at 117 (restating the Rule of Law as the ideal of protected expectations).

⁵⁵ See Summers II, *supra* note 22, at 821-24.

of good faith in the discourse of commercial law. It is to that conception that we now turn.

II. TOWARD A RECONSTRUCTION OF GOOD FAITH

A. *Conceptualization and the U.C.C.*

1. Prelude

Having established the need to replace Summers' excluder analysis with a more capacious analytical framework, we turn to that constructive task. The alternative analysis developed here begins with a general theory⁵⁶ of linguistic meaning, taken from the later philosophy of Wittgenstein.⁵⁷ Against the current of some post-modern "methodological" approaches to problems of legal interpretation,⁵⁸ the present the-

⁵⁶ Notwithstanding the descriptive nature of the account of good faith given here, the argument is not devoid of prescriptive content. A "discursive ethics" is at work in the argument for a reconstructed conception of good faith. The prescriptive aspect of the argument is grounded in the actual pragmatics of discourse, making the argument simultaneously prescriptive and descriptive, and therefore evolutionary. As Corbin said in another vein, "the evolution of law is struggle and compromise, no system of law can ever be static or definitely knowable." Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449, 475 (1937).

A related and equally important point is that the argument here is not rationalist in inspiration. It advances no claim that legal argument should take any particular form other than that in which it comes to us through the discursive tradition. On the importance of tradition and the historicist perspective, see *infra* note 89 (discussing the ramifications of the historicist approach to the interpretation of texts).

⁵⁷ The theory is developed so that it responds to present concerns, but its reach is broader than the present context. What is said here of good faith can, and should, be said of legal discourse *tout court*.

⁵⁸ A relatively innocuous form of the anti-rationalism of which some legal scholars are enamored is found in the work of Stanley Fish. See S. FISH, IS THERE A TEXT IN THIS CLASS? 353 (1980) ("The basic gesture, then, is to disavow interpretation in favor of simply presenting the text; but it is actually a gesture in which one set of interpretive principles is replaced by another that happens to claim for itself the virtue of not being an interpretation at all."); Fish, *The Uses of Theory*, 96 YALE L.J. 1773, 1797 (1987) ("[T]he insight that interpretive constructs underlie our perceptions and deductions cannot do anything at all. It cannot act as a direction to seek something other than interpretive constructs, because there is no such other thing to be found; and it cannot act as a caution against the influence of interpretive constructions now in place because that influence will already be at work contaminating any effort to guard against it."). For an excellent assessment of Fish's argument, which makes the (correct) observation that Fish's position depends upon the "inside/outside" distinction (the very distinction at which his argument is directed), see Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37, 56-58 (1987).

An infinitely more troublesome doctrine that still appears to have some support in the present legal culture is deconstruction. For examples of the use of this doctrine in legal scholarship, see Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Leubsdorf, *Deconstructing the Constitution*, 40 STAN. L. REV. 181 (1987). The doyen of deconstruction is, of course, Jacques Derrida. See J. DERRIDA, OF GRAMMATOLOGY 158 (G. Spivak trans. 1974) ("There is nothing outside of

ory, which is denominated "purposive," may have the appearance of

the text."). In the realm of legal theory, proponents of Derrida's "différance" seek to undermine any interpretive project that lays claim to an account of contextualized meaning. In brief, Derrida's assertion is that meaning cannot be situated contextually, that "[e]very concept is necessarily and essentially inscribed in a chain or a system, within which it refers to another and to other concepts, by the systematic play of differences. Such a play, then—différance—is no longer simply a concept, but the possibility of conceptuality, of the conceptual system and process in general." *Id.* at 140. The thrust of Derrida's claim for the systematic "play" of conceptual difference is well stated by Jonathan Culler:

Context is boundless. . . . First, any given context is open to further description. There is no limit in principle to what might be included in a given context, to what might be shown to be relevant to the performance of a particular speech act. . . . Context is also unmasterable in a second sense: any attempt to codify context can always be grafted onto the context it sought to describe, yielding a new context which escapes the previous formulation.

J. CULLER, ON DECONSTRUCTION 123-24 (1983).

Of his own work, Derrida has responded to an interviewer this way: "je me risque à ne rien-vouloir-dire." A. MEGILL, PROPHETS OF EXTREMITY 259 (1985) (quoting Derrida). Alan Megill comments on this remark:

With typically Derridean ambiguity, this can be translated either as "I am taking the risk of not wishing to say anything" or as "I am taking the risk of not meaning anything." No wonder it seems especially difficult to come to grips with Derrida's enterprise. "I asked you where to begin, and you have led me into a labyrinth," the interviewer observed in some frustration. And the labyrinth has now become far more complex and ramified than it was in 1967 [the year of the interview from which the passage quoted above was taken]. One is reminded of an Escher print.

Id. (citations omitted).

For a stinging critique of deconstruction, see Searle, *The Word Turned Upside Down* (Book Review), N.Y. REV. BOOKS, Oct. 27, 1983, at 74, 78 (reviewing J. CULLER, *supra*) ("[I]t should be fairly obvious to the careful reader that the emperor has no clothes."); see also P. DEWS, LOGICS OF DISINTEGRATION: POST-STRUCTURALIST THOUGHT AND THE CLAIMS OF CRITICAL THEORY 13 (1987) ("Derrida's view is not that meaning is inexhaustible, but rather that any specification of meaning can only function as a self-defeating attempt to stabilize and restrain what he terms the 'dissemination' of the text. Meaning is not retrieved from apparent unmeaning, but rather consists in the repression of unmeaning."). Derrida's claims for the boundless nature of context have no purchase on non-totalizing theories of social knowledge of the type advocated by the later Wittgenstein nor, for that matter, speech act theories such as those of Austin, Searle, and Grice. As Michael Sinclair emphasizes in his lucid discussion of Grice's theory, "human conversation is, for the most part, a cooperative and purposive process." Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 377 (1985). A recent effort to revive Grice's theory is D. SPERBER & D. WILSON, RELEVANCE: COMMUNICATION AND COGNITION 21-24 (1986) (Human communication is based upon the transfer of relevant information. Information is relevant to the extent it discloses the intentions of the speaker.); cf. S. SCHIFFER, MEANING 19 (1972) (a more technical explication of intention-based semantics). A collection of recent papers devoted to Grice's communicative theory is PHILOSOPHICAL GROUNDS OF RATIONALITY: INTENTIONS, CATEGORIES, ENDS (R. Grandy & R. Warner eds. 1986). For criticism of Grice's view, see Black, *Meaning and Intention: An Examination of Grice's Views*, 4 NEW LITERARY HIST. 257 (1972).

All that Derrida has demonstrated is what we already knew: "the 'boundlessness'

novelty. The theory is, however, not entirely new; it is consistent with an older tradition of thought⁵⁹ that has been overshadowed by the general post-modernist preoccupation⁶⁰ with reader-centered theories of discourse.⁶¹ Current preoccupations aside, the particular virtues of the Wittgensteinian approach to problems of meaning can be measured only by the degree to which the approach succeeds where the excluder analysis fails. The criterion of success for this (or any other) interpretive theory is no different than it would be for a scientific theory. The ultimate question is: "Does the theory make sense of the data?"⁶²

This Article employs a Wittgensteinian perspective to support the

of context is a feature of effectively determined contexts, not a mark of the radical pointlessness of claiming relevance and confirmability for any discourse at all." J. MARGOLIS, *SCIENCE WITHOUT UNITY: RECONCILING THE HUMAN AND NATURAL SCIENCES* 390 (1987).

In his latest effort at tracing the roots of the philosophical discourse of modernity, Jürgen Habermas responds in a similar vein to the claims of "differance." See J. HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* 197 (F. Lawrence trans. 1987) ("Meanings of sentences, however well analyzed, are thus valid only relative to a shared background knowledge that is constitutive of the lifeworld of a linguistic community. . . . [T]he addition of this relational moment does not bring with it the relativism of meaning that Derrida is after. As long as language games are functioning and the preunderstanding constitutive of the lifeworld has not broken down, participants rightly count on world conditions being what is understood in their linguistic community as 'normal.'").

⁵⁹ See Marcin, *Epieikeia, Equitable Lawmaking in the Construction of Statutes*, 10 CONN. L. REV. 377, 377-80 (1978) (discussing the origins of equity); see also Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664 ("[I]s it really ever possible to interpret a word in a statute without knowing the aim of the statute?"). For a reading along these lines of Dworkin's latest version of the Rights Thesis, see Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847 (1987) (reviewing R. DWORKIN, *supra* note 12). For a different view, one that sees significant similarities between the projects of Dworkin, Hart, and Sacks, see Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413, 474 (1987) ("Dworkin's kinship with Hart and Sacks implies that the Legal Process tradition is more vital than has commonly been supposed.").

⁶⁰ The mindset of this preoccupation is engendered "not [by] the collapse of order around it, as we are inclined to feel, but by an extraordinary desire for an impossible certainty followed by an extraordinary despair when this desire is disappointed." White, *Introduction: Is Cultural Criticism Possible?*, 84 MICH. L. REV. 1373, 1378 (1986).

⁶¹ For a representative collection of essays on the reader response orientation in literary criticism, see E. FREUND, *THE RETURN OF THE READER: READER RESPONSE CRITICISM* (1987); *READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM* (J. Tompkins ed. 1980).

⁶² See Davidson, *On the Very Idea of a Conceptual Scheme*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 183, 193 (D. Davidson ed. 1984) ("If a theory quantifies over physical objects, numbers, or sets, what is [sic] says about these entities is true provided the theory as a whole fits the sensory evidence."); Rorty, *Is Natural Science a Natural Kind?*, in *CONSTRUCTION AND CONSTRAINT* 49, 69 (E. McMullin ed. 1988) ("From a Wittgensteinian or Davidsonian or Deweyan angle, there is no such thing as 'the best explanation' of anything; there is just the explanation which best suits the purpose of some given explainer.").

foundational proposition that, in order to know the meaning of a concept, we first need some conception of the point or purpose that it serves in our discourse. This is important as a general matter because we must have available some intersubjective means for evaluating competing claims about the meaning of legal concepts. A necessary propaedeutic to productive disagreement about the meaning of legal language is some notion of how language has any meaning at all. Only then can we develop a framework for addressing the specific question of how to adjudicate conflicts in the discourse over the meaning of competing legal conceptions.

In Subsection A, I will first summarize Wittgenstein's approach to analyzing and describing linguistic behavior. This discussion yields the essential analytic framework for developing a reconstructed conception of good faith. I will then illustrate the general methodology by working through a simple, but familiar, problem that arises under Article Two's Statute of Frauds. This concrete illustration serves as a bridge into Subsection B which uses the Wittgensteinian approach to the analysis of linguistic behavior to reconceptualize good faith.

2. Wittgenstein and Meaning

The centerpiece of Wittgenstein's later philosophy is the doctrine of "meaning as use." He states: "For a large class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language."⁶³ Understanding the meaning of a linguistic sign is a public affair; meaning is not a private, mental phenomenon.⁶⁴ "Understanding" the meaning of a word means

⁶³ L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 43, at 20 (G. Anscombe trans. 3d ed. 1968). The original German text reads as follows: "*Man kann für eine grosse Klasse von Fällen der Benützung des Wortes 'Bedeutung'—wenn auch nicht für alle Fälle seiner Benützung—dieses Wort so erklären: Die Bedeutung eines Wortes ist sein Gebrauch in der Sprache.*" The key word in the passage is "*Gebrauch*," which appears in the translation as "use." The translation of this word as "use" is appropriate but problematic. By "*Gebrauch*" Wittgenstein does not mean "façon de parler" but should be understood as making two points: first, that language is akin to tools, which can be used for all sorts of purposes (the tool metaphor permeates *Philosophical Investigations*). Second, it is not simply the meaning of words that Wittgenstein seeks to illuminate, it is the meaning of words in contexts. The emphasis has to be on seeing language interwoven with (non-linguistic) activities. The point of this is that while it is accurate to say that Wittgenstein is a conventionalist, he is a conventionalist of a special sort. For a complete discussion of these matters, see M. HINTIKKA & J. HINTIKKA, *INVESTIGATING WITTGENSTEIN* 217-20 (1986).

⁶⁴ See G. MADISON, *UNDERSTANDING: A PHENOMENOLOGICAL-PRAGMATIC ANALYSIS* 137 (1982) ("Meaning is not natural but cultural, and like all other things cultural, such as social institutions, it is not, unlike behavior, something that can be seen and thus described; it can only be inferred from behavior.").

using it correctly⁶⁵ on an appropriate occasion.⁶⁶ This performance, this usage, is assessed against the background of public, intersubjective practices.⁶⁷ Thus, the learning of language is a matter of grasping the complexities of linguistic utterances that lie in a world outside of the speaker. In short, to understand language means to be part of a "form of life."⁶⁸

Wittgenstein often is regarded as the progenitor of two distinct approaches to philosophical problems of meaning.⁶⁹ In his "early" period,

⁶⁵ See P.M.S. HACKER, *APPEARANCE AND REALITY* 147 (1987) ("The criteria for possession of a concept, for mastery of the use of a word, consist in one's correctly using and explaining an expression . . ."). But see P. MUNZ, *OUR KNOWLEDGE OF THE GROWTH OF KNOWLEDGE* 194 (1985) ("[I]t does not follow that knowledge is determined by obedience to speech rules prevalent in a given community and that knowledge is not a relation.").

⁶⁶ As Professor Hacker puts it:

A person's understanding of an expression is manifest in his use of it (i.e. whether he does use it in accord with the correct explanation) and in his giving correct explanations of it on appropriate occasions. And also, of course, in his responding appropriately to the use of the expression by others.

P.M.S. HACKER, *INSIGHT AND ILLUSION* 247-48 (rev. ed. 1986).

⁶⁷ See C. TAYLOR, *THE EXPLANATION OF BEHAVIOUR* 90-93 (1964); Taylor, *Interpretation and the Sciences of Man*, in 2 *HUMAN AGENCY AND LANGUAGE* 15, 42-47 (C. Taylor ed. 1985).

⁶⁸ As Wittgenstein puts it: "[T]he speaking of language is part of an activity, or of a form of life." L. WITTGENSTEIN, *supra* note 63, § 23, at 11.

As the result of reviewing Wittgenstein's unpublished manuscripts (*Nachlass*), S. Stephen Hilmy offers a privileged perspective on the question of Wittgenstein's "relativism" in his use of the concept "form of life" (*Lebensform*). He writes:

One of the senses of the German word *Leben* is in fact "activity", and quite obviously the "life" of which Wittgenstein is speaking here is the linguistic activity or locus of linguistic practice (the language game, calculus or system of communication) which is determinative of the "grammar" of the signs. It is the language game (calculus, system of communication) that is a form of life; and it is in relation to this activity, not to some ethereal hidden psychological mechanism, that one is to understand the signification of signs. There is no doubt, therefore, that Wittgenstein intended his "calculus/game/system" conception as an emphasis upon the forms of "life", the forms of activity or loci of linguistic practice constitutive of the meaning of signs, and that this emphasis involved, as he saw it, in effect a sort of "linguistic relativity theory" of the signification of signs.

S. HILMY, *THE LATER WITTGENSTEIN* 163 (1987).

⁶⁹ Garth Hallett puts this matter in chronological perspective. He writes:

The two definitions of words' meanings—as their referents, then as their uses—belong to two periods in Wittgenstein's philosophical activity. There is some disagreement as to whether there were two Wittgensteins or one, and about the degree of continuity between his earlier and later views, but chronologically at least, his work falls clearly into two periods. The first period began late in 1911 or early in 1912, when Wittgenstein arrived in Cambridge to study logic and the foundations of mathematics under [Bertrand] Russell. He began almost immediately filling notebooks, some of

during which he wrote the only one of his philosophical books published during his lifetime, the *Tractatus Logico-Philosophicus*,⁷⁰ Wittgenstein advanced the view that problems of meaning were reducible to disclosing the relationship between propositions and "states of affairs" in the world. From this seemingly realist⁷¹ perspective, all

which have survived, with jottings on these and other matters. Out of these grew the *Tractatus*, which he wrote while serving with the Austrian army during the First World War. Having thus given form to his thoughts, Wittgenstein retired from philosophy for more than ten years. In the meantime the *Tractatus* became a classic of logical atomism and exercised a wide influence, especially through the Vienna Circle, whose logical positivism stemmed largely from discussions on the *Tractatus*.

Wittgenstein returned to Cambridge and to philosophy in 1929. . . . In 1933-1934 and 1934-1935 respectively Wittgenstein dictated two folios of notes which came to be known and were posthumously published as *The Blue and Brown Books*. From 1937 till 1944 he put down a series of jottings from which some were later selected and posthumously published under the title *Remarks on the Foundations of Mathematics*. During a similar period (1938-1946) several of Wittgenstein's students were taking notes from a number of his *Lectures and Conversations on Aesthetics, Psychology and Religious Belief*, recently made public. The only one of his later works which Wittgenstein envisaged publishing was the *Philosophical Investigations*, which he described in 1945 as "the precipitate of philosophical investigations which have occupied me for the last sixteen years."

G. HALLETT, WITTGENSTEIN'S DEFINITION OF MEANING AS USE 3-4 (1967) (footnotes and citations omitted).

Wittgenstein himself recommended that the *Tractatus* and *Philosophical Investigations* be read together. But his reasons for this recommendation are anything but clear. He states:

I had occasion to re-read my first book (the *Tractatus Logico-Philosophicus*) and to explain its ideas to someone. It suddenly seemed to me that I should publish those old thoughts and the new ones together: that the latter could be seen in the right light only by contrast with and against the background of my old way of thinking.

L. WITTGENSTEIN, *supra* note 63, at x.

Robert Ackermann advances the argument that there is only "one Wittgenstein," and that the link between the *Tractatus* and *Philosophical Investigations* is Wittgenstein's continuing attempt to formulate a complete analysis of clear meaning and language (the unfulfilled objective of the *Tractatus*). See R. ACKERMANN, WITTGENSTEIN'S CITY at xi (1988); see also D. LACAPRA, RETHINKING INTELLECTUAL HISTORY: TEXTS, CONTEXTS, LANGUAGE 113 (1983) (The later Wittgenstein "did not simply reject the picture in the *Tractatus* (one is not in an area where simple rejections are pertinent), but reinscribed it in a critical way, after pointing out where its views were misleading."). For an approach to this and other questions, in the genre of fiction (*roman à clef*), see B. DUFFY, THE WORLD AS I FOUND IT (1987) (fictionalized biography of Wittgenstein).

⁷⁰ L. WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (D.F. Pears & B.F. McGuinness trans. 1961). Wittgenstein wrote the *Tractatus* during the First World War while serving as an artillery observer in the Austrian army.

⁷¹ The central ontological claim of the *Tractatus* is that the world is composed of "objects" that constitute the substance of the world [among which] are simple unanalysable properties and relations." P.M.S. HACKER, *supra* note 66, at 63; see also

questions of meaning are reducible to the discernment of the logical form of propositions.⁷² In short, language is a "mirror" of reality.

In his "later" period, during which he composed his most widely-known work, *Philosophical Investigations*, Wittgenstein came to realize that the logical form of propositions was not the only way that utterances could be meaningful. This shift is crystallized in the idea that a multitude of avenues exists for projecting concepts onto the world.⁷³ As he puts it:

Suppose, however, that not merely the picture of [a] cube, but also the method of projection comes before our mind?—How am I to imagine this?—Perhaps I see before me a schema shewing the method of projection: say a picture of two cubes connected by lines of projection.—But does this really get me any further? Can't I now imagine different applications of this schema too?—Well, yes, but then can't an *application come before my mind*?—It can: only we need to get clearer about our application of *this* expression. Suppose I explain various methods of projection to someone so that he may go on to apply them; let us ask ourselves when we should say that *the* method that I intend comes before his

D. PEARS, *THE FALSE PRISON* 9 (1987) ("Objects are set in a fixed grid of possible states of affairs, which is in no way dependent upon the contribution made by our minds.").

⁷² See A. KENNY, *WITTGENSTEIN* 54-71 (1973). But see D. PEARS *supra* note 71, at 75 ("The thing, with its independent nature, is the dominant partner in the [name-thing] association, and if the name does not remain faithful to the possibilities inherent in the thing, the association is annulled. So representation (*Vertretung*) requires an initial correlation followed by faithfulness to possibilities intrinsic to the thing with which the initial correlation was made.").

⁷³ Wittgenstein's later philosophy is not without its contemporary detractors:

Let me turn finally to one of the most important sources of contemporary idealism: Wittgenstein. His later views on the conditions of meaning seem to imply that nothing can make sense which purports to reach beyond the outer bounds of human experience and life, for it is only within a community of actual or possible users of the language that there can exist that possibility of agreement in its application which is a condition of the existence of rules, and of the distinction between getting it right and getting it wrong.

T. NAGEL, *THE VIEW FROM NOWHERE* 105 (1986). For a booklength assault on the later philosophy of Wittgenstein, see E. GELLNER, *WORDS AND THINGS* (rev. ed. 1979). Professor Gellner has made something of a career out of criticizing the views of the later Wittgenstein, particularly the latter's notion of "form of life." For the latest assault on the citadel, see Gellner, *The Stakes in Anthropology*, 57 *AM. SCHOLAR* 17, 19 (1988) ("A language tied to a closed community and eschewing all aspiration to transcendence thereby became the norm of intellectual health. Those who think otherwise are diseased, and he, Wittgenstein, was going to cure them. If you believe that, you'll believe anything.").

mind.

Now clearly we accept two different kinds of criteria for this: on the one hand the picture (of whatever kind) that at some time or other comes before his mind; on the other, the application which—in the course of time—he makes of what he imagines. (And can't it be clearly seen here that it is absolutely inessential for the picture to exist in his imagination rather than as a drawing or model in front of him; or again as something that he himself constructs as a model?)

Can there be a collision between picture and application? There can, inasmuch as the picture makes us expect a different use, because people in general apply *this* picture like this. I want to say: we have here a *normal* case, and abnormal cases.⁷⁴

Propositions are, indeed, "pictures" of reality. This passage illustrates a definitive shift in emphasis from the early to the late period: that the meaning of a proposition or concept is both the "sense" of the proposition and the method of projecting it onto reality. Thus, the "meaning" of a word is the (infinite) sum of all known and unknown ways of projecting a concept onto the world.⁷⁵ We make sense of the world through language;⁷⁶ language is the medium for understanding

⁷⁴ L. WITTGENSTEIN, *supra* note 63, § 141 at 55-56.

⁷⁵ See P. WINCH, TRYING TO MAKE SENSE 75 (1987) ("The notion of a 'technique' of using the picture replaces that of a 'rule of projection' on which the Tractatus had relied. 'The connection between the picture and what is pictured' is what we might call the lines of projection; but so too might we call the technique of projection."). For a discussion of the importance to literary theory of Wittgenstein's shift to methods of projection, see C. ALTIERI, ACT & QUALITY 23-25 (1981).

⁷⁶ It is in language that one finds the presuppositions that make understanding possible.

Hermeneutical reflection draws attention to presuppositions which are inaccessible to knowledge as such, since it is they alone which make it possible. Even an attempt at knowledge which is directed toward just these presuppositions does not release us from this dependency, since it knows its object only in recognizing its character as a presupposition. Otherwise, it falls victim to self-deception. The constant references of hermeneutics to the facticity of understanding, to successful communication and the concrete transmission of tradition, do not concern all these achievements themselves, but serve to make us more acutely aware of the radical priority of all that which must already be at work before we come to know anything specific. Indeed, such an appeal to the practical experience of hermeneutically relevant situations should open our eyes to the constitutive role of preconditions and thus reinforces the transcendental aspect of hermeneutics. The aim of this theory is not at all to establish a realm of mutual understanding, practically free of compulsion, as the true life-world of rational individuals. The theory of the conditional character of substantively determined knowledge ought not to give itself up in favor of a gradual integration into the manifold processes of understanding which

reality.⁷⁷ The only understanding we ever can, or need to have, is linguistic understanding.⁷⁸ This is why, in order to understand our world, legal or otherwise, we should turn our attention to the uses of language.

If there is more than one way to project a concept onto reality, does that not mean that the meaning of a concept is determined by a subjective choice of the method of projection⁷⁹ and, hence, by a subjective choice of the meaning of the concept?⁸⁰ In other words, is there any

actually take place.

R. BUBNER, *ESSAYS IN HERMENEUTICS AND CRITICAL THEORY* 104 (1988).

⁷⁷ Of the relationship between meaning and mental process, Wittgenstein said:

Now you might ask: do we interpret the words before we obey the order? And in some cases you will find that you do something which might be called interpreting before obeying, in some cases not.

It seems that there are *certain definite* mental processes bound up with the working of language, processes through which alone language can function. I mean the processes of understanding and meaning. The signs of our language seem dead without these mental processes; and it might seem that the only function of the signs is to induce such processes, and that these are the things we ought really to be interested in.

... The mistake we are liable to make could be expressed thus: We are looking for the use of the sign, but we look for it as though it were an object co-existing with the sign. (One of the reasons for this mistake is again that we are looking for a "thing corresponding to a substantive.")

The sign (the sentence) gets its significance from the system of signs, from the language to which it belongs. Roughly: understanding a sentence means understanding a language.

L. WITTGENSTEIN, *supra* note 32, at 3, 5.

⁷⁸ See G. HALLETT, *LANGUAGE AND TRUTH* 32 (1988) (A statement is true if its use of expressions coincides with their conventional meanings, properly understood.); R. RORTY, *CONSEQUENCES OF PRAGMATISM* at xix (1982) ("[T]here is no way to think about either the world or our purposes except by using our language.").

⁷⁹ This question is taken up in A. MacIntyre, *Relativism, Power, and Philosophy*, Presidential Address Delivered Before the 81st Annual Eastern Division Meeting of the American Philosophical Association (Dec. 29, 1984), *reprinted in* 59 *PROC. AM. PHIL. SOC'Y* 5, 14 (1985) ("[T]here are multifarious modes of identifying, picking out, referring to, calling towards, in or up and the like, all of which connect a name and a named, but there is no single core relation of name to named for theories of reference to be theories of.").

⁸⁰ My contention is that subjective preference alone cannot claim any purchase on "reality." See *infra* text 89-92 and accompanying text. This does not mean that I contend that the only other epistemological choice for a standpoint is a "knowable" reality that subsists independently of a perspective. The point is that a perspective on reality cannot (short of madness) be solely the product of one's own invention but is constituted publicly through language. For this reason, epistemology must necessarily be historical and comparative. For an early twentieth century monograph on the importance of this point for the philosophy of science, see L. FLECK, *GENESIS AND DEVELOPMENT OF A SCIENTIFIC FACT* (F. Bradley & T. Trenn trans. T. Trenn & R. Merton eds. 1979). See also B. LATOUR, *SCIENCE IN ACTION* 42 (1987) ("[a] fact is what is collectively stabilised from the midst of controversies when the activity of later papers does not consist only of criticism or deformation but also of confirmation."). For an argument that the proponents of social epistemology such as Latour and Woolgar are threatening the distinctiveness of the sociological method, see Fuller, *On Regulating What is Known: A Way to Social Epistemology*, 73 *SYNTHESE* 145, 158-59 (1987).

check on the freedom of the speaker to choose the method of projection?⁸¹ Wittgenstein's answer to this question is found in the notion of a "language-game," which he describes as "the whole, consisting of language and the actions into which it is woven."⁸² Understanding concepts requires looking at the various activities of which they are a part.⁸³ These activities are the things we "do" with language.⁸⁴ The things we do with language—these activities—are all part of the "grammar" of concepts. In short, to understand a concept is to understand its grammar. This is why Wittgenstein says that "[g]rammar tells what kind of object anything is."⁸⁵ Consider what Stanley Cavell does with the grammar of "chair":

It is part of the grammar of the word 'chair' that *this* is what we call "to sit on a chair". . . . That you use this object *that*

Fuller develops his critique, based (loosely) in scientific realism, in Fuller, *Playing Without a Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory*, 97 YALE L.J. 549 (1988).

⁸¹ The public character of practices provides the needed foundation for objectivity. See *infra* text preceding note 99; see also R. NEWELL, OBJECTIVITY, EMPIRICISM AND TRUTH 70 (1986) ("Epistemology must be shifted away from thoughts of a terminus in evidence and should focus on the explanation of entrenchment itself."). See generally L. WITTGENSTEIN, ON CERTAINTY (D. Paul & G.E.M. Anscombe trans. G.E.M. Anscombe & G.H. von Wright eds. 1969).

⁸² L. WITTGENSTEIN, *supra* note 63, § 7, at 5.

⁸³ This is particularly true in adjudication.

[A]s Wittgenstein suggests, when the rules become more important than the context in which they are applied, "things do not turn out as we had assumed." When the context in which legal words are used changes drastically, cases with similar factual situations may not at all be alike, and to treat them as such might serve neither justice nor logic. Indeed, when legal language "goes on a holiday" and the judge rigidly applies precedent without consideration for the language-game, or context, in which the words of statute or the Constitution are being used, he may well find himself entangled in his own rules, making distinction after distinction in order to make the factual situation fit the precedent, and in the end, clearly losing touch with the real needs of the community.

Stroup, *Law and Language: Cardozo's Jurisprudence and Wittgenstein's Philosophy*, 18 VAL. U.L. REV. 331, 352 (1984).

⁸⁴ In short, language is embedded in our everyday activities and is interwoven with our behavior.

A language-game consists both of the use of a particular element of language (word, expression, sentence, etc.) and of features of the activities in which instances of that use are embedded. . . . [T]he use of language is one element among many in our activities, which themselves are embedded in a matrix of interrelated actual and possible activities, the totality of which constitutes the form of life in which the user of language finds himself.

Schatzki, *The Prescription is Description: Wittgenstein's View of the Human Sciences*, in THE NEED FOR INTERPRETATION: CONTEMPORARY CONCEPTIONS OF THE PHILOSOPHER'S TASK 118, 126 (S. Mitchell & M. Rosen eds. 1983).

⁸⁵ L. WITTGENSTEIN, *supra* note 63, § 373, at 116.

way, sit on it *that* way, is our criterion for calling it a chair. You can sit on a cigarette, or on a thumbtack, or on a flag pole, but not in *that* way. Can you sit on a table or a tree stump in that (the "grammatical") way? Almost; especially if they are placed against a wall. That is, you can *use* a table or a stump *as* a chair (a place to sit; a seat) in a way you cannot use a tack as a chair. But so can you use a screw-driver as a dagger; that won't make a screw-driver a dagger. What can *serve as a chair* is not a chair, and nothing would (be said to) serve as a chair if there were no (were nothing we called) (orthodox) chairs. We could say: It is part of the grammar of the word "chair" that *this* is what we call "to serve as a chair."

The force of such remarks is something like: If you don't know all this, and more, you don't know what a chair is; what "chair" "means"; what we call a chair; *what* it is you would be certain of (or almost certain of, or doubt very much) if you were certain (or almost certain, or doubt very much) that something is a chair.⁸⁶

Wittgenstein's remarks on the grammatical nature of understanding⁸⁷ lead inexorably to the conclusion that conceptual understanding is

⁸⁶ S. CAVELL, *THE CLAIM OF REASON* 71 (1979).

⁸⁷ Wittgenstein did not claim that the grammar of a concept is in any sense "closed." See L. WITTGENSTEIN, *supra* note 63, § 80 at 38. Julius Kovesi demonstrates well the "evolutionary" nature of grammar in the following example:

I expect the reader is familiar with those little machines which are used by bus conductors in some places for printing the tickets. Now suppose that a passenger has asked for a fourpenny ticket and for some reason the conductor dialed five, thus producing the wrong ticket. He made another ticket but kept the fivepenny one as he had to account for all the tickets printed. Some time later someone else asked for a fivepenny ticket and was given the one printed earlier. So far so good, but trouble arose when the inspector boarded the bus, for since the ticket had been printed some time before the passenger got on the bus it had by now expired, and the conductor had to be called on to explain. All this was rather a nuisance as it took up the conductor's time while other passengers were getting on and off; besides, he felt that the inspector must have thought him careless and inefficient. When he came off duty he stayed to have a cup of tea at the canteen where he told the story to a group of other conductors who replied with similar stories. Some had had to do their explaining during the rush hour or to an inspector who was slow to understand. When I want to suggest that the conductors might eventually coin an expression to refer to these stories I do not of course want to say that they all suddenly decide one day: "Well, let's call it making a misticket." It might take several years of exchanging stories before some conductor coins this word, and perhaps even longer before it becomes general currency. Now if it is only the conductors who talk together over their cups of tea the word will be-

an aspect of social anthropology.⁸⁸ All understanding begins in language,⁸⁹ but to understand the grammar of a concept one needs to in-

come part only of their vocabulary, but if they share their discussions with the inspectors it will become part of their vocabulary as well. In the first case the word could only function as a "nuisance-word", in the second, it could function as an "excuse-word." What I mean is that in the first case a conductor could not use the new word to the inspector when he wants a short-hand explanation to excuse a passenger and himself; he could only use it among the other conductors when he wants to say that this trouble has come up again. In the second case, however, he can tell the inspector: "There is a misticket in the back", thus achieving what before the existence of this word needed a long explanation.

....

At the beginning of the formation of this notion [misticket] different conductors stressed various different aspects of the occasions on which they had printed wrong tickets, and some of these aspects eventually turned out to be irrelevant. Only that which was common to all their experiences was eventually incorporated into the notion of making a misticket. This must be so if the word is to be part of a public language. . . . As before, irrelevances and subjective preferences have necessarily been dropped out in the course of this process. Before the existence of this excuse-word a conductor had to use arguments which, if they were successful, excused only himself. The new word however, will excuse any conductor, however unskilled in argument or disliked by the inspector.

J. KOVESI, MORAL NOTIONS 46-49 (1967).

⁸⁸ In short, epistemology is social. For a recent argument to the effect that the scientific enterprise is itself a social and political practice, see J. ROUSE, KNOWLEDGE AND POWER 166-208 (1987). An earlier, more radical proponent of this view was Paul Feyerabend. See generally P. FEYERABEND, AGAINST METHOD 20-22 (1975) (arguing that science is an anarchistic enterprise and that theoretical anarchism encourages progress). For a view of scientific practice as a dialectic between data and theory mediated by instruments, see R. ACKERMANN, DATA, INSTRUMENTS, AND THEORY (1985). For a review of some of these themes from the perspective of the social sciences, see R. TRIGG, UNDERSTANDING SOCIAL SCIENCE (1985). See generally P. WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 40-43 (1958) (arguing that the study of society must begin with the insider's perspective).

⁸⁹ In Gadamer's hermeneutics one finds the strongest argument for the claim that there can be no understanding that is not linguistic. On this point, there are obvious affinities with the later Wittgenstein. Echoing the thought of his teacher, Martin Heidegger, Gadamer says the following with respect to the Wittgenstein of the *Philosophical Investigations*:

"If language is to be a means of communication, there must be agreement not only in definitions but also (queer as this may sound) in judgments." Perhaps the field of language is not only the place of reduction for all philosophical ignorance, but rather itself an actual whole of interpretation that, from the days of Plato and Aristotle till today, requires not only to be accepted, but to be thought through to the end again and again. At this point, Husserl's transcendental-phenomenological reduction seems to me, despite all its idealism of reflection, to be less prejudiced than Wittgenstein's self-reduction. Over and against both of them, we must admit that we are ever again and only "on the way to language."

Gadamer, *The Phenomenological Movement*, in H. GADAMER, PHILOSOPHICAL HERMENEUTICS 130, 177 (D. Linge trans. and ed. 1976) (quoting L. WITTGENSTEIN, *supra* note 63, § 242, at 88). For an exegetical comparison of Wittgenstein's later philosophy and Gadamer's hermeneutics, see K. APEL, TOWARDS A TRANSFORMA-

investigate the point(s) the concept serves in social practices (the activities

TION OF PHILOSOPHY 1-45 (G. Adey & D. Frisby trans. 1980). *See also* HERMENEUTICS VS. SCIENCE? THREE GERMAN VIEWS 20-25 (J. Connolly & T. Keutner eds. 1988) (Essays by Wolfgang Stegmüller, Hans-Georg Gadamer, and Ernst Konrad Specht); N. GIER, WITTGENSTEIN AND PHENOMENOLOGY 2-5 (1981) (analyzing Wittgenstein's phenomenology in the context of 20th century phenomenology, generally).

Gadamer is unique in carrying on Heidegger's project of demonstrating the ontological significance of language as a constitutive medium. Consider:

Language is not just one of man's possessions in the world, but on it depends the fact that man has a world at all. For man the world exists as world in a way that no other being in the world experiences. But this world is linguistic in nature. . . . [L]anguage has no independent life apart from the world that comes to language within it. Not only is the world "world" only insofar as it comes into language, but language, too, has its real being only in the fact that the world is represented within it. Thus the original humanity of language means at the same time the fundamental linguistic quality of man's being-in-the-world.

H. GADAMER, TRUTH AND METHOD 401 (G. Barden & J. Comming trans. ed. 1975). Some do not see Gadamer's project as fundamental:

Gadamer . . . plays only a secondary role and has but a minor voice. . . . From the point of view of radical hermeneutics, Gadamer's "philosophical hermeneutics" is a reactionary gesture, an attempt to block off the radicalization of hermeneutics and to turn it back to the fold of metaphysics. Gadamer pursues a more comforting doctrine of the fusion of horizons, the wedding of the epochs, the perpetuation of the life of the tradition which sees in Heidegger only a philosophy of appropriation and which cuts off Heidegger's self-criticism in midstream.

J. CAPUTO, RADICAL HERMENEUTICS 5-6 (1987). Stanley Rosen sees Gadamer's problems as more basic than the attempt to purge the radical elements in Heidegger:

The common assumption that everything must be understood historically leads to the consequence that nothing can be understood, not even the validity of one's methods, let alone their significance. Or else it leads to the consequence that all understanding is self-understanding. To interpret a text is in fact to produce one's own text. This is why orthodox philology, saturated as it is by historicist assumptions, is not in a strong position to resist the onslaught of post-modern deconstructive criticism. Our historicity leads us, as it would seem, to produce differing interpretations of the same text at different periods of our life; the "sameness" of the text disappears, and identity gives way to difference. On this point, I cannot find any real difference between the two "orthodox" hermeneutical schools represented by H.G. Gadamer and Emilio Betti.

S. ROSEN, HERMENEUTICS AS POLITICS 164 (1987).

The importance of the constitutive nature of linguistic understanding recently has been given increased emphasis through the analysis of the power of metaphor as an element in scientific explanation.

Scientific data are initially described either in an "observation" language or in the language of a familiar theory and are then redescribed in terms of a theoretical model that allows two apparently disparate situations to interact in a novel way. For example, sounds and waves on water are both parts of our everyday observation; what is novel is the suggestion that there is something about sound akin to waves — not the wetness or the sight of whitecaps but an underlying regularity of motion. We recognize some positive analogy between the two systems, and the negative analogy

into which it is woven),⁹⁰ which practices⁹¹ must themselves be the fo-

creates a tension that can invest the phenomena with new meaning. Metaphor causes us to "see" the phenomena differently and causes the meanings of terms that are relatively observational and literal in the original system to shift toward the metaphoric meaning. Terms such as "harmony," "resonance," and "pitch" come to be used with precise meanings derived from the wave model. Meaning is constituted by a network, and metaphor forces us to look at the intersections and interaction of different parts of the network. In terms of the metaphor, we can find and express deeper analogies between diverse phenomena; or, of course, in the case of bad metaphors we may find we are misled by them.

This interaction view of theoretical models is compatible with the thesis that observations are theory laden. It entails the abandonment of a two-tiered account of language in which some observational uses are irreducibly literal and invariant with respect to all changes of the language and content of explanatory theory. The interaction view sees all language, including the scientific, as dynamic. What is at one time theoretical may become observational (for example, "the earth is round"); and what is observational may become theoretical (for example, Francis Bacon's observations that "heat is a mode of motion").

M. ARBIB & M. HESSE, *THE CONSTRUCTION OF REALITY* 156-57 (1986); *see also* P. ROTH, *MEANING AND METHOD IN THE SOCIAL SCIENCES* 50 (1987) ("The ability of people to perceive similar stimulations as similar is the sine qua non of language acquisition. The relevant notion of similarity, it is important to note, is not defined by appeal to objects."). *See generally* W.V.O. QUINE, *WORD AND OBJECT* (1960) (discussing the implications of the idea that linguistic meaning is collated in terms of individuals' disposition to respond overtly to socially observable stimulations). Feyerabend takes a more radical stance: "Different forms of knowledge engender different ordering schemes." P. FEYERABEND, *FAREWELL TO REASON* 111 (1987); *see id.* at 104-127; *cf.* N. GOODMAN, *WAYS OF WORLDMAKING* x (1978) ("I think of this book as belonging in that mainstream of modern philosophy that . . . now proceeds to exchange the structure of concepts for the structure of the several symbol systems of the sciences, philosophy, the arts, perception, and everyday discourse.").

⁹⁰ As Wittgenstein says with respect to games, "[t]he game, one would like to say, has not only rules but also a *point*." L. WITTGENSTEIN, *supra* note 63, § 564, at 150. The point can be elaborated:

The meanings of words can only be understood if we understand the purpose or ends of the human activities of which words are part. Ignoring the different language games and their ends or purposes when seeking the meaning of a word is like trying to understand the brake lever in a locomotive without understanding what a locomotive does or what it is for.

J. DANFORD, *WITTGENSTEIN AND POLITICAL PHILOSOPHY* 85-86 (1978).

⁹¹ Understanding a practice means more than responding to behavioral prompts.

[T]o understand a practice is first of all to grasp "how to go on," and that involves neither merely acquiring a repertoire of routine reactions to routine situations, nor grasping a general proposition (let alone a systematic theory) logically independent of the practice activities. Rather, it involves learning a discipline or mastering a technique. It involves the capacity to relate different items in the world of the practice and to locate apparently new items in that world, to move around with a certain ease in the web of relationships created by it. This is interpretation, in the straightforward sense that it involves a sure grasp of the "meaning" of the various actions in the repertoire in question through their places in the practice, and a grasp of how the practice fits together, how it makes sense.

Postema, "Protestant" *Interpretation and Social Practices*, 6 *LAW AND PHIL.* 281,

cus of attention in any investigation of meaning.⁹²

Wittgenstein's remarks in *Philosophical Investigations* on the nature of "following a rule" are important here.⁹³ In a now much-discussed⁹⁴ section of *Philosophical Investigations*, Wittgenstein states the following:

This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.

It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shews is that there is a way of grasping a rule which is *not an interpretation*, but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases.

Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term "interpretation" to the substitution of one expression of the rule for another.⁹⁵

Some read Wittgenstein here to be making the claim that the application of rules is a hopelessly indeterminate affair,⁹⁶ because a rule can

303-04 (1987).

⁹² See D. BLOOR, WITTGENSTEIN: A SOCIAL THEORY OF KNOWLEDGE 183 (1983) ("The stream of life in a language-game involves the whole, turbulent, cross-cutting stream of interests that we come across among men."). Professor Bloor is one of many scholars who read the later Wittgenstein as a thoroughgoing relativist. For an interesting, albeit scathing, critique of this view of Wittgenstein, see Munz, *Bloor's Wittgenstein or the Fly Bottle*, 17 PHIL. SOC. SCI. 67 (1987). What attracts Munz's ire is not Bloor's reading of the later Wittgenstein; Munz thinks Bloor gets Wittgenstein right. What Munz attacks is the substance of the views Bloor attributes to Wittgenstein; Munz agrees with Bloor that the attributed views are Wittgenstein's. For different readings of Wittgenstein's views on epistemology, see T. MORAWETZ, WITTGENSTEIN & KNOWLEDGE: THE IMPORTANCE OF *ON CERTAINTY* 28 (1978); E. WOLGAST, PARADOXES OF KNOWLEDGE 64-68 (1977).

⁹³ See L. WITTGENSTEIN, *supra* note 63, §§ 201-238, at 81-88.

⁹⁴ See R. FOGELIN, WITTGENSTEIN 142 (2d ed. 1987); L. KATZ, BAD ACTS AND GUILTY MINDS 93-96 (1987); S. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE 55 (1982).

⁹⁵ See L. WITTGENSTEIN, *supra* note 63, § 201, at 81.

⁹⁶ See S. KRIPKE *supra* note 94, at 55 ("There can be no such thing as meaning anything by a rule. Each new application we make is a leap in the dark; any present intention could be interpreted so as to accord with anything we may choose to do. So

be made to fit a multiplicity of interpretations and, hence, can have no determinate meaning. Such a reading of Wittgenstein's remarks here misses the important point about the nature of rules and the conventionalist perspective.⁹⁷ Acting or judging in accordance with a rule is a practice;⁹⁸ it is a matter of having and giving reasons for action.⁹⁹ "Following a rule is analogous to obeying an order."¹⁰⁰ What makes one interpretation (a possible reading of the meaning) of an order stand out from all the other possible interpretations¹⁰¹ of the words is the training¹⁰² that precedes its issuance.¹⁰³ Like an order, a rule (norm) makes

there can be neither accord, nor conflict."); cf. R. FOGELIN *supra* note 94, at 155-85 (Fogelin contrasts his own skeptical reading of Wittgenstein with that of Kripke). For an assessment of the importance for jurisprudence of Wittgenstein's alleged skepticism, see Yablon, *Law and Metaphysics* (Book Review), 96 YALE L.J. 613, 633 (1987) (reviewing S. KRIPKE, *supra*) ("Probably the most important contribution Kripke's book makes to lawyers is to clarify the ways in which a rule may be indeterminate."). For an even more egregious misreading of Wittgenstein's remarks on rule-following, see L. KATZ *supra* note 94, at 93 (1987) ("It was Wittgenstein's contention that, in a certain sense, all rules are 'empty.'") Because it is not clear what Katz means to convey by "in a certain sense," the full extent of his misreading of Wittgenstein is unclear. What is clear is that Wittgenstein never held any position even remotely consistent with skepticism. In his first philosophical writings, Wittgenstein said the following about skepticism: "Skepticism is not irrefutable, but obvious nonsense . . ." L. WITTGENSTEIN, *NOTEBOOKS: 1914-1916* at 44 (2d ed. G.H. von Wright & G.E.M. Anscombe eds. G.E.M. Anscombe trans. 1979).

Kripke's reading of Wittgenstein has been rejected by many leading Wittgenstein scholars. See, e.g., G.P. BAKER & P.M.S. HACKER, *SKEPTICISM, RULES & LANGUAGE* 2 (1984) ("Kripke attributes to Wittgenstein a variety of views which he never held, and imposes upon his writings a variety of interpretations for which there is no license."); N. MALCOLM, *NOTHING IS HIDDEN* 154 (1986) ("From what remarks did Kripke get the impression that Wittgenstein was endorsing a form of philosophical skepticism?"); C. MCGINN, *WITTGENSTEIN ON MEANING* at xiv (1984) ("I believe that the objections I shall raise against Kripke's arguments do serve to underline the remoteness of Kripke's interpretation from Wittgenstein's real position.").

⁹⁷ See 2 G.P. BAKER & P.M.S. HACKER, *WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY: AN ANALYTICAL COMMENTARY ON THE PHILOSOPHICAL INVESTIGATIONS* 338 (1985) ("To the limited extent to which philosophical illumination can be derived from pigeon-holing global philosophical conceptions, it seems plausible to claim that Wittgenstein espoused conventionalism in his account of propositions of logic, mathematics and metaphysics.").

⁹⁸ See L. WITTGENSTEIN, *supra* note 63, § 202.

⁹⁹ See R. FLATHMAN, *THE PRACTICE OF RIGHTS* 14-15 (1976) ("As ordered, regular, patterned as it often is, rule-governed conduct involves human *action*; it involves reflection, intention, and decision on the part of the agents in question. Above all it involves having reasons for what one does. Following a rule requires discriminations among correct and incorrect, defensible and indefensible interpretations and applications of the rule to sets of circumstances.").

¹⁰⁰ L. WITTGENSTEIN, *supra* note 63, § 206, at 82.

¹⁰¹ "There is a gulf between an order and its execution. It has to be filled by the act of understanding." L. WITTGENSTEIN, *supra* note 63, § 431, at 128.

¹⁰² See S. LOVIBOND, *REALISM AND IMAGINATION IN ETHICS* 55 (1983) ("['We'] are a body of people who have all been subjected, as children, to a basically similar process of training in the use of our native language. And this training is, at any rate in the initial stages, manipulative in character: it essentially involves the exer-

sense only because there is a common history¹⁰⁴ and a set of reasons¹⁰⁵ for its place in the discourse.¹⁰⁶ Knowing the reasons or the point of the rule enables us to "go on"¹⁰⁷ and apply it to new¹⁰⁸ and unforeseen

cise of certain powers of control over the learner. To the extent that it eventually ceases to be manipulative, this happens because the learner comes in the course of his training to internalize the goal set before him by his trainers . . . (footnote omitted)).

¹⁰³ The same is true in the acquisition of language. See W.V.O. QUINE, *supra* note 89, at 5-8 (the initiate into a language is "pulled" toward the objectivity of language by the need to communicate).

¹⁰⁴ See M. HINTIKKA & J. HINTIKKA *supra* note 63, at 189 ("The thing to do in investigating whether someone is following the rule, and not merely acting in accordance with it, is to explore the broader behavioural and conceptual context in which the alleged rule-following takes place. . . . In the last analysis, it is only the common framework of modes of behaviour which he and I share that can provide the answer.").

¹⁰⁵ J.C. Nyiri characterizes the importance of Wittgenstein's critique of rule-following in this way:

Now the idea that human behaviour, human speech, and human thought are not, as it were, free-floating but are, on the contrary, constrained by rules, is in itself by no means necessarily a conservative idea. For rules have to be applied, and since they can neither determine their own application, nor be endlessly supported by rules of application, the phenomenon of rule-following seems to point directly to an underlying region of arbitrariness, of irregularity, to a level at which "everything could be justified," since whatever one does "can . . . be brought into accord with the rule," "can be interpreted as a consequence." But Wittgenstein's philosophical achievement was that he supplanted the conceptual framework within which this so to speak anarchistic conclusion can occur, by elaborating another, essentially different one. The basic concepts of the new framework are: training and behaviour, use, custom, institution, practice, technique, agreement. The following of a rule is a custom, an institution, embedded in the agreements, in the correspondences of behaviour within society. The question concerning the interpretation of any rule can be raised—though it need not be—and it should be answered by referring to agreements in behaviour.

Nyiri, *Wittgenstein's Later Work in Relation to Conservatism*, in A. KENNY, B. MCGUINNESS, J.C. NYIRI, R. RHEES & G.H. VON WRIGHT, *WITTGENSTEIN AND HIS TIMES* 44, 58 (B. McGuinness ed. 1982).

¹⁰⁶ As Hannah Pitkin puts it:

[L]earning the rules or principles intellectually is not equivalent to mastering the practice; for that would require knowing how to use and apply them in all the inarticulate detail of the practice. Thus, for example, a cookbook is of use only to someone who already knows how to cook. "It is the stepchild not the parent of the activity" of cooking.

H. PITKIN, *WITTGENSTEIN AND JUSTICE* 53 (1972) (quoting M. OAKESHOTT, *RATIONALISM* 119 (1962)).

¹⁰⁷ James Boyd White makes this point well in the context of constitutional interpretation. He says:

The mythic origins of the Constitution not only place the power of exposition naturally in the hands of the Court, they inform us as to the spirit and manner in which that power should be exercised. . . . [T]he instrument must be expounded as a kind of sacred and testamentary trust, with a recognition that it is not subject to revision by its Author and hence with an eye to purpose and structure and value, not to particular terms and details.

circumstances.¹⁰⁹

J.B. WHITE, WHEN WORDS LOSE THEIR MEANING 262 (1984).

¹⁰⁸ For an instructive study of the hermeneutical approach to applying rules to new circumstances, see B. HANSON, APPLICATION OF RULES IN NEW SITUATIONS: A HERMENEUTICAL STUDY (1977).

¹⁰⁹ The "point" or "reason" for a rule is not reducible to the intentions of a legislature or common law courts. It is sometimes the case but not always that intentions can tell us a great deal about meaning. Consider the following from E.D. Hirsch, Jr., the most persistent advocate of the "authorial intent" approach to problems of literary meaning:

Suppose, in drawing up a civil code, I write: "It shall be an offense for any automobile, bicycle, or any other wheeled vehicle, using the public road, not to come to a complete stop at a facing red light." Suppose, then, some years after the law has been enacted, there comes into use a new type of vehicle which moves on a stream of compressed air and is completely without wheels. Does the law apply to such a vehicle? Did my meaning embrace this unknown and unforeseen state of affairs? If, as a judge, I had to decide on the validity of this interpretation, I would certainly say, "Yes, the meaning is implied, and this new type of vehicle is embraced by the law." I would support my decision in this way: when the law stated "any other wheeled vehicle using the public road" the type that was willed was "any vehicle," the adjective "wheeled" being an unfortunate overspecification traceable to the fact that when the law was written all the vehicles using the public road were "wheeled." It can reasonably be inferred, therefore, that "all wheeled vehicles" embraces the meaning "all vehicles serving the function of wheeled vehicles within the purpose and intent of the law." No doubt, in my written opinion, I might recommend that the law be amended and made unambiguous, but I would have no reasonable doubt about my interpretation. I know that, since no law can predict all the future instances which will belong to the type, the conventions of lawmaking and law interpreting must include the notion of analogy. The idea of a law contains the idea of *mutatis mutandis*, and this generic convention was part of the meaning that I willed. The compressed-air vehicle was implied in my meaning, even though I had never conceived of a compressed-air vehicle. It belonged to the willed type.

E.D. HIRSCH, JR., VALIDITY IN INTERPRETATION 124-125 (1967) (footnote omitted). For a singularly complete working out of the intentionalist perspective in law, and one that leans heavily on Hirsch, see Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226 (1988).

Hirsch's orientation in matters of interpretation, at least as articulated in *Validity in Interpretation* and in *The Aims of Interpretation* was methodological. The methodology is the hypothetico-deductive method, an empiricist scientific methodology that was popular at the time Hirsch first advanced the authorial intention model for the interpretation of literary texts. For an example of this popular methodology, see C. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION AND OTHER ESSAYS IN THE PHILOSOPHY OF SCIENCE (1965).

Seven years before the publication of *Validity in Interpretation*, Gadamer's magnum opus, *Truth and Method*, appeared in German. Hirsch reviewed the German text in a leading philosophical journal in 1965. See Hirsch, *Truth and Method in Interpretation*, 18 REV. METAPHYSICS 488 (1965). There, Hirsch excoriated Gadamer for his failure to maintain what Hirsch regards as a basic distinction in hermeneutical theory, that between understanding a text and explicating its meaning. See *id.* at 496 ("With this highly insubstantial argument [that understanding always involves application] Gadamer has set out to topple one of the firmest distinctions in the history of herme-

It is here that we begin to see the outline of a framework for the

neutic theory, that between the subtilitas intelligendi and the subtilitas explicandi—the art of understanding a text and the art of making it understood by others.”). Hirsch scoffed at Gadamer’s project because it flies in the face of the “objectivity” guaranteed by the hypothetico-deductive method: “This identity of genre, pre-understanding, and hypothesis suggests that the much-advertised cleavage between thinking in the sciences and the humanities does not exist. The hypothetico-deductive process is fundamental in both of them, as it is in all thinking that aspires to knowledge.” *Id.* at 507.

Of course, much has changed since the 1960s. Empiricism in the philosophy of science has been replaced by arguments about paradigms, *see* T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10-11 (1970), and Hirsch has kept up with the times. In 1984, Hirsch declared that “I am now very much in agreement with Gadamer’s idea that application can be part of meaning.” Hirsch, *Meaning and Significance Reinterpreted*, 11 *CRITICAL INQUIRY* 202, 212 (1984). This gesture of recognition on the part of Hirsch is no mere softening of the tone of youthful enthusiasm: this concedes Gadamer’s argument and marks the abandonment of the claims for objectivity guaranteed by method. This giving of theoretical ground has not gone unnoticed by watchful observers. *See, e.g.,* L. SCHMIDT, *THE EPISTEMOLOGY OF HANS-GEORG GADAMER* 78-85 (1985) (discussing critically Hirsch’s claim for the primacy of authorial intent as the measure of the meaning of a text); Weinsheimer, *History and the Future of Meaning*, 9 *PHIL. & LITERATURE* 139, 142 (1985) (“Clearly the essay [*Meaning and Significance Reinterpreted*] marks a noteworthy shift in Hirsch’s own thought . . .”).

At the present juncture, it is not at all clear where Hirsch can take his theory, having conceded the fundamental point in Gadamer’s hermeneutics that understanding always involves application. It seems that Gadamer’s position encompasses (totalizes) Hirsch’s in a way that does not permit Hirsch to rebut the force of the Gadamerian critique of methodology. There are two recent secondary works that discuss Gadamer’s place in the hermeneutical tradition and the first considers the points canvassed here in the debate between Hirsch and Gadamer (it isn’t really a “debate” as such, because Gadamer has never addressed any of Hirsch’s criticisms). *See* G. WARNKE, *GADAMER: HERMENEUTICS, TRADITION AND REASON* (1987); J. WEINSHEIMER, *GADAMER’S HERMENEUTICS: A READING OF TRUTH AND METHOD* (1985). Weinsheimer’s book is a paragraph-by-paragraph exposition of *Truth and Method* whose author has had the benefit of discussions with Gadamer. In addition to assessing the place of Gadamer’s thought in the hermeneutical tradition, Warnke’s book covers the main points of criticism advanced by Hirsch. Additionally, she explicitly discusses the “Habermas-Gadamer” debate in a critical fashion.

An excellent critique of some of the analytical conundra in Gadamer’s hermeneutical theory is T. SEUNG, *STRUCTURALISM AND HERMENEUTICS* 198-212 (1982). *See also* D. HOY, *THE CRITICAL CIRCLE: LITERATURE, HISTORY, AND PHILOSOPHICAL HERMENEUTICS* vii (1978) (surveying the idea of the hermeneutic circle in recent hermeneutical and reader-centered literary theory); T. SEUNG, *SEMIOTICS AND THEMATICS IN HERMENEUTICS* 179-83 (1982) (discussing Gadamer’s notion of “application” in legal and theological contexts). For a general introduction to anti-foundationalist theory that has the virtue of unsurpassed clarity in exposition, *see* R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983).

There is little commentary available in English on the application of hermeneutical theory to law. Much of the available literature is canvassed in Williams, *Hermeneutics in Law*, 51 *MOD. L. REV.* 386, 395-402 (1988). For a comparison of the views of Gadamer and Dworkin, *see* Hoy, *Dworkin’s Constructive Optimism v. Deconstructive Legal Nihilism*, 6 *LAW & PHIL.* 321, 327-332 (1987). A recent, more general effort is P. GOODRICH, *READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES* 126-167 (1986). One can give only a guarded endorsement of Goodrich’s recapitulation of the history of hermeneutical theory from the time of the ancients to the present. For example, citing Gadamer, Goodrich states that the task herme-

construction of an alternative to the excluder analysis of good faith. To know what good faith means, we need to consider the purposes that the concept serves¹¹⁰ in legal discourse.¹¹¹ By disclosing the purposive ra-

neutics sets for itself is the recovery of a textual message that "is estranged from its original meaning and depends for its unlocking and communication upon hermeneutics." *Id.* at 133. Five sentences later in the same paragraph he states: "The task of hermeneutics is that of elaborating the rules or techniques that will uncover that original meaning and will reinstate it" *Id.* at 133-34. Missing from this representative passage is any mention that one of the important developments of Gadamer's hermeneutics is his break with the Romantic hermeneutics of Schleiermacher and Dilthey on just this point. Gadamer believes we can never know the original meaning of a text; we can only know its meaning in the present as it comes to us through tradition. See G. WARNKE, *supra*, at 9-10, 40-41. Here, Gadamer is in agreement with the view that the writing of history is a "retroactive re-alignment of the past." A. DANTO, *NARRATION AND KNOWLEDGE* 168 (1985). It is regrettable that Goodrich fails to note this and other important differences between Gadamer and his Romantic predecessors.

¹¹⁰ It has been argued that investigation of purpose is unnecessary because language has meaning apart from purpose:

[N]o lengthy essay is needed to underscore the importance of distinguishing questions about the purposes of specific legislators from general questions about the meanings of statutory words. The major source of confusion has been the belief that we must always guide our understanding of statutory words by an understanding of legislative purposes, as though we could not understand the words without prior knowledge of the purposes.

MacCallum, *Legislative Intent*, 75 YALE L.J. 754, 757 (1966) (footnote omitted). The argument in this Article is that we cannot understand the meaning of words apart from the practices that give those words meaning. See *supra* notes 89-92 and accompanying text. H.L.A. Hart's distinction between "core" and "penumbral" meaning shows how Professor MacCallum's criticism misses the mark.

If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behaviour be regulated by rules, then the general words we use—like 'vehicle' in the case I consider—must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case. Human invention and natural processes continually throw up such variants on the familiar, and if we are to say that these ranges of facts do or do not fall under existing rules, then the classifier must make a decision which is not dictated to him, for the facts and phenomena to which we fit our words and apply our rules are as it were *dumb*.

We may call the problems which arise outside the hard core of standard instances or settled meaning 'problems of the penumbra'; they are always with us whether in relation to such trivial things as the regulation of the use of the public park or in relation to the multidimensional generalities of a constitution. . . . And it follows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises. So if it is rational or 'sound' to argue and to decide that for purposes of this rule ["No vehicles in the park"] an aeroplane is not a vehicle, this argument must be sound or rational without being logically conclusive.

H.L.A. HART, *Positivism and the Separation of Law and Morals*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49, 63-64 (1983). As the distinction between core and penumbra shows, it is only because words have core (settled) meaning that they can be understood apart from any particular context. It is the settled contexts that give words their recognizable meaning. *But see* Schauer, *Formalism*, 97 *YALE L.J.* 509 (1988). Schauer supports his argument for the possibility of legal formalism by developing arguments for the possibility of linguistic formalism. *Id.* at 522-29. The central point in the argument is the claim that because words can be understood apart from context, that shows that context is not necessary for meaning. In other words, meaning is not contextually localized.

The example Schauer uses to make his point is an interesting choice: the word "Cat." Were shells to "wash up on the beach in the shape of C-A-T, I think of small house pets and not of frogs or Oldsmobiles precisely because those marks, *themselves*, convey meaning independently of what might have been meant by any speaker." *Id.* at 527-28 (emphasis added). If this were an argument against authorial intent, the view that word meaning is reducible to a mental occurrence in the mind of the speaker, the argument would be fine. But intentionalism is not Schauer's target: Schauer wants to show that literal meaning is possible so that he can get his legal formalism off the ground. But much more has to be shown before Schauer can get to where he wants to be.

Schauer cannot sustain his claim that the marks "C-A-T" convey meaning by themselves. Those marks are part of a language that must first be learned before it can be used. Without their incorporation into a system of speech, those marks have no meaning at all. The signs are given life in a language. Schauer claims to acknowledge this point when he admits that "there can never be *totally* acontextual meaning. The community of speakers of English is itself a context." *Id.* at 528. He goes on, however, to reiterate that "literal meaning is possible." *Id.* at 530. "Literal meaning" however, begs the question; it must come from somewhere, or exist independently. If it exists independently, the meaning of C-A-T could pre-exist the English, or any other, language, and Schauer's qualification on acontextual meaning is incorrect. If it comes from somewhere, how are we to determine *where* that somewhere is? *See* P.F. STRAWSON, *INDIVIDUALS: AN ESSAY IN DESCRIPTIVE METAPHYSICS* 20 (1959) ("A name is worthless without a backing of descriptions which can be produced on demand to explain its application.").

Schauer makes precisely the same move Wittgenstein criticizes in the first 27 sections of *Philosophical Investigations*. L. WITTGENSTEIN, *supra* note 63, at 2-13. He attempts to reduce the learning of language to ostensive definition. Noun words like "Cat" are learned by recognizing the object that bears the name. But the whole of language is not so acquired. Consider sensation talk. The meaning of "pain" cannot be grasped by the association of that word with an inner state. "Reports of pain are expressions of pain, not reports of feelings." R. ACKERMANN, *supra* note 69, at 160. The language of pain is interwoven with the behavioral contexts in which it is appropriate to say "She is in pain." It is true that "She is in pain" is understandable, but it is understandable because the contexts in which the word was learned are the ground upon which the meaning(s) of the word stands. Without the background of context, the marks on a page would have no meaning at all. For a discussion of the role of ostensive definition in Wittgenstein's thought, see 1 G.P. BAKER & P.M.S. HACKER, *WITTGENSTEIN: UNDERSTANDING AND MEANING* 163-314 (1980).

¹¹¹ While the purposive theory of interpretation has roots in antiquity, it is perhaps best known in the context of Lon Fuller's famous debate nearly thirty years ago with H.L.A. Hart over the nature of law. *See* Fuller, *supra* note 59, at 661-69. In the work of Karl Llewellyn, the principal architect of the Uniform Commercial Code project, the purposive theory of interpretation became the underlying interpretational approach to the Code. *See* W. TWINING, *supra* note 11, at 321 ("Llewellyn's teleological view of laws as instruments of policy found clear expression in the Uniform Commercial Code.").

tionale of legal discourse,¹¹² we can provide the analytical framework within which participants in that discourse are able to anchor claims about what the law requires in adjudicative contexts.

3. A Methodological Example

The argument for a purposive approach to problems of meaning can best be made by illustration. Consider whether a farmer is a "merchant" for purposes of Article Two.¹¹³ Section 2-201(2)¹¹⁴ of the

The first explicitly philosophical development of the theory of purposive interpretation in the context of Code jurisprudence was an article by Professor Julian B. McDonnell. Professor McDonnell states the gravamen of the approach this way:

By identifying as desirable a specified outcome for a class of factually divergent events, a statement of purpose attempts to summarize what the more complex statutory message seeks to achieve. Thus, a statement of purpose may have a "plumb-line" effect, guiding the development of Code case law along a given policy line.

McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 833 (1978) (footnote omitted).

The theory of purposive interpretation can be reduced to a four-step process that constitutes a methodology for resolving interpretive questions under the U.C.C. The elements of the process are:

1. Start with the statutory language and read it all as it stands with an eye to the underlying purpose or purposes and the relationship between them.
2. Look for articulation of purpose in the Official Comments.
3. Explore how the present statutory text varies from earlier drafts of the Code and from the treatment of the same subject in pre-Code law.
4. After considering statutory language, Official Comments, and historic context, in seriatum, examine these factors in combination for a coherent interpretation.

Id. at 853-54. For discussion of Llewellyn's approach to purposive interpretation, see Gedid, *supra* note 11, at 372 ("Llewellyn consciously included reason, purpose, and policy in each section as part of the major drafting technique in the Code. [This] was a manifestation of a more general realist theory of statutory interpretation.") (footnotes omitted). For an application of the purposive methodology to Article Nine priority problems, see Note, *Priority Contests Under Article 9 of the Uniform Commercial Code: A Purposive Interpretation of a statutory Puzzle*, 72 VA. L. REV. 1155 (1986).

¹¹² The "purposive rationale" is not coextensive with "authorial intent," see *supra* note 109. The author's intended meaning is but one element of a larger framework of inquiry. "The proper question is accordingly not 'what the writer intended,' as this question is usually meant—as if its answer were something other than an interpretation—but 'what this language by this speaker in this [present] context means.'" J.B. WHITE, *HERACLES' BOW* 101 (1985).

¹¹³ See McDonnell, *supra* note 111, at 801-09; see also S. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 45-57 (1985) (analyzing the farmer as "merchant" problem within a deductive framework). For a discussion of how the merchant's exception exemplifies Llewellyn's jurisprudence and its relationship to "Grand Style" judging, see Wiseman, *supra* note 11, at 529-38.

¹¹⁴ The applicable portion of Section 2-201 is as follows:

§ 2-201. Formal Requirements; Statute of Frauds

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or

Code, part of Article Two's Statute of Frauds, permits the enforcement of a contract for the sale of goods priced at \$500 or more between merchants notwithstanding the fact that one merchant has not signed a writing, provided that that merchant receives written confirmation of the contract sufficient against the sender, and she does not object to the contents of that confirmation within 10 days after she receives it. Is a farmer who orally agrees to sell her crop a "merchant" for purposes of Section 2-201(2)?

To answer this question, we need to know why the "merchant's exception" is part of Article Two's Statute of Frauds: we need (at least) to know the reason or purpose that motivated the drafters to include it in the Code. As it turns out, there is a history to the exception that tells us much about what it means. In a note to his draft of the Uniform Revised Sales Act,¹¹⁵ which Article Two superseded, Llewellyn justified the merchant's exception with the following example:

A farmer has a small farm and apple orchard, marketing three to six hundred bushels a year. With respect to the warranty of merchantability under Section 38 he is a merchant, since his experience and position necessarily charge him with packing in full accordance with what the description means in the market, as also with the truthfulness of any labelling of his packages. But Section 20(b), which incorporates into the contract additional minor terms stated in a "confirmation," depends upon the established practice of regular merchants to attend and reply promptly to correspondence. No such practice exists among small farmers, and no material term which is adverse to such a farmer is to be incorporated into the contract on the basis of that section. His occupation does not hold him out as familiar with any practice "of the kind involved" or as having the general knowledge or

defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

U.C.C. § 2-201(1) & (2) (1988).

¹¹⁵ *UNIFORM REVISED SALES ACT*, (Proposed Final Draft No. 1, 1944), *reprinted in* II *UNIFORM COMMERCIAL CODE DRAFTS* 1 (1984) (compiled by E. Kelly).

skill in that aspect of a person in trade. By contrast, a large-scale farmer who is using standard business marketing methods is with respect to all aspects of the transactions concerned a person in trade and therefore a "merchant."¹¹⁶

Not all farmers are merchants for all purposes.¹¹⁷ Whether a farmer is a merchant depends both upon the context of the question (packing, description, or the addition of terms) and the farmer's degree of business sophistication.¹¹⁸ The purpose of the merchant's exception is to impose, upon farmers having the requisite sophistication to know its meaning, a duty¹¹⁹ to respond to a confirmatory memorandum containing additional terms. Only if the farmer is within the class of business persons having the requisite sophistication will the confirmatory writing bind her. In short, no mechanical answer exists to the question: "Are farmers merchants with respect to Section 2-201(2)?" In order to determine this answer, we must determine the purpose of the exception.

The merchant's exception illustrates that understanding a concept's meaning requires understanding the concept's role and function in some way of life.¹²⁰ Through identification of the purposes our concepts serve in our way of life¹²¹—or in a discourse¹²²—we come to un-

¹¹⁶ *Id.* § 7 comment, illustration 2, reprinted in II UNIFORM COMMERCIAL CODE DRAFTS, *supra* note 115, at 104-5.

¹¹⁷ See Dolan, *The Merchant Class of Article 2: Farmers, Doctors, and Others*, 1977 WASH. U.L.Q. 1, 24 ("While farmers *can* be merchants, not all farmers *are* merchants.").

¹¹⁸ See McDonnell, *supra* note 111, at 809.

¹¹⁹ Of course, there is no "duty" to respond to the confirmatory memorandum, only consequences for failure to do so. See U.C.C. § 2-201(2) comment 3 (1988) ("The only effect, however, is to take away from the party who fails the answer the defense of the Statute of Frauds . . .").

¹²⁰ See J. KOVESI, *supra* note 87, at 25 ("There is a point in bringing certain features and aspects of actions and situations together as being relevant, and by removing this point, by removing the 'evaluative element,' we are not left with the same facts minus evaluation. Standards, needs and wants also enter into the formation of terms that we usually call descriptive terms. What makes a term descriptive is not the lack of these but the point of view from which we organize these and other elements into concepts."); see also R. PETERS, *THE CONCEPT OF MOTIVATION* 4 (1960) ("So the usual way of explaining an action is to describe it as an action of a certain sort by indicating the end which Jones had in mind. We therefore ask the 'why' question in a more specific form. We ask what was his reason for doing that or what was the point of it.")

¹²¹ An action cannot be intelligible unless it can be found to be such in a way of life or a practice. Thus, as Alasdair MacIntyre argues:

[T]he concept of an intelligible action is a more fundamental concept than that of an action as such. Unintelligible actions are failed candidates for the status of intelligible action; and to lump unintelligible actions and intelligible actions together in a single class of actions and then to characterize action in terms of what items of both sets have in common is to make the mistake of ignoring this. It is also to neglect the central importance of

derstand which individual facts are significant and which are not.¹²³

the concept of intelligibility.

A. MACINTYRE, *AFTER VIRTUE* 205 (2nd ed. 1984).

Also important is Mark Okrent's reading of the pragmatic elements in Heidegger's analysis of intentionality. In the course of discussing Heidegger's analysis of tools, Okrent draws a distinction between a tool and an artifact. To African bushmen, a Coke bottle is taken to be a weapon, a rolling pin, or a hammer. The bushmen fail to grasp the role of the bottle as a tool meeting the specialized need of holding a soft drink because they lack our "equipment context"; they do not understand what the bottle *is*. From this example, Okrent makes the following generalization:

Every object is, strictly, capable of an indefinite number of applications, as demonstrated by the Bushmen's use of the bottle. Nonetheless, there is a "correct" way to understand (that is, to use) most implements and the vast majority of implements that are also artifacts: the way in which these tools function within shared patterns of use and, if they were made, the way in which they were designed to be used. (These two criteria of correctness can, on occasion, conflict.) This correct way to be used defines what sort of tool a given tool is.

M. OKRENT, *HEIDEGGER'S PRAGMATISM: UNDERSTANDING, BEING, AND THE CRITIQUE OF METAPHYSICS* 47 (1988).

¹²² "The judge who begins the trial proceedings with 'Batter up!' has said nothing true or false though he has said something which could be meaningful in another context." Smith, *Gadamer's Hermeneutics and Ordinary Language Philosophy*, 43 *THOMIST* 296, 303 (1979).

¹²³ Wittgenstein, Gadamer, and Winch all recognize that the "meaning" of concepts is embedded in social relations.

To understand a way of life . . . is to be able to individuate actions as the participants do, and to individuate actions one must place them in the larger social context in which they are situated. Thus to identify the act of plagiarism, one must first know how intellectual life is constituted in contemporary society, *what its point or purpose is*, and why contributions to that activity are prized by participants. And once "plagiarism" has been placed in this context, one has already gone some distance toward explaining why the activity is condemned by participants.

W. CONNOLLY, *POLITICS AND AMBIGUITY* 61 (1987) (emphasis added). *But see* 1 W. RUNCIMAN, *A TREATISE ON SOCIAL THEORY: THE METHODOLOGY OF SOCIAL THEORY* 230 (1983) ("Behind the methodological difficulties in framing and testing a descriptive theory lie, once more, the philosophical problems of justifying the possibility of such a theory at all . . .").

Clifford Geertz has applied this view to anthropology and made it the centerpiece of his methodology.

If anthropological interpretation is constructing a reading of what happens, then to divorce it from what happens—from what, in this time or that place, specific people say, what they do, what is done to them, from the whole vast business of the world—is to divorce it from its applications and to render it vacant. A good interpretation of anything—a poem, a person, a history, a ritual, an institution, a society—takes us into the heart of that of which it is the interpretation. When it does not do that, but leads us instead somewhere else—into an admiration of its own elegance, of its author's cleverness, or of the beauties of Euclidean order—it may have its intrinsic charms; but it is something else than what the task at hand—figuring out what all that rigamarole with the sheep is all about—calls for.

C. GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE*

The purposive analysis of legal concepts is most useful in discourse

INTERPRETATION OF CULTURES 3, 18 (1973); see C. GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 16 (1983). As an example of other works emphasizing the importance of social interaction, see G. MARCUS & M. FISCHER, *ANTHROPOLOGY AS CULTURAL CRITIQUE: AN EXPERIMENTAL MOMENT IN THE HUMAN SCIENCES* (1986).

The attraction of interpretive anthropology at the moment is precisely its sophisticated inquiry into the nature of ethnographic reporting, which is not only the basis of all anthropological knowledge, pursued in whatever theoretical direction, but also one palatable source of inspiration for other social sciences in resolving their own predicaments, stimulated by the contemporary crisis of representation; historically, anthropology has been near to them in institutional definition as a social science, but far in the singularity of its subject and method.

Id. at 27; see also R. ULIN, *UNDERSTANDING CULTURES* 148 (1984) ("Culture is embodied in the medium of ordinary language communication, or what Clifford Geertz refers to in *The Interpretation of Cultures* as ordered systems of meaning and symbols."); Rorty, *How to Interpret Actions*, in *RATIONALITY, RELATIVISM AND THE HUMAN SCIENCES* 81, 89 (J. Margolis, M. Krausz, & R.M. Burian eds. 1986) ("[T]he intelligibility of individual intentions rides on publicly shared meanings implicit in social practices.").

In the writings of Jürgen Habermas, who himself urges a dialogical approach to normative and political inquiries, one finds the greatest challenge to linguistic theories of sociality. In his early work Habermas, while enamored of the positive contribution made by hermeneutics as against positivism, criticized hermeneutics for its lack of an explicit social theory. See J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 171 (J. Shapiro trans. 1971) ("[U]nderstanding must combine linguistic analysis with experience. Without the factors compelling this peculiar combination, the circular development of the interpretive process would be caught in a vicious circle.").

In Gadamer's hermeneutics, truth is the product of dialogue. Habermas rejects this notion in favor of a "consensus" theory of truth, in which truth emerges as the product of undistorted communication:

The consensus-producing power of argument rests on the supposition that the language system in which the recommendations requiring justification, the norms, and the generally accepted needs cited for support are interpreted, is appropriate. . . . We call appropriate that language of morals which permits determinate persons and groups, in given circumstances, a truthful interpretation both of their own particular needs and more importantly of their common needs capable of consensus. The chosen language system must permit those and only those interpretations of needs in which the participants in the discourse can make their inner-natures transparent, and know what they really want. . . . By virtue of its formal properties, practical discourse must guarantee that the participants can at any time alter the level of discourse and become aware of the inappropriateness of traditional need interpretations; they must be in a position to develop that language system which permits them to say what they want under given conditions with a view to the possibility of changing conditions, and to say—on the basis of universal consensus—what they ought to want.

J. HABERMAS, *WAHREITSTHEORIEN*, quoted and translated in T. MCCARTHY, *THE CRITICAL THEORY OF JÜRGEN HABERMAS* 316 (1978). For some of Habermas' direct comments on Gadamer, see Habermas, *A Review of Gadamer's Truth and Method*, in *UNDERSTANDING AND SOCIAL INQUIRY* 335, 335-363 (F. Dallmayr & T. McCarthy eds. 1977). For an assessment of the importance for legal theory of the Habermas-Gadamer debate, see Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist*

methodology, and it marks a significant advance beyond the excluder analysis. By identifying the role and function of good faith in the discourse of commercial law, we can unify the many contexts¹²⁴ in which good faith has meaning. The meaning of good faith can never be exhausted in any one of its instances, nor is any particular instance uniquely illustrative¹²⁵ or paradigmatic.¹²⁶ This should be seen as a limitation neither of the purposive methodology nor of the concept of good faith: what is true of good faith is true of all concepts. As the future unfolds, new states of affairs present themselves. The link between these new contexts and the old can be discerned only through the continuing development of our practices and the language-games that constitute them. The purposive analysis affords us the tools with which to make sense of these new and unforeseeable circumstances.

B. *Reconstructing the Concept of Good Faith*

Using good faith as a normative first principle of commercial relations requires that, so far as possible, it be given substantive content. The reconstruction of good faith advanced here does not proceed from an *a priori* axiological perspective,¹²⁷ which is then read into the con-

Perspectives, 58 S. CAL. L. REV. 136, 152-64 (1985).

¹²⁴ The relationship among the set of circumstances that constitute the extension of the concept "good faith" is one of "family resemblance." See L. WITTGENSTEIN, *supra* note 63, §§ 66-67 at 31-32 (stating that the reason we call so many different activities "games" is because they share a network of overlapping similarities). The best discussion of Wittgenstein's notion of "family resemblance" is Bambrough, *Universals and Family Resemblances*, in WITTGENSTEIN: THE PHILOSOPHICAL INVESTIGATIONS 186, 186-204 (G. Pitcher ed. 1968) (claiming Wittgenstein solved the problem of universals). But see Dilman, *Universals: Bambrough on Wittgenstein*, 79 PROC. ARISTOTELIAN SOC'Y 35 (1979) (claiming that the generality of our words does not mirror any feature of reality independent of our language).

¹²⁵ This is not to say that "good faith" is an essentially contested concept. "Such concepts 'essentially involve endless disputes about their proper uses on the part of their users.'" W. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10 (2d. ed. 1983) (quoting Gallie, *Essentially Contested Concepts*, in *THE IMPORTANCE OF LANGUAGE* 121, 123 (M. Black ed. 1962)).

¹²⁶ For the presentation of a model of legal reasoning with an emphasis on paradigmatic cases, see Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1334-41 (1969).

The model requires that anyone who wishes to use a statute in the course of legal reasoning give what he believes to be the paradigm case or cases covered by the statute. "Presenting a paradigm case" does not mean divining the "true meaning of the statute—the model makes no such demand—but only presenting a case as to which it is asserted that, whatever else *may also* be covered by the statute, this case *is*. The party must then argue that the instant case is or is not significantly different from *any* such paradigm case.

Id. at 1334.

¹²⁷ The concept of good faith already is embedded in the discourse and is not

cept as its content.¹²⁸ *A priori* efforts at "constructive interpretation"¹²⁹ suffer the fate of all external forms of argument: there is no way to translate external perspective into legislative value choice. External perspectives do not explain the law, they merely serve as a basis for critiquing it. In the specific example of good faith, competing conceptions of good faith can lay claim to validity only to the extent that they are consistent with the textual, discursively situated materials that they purport to explain. Again, the question that bears repeating is: "Does the theory make sense of the data?"¹³⁰ The perspective on good faith advanced here is valid insofar as it is implicit in the legal materials that are the subject of inquiry. The argument here does not impose an external normative view; rather, it reveals a normative perspective on commercial conduct immanent in the discourse under scrutiny.

Reconstruction of the meaning and content of the concept of good faith begins by considering the Code's definition of, and comments on, the term. Second, we move to the Code's statutory history and the treatment of good faith in pre-code law. At that point, we consider the Code's unique structure for supplementing its substantive provisions: the drafters' incorporation into the Code of an explicit invitation to judicial expansion of the Code's substantive provisions in the light of developing commercial practices. It is this internal mandate for substantive enhancement of Code norms that provides the vehicle for reconstructing the concept of good faith. This section ends with a discussion of the theoretical implications of the argument for statutory interpretation.

1. The Good Faith Standard: Text and History

Section 1-203 states, "Every contract or duty within [the U.C.C.] imposes an obligation of good faith in its performance or enforce-

imposed as a regulative ideal.

¹²⁸ This is what Dworkin recommends for judges in interpreting statutes. In reading statutes, judges should interpret them in a manner that best contributes to a principled construction of law (whether legislatively or judicially created). See R. DWORKIN, *supra* note 12, at 313-14, 337-38. This approach to statutory interpretation is antithetical to the perspective here advanced insofar as, for Dworkin, the construction of principle is wholly external to legal discourse. I believe that just the opposite is true, and that the best efforts at interpretation, particularly of statutes, are internal, immanent ones. The severity of Dworkin's break with longstanding conceptions of the relationship between legislatures and courts has invited the characterization of his approach as "almost utopian." See Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 719 (1987).

¹²⁹ See R. DWORKIN, *supra* note 12, at 52-53.

¹³⁰ See *supra* text accompanying note 63.

ment.”¹³¹ Section 1-201(19) defines good faith as “honesty in fact in the conduct or transaction concerned.”¹³² This spare definition found in Article One is expanded in Article Two, specifically in Section 2-103(1)(b), which imposes upon merchants¹³³ the additional requirement of observing “reasonable commercial standards of fair dealing in the trade.”¹³⁴

Commentators have said that the general requirement of good faith articulated in Article One sets a “subjective” standard,¹³⁵ while the additional requirement in Article Two of “observance of reasonable commercial standards of fair dealing” creates an “objective” standard.¹³⁶ “Honesty in fact,” according to the argument, is simply the “pure heart, empty head” test of good faith.¹³⁷ This subjective standard

¹³¹ U.C.C. § 1-203 (1987).

¹³² *Id.* § 1-201(19).

¹³³ One court has gone so far as to apply to banks the Article Two standard of good faith for merchants. *See Branch Banking & Trust Co. v. Creasy*, 44 N.C. App. 289, 293, 260 S.E.2d 782, 784 (1979) (“Surely, the standards of good faith of a bank should be no less than those of a merchant.”), *rev’d on other grounds*, 301 N.C. 44, 269 S.E.2d 117 (1980); *see also* *Reid v. Key Bank of S. Me.*, 821 F.2d 9, 15 n.2. (1st Cir. 1987) (stating that good faith arguably applies to banks under Article 2).

¹³⁴ U.C.C. § 2-103 (1987). The additional requirement of observance of reasonable commercial standards is imposed by Section 3-419(3) (“Conversion of Instrument”), Section 5-109 (“Issuer’s Obligation to Its Customer”), Section 7-404 (“No Liability for Good Faith Delivery Pursuant to Receipt or Bill”), Section 8-318 (“No Conversion by Good Faith Conduct”), and Section 9-318 (“Modification of Contract After Notification of Assignment”).

¹³⁵ *See* Aronstein, *Good Faith Performance of Security Agreements: The Liability of Corporate Managers*, 120 U. PA. L. REV. 1, 31 (1971) (“Good faith [as] defined in § 1-201(19) . . . [has] been historically construed as applying only to the actor’s subjective state of mind.”); Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 812 (1958) (describing the test of good faith in Section 1-201(19) as a “subjective” test, sometimes known as the rule of “the pure heart and empty head”); Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 674 (1963) (commenting on the meaning of good faith under the Code in light of the drafting history of Section 1-203); Lawrence, *The Prematurely Reported Demise of the Perfect Tender Rule*, 35 U. KAN. L. REV. 557, 571 (1987) (“Good faith is a subjective term meaning ‘honesty in fact in the contract or transaction concerned.’”); Mooney, *Old Contract Principles and Karl’s New Code: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 247-49 (1966) (“[A] more meaningful statement of the commercial good faith principle appears in the comment to the section which imposes the general obligation of good faith [U.C.C. § 1-203]”); Note, *Uniform Commercial Code—Sections 1-201(19), 2-103(1)(b), 9-307(1)—Good Faith Requirement for Buyer in Ordinary Course—Sherrock Bros. v. Commercial Credit Corp.*, 14 B.C. INDUS. & COMM. L.J. 343, 350 (1972) (“[T]he draftsmen intended that the subjective definition of good faith was to apply generally—to all transactions covered by the Code—while the objective definition was to be used only when a particular provision of the Code called for its application.”).

¹³⁶ Farnsworth, *supra* note 135, at 675.

¹³⁷ *See* Note, *Good Faith Under the Uniform Commercial Code*, 23 U. PITT. L. REV. 754, 756 (1962) (“The Code’s definition of ‘good faith’ is an exemplification of the subjective test of honesty in fact which is sometimes referred to as the rule of ‘the

has been in force for over a century, ever since courts abandoned their brief experiment with an "objective" test of good faith.¹³⁸

The 1950 draft of the Code did not contain a separate standard of good faith for merchants. There, good faith was defined in Article One as both honesty in fact and "observance by a person of the reasonable commercial standards of any business or trade in which he is engaged."¹³⁹ By 1952, when adoption of the Code first was proposed, the "reasonable commercial standards" clause was gone. At the urging of the American Bar Association's Section of Corporation, Banking, and Business Law, the "objective" portion of the good faith standard had been deleted. The reason the committee gave for the deletion was that, to the average person or lawyer, good faith meant nothing more than honesty.¹⁴⁰ As the committee saw it, any additional language of objec-

pure heart and empty head.'"). See generally Eisenberg, *Good Faith Under the Uniform Commercial Code—A New Look at an Old Problem*, 54 MARQ. L. REV. 1, 17 (1971) (stating that while framing universal definitions and standards of good faith is "probably an impossible task," it is "the *concept* of the term which must always be stressed and applied . . .").

¹³⁸ This "objective" test was first articulated in *Gill v. Cubitt*, 3 B. & C. 466, 107 Eng. Rep. 806 (1824) (holding that a transferee of a bill of exchange could not be a "holder in due course" if the transfer was made "under circumstances which ought to have excited the suspicion of a prudent and careful man"). As Professor Littlefield has noted:

This result, of course, set an objective standard. It increased the burden of the purchaser in proving protected status. It obviously discouraged a policy of free flow of paper. As such, the case presents a threat to typical purchasers of commercial paper such as banking interests. They would be required to act as "prudent men."

Littlefield, *Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test*, 39 S. CAL. L. REV. 48, 51 (1966); see also Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1065 n.22 (1954) (discussing *Gill v. Cubitt* and the history of the distinction between "subjective" and "objective" good faith in the law of negotiable instruments). The objective standard of good faith was abandoned in the United States in *Murray v. Lardner*, 69 U.S. (2 Wall) 110 (1864).

¹³⁹ U.C.C. § 1-201(18) (1950) stated that "[g]ood faith" means honesty in fact in the conduct or transaction concerned. Good faith includes observance by a person of the reasonable commercial standards of any business or trade in which he is engaged."

¹⁴⁰ The committee's reasoning was as follows:

[W]e submit that as presently defined "good faith" involves not one or two concepts but at least four graduated but quite different concepts. They are:

- (1) Honesty in fact.
- (2) Commercial decency.
- (3) Observance of reasonable commercial standards.
- (4) Observance of presently existing and established trade practices.

This committee believes it is a serious mistake to include or to run the risk of including all of the concepts in the one term "good faith." Although we recognize that there are some court decisions that have added to "honesty in fact" in the meaning of "good faith" the requirement to observe some commercial standards of conduct, nevertheless we believe that to the average person and the average lawyer, "good faith" signifies

tivity was at best unnecessary and at worst potentially misleading. By 1956, when the Law Revision Commission for the State of New York had completed its review of the proposed Code, the objective standard for merchants had found its way back into Section 2-103 but nowhere else. The Article One definition of good faith, which applies throughout the Code, was limited to the "honesty in fact" definition.¹⁴¹

It is clear from all of the published reports on the drafting history of the Code's good faith provisions that at no time did the drafters, nor any of the groups commenting on proposed drafts of the Code,¹⁴² pay any attention to the role of good faith performance or enforcement in Article Nine.¹⁴³ In fact, as the reports indicate, the only areas of concern with respect to an objective test of good faith were (1) the standards for the conduct of merchants under Article Two and (2) the test in Article Three for transferees of negotiable instruments.¹⁴⁴ In short, the drafters did not consider the good faith standard's effect, generally, under Article Nine, nor its effect, specifically, on the evaluation of secured creditor behavior. At best, the drafting history of the Code's good faith provisions evinces a concern with problems unrelated to secured

primarily "honesty." Assuming, however, that within the term there should be added to "honesty" some meaning of "commercial decency" the phrase "observance of reasonable commercial standards" carries with it the implication of usages, customs or practices. If this is true there immediately arises the very difficult problem of *what* usages, customs and practices are those intended to be included in the standard. Any lawyer who has ever attempted to prove what a usage or custom is will immediately recognize how litigious such a standard could grow to be. More serious still is the possibility that "reasonable commercial standards" could mean usage, customs or practices existing at any particular time. This could have the very bad effect of freezing customs and practices into particular molds and thereby destroy the flexibility absolutely essential to the gradual evolution of commercial practices,—a result which the Code draftsmen certainly would never desire.

Committee on the Proposed Commercial Code, Section on Corporation, Banking and Business Law of the American Bar Association, *Report: Developments Since the September 1949 Report*, 6 BUS. LAW. 119, 127-28 (1951).

¹⁴¹ The Report of the Commission evinces a preoccupation with the *Gill v. Cubitt* problem. See STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1956, N.Y. LEGISLATIVE DOC. NO. 65 at 27-28 (1956) ("In support of the provision it was urged that Section 3-302(1)(b) does not embody the rule of *Gill v. Cubitt* and that the criterion of 'reasonable commercial standards' is in fact applied by the courts under the Negotiable Instruments Law in determining good faith.").

¹⁴² See *supra* notes 139-41 and accompanying text (discussing the influence of the American Bar Association's Committee on Corporation, Banking and Business Law as well as that of the New York Law Revision Commission).

¹⁴³ This fact notwithstanding, it is also unclear what was agreed upon with respect to a substantive standard of good faith. See Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619, 623 ("The drafting history of the Code does not indicate conclusively which interpretation of the good faith provision was intended.").

¹⁴⁴ See U.C.C. § 3-302(1)(b) (1987).

transactions and an effort to reach an accommodation among competing interests for a standard that did not resurrect abandoned common law conceptions of good faith.

The comments to Section 1-201(19) state something that accounts of the drafting history almost always fail to mention: the definition of good faith in Section 1-201(19) is a minimal standard.¹⁴⁵ As the comment states: " 'Good faith', whenever it is used in the Code, means *at least* what is here stated."¹⁴⁶ This suggests that the definition states a necessary, but not a sufficient, condition for a finding of good faith. To act in good faith is, at a minimum, to act honestly in the transaction. One who acts honestly is not necessarily acting in good faith; contrariwise, one who acts dishonestly is necessarily acting in bad faith. Not all acts in bad faith are dishonest, but all acts of dishonesty are acts in bad faith.

Even if the definition of good faith states only a minimal standard, how, if at all, can that minimal definition be supplemented? Does the Code provide any opening for enhancement of this bare-bones statement of the duty of good faith? The Official Comments¹⁴⁷ to the Code instruct courts to develop its provisions "in the light of unforeseen and new circumstances and practices."¹⁴⁸ As the review of the legislative and drafting history of the good faith standard shows, the drafters of the Code did not contemplate the regulation of secured creditor conduct as a circumstance in which good faith was to play a substantive, normative role. In the absence of specific intent with respect to the normative evaluation of secured creditor conduct, no *in principle* argument exists for limiting expansion of the substantive content of good faith in the secured transactions context.

As the preceding discussion illustrates, the specific content of a reconceptualized good faith standard cannot come from within the Code's four corners; it must come from outside. The Code provides for

¹⁴⁵ But see Campbell, *Contracts Jurisprudence and Article Nine of the Uniform Commercial Code: The Allowable Scope of Future Advance and All Obligations Clauses in Commercial Security Agreements*, 37 HASTINGS L.J. 1007, 1036 (1986) ("The Comments state that 'good faith' . . . means *at least* [honesty], necessarily implying that the term may mean more." (footnote omitted)).

¹⁴⁶ U.C.C. § 1-201(19) comment 19 (1987) (emphasis supplied).

¹⁴⁷ For commentary on the legal and pragmatic effects of Code comments, see Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 598-606. At least one court of appeals rejects the contention that the comments can restrict the statutory language of the Code. See *Burk v. Emmick*, 637 F.2d 1172, 1175 n.5 (8th Cir. 1980) (comments cannot impose restrictions unwarranted by statutory language). But see *Szabo v. Vinton Motors, Inc.*, 630 F.2d 1, 4 (1st Cir. 1980) (comments without force of law, but helpful in explaining Code; comments promote uniformity of construction).

¹⁴⁸ U.C.C. § 1-102 comment 1 (1987).

the expansion of its substantive provisions by resort to non-Code law. Section 1-103 states this directly:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.¹⁴⁹

Further, comment 3 to Section 1-103 states that the text's list of supplemental sources is "merely illustrative." There is simply no limit, save explicit displacement, to the sources for supplementation and expansion of substantive Code provisions.

The standard of good faith set forth in Section 205 of the Restatement (Second) of Contracts¹⁵⁰ stands in marked contrast to the subjective standard of good faith articulated in Section 1-201(19). Section 205 provides an objective standard that goes well beyond the Code's standard: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."¹⁵¹

The comments to Section 205 articulate several of the purposes that "good faith" is intended to serve. Here we reach the nub of the reconceptualization of good faith in the context of secured transactions. In the performance and enforcement of contracts, good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."¹⁵² In the context of secured transactions, the justified expectations of the parties become a test of the good faith of each.¹⁵³ If one of the parties leads the other to

¹⁴⁹ *Id.* § 1-103.

¹⁵⁰ As Summers himself states, the standards of good faith under "the Uniform Commercial Code and the RESTATEMENT SECOND [sic] diverge significantly." Summers II, *supra* note 22, at 813. For a brief discussion of the relationship among the common law duty of good faith, good faith under the Code, and the Restatement (Second) conception of good faith, see J. CALAMARI & J. PERILLO, *CONTRACTS* §11-38, at 508-12 (3d ed. 1987).

¹⁵¹ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

¹⁵² *Id.* § 205 comment a.

¹⁵³ This construction of the obligation of good faith in the secured transactions context as the fulfillment of the justified expectations of the debtor is consistent with the broader body of contract law. See 3 A. CORBIN, *CORBIN ON CONTRACTS* § 570 (Kaufman Supp. 1984).

If the purpose of contract law is to enforce the reasonable expectations of the parties induced by promises, then at some point it becomes necessary for courts to look to the substance rather than to the form of the agreement, and to hold that substance controls over form. What courts are doing here, whether calling the process "implication" of promises, or interpreting the requirements of "good faith," as the current fashion may be, is

believe that a certain state of affairs or understanding of the parties' relationship exists, and that expectation is reasonable, good faith requires that those expectations be respected in the enforcement of rights under the security agreement.

Beyond the justified expectations of the debtor, the *Restatement (Second) of Contracts*'s Section 205 mentions that additional purposes served by the concept of good faith—community standards of decency, fairness, and reasonableness¹⁶⁴—have an important role to play in any evaluation of secured creditor conduct. Take the purpose of "community standards." The word "community" should not be read to mean only the "community at large" when we speak of "community standards of reasonableness." For instance, whether it is "reasonable" for a

but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations. When the court "implies a promise" or holds that "good faith" requires a party not to violate those expectations, it is recognizing that sometimes silence says more than words, and it is understanding its duty to the spirit of the bargain is higher than its duty to the technicalities of the language.

Id.; see also E. FARNSWORTH, *supra* note 21, at 536 ("When parties make a bilateral contract, they exchange promises in the expectation of a subsequent exchange of performances. Although the consideration for each party's promise is the other party's return promise, each party enters into the transaction only because he expects that the return promise will be performed."); Burton, *supra* note 24, at 371 ("[T]he courts employ the good faith performance doctrine to effectuate the intentions of the parties, or to protect their reasonable expectations."); Dugan, *Standardized Forms: Unconscionability and Good Faith*, 14 NEW ENG. L. REV. 711, 745-51 (1979) ("Good faith" performance under standardized contracts should be construed to limit surprise.); House, *Good Faith Rejection and Specific Performance in Publishing Contracts: Safeguarding the Author's Reasonable Expectations*, 51 BROOKLYN L. REV. 95, 126-27 (1984) ("The implied duty of good faith should be interpreted so as to give effect to the reasonable expectations of the parties when the contract is signed."); Murray, "Basis of the Bargain": *Transcending Classical Concepts*, 66 MINN. L. REV. 283, 320 (1982) ("The need for 'good faith' is clear. If it was [sic] not present, commercial transactions would be seriously impeded by the resulting lack of trust. Breaking a promise, or not intending to honor it when initially setting it forth, frustrates a reasonable expectation and is not in good faith." (footnote omitted)); Reiter, *supra* note 23, at 714 ("A substantial element of what constitutes reasonable expectations is 'good faith,' . . ."); Reiter & Swan, *Contracts and the Protection of Reasonable Expectations*, in STUDIES IN CONTRACT LAW 1, 11 (B. Reiter & J. Swan eds. 1980) ("[T]hroughout the law of contract, a striving to protect reasonable expectations is visible. . ."). For an argument that the satisfaction of reasonable expectations is a basic principle of justice, see Farnsworth, *Meaning in the Law of Contracts*, 76 YALE L.J. 939, 951 (1967) ("The object of contract law is to protect the justifiable expectations of the contracting parties themselves . . ."); Kaufman, *The Scientific Method in Legal Thought: Legal Realism and the Fourteen Principles of Justice*, 12 ST. MARY'S L.J. 77, 89-93 (1980) (stating that the first of fourteen principles of justice is that "No One Should Profit by His Own Wrong (i.e. by Defeating the Reasonable Expectations of Others).").

¹⁶⁴ RESTATEMENT (SECOND) OF CONTRACTS § 205 comment a (1981) ("[Good faith] excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.").

secured creditor to accelerate a loan upon default after having accepted late payments consistently, should be determined by reference to the financial community,¹⁵⁵ the "community" of which the secured party, and possibly the debtor, is a member.¹⁵⁶ Whether a behavioral norm of the financial community has been violated is a judgment whether the acceleration upon default is consistent (reasonable) with the behavior of lenders similarly situated.¹⁵⁷ This behavior must be motivated by a valid business reason: the loan cannot be "called" simply because the secured party has "had enough" of the debtor's tardy behavior.

This approach to the meaning of "community" in the judgment of financial reasonableness is consistent with the fabric of commercial law.¹⁵⁸ For example, Section 1-208¹⁵⁹ of the Code states that a term

¹⁵⁵ See *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 761-62 (6th Cir. 1985) (no reasonable loan officer in the position of defendant would have refused to make the advance requested by plaintiff because the loan was fully secured).

¹⁵⁶ See Reiter, *supra* note 23, at 707 ("The good faith that is relevant is the norm to which members of the group hold in their conduct with each other."); see also D. KING, *THE NEW CONCEPTUALISM OF THE UNIFORM COMMERCIAL CODE* (1968).

Even though there are numerous problems arising from the use of the term "reasonable commercial standards," the application of such standards may be feasible. Evidence of commercial standards and business practices may be obtained through the testimony of those engaged in a particular business. Thus, if a practice is widely accepted, a failure to follow it may indicate a failure to meet "reasonable business standards." This may be especially true in a business setting where each party seeks to maximize its own advantages within reasonable limits of conduct. Still, the question of reasonableness will depend upon testimony concerning what is practical in situations such as those found in the particular case before the fact-finder. In any event, it should be emphasized that it will be important for the practitioner to place emphasis upon factors relating to the overall setting and the particular relationship of the parties.

Id. at 80.

¹⁵⁷ This is a "least common denominator" test of reasonableness. If all, or almost all, lenders similarly situated would refrain from declaring a default in the same circumstances, the declaration of default may be a violation of the obligation of good faith. See D. ROME, *BUSINESS WORKOUTS MANUAL* § 8.04[2], at S8-4 (Supp. 1987) ("[A]cceleration due to nonmonetary defaults that do not jeopardize the loan may not be good business judgment and could violate principles of good faith." (citation omitted)). But see *Massey-Ferguson, Inc. v. Helland*, 105 Ill. App. 3d 648, 653, 434 N.E.2d 295, 298 (1982) (in secured transactions, the obligation of good faith does not require commercial reasonableness).

¹⁵⁸ See, e.g., U.C.C. § 2-209 comment 2 (1987) (contractual modifications must meet the test of good faith) see also Hillman, *Policing Contract Modifications Under the Uniform Commercial Code: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 856 (1979) ("[T]he Code framers chose to rely on the broad notion of good faith performance to police modifications . . ."); Narasimhan, *Modification: The Self-Help Specific Performance Remedy*, 97 YALE L.J. 61, 74 (1987) ("Good faith requires that the modification be made only for legitimate commercial reasons."); .

¹⁵⁹ U.C.C. § 1-208.

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collat-

allowing acceleration when a party "deems himself insecure" can be invoked only when the party "in good faith believes that the prospect of payment or performance is impaired." Courts have interpreted Section 1-208 to require that a valid business reason exist for accelerating at will.¹⁶⁰ In addition, that business judgment must be reasonable,¹⁶¹ but not necessarily correct.¹⁶² More important, the "reasonableness" of the

eral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

Id.

¹⁶⁰ See *K.M.C. Co.*, 757 F.2d at 761-762 ("at will" acceleration deemed violative of Code obligation of good faith where secured party was adequately secured by collateral of the debtor); *Brown v. Avemco Inv. Corp.*, 603 F.2d 1367, 1376 (9th Cir. 1979) (acceleration of due-on-lease clause held improper because lender did not in good faith believe that prospect for payment or status of collateral was impaired); see also *Clayton v. Crossroads Equip. Co.*, 655 P.2d 1125, 1128-29 (Utah 1982) (acceleration must be "reasonable"; subjective honesty is not enough to meet the requirements of U.C.C. § 1-201(19)); *Williamson v. Wanlass*, 545 P.2d 1145, 1149 (Utah 1976) (debtor's late payments deemed an insufficient reason to call loan under Section 1-208 where creditor had adequate security).

Professor Gilmore's characterization of the state of the law is still accurate:

The cases are quite clear that the insecurity clause will not be allowed to operate as a charter of irresponsibility. A "reasonable man" rule emerges from the cases. The creditor has the right to accelerate if, under all the circumstances, a reasonable man, motivated by good faith, would have done so. Not all creditors have cleared the hurdle. The Code adopts such a rule in § 1-208.

2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY*, § 43.4, at 1197 (1965) (footnote omitted).

For a discussion of the question of the applicability of good faith under Section 1-208 to the call-on-demand instruments, see Lawrence & Wilson, *Good Faith in Calling Demand Notes and in Refusing to Extend Additional Financing*, 63 IND. L.J. 825 (1988). This article is the first to recognize what every other commentator on this question has failed to notice: that a distinction exists between acceleration of an obligation for any reason and acceleration in bad faith.

Under section 1-208, an "at will" acceleration clause that is otherwise absolute on its face nevertheless can be exercised for only one reason—a good faith belief that the prospect for payment or performance is impaired. The Comment accurately depicts the distinguishing features of demand instruments [and nothing more]: payment does not have to be accelerated since demand instruments can be called at any time, and a holder's call of a demand instrument is not limited statutorily to any specific [good faith] reasons. The statement in the Comment, however, does not legitimize bad faith calls of demand notes. A holder's right to call a demand instrument includes the section 1-203 obligation to do so only in good faith [remember, the duty of good faith cannot be disclaimed by the parties], and the Comment to section 1-208 does not provide otherwise.

Id. at 832 (footnote omitted).

¹⁶¹ See *Universal C.I.T. Credit Corp. v. Shepler*, 164 Ind. App. 516, 521, 329 N.E.2d 620, 624 (1975) (subjecting good faith to a reasonable person test).

¹⁶² See *Smith v. Union State Bank*, 452 N.E.2d 1059, 1064 (Ind. Ct. App. 1983)

belief is determined relative to what a similarly situated party would have done in the circumstances; in short, the relevant community is the financial community.¹⁶³

2. Theoretical Implications

The general imperative that the reasonable expectations of the parties are the measure of the good faith of each can be given specific methodological parameters.¹⁶⁴ At the level of the general structure of the argument, emphasis is on the degree to which the present argument departs from the standard utterance (conversation) model of statutory interpretation. That model can be represented this way:¹⁶⁵

(determination of insecurity in fact not necessary so long as judgment was made in good faith); *Van Horn v. Van De Wol Inc.*, 6 Wash. App. 959, 961, 497 P.2d 252, 254 (1972) ("[N]egligence is irrelevant to good faith.").

¹⁶³ See Mooney, *supra* note 135, at 249 ("[P]erforming the role of a secured lender, the 'professional' may be the commercially reasonable secured party under [A]rticle 9" (citation omitted)).

¹⁶⁴ See *infra* notes 283-86 and accompanying text.

¹⁶⁵ This figure and the one following it are adapted from C. CONDREN, *THE STATUS AND APPRAISAL OF CLASSIC TEXTS: AN ESSAY ON POLITICAL THEORY, ITS INHERITANCE, AND THE HISTORY OF IDEAS* 293 (1985). This figure is reproduced with the permission of Princeton University Press. My thanks to Howard I. Kalodner for technical assistance in producing this figure.

In the traditional utterance model, the recovery of original intent is taken as the primary methodological prerequisite to interpretation of a statute. Originalist slogan expresses this idea as, e.g., "the meaning of a statute is what the legislature intended" or "the intent of the legislature controls." In this model, the meaning of a statute in any context is a direct function of the historically situated reader's¹⁶⁶ ability to recover the subjective intent (*Geist*) of a (the) legislative subject(s). The recovery of that intent, that *mens auctoris*, is the gravamen of the disclosure and discernment of textual meaning.

The purposive theory advocated here does not reject the importance of legislative intent,¹⁶⁷ it merely construes it as indicative, not determinative,¹⁶⁸ of meaning.¹⁶⁹ More importantly, the purposive

¹⁶⁶ The reader can be anyone, but for present purposes the reader is an institutional legal actor (lawyer, judge, or clerk).

¹⁶⁷ See Stout, *What is the Meaning of a Text?*, 14 NEW LITERARY HIST. 1, 6 (1982).

I [do not] see how we could get very far in *historical* understanding without having something to say about both author's intentions and contextual significance. When conscious intentions fail to explain behavior, linguistic or otherwise, we postulate motives. And all talk of intention and motivation presupposes some kind of relation to broader contexts.

Id.

¹⁶⁸ Honoré puts legislative intent into proper perspective:

If the legal system is to be a continuing, problem-solving system, historical criteria are not sufficient. For the rules to be interpreted have in that case to apply to situations not contemplated by their author or authors. But it is central to the process of legal interpretation that, though an inquiry into the author's meaning is often not sufficient, interpretation takes as its starting-point the words or non-verbal practices to be interpreted. Its paradigm is the interpretation of a form of words or text: for example the text of a statute, code, treaty, contract, will, regulation, or some other document. This has two implications: first, that *prima facie* a legal text should be given the meaning, if any, intended by its author or the official body which adopted it; secondly, that nothing which the words could not mean counts as an interpretation of the text. Similarly, nothing inconsistent with a customary practice can count as an interpretation of that practice.

A.M. HONORÉ, *supra* note 39, at 25-26 (footnote omitted). Compare E.D. HIRSCH, JR., *supra* note 109, at 124-25 (using as an example the meaning of "vehicle").

¹⁶⁹ See Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982).

In order to make sense of language, we presume that it represents the intentional acts of human beings. But there is a difference between the intention of a text and the human thoughts that accompanied the creation of the text. Although the authority of a text is derived in part from the intention that it be authoritative, a text can have purpose without reference to the psychological condition of its creator, as we see in the attempts of courts to derive purpose from statutes themselves.

Id. at 810-11 (footnotes omitted); see also Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 599 (1988) ("'Purpose'. . . can be de-

model requires that institutional history, of which legislative intent is an aspect, be reconstructed (revised) along non-subjective (non-intentional) lines when the context and textual materials so indicate. The following figure indicates the theory's rendering of the relationship among legislative intent, purpose, and the reader:

PURPOSIVE MODEL

FIGURE II

In (re)constructing the facts of institutional history against the background of purposes not apparent to the drafters of the Code, the original institutional, normative commitments of the legislature (intentions) are kept in place, but are recast within a wider institutional framework (purposive rationale) that integrates those prior institutional commitments with changing circumstances (the current historical context of a reader/subject). This approach is consistent with the perspective of the drafters of the Code, as it was their explicit directive that courts interpreting the Code remain open to new possibilities for analytical/axiological reconstruction and that the substantive provisions of the Code "be developed by the courts in the light of unforeseen and

finely narrowly or broadly."(footnote omitted)).

new circumstances and practices."¹⁷⁰

Perhaps more than any other Code provision, the obligation of good faith in the performance and enforcement of contract rights is particularly amenable to purposive reconstruction. Incorporating the standard of good faith found in Section 205 of the *Restatement (Second) of Contracts* into Section 1-201(19) of the Code reconstitutes the concept of good faith performance and enforcement and, in the process, generates a new analytical framework for the evaluation of secured creditor conduct.¹⁷¹ The horizon of the Code is enlarged in a fashion consistent with the intent of the drafters. This expansion also weaves the Code into the fabric of modern contract law in a manner consistent with the doctrinal developments of courts.¹⁷² Doctrinal developments can now be given methodological description: the "paradigm" of good faith performance and enforcement for secured creditors has been shed incrementally by courts that have been influenced by the role of good faith in other contractual contexts. This process has its analogue in other areas of law¹⁷³ and in the natural sciences¹⁷⁴ as well.¹⁷⁵ More importantly, approaches once viewed as "radical" are now seen as consistent and, perhaps, the inevitable outcome of an ever-enlarged integration of

¹⁷⁰ U.C.C. § 1-102 comment 1 (1987).

¹⁷¹ The need for an "objective" standard of good faith performance has been recognized for quite some time. See E. FARNSWORTH, *supra* note 21, at 677 ("Only to the extent that the test is objective do commercial practices become vital in establishing the standards of good faith.").

¹⁷² As the analysis of anti-waiver clauses will show, see *infra* notes 187-214 and accompanying texts, courts appear systematically to distort doctrine in an effort to reach results that are perceived to be equitable in the circumstances. The reconstructed conception of good faith shows that what appears as "distortion" is, in effect, the attempt to shed an unworkable framework of analysis without the benefit of an appropriate axiological framework. The paradigm of good faith advanced here provides just such a necessary framework.

¹⁷³ See, e.g., Eskridge, *supra* note 14, at 1488-94 (discussing *United Steelworkers v. Weber*, 443 U.S. 193 (1979), against the background of an evolving conception of "discrimination").

¹⁷⁴ See generally H. RICKERT, *THE LIMITS OF CONCEPT FORMATION IN NATURAL SCIENCE* 27-28 (G. Oakes trans. abr. ed. 1986) (Scientific conceptualization proceeds from the standpoint of cognitive interests.).

¹⁷⁵ See R. MILLER, *FACT AND METHOD: EXPLANATION, CONFIRMATION AND REALITY IN THE NATURAL AND THE SOCIAL SCIENCES* 105 (1987).

Explanation directs us toward those parts of the history of the world that are of most use in coping with the world. This singles out the activity of explanation, even though individual successes in explanation may not yield lessons about promoting or preventing change. (The necessary background circumstances may be too unique, for example, or the causes too uncontrollable.) This is the point of the activity as a whole. So an adequate account of explanation should describe an activity uniquely fitted to play this role.

legal results into a revised analytical framework.

Implicit in the construction of the meaning of good faith against the background of modern contract law is an enlarged view of the constitutive nature of the relationship between courts and legislatures.¹⁷⁶ By way of contrast, consider the model advanced by Hart and Sacks. For them, legislatures are best seen as "maximizers of social utilities,"¹⁷⁷ making value choices that find their expression in statutes. In this model, the task of the courts is to give effect to these legislative value choices: "Underlying every rule and standard . . . is at least a policy and in most cases a principle. This principle or policy is always available to guide judgment in resolving uncertainties about the arrangement's meaning."¹⁷⁸

To see the task of courts as applying legislative value choices is to recognize an important aspect of any purposive theory of legal interpretation. But legislative purpose is only one element in legal discourse. The relationship between legislatures and courts is not linear, as it is in Hart and Sacks' model. Courts do not, and should not, merely apply legislative preference in an unreflective manner. The relationship between the two branches is not univocal but dialogical;¹⁷⁹ the fashionable

¹⁷⁶ For a view that goes much further than the present proposal, see Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 223-26 (1986) (Courts should check the corruption of legislation by interest group factionalism through the "filter" of statutory interpretation.).

¹⁷⁷ See Danzig, *supra* note 17, at 624.

¹⁷⁸ H. HART & A. SACKS, *supra* note 14, at 166-67.

¹⁷⁹ The project of dialogical disclosure of truth, at least as Habermas conceives it, is not without its problems.

[I]t seems neither possible, nor even prudent, to follow Habermas in orienting our treatment of the problem of legitimation in the direction of a search for universal consensus through what he calls Diskurs, in other words, a dialogue of argumentation.

This would be to make two assumptions. The first is that it is possible for all speakers to come to agreement on which rules or metaprescriptions are universally valid for language games, when it is clear that language games are heteromorphous, subject to heterogeneous sets of pragmatic rules.

The second assumption is that the goal of dialogue is consensus. But . . . consensus is only a particular state of discussion, not its end. Its end, on the contrary, is parody [the undermining of a previous conceptual framework from within it]. This double observation (the heterogeneity of the rules and the search for dissent) destroys a belief that still underlies Habermas's research, namely, that humanity as a collective (universal) subject seeks its common emancipation through the regularization of the "moves" permitted in all language games and that the legitimacy of any statement resides in its contributing to that emancipation.

J. LYOTARD, *THE POST-MODERN CONDITION: A REPORT ON KNOWLEDGE* 65-66 (G. Bennington & B. Massumi trans. 1984) (footnotes omitted). For discussion of Lyotard's concept of "dissensus," see G. BENNINGTON, LYOTARD: *WRITING THE EVENT*

metaphor of "conversation"¹⁸⁰ is appropriate, particularly in discussing good faith. Unlike the civil codes of some Western European countries,¹⁸¹ the Uniform Commercial Code is open to discursive possibilities beyond its four corners.¹⁸² So constituted, Code provisions such as good faith are amenable to reconceptualization on non-legislatively based axiological models, particularly when, as with good faith, those models are consistent with the specific value choices articulated in the Code.¹⁸³ In the end, this enlarged perspective on the relationship between courts and legislatures affords judges the opportunity to engage in substantive, normative construction without compromising the superior position of the legislature as the principal arbiter of social conflict on matters of social policy.

Before turning to a specific context for working through the dis-

140-141 (1988).

¹⁸⁰ The metaphor is Oakeshott's, but Richard Rorty has given it new life. See M. OAKESHOTT, *The Voice of Poetry in the Conversation of Mankind*, *supra* note 14, at 197-247; R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 155-72, 371-79 (1979); see also F. DALLMAYR, *POLIS AND PRAXIS: EXERCISES IN CONTEMPORARY POLITICAL THEORY* 192-223 (1984) (discussing the interplay among conversation, discourse, and politics, with particular attention to Rorty's analysis).

¹⁸¹ For example, the differences between American and English judges in approach to statutory interpretation are striking. Atiyah and Summers comment that

[a]n English lawyer would be amazed to hear it said (as it has recently been said by an American judge) that a judge "rarely starts his inquiry with the words of the statute, and often if the truth be told, he does not look at the words at all". Second, the accepted doctrine of English law is that courts are not entitled to consider the statutory purpose unless the words used in the statute have no determinate ordinary meaning, and are thus unclear on their face in some way [T]his . . . represent[s] the general practice of English judges.

P. ATIYAH & R. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* 101 (1987) (footnotes omitted). For specific treatment of the similarities and differences between the Code and European civil codes, see Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291, 291-313.

¹⁸² See U.C.C. § 1-102 comment 1 (1987) which states in pertinent part:

This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices.

Id.

¹⁸³ This is best seen in the relationship between the definition of good faith in Section 1-201(19) and that in the RESTATEMENT (SECOND) OF CONTRACTS § 205. The claim that good faith means consistency with the justified expectations of the other party subsumes the limited definition of good faith as merely "honesty in fact." See *supra* notes 130-63 and accompanying text. The legislative value expressed in the Code is, indeed, applied by courts in appropriate contexts. The point is that that conception of good faith can be made part of a larger conceptual framework external to and different from, yet consistent with, the Code.

cursive structure just described, it is important to reaffirm the unique character of the Code as a regulative statute. In asking what the Code requires in a given context, it is not enough to ask after the purpose of given Code provisions.¹⁸⁴ The "purpose" of the Code in any given context is as much a function of the discursive possibilities open to a court or lawyer at the time a question is posed as it is answerable by direct resort to the limited purpose of a given Code provision. This is the point of the reconceptualization argument. As the discursive possibilities become richer, so do the possibilities for constructive argument. Adding Section 205 of the Restatement (Second) of Contracts to the discursive structure of commercial law creates new possibilities for answering the question of what good faith means in a given context.¹⁸⁵ Only by giving our attention to these new discursive possibilities have we any hope of moving beyond outmoded forms of legal justification.

III. THE "PROBLEM" OF ANTI-WAIVER CLAUSES¹⁸⁶

A clause in the security agreement will attempt to protect the secured party against the waiver allegation, but the courts pay little attention to clauses which appear to say that meaningful acts are meaningless and that the secured party can blow hot or cold as he chooses. —Grant Gilmore¹⁸⁷ [I]f the security agreement contains an "anti-waiver" clause . . . that clause should be upheld against a commercial debtor who ought to understand what he signs. Some courts have even been willing to enforce such an anti-waiver clause against a consumer debtor. —Barkley Clark¹⁸⁸

The doctrinal problem of anti-waiver clauses in security agreements provides the focus for evaluating the cogency of the reconstructed conception of good faith advanced earlier. The specific "problem" posed by anti-waiver clauses is the extent to which they are enforceable against a debtor when the secured party has engaged in conduct that

¹⁸⁴ In other words, the search for a legislative *Geist* is doubly ineffective. Often, it cannot even be found, and, when it can be discerned, often it cannot answer a contextually generated question.

¹⁸⁵ The Code itself directs the attention of participants in the discourse to sources of law outside its four corners. See *supra* note 20 and accompanying text.

¹⁸⁶ By virtue of the priority of express terms of a security agreement under Article Nine, the problem posed by anti-waiver clauses is unique to Article Nine. See *infra* note 201 and accompanying text.

¹⁸⁷ 2 G. GILMORE, *supra* note 161, § 44.1, at 1214.

¹⁸⁸ B. CLARK, *THE LAW OF SECURED TRANSACTIONS* § 4.02[3], at 4-15 (2d ed. 1988).

would, but for the anti-waiver clause, amount to a waiver of the right to accelerate upon default¹⁸⁹ under the terms of a security agreement. Answering this seemingly simple question requires analyzing the structure of Article Nine of the Uniform Commercial Code¹⁹⁰ in the light of the Code drafters' dual purposes: (1) the simplification of the law of commercial transactions¹⁹¹ (2) in a way that is consistent with the continued expansion of the Code's substantive provisions through the incorporation of non-Code sources of law.¹⁹² This section provides a close reading of Article Nine with particular attention to its relationship to Article One and advances a preliminary answer to the question at issue.

As stated in the Introduction, the judicial responses to the question of the enforceability of anti-waiver clauses in security agreements can be divided into three divergent and incommensurable analyses. These are organized and described thematically in the next section. That section also provides an assessment of each of the three approaches and concludes that the only doctrinally defensible analysis is that which mandates the enforcement of anti-waiver clauses, because they are express terms, and the interpretational priorities set forth in Article One therefore require their enforcement according to their terms, notwithstanding the secured party's conduct. The problem with this conclusion is its failure to account for the outcomes of the vast majority of these cases. The reconstituted conception of good faith is then reintroduced as a supplement to the reading of Article Nine and Article One that may allow resolution of this conflict.

The outcomes of anti-waiver suits are seen as conflicting and contrary to sense only because our approach to the anti-waiver clause

¹⁸⁹ A well-drafted security agreement will contain a provision to the effect that, upon the default of the debtor under any of the terms of the agreement (the principal default is a failure to make a payment when due), all amounts due under the agreement will then be due and owing to the secured party.

The right to accelerate upon default has three principal purposes: First, in the event of a material and adverse change in the borrower's creditworthiness, it permits the lender to stop making advances and to begin the recovery of funds advanced; second, in the event of the borrower's collapse or, as previously noted, upon adverse change, it permits an action to recover the entire balance owing and not merely missed payments as they come due, while the lender and other creditors compete for a diminishing pool of assets; and, third, it helps to compel the borrower's compliance with the agreement's covenants and obligations generally.

R. NASSBERG, *THE LENDER'S HANDBOOK* 57-58 (1986).

¹⁹⁰ U.C.C. §§ 9-101 to 9-507 (1987).

¹⁹¹ U.C.C. § 1-102(2) (1987). "This Act is drawn to provide flexibility so that . . . it will provide its own machinery for expansion of commercial practices." U.C.C. § 1-102 comment 1 (1987).

¹⁹² See U.C.C. § 1-103 (1987).

problem is impoverished. The locus of this poverty is our present understanding of the meaning of "good faith" under the Code. Once we understand that good faith means more than our present understanding seems to indicate, we can move toward the development of a new and enhanced approach.¹⁹³ Again, the problem is interpretive: current doctrine appears incoherent because we are not looking at it productively. To see it differently requires a new analytical framework. The reconstituted conception of good faith is such a framework.

As the arguments herein suggest, the primacy of express terms¹⁹⁴ under Article Nine mandates that anti-waiver clauses remain an effective means for a secured party to continue an established course of conduct (specifically, a course of performance) in accepting late payments from the debtor without disabusing the debtor of the belief that the secured party will continue to forbear from accelerating upon default under the terms of the security agreement. For the debtor, such a belief can lead to disastrous results; if the anti-waiver clause is given effect, the secured party is free, without prior warning to the debtor,¹⁹⁵ to repossess the collateral and dispose of it in accordance with the dictates of Part Five of Article Nine.¹⁹⁶

If courts continue to assess the problem posed by anti-waiver clauses within the present frameworks, analysis of the problem of secured creditor misconduct will remain fragmented and, on occasion, disingenuous. The solution to this conundrum lies in recasting our understanding of the concept of good faith performance and enforce-

¹⁹³ This Article applies a reconstructed conception of good faith to the specific problem of the enforceability of anti-waiver clauses in security agreements. The scope of the analysis purposely is limited to anti-waiver clauses because the extent of their enforcement presents one of the most common (ordinary) questions in secured financing. The frequency with which the enforcement of anti-waiver clauses is challenged demands that any theory of good faith performance and enforcement thoroughly address the particulars of the problems such clauses present.

This particular focus notwithstanding, the theory of good faith performance and enforcement presented here can be applied to other contexts in the law of secured financing, including good faith enforcement of rights upon default and refusals to continue advancing funds. For analysis of these and other topics in the lender liability context, see McDonnell, *Handling Distress Loans: New Liabilities for Secured Lenders*, in 1B BENDER'S UNIFORM COMMERCIAL CODE SERVICE §§11.01 to 11.04 (1988).

¹⁹⁴ The "primacy" is between express terms and course of performance. Express terms have "priority" over course of performance in the sense that course of performance is not an element of the meaning of "security agreement" under Article Nine. This point is elaborated *infra* notes 214-23 and accompanying text.

¹⁹⁵ In the consumer credit context, the secured party may be required to provide the debtor with notice of her right to cure a default prior to repossession. See UNIFORM CONSUMER CREDIT CODE ACT §§ 5.109 [Default] 7A U.L.A. 171; 5.110 [Notice of Consumer's Right to Cure] 7A U.L.A. 172; 5.111 [Cure of Default] 7A U.L.A. 175; 5.112 [Creditor's Right to Take Possession After Default] 7A U.L.A. 171-77 (1985).

¹⁹⁶ See U.C.C. §§ 9-501 to 9-507 (1987).

ment¹⁹⁷ in the secured credit context.¹⁹⁸ In fact, the intuitive sensibilities of courts that anti-waiver clauses should not always be enforced are correct: it is simply unfair for secured parties to engender states of mind in debtors that will not be sustained. If the secured party acquiesces in a course of late payments, thereby leading the debtor to believe that late payments will be tolerated, the secured party should be required to live up to the debtor's reasonable expectations.¹⁹⁹

Only by resort to the general obligation of good faith under the Code²⁰⁰ can a proper analysis of the problems posed by anti-waiver clauses be addressed and understood. When its scope and content are appreciated fully, the obligation of good faith in the secured transactions context is a powerful analytical tool for policing the conduct of secured parties.

Under Part Five of Article Nine²⁰¹ the secured party, upon the default²⁰² of the debtor under the terms of the security agreement,²⁰³

¹⁹⁷ The good faith obligation is operative in both performance and enforcement. *See id.* § 1-203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."); *see also* 3 A. CORBIN, *supra* note 153, § 541, at 95 (A court "will compel performance in accordance with what it believes to be required by good faith and fair dealing."); 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 670, at 159 (3d ed. 1961) ("[I]n every contract there exists an implied covenant of good faith and fair dealing.").

¹⁹⁸ The duty of good faith applies to "[e]very contract within this Act [the U.C.C.]" U.C.C. § 1-203 (1987). The duty of good faith in performance and enforcement applies to all Article Nine security agreements because each is a "contract." *Id.* § 1-201(11), which is itself the legally enforceable result of the "agreement of the parties." *Id.* § 1-201(3); *see infra* note 218. (discussing the Code's distinction between "agreement" and "contract"); *see also* *United States v. Cain*, 736 F.2d 1195, 1197 (7th Cir. 1984) (obligation of good faith applies to secured transactions and enforcement of guaranty agreements); D. KING, C. KUENZEL & B. STONE, *COMMERCIAL TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* 935 (4th ed. 1987) ("[T]he Code's general obligation of good faith in the enforcement of rights is applicable to security agreements."); Aronstein, *supra* note 135, at 28 ("There can be little doubt that the typical commercial security agreement is a 'contract . . . within this Act.'").

Because every enforceable security agreement is an Article One contract, the duty of good faith is imposed automatically. U.C.C. §§ 1-201(11), 1-203 (1987). The duty of good faith cannot be disclaimed by the parties, although they are free to set the standard of good faith. *Id.* § 1-102(3).

¹⁹⁹ For discussion of the concept of "reasonable expectation," *see infra* notes 280-86.

²⁰⁰ The concept of good faith is central to the Code and modern contract law. Under the Code, good faith has a general and, in some instances, a quite specific meaning. Beyond Section 1-203's obligation of good faith (defined as "honesty in fact" in Section 1-201 (19)), Section 2-103(1)(b) adds the "observance of reasonable commercial standards of fair dealing in the trade" for merchants. Article Three, specifically Section 3-302(1)(b), requires that a holder in due course take an instrument "in good faith."

²⁰¹ U.C.C. §§ 9-501 to 9-507 (1987).

²⁰² Article Nine does not define "default." Customary events of default include:

1. Failure to pay an installment when due;
2. Breach of any warranty, representation or covenant;

has the right to accelerate the time for payment of all amounts due, and to repossess and sell the collateral²⁰⁴ securing the debtor's obliga-

3. Death of the debtor or guarantor;
4. Appointment of a receiver;
5. Insolvency or bankruptcy of the debtor;
6. Entry of any judgment against the debtor; and
7. An "insecurity" clause under which default includes any good faith belief by the secured party that the obligations are inadequately secured or that the prospect of payment or status of the collateral is in any way impaired.

B. CLARK, *supra* note 188, § 4.02[1], at 4-4 to 4-5.

No default can be an occasion for the exercise by the secured party of its right to repossess the collateral unless the event of default is specified in a security agreement signed by the debtor. See U.C.C. § 9-203(1)(a) (1987). The only exception to the requirement of a written security agreement is the pledge: if the secured party retains possession of the collateral pursuant to an oral security agreement with the debtor, the oral agreement is no less enforceable than a written security agreement. See *id.* comment 1.

²⁰³ The secured party cannot repossess the collateral, or exercise any other rights against the collateral, unless the security agreement is enforceable against the debtor. To be enforceable against the debtor and other creditors, the security interest must first "attach." U.C.C. § 9-203(1) (1987). For attachment to occur, three conditions must be met:

- (1) the collateral must be in the possession of the secured party pursuant to a (written or oral) agreement or, if the debtor retains possession of the collateral, the debtor must have signed a written security agreement containing a description of the collateral sufficient to identify it; and
- (2) the secured party must have given value to the debtor; and
- (3) the debtor must have rights in the collateral.

Id.

²⁰⁴ Section 9-504 states the secured party's obligations with respect to the disposition of the collateral at a sale. It provides:

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of the goods is subject to the Article on Sales (Article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so

tion(s).²⁰⁵ As with most rights, be they those of the secured party or

provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition, including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral.

The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by the secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part [Part Five] or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

Id.

²⁰⁵ The secured party's rights upon default "are the essence of the rights of a secured creditor." Davenport, *Default, Enforcement and Remedies Under Revised Article 9 of the Uniform Commercial Code*, 7 VAL. U.L. REV. 265, 267 (1973). In addition to the right to repossess (Section 9-503) and sell the collateral (Section 9-504), the secured party may lease the collateral or otherwise dispose of it (Section 9-504), or keep the collateral in satisfaction of the debt (strict foreclosure)(Section 9-505). If the collateral is chattel paper or commercial paper (Section 9-501(1)), or accounts (Section 9-502(1)), the secured party may collect the sums owed directly from the parties owing payment to the debtor. Lastly, the secured party may avail itself of none of these remedies and may simply "reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure" (Section 9-501(1)).

After default and repossession, but before the sale of the collateral, the debtor continues to have rights in the collateral and against the secured party. In addition to any rights provided in the security agreement, the secured party must use reasonable care in the custody and preservation of collateral in its possession. U.C.C. § 9-207(1)-(2). The secured party is liable to the debtor for any loss caused by its failure to use

another, the right to repossess and sell the collateral may be waived.²⁰⁶ The waiver can be explicit, either oral or in writing, but is more often implicit: the result of the secured party's conduct.²⁰⁷ The most common form of conduct constituting implicit waiver is the secured party's acceptance of the debtor's late payments. The question is whether the secured party's conduct waives the right to accelerate upon default and exercise rights under Part Five of Article Nine. The judicial response

reasonable care in the custody and preservation of the collateral. *See id.* § 9-207(3).

²⁰⁶ *See generally* Epling, *Waiver Clauses in Commercial Loan and Guaranty Agreements*, 15 U.C.C. L.J. 231, 243-47 (1983) (discussing waiver of post-default rights). "Waiver" is almost always defined as "the intentional and voluntary relinquishment of a known right." Note, *Debtor-Creditor: Estoppel of Creditor Claims of Default for Non-Payment—"Stopping the Bleeding" or "Pulling the Rug Out?"*, 23 WASHBURN L.J. 82, 87 (1983). This definition is incorrect. Waiver is the excuse of the nonoccurrence, or a delay of condition. *See* E. FARNSWORTH *supra* note 21, § 8.5, at 561; *see also* Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. U.L. REV. 906, 922 (1977) ("[T]he principle that rights once waived may generally not be reinstated if the other party would be prejudiced is equitable. Thus, if a seller who has extended credit waives a default, and the buyer reasonably assumes the seller will waive a further one, but does not, the buyer should prevail even though the seller does not again waive.").

In the present context, "waiver" means the excusal of a default, which is the non-occurrence of timely payment and, therefore, relinquishment of the right to declare a default and exercise rights under Part Five of Article Nine. Resort to a waiver analysis in the present context obscures precisely what the secured party waives by continual acceptance of late payments. It is fairly clear that the acceptance of a late payment waives any default with respect to that payment. What is unclear is how a waiver analysis can be extended to a waiver of future defaults. But this is what proponents of the waiver of express terms analysis assert. *See infra* note 245 and accompanying text. The connection between waiver of a present default and waiver of future defaults is, at best, unclear. The grammar of waiver is thoroughly retrospective: this is what is clear in Farnsworth's interpretation of the term. *See* E. FARNSWORTH, *supra* note 21, § 8.5, at 561. If the waiver of a past default is to be transformed into the relinquishment of rights in the future, a different analysis is indicated.

Even under traditional waiver analysis, the waiver must be accomplished with full knowledge of the rights involved. *See, e.g.,* *Vogel v. Carolina Int'l*, 711 P.2d 708, 711-12 (Colo. Ct. App. 1985) ("A waiver is a voluntary abandonment of a known right, with the intent that such right shall be surrendered and such persons forever deprived of its benefit. . . . Waiver requires a clear, unequivocal, and decisive act of a party showing such purpose." (citation omitted)); *United Mo. Bank S. v. Cole*, 597 S.W.2d 209, 211 (Mo. Ct. App. 1980) ("In order to prove an implied waiver the acts of the Bank must be so consistent with and indicative of an intention to relinquish its right to enforce the collection of the full balance of the Code obligation and so clear and unequivocal that 'no other reasonable explanation of their conduct is possible.' (citation omitted)); *Western Nat'l Bank v. Harrison*, 577 P.2d 635, 638 (Wyo. 1978) ("An effective waiver requires full knowledge of rights being waived.").

²⁰⁷ The Code has no explicit waiver provision. However, the Code incorporates common law principles of waiver as well as all other relevant principles of law and equity as a supplement to the Code's provisions. *See* U.C.C. § 1-103 (1987) ("Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions."). Additionally, the Code mandates that its provisions are to "be liberally construed and applied to promote its underlying purposes and policies." *Id.* § 1-102(1).

to this question has been unanimous. All else being equal, consistent acceptance of late payments waives the debtor's default(s): the secured party's acquiescence precludes its exercise of its rights under Part Five of Article Nine.²⁰⁸

To avoid debtors' resort to the argument that by consistently accepting late payments the secured party waives its rights under Part Five of Article Nine, most security agreements now include an anti-waiver clause. The following is representative of such a clause:

No waiver by the Secured Party of any default shall be effective unless in writing, nor operate as a waiver of any other default or of the same default on a future occasion.²⁰⁹

The insertion of an anti-waiver clause in a security agreement, it is argued, renders legally inconsequential any act or course of conduct (subsequent to formation of the parties' agreement), by the secured

²⁰⁸ See, e.g., *Warren v. Ford Motor Credit Co.*, 693 F.2d 1373, 1376 (11th Cir. 1982) (credit company waived default due to transfer of vehicle by accepting payments from party to whom vehicle was transferred); *Draughon v. General Fin. Credit Corp.*, 362 So. 2d 880, 884 (Ala. 1978) (creditor did not acquiesce in debtor's practice of mailing loan payments late because debtor had changed his residence without notifying finance company and concealed his telephone number to avoid creditors); *Alaska Statebank v. Fairco*, 674 P.2d 288, 296-99 (Alaska 1983) (sustaining award of punitive damages for creditor's wrongful repossession of collateral despite debtor's delinquent payments); *Varela v. Wells Fargo Bank*, 15 Cal. App. 3d 741, 747, 93 Cal. Rptr. 428, 431 (1971) (because past conduct of bank indicated that debtor was not expected to pay the installments on the exact date due, bank waived its right to repossess automobile); *Pierce v. Leasing Int'l, Inc.*, 142 Ga. App. 371, 372-73, 235 S.E.2d 752, 754 (1977) (if creditor has given debtor a reasonable impression that late payments will be accepted, the creditor may be estopped from repossession without first giving notice); *Margolin v. Franklin*, 132 Ill. App. 2d 527, 530, 270 N.E.2d 140, 142-43 (1971) (seller may not establish a pattern of accepting late payments and later insist on strict compliance with time provisions of contract without first notifying buyer); *Steichen v. First Bank Grand*, 372 N.W.2d 768, 771-72 (Minn. Ct. App. 1985) (repossession wrongful as a matter of law because creditor, after accepting late payments, failed to notify debtor that strict compliance with payment schedule was required); *Nevada Nat'l Bank v. Huff*, 94 Nev. 506, 514, 582 P.2d 364, 369 (1978) (secured party cannot declare debtor in default after accepting delinquent payments without first notifying debtor that payment deadlines will be enforced); *Slusser v. Wyrick*, 28 Ohio App. 3d 96, 502 N.E.2d 259, 260 (1986) (seller waived right to repossess without giving prior notice by acceptance of late payments); *Knittel v. Security State Bank*, 593 P.2d 92, 95 (Okla. 1979) (late payment did not constitute default as a matter of law in light of statement by bank employee that installment need not be paid when due); *Lee v. Wood Prods. Credit Union*, 275 Or. 445, 448, 551 P.2d 446, 448 (1976) (even under an agreement with a time essence clause, secured party cannot declare debtor in default after accepting delinquent payments without providing debtor with reasonable notice); *Fontaine v. Industrial Nat'l Bank*, 111 R.I. 6, 11, 298 A.2d 521, 523 (1973) (bank required to demand payment before repossession because late payments previously had been accepted); *Ford Motor Credit Co. v. Washington*, 573 S.W.2d 616, 618 (Tex. Ct. App. 1978) (credit company's consistent acceptance of late payments after ineffective attempts to repossess automobile justified jury's finding of waiver).

²⁰⁹ B. CLARK, *supra* note 188, § 4.02[3], at 4-5.

party, that could under any circumstance be construed as a waiver of the secured party's rights under Part Five of Article Nine.²¹⁰ In short, not only is the debtor precluded from stopping the secured party's disposition of the collateral after repossession, she is effectively foreclosed from objecting to the secured party's self-interested course of conduct in accepting late payments while maintaining the right to repossess and sell the collateral. In considering whether anti-waiver clauses nullify the legal significance of secured party conduct on the agreement of the parties, courts have been routinely sympathetic to debtors who are lulled into a sense of security that their secured creditors will "bear with them" through a period of late payments.²¹¹ These cases indicate a larger trend in the law of secured transactions; courts are taking a decidedly dim view of lenders' precipitous and unjustifiably aggressive tactics toward debtors.²¹² Along the parameter of propriety of result, it is difficult to quarrel with courts' conclusions that anti-waiver clauses do not enjoy the preclusive effect intended and hoped for by secured parties. This sympathy notwithstanding, the violence done to Article Nine in the course of reaching this result is doctrinally indefensible. When limited to a reading of Article Nine, the Code requires that anti-waiver clauses be enforced according to their terms.²¹³

²¹⁰ See *id.*, § 4.2[3], at 4-9 to 4-11.

²¹¹ Despite the presence of anti-waiver clauses, the courts have required secured creditors to notify debtors that strict compliance with contract terms will be required by the debtors before lawful repossession may be carried out. See *Ford Motor Credit Co. v. Waters*, 273 So. 2d 96, 99-100 (Fla. Dist. Ct. App. 1973); *Smith v. General Fin. Corp.*, 243 Ga. 500, 500-01, 255 S.E.2d 14, 15 (1979); *Pierce v. Leasing Int'l, Inc.*, 142 Ga. App. 371, 372-73, 235 S.E.2d 752, 754 (1977); *Battista v. Savings Bank*, 67 Md. App. 257, 270, 507 A.2d 203, 209 (1986).

²¹² See, e.g., *Reid v. Key Bank*, 821 F.2d 9, 15-16 (1st Cir. 1987) (lender violated obligation of good faith by refusing to advance funds under line of credit agreement without prior notice); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 761-63 (6th Cir. 1985) (affirming multimillion dollar verdict against secured party that refused, without any business justification, to make a loan advance); *Sahadi v. Continental Ill. Nat'l Bank & Trust Co.*, 706 F.2d 193, 199 (7th Cir. 1983) (borrower's failure to make an interest payment when due is an insufficient basis for calling the loan); *Skeels v. Universal C.I.T. Credit Corp.*, 335 F.2d 846, 850-51 (3d Cir. 1964) (affirming judgment of tortious conduct against credit corporation for repossessing collateral after secured party repeatedly accepted late payments and assured future forbearance); *Ricci v. Key Bankshares* 662 F. Supp. 1132, 1141-42 (D. Me. 1987) (jury verdict of \$15 million against bank for wrongful termination of line of credit); *Alaska Statebank*, 674 P.2d at 297-99 (affirming award of punitive damages for repossession of collateral after secured party had led debtor to believe it would refrain from doing so); *State Nat'l Bank v. Farah Mfg. Co.*, 678 S.W.2d 661, 685, 689-90 (Tex. Ct. App. 1984) (affirming jury verdict that lender breached obligation of good faith by exercising control over the affairs of the debtor, precipitously enforcing a management change clause in security agreement, and misrepresenting lender's intentions to call the loan).

²¹³ See *Monarch Coaches, Inc. v. ITT Indus. Credit*, 818 F.2d 11, 13 (7th Cir. 1987); *K.B. Oil Co. v. Ford Motor Credit Co.*, 811 F.2d 310, 312-13 (6th Cir. 1987); *Wade v. Ford Motor Credit Co.*, 455 F. Supp. 147, 149-50 (E.D. Mo. 1978).

Article Nine, however, cannot be read in isolation. Its substantive provisions are all part of the Code and the larger body of contract law. As Part IV of this article shows, by employing a reconstructed conception of good faith we can see better the role of good faith in the policing of secured creditor misconduct, and illuminate Article Nine's thread in the seamless web of contract law.

IV. ARTICLE NINE AND THE PRIORITY OF EXPRESS TERMS

Whether the legal effect of a secured party's behavior under the terms of a security agreement can be nullified by the presence in the agreement of an anti-waiver clause can be determined only after close attention is paid to the priority Article Nine and Article One accord the express terms of a security agreement. Under Section 9-201, the terms of a security agreement control the rights and obligations of the parties. It provides: "Except as otherwise provided by [the U.C.C.] a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors."²¹⁴

As with other definitions in the Code,²¹⁵ more than one source contributes to the meaning of "Security agreement" in Article Nine. An Article Nine "Security agreement" is a specific type or form of Article One "Agreement." Section 9-105(1)(l) defines a security agreement as "an agreement which creates or provides for a security interest." But Section 9-105(4) enlarges the ostensibly narrow definition of "security agreement,"²¹⁶ explicitly incorporating Article One's expansive definition of "Agreement." Under the definition of "Agreement" in Section

²¹⁴ U.C.C. § 9-201 (1987).

²¹⁵ Compare *id.* § 1-201(24) (" 'Money' means a medium of exchange authorized or adopted by a domestic or foreign government as part of its currency.") with *id.* § 3-107 ("(1) An instrument is payable in money if the medium of exchange in which it is payable is money at the time the instrument is made. An instrument payable in 'currency' or 'current funds' is payable in money. (2) A promise or order to pay a sum stated in a foreign currency is for a sum certain in money and, unless a different medium of payment is specified in the instrument, may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying sight rate for that currency on the day on which the instrument is payable or, if payable on demand, on the day of demand.").

²¹⁶ The same was true under the 1962 version of the Code:

Both [the 1962 and the 1972] Article Nine . . . [define] the word "agreement," . . . in § 1-201(3) as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance." The term "security agreement" is defined in § 9-105(1)(h) and Rev. § 9-105(1)(l) as "an agreement which creates or provides for a security interest," thus keying into the broad definition of "agreement" in § 1-201(3).

B. CLARK, *supra* note 188, § 2.02[1][b], at 2-9 n.19.

1-201(3),²¹⁷ the parties' agreement is generated from several sources:²¹⁸ (1) the language of the agreement;²¹⁹ and (2) by implication from other circumstances including (a) the parties' course of dealing;²²⁰ and (b) any applicable usage of trade.²²¹

²¹⁷ The "agreement of the parties" is the source of their "contract," defined in Section 1-201(11) as "the total legal obligation which results from the parties' agreement as affected by [the U.C.C.] and any other applicable rules of law." The "agreement of the parties" and the "contract" that may result from it are not always coextensive. The "contract" is "the legal result of [the agreement]." T. QUINN, U.C.C. COMMENTARY AND LAW DIGEST ¶ 1-201[A][1], at 1-26 (1978). The "security agreement" qua "agreement of the parties" is enforceable between the secured party and the debtor when the requisites of Section 9-203 are met:

[A] security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral . . . ;

(b) value has been given; and

(c) the debtor has rights in the collateral.

. . . A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the [above] events . . . have taken place unless explicit agreement postpones the time of attaching.

U.C.C. § 9-203 (1987).

²¹⁸ Section 1-201(3) is as follows:

"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Section 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103).

Id. § 1-203(3)

Several approaches to the Code concept of "agreement" are canvassed in J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 3-2 to 3-3 (3d ed. 1988).

A point that needs to be made about the definition of "Agreement" in Section 1-201(3) concerns its relationship with the definition of "Security agreement" found in Section 9-105(1)(l). "Course of performance" is not part of the meaning of "Security agreement." Therefore, the only sources for the meaning of "Security agreement" are the express terms of the parties, their course of dealing, and any applicable usage of trade. *See infra* note 223 and accompanying text.

²¹⁹ The "language" can be written or oral. This is consistent with Section 9-203, which permits creation of an enforceable security agreement under the terms of a written or oral agreement. For the oral security agreement to be enforceable against the debtor and other creditors, the secured party must take possession of the collateral. *See* U.C.C. § 9-203(1), comment 1 (1987).

²²⁰ "Course of dealing" is "a sequence of *previous* conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *Id.* § 1-205(1) (emphasis added).

²²¹ "Usage of trade" is

any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be ob-

By virtue of the broad definition of "Agreement" in Section 1-201(3), the language of a written security agreement is not the sole source of the "agreement" between the secured party and the debtor. Conduct, to the extent it is part of a course of dealing or reflective of an applicable usage of trade, is presumptively made part of the interpretational matrix for discerning the meaning and content of the parties' agreement.

Conduct, however, is only *presumptively* part of the interpretational matrix for discerning the meaning and content of the parties' agreement. Section 1-205(4) sets forth an interpretational hierarchy²²²

served with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

Id. § 1-205(2).

²²² Section 1-205(4) provides:

The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

Id. § 1-205(4).

Professor Roger Kirst has argued that the priority scheme set forth in Section 1-205 has been seriously misunderstood and is usually interpreted far more rigidly than its author, Karl Llewellyn, ever intended. See Kirst, *Usage of Trade and Course of Dealing: Subversion of the UCC Theory*, 1977 U. ILL. L. REV. 811, 813, 818-19; see also Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage, "Express Terms," and Consistency Under Section 1-205 of the Uniform Commercial Code*, 64 N.C.L. REV. 777, 796 (1986) (characterizing Section 1-205 as a "rule of construction" rather than a rule of evidence.).

Professor Kirst explains that Section 1-205 was solely the product of Llewellyn's efforts to displace the rigidity of the Willistonian model of contract, which emphasized the written terms of the parties' agreement, in favor of a focus on the agreement of the parties in fact. See Kirst, *supra*, at 811-13. Llewellyn's efforts at doctrinal reform were motivated by the need "to make commercial law responsive to commercial reality." *Id.* at 813. I believe that Professor Kirst's claim is correct. That argument, however, does not affect this Article's central claim that the course of the parties' performance is not applicable to determining the meaning of a security agreement (as opposed to a sales contract). See Dugan, *Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code*, 46 U. COLO. L. REV. 333, 340 (1975) ("Section 1-205 simply does not attempt to deal with the legal consequences of *post-agreement* events such as those which the Code defines elsewhere [U.C.C. § 2-208(1), (3)] as 'course of performance'. . . .").

But (legal) reality has turned history on its head. Commentators and courts alike read Section 1-205 as a statutory totem pole with express terms at the top and usage of trade at the bottom. I do not argue for a different reading of Section 1-205 but accept the received reading and show that, even under this reading, the argument advanced here indicates that anti-waiver clauses should not always be enforced, notwithstanding their status as express terms of the parties' agreement.

I stress the totem pole reading of Section 1-205 not because I believe it is "correct" (that is, consistent with the intellectual history of Section 1-205), but because it is the received view. I believe that if my argument for reconstructing the meaning of good

for the various elements constituting the "agreement of the parties." When they cannot reasonably be construed as consistent, the express terms of the agreement of the parties control both course of dealing and usage of trade.²²³ Therefore, when the secured party engages in conduct that might be interpreted as a waiver of its rights upon default under the terms of the security agreement, and the security agreement contains an anti-waiver clause, the fact that the anti-waiver clause is an express term elevates it to a priority position in the interpretational matrix. Under the language of this provision, no matter what the secured party may do by way of conduct inconsistent with the express terms of the security agreement, the anti-waiver clause, because it is an express term, will dictate the interpretational outcome.

In summary, the integration of Article Nine and Article One dictates the following on interpretational priorities:

- (1) Section 9-105(1)(l) provides the basic definition of "Security Agreement";
- (2) Section 9-105(4) explicitly incorporates Article One's definition of "Agreement" into Article Nine to augment the meaning of "Security Agreement" (Section 1-201 is also cross-referenced in Section 9-105 for the meaning of "Agreement");
- (3) Section 1-201(3)(the definition of "Agreement") sets forth the three elements that constitute the [Security] Agreement of the parties (express terms, course of dealing, and usage of trade);
- (4) Section 1-205(3) states specifically that course of dealing and usage of trade supplement the express terms of the parties' agreement;
- (5) Section 1-205(4) contains the interpretive priority

faith can survive the rigors of this construction of Section 1-205, the argument will be all the better. In a future article on the good faith obligations of lenders to their customers under "acceleration at will" clauses, I will explore the intellectual history of Section 1-205 in depth and demonstrate its important connections, both historical and conceptual, with the obligation of good faith.

²²³ See U.C.C. § 1-205(4) (1987); see also *State Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 379, 387, 349 N.W.2d 912, 917 (1984) ("[W]here a buyer of farm products subject to a recorded security interest requiring 'written consent' relies on the 'or otherwise' provision, § 9-306(2), and implied consent, waiver, or ratification by course of dealing, § 1-205, the buyer must prove that the course of dealing was reasonably consistent with the express provisions in the security agreement, § 1-205(4), and that the course of dealing was a voluntary and intentional relinquishment by the secured party of a known and existing right, amounting to waiver, consent, or ratification."); R. HILLMAN, J. McDONNELL & S. NICKLES, *COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE* ¶ 22.02[1][b], at 22-25 (1985) ("[T]he courts have been unwilling to infer authority to dispose of collateral solely from a previous course of dealing between the secured party and the debtor. The present tendency among the courts is to conclude that such a provision in the parties' agreement negates the significance of a contrary course of dealing. This conclusion is supported by one of the Code's general rules of interpretation, Section 1-205(4) . . .").

rules for all three elements of "Agreement," according clear priority to express terms over course of dealing and usage of trade.

Having established that express terms have (presumptive) priority over course of dealing and usage of trade, we turn to the judicial responses to the problem presented by anti-waiver clauses. As will be shown, the courts pay little attention to interpretational questions of priority, and when they do consider such questions, they answer them incorrectly.

A. *Judicial Responses*

The extent to which a secured creditor may resort to its rights under Part Five of Article Nine after engaging in conduct potentially waiving those rights has been the subject of much judicial scrutiny. This judicial energy has generated three incommensurable²²⁴ positions: the (a) "Effectiveness of Express Terms," (b) "Right to Rely," and (c) "Waiver of Express Terms" approaches. The positions can be summarized thus:

(a) Effectiveness of Express Terms:²²⁵ a security agreement is effective according to its terms. If one of those terms is an anti-waiver clause, it will be enforced, the secured party's conduct notwithstanding; (b) Right to Rely:²²⁶ even if the security agreement contains an anti-waiver clause, when the secured party engages in conduct that would, in the absence of the clause, amount to a waiver of its right to accelerate upon default and move against the collateral, the secured party will be required to give the debtor notice of its intention to accelerate the time for payment of amounts due and to move against the collateral prior to doing so;

(c) Waiver of Express Terms:²²⁷ even if the security agreement contains an anti-waiver clause, if the secured party engages in conduct amounting to a waiver of its right to accelerate upon default the anti-waiver clause, together with the right to accelerate upon default, will be deemed to have been waived.

²²⁴ By "incommensurable," I mean that the three doctrinal approaches to the problem of anti-waiver clauses cannot be reconciled. Here I follow the current use of the term in the philosophy of science. See R. BERNSTEIN, *supra* note 109, at 79-108.

²²⁵ See *infra* text accompanying notes 229-36.

²²⁶ See *infra* text accompanying notes 237-44.

²²⁷ See *infra* text accompanying notes 245-76.

Only the Effectiveness of Express Terms analysis is a defensible reading of the direct provisions of Article Nine. In other words, the *language* of Article Nine, together with that of Article One, mandates that anti-waiver clauses be enforced according to their terms.²²⁸

This analysis notwithstanding, I advance the position that in many circumstances anti-waiver clauses should not be enforced. My difference with the latter two positions, on the other hand, is not with their results, but rather with the reasoning and interpretive logic used to get there. The results will not change, but the analysis will, and decidedly so.

1. Effectiveness of Express Terms

In *Van Bibber v. Norris*,²²⁹ the Indiana Supreme Court examined the issue of anti-waiver clauses in the context of a secured creditor's repossession of a debtor's mobile home and its contents. The secured party repossessed the debtor's property after having accepted fifty-seven late payments, the debtor having made fifty-nine payments in all.²³⁰ The debtor's argument was simple: the anti-waiver clause notwithstanding, the bank had repossessed his property wrongfully because it had waived the right to self-help repossession through its course of performance in accepting late payments.²³¹ The court dismissed the debtor's position with a straightforward reading of Section 9-201.²³² The security agreement is effective according to its terms; if one of those terms is an anti-waiver clause, it will be enforced.²³³ "If the security agreement is to be truly effective according to its terms, we must conclude that [the bank] did not waive its rights to demand strict com-

²²⁸ This conclusion ultimately will be rejected because a reconceptualized notion of good faith overrides the requirement that anti-waiver clauses be enforced according to their terms. See *infra* notes 277-86 and accompanying text.

²²⁹ 275 Ind. 555, 419 N.E.2d 115 (1981).

²³⁰ See *id.* at 559, 419 N.E.2d at 118.

²³¹ See *id.* at 562-63, 419 N.E.2d at 120.

²³² See *id.* at 567, 419 N.E.2d at 123. For other decisions using the Effectiveness of Express Terms analysis, see *Monarch Coaches, Inc. v. ITT Indus. Credit*, 818 F.2d 11 (7th Cir. 1987); *K.B. Oil Co. v. Ford Motor Credit Co.*, 811 F.2d 310 (6th Cir. 1987); *Wade v. Ford Motor Credit Co.*, 455 F. Supp. 147 (E.D. Mo. 1978); *Williams v. Ford Motor Credit Co.*, 435 So. 2d 66 (Ala. 1983); *Hale v. Ford Motor Credit Co.*, 374 So. 2d 849 (Ala. 1979); *McAllister v. Langford Investigators, Inc.*, 380 So. 2d 299 (Ala. Civ. App. 1980); *Fair v. General Fin. Corp. of Ga.*, 147 Ga. App. 706, 250 S.E.2d 9 (1978); *General Grocer Co. v. Bachar*, 51 Ill. App. 3d 907, 365 N.E.2d 1106 (1977); *Riley State Bank v. Spillman*, 242 Kan. 696, 750 P.2d 1024 (1988); *Universal C.I.T. Credit Corp. v. Middlesboro Motor Sales, Inc.*, 424 S.W.2d 409 (Ky. Ct. App. 1968); *Home Fin. Co. v. Frazier*, 380 S.W.2d 91 (Ky. Ct. App. 1964).

²³³ See *Van Bibber*, 275 Ind. at 565, 419 N.E.2d at 122.

pliance and to pursue its contract and statutory remedies."²³⁴

By virtue of the interpretational priority accorded the express terms of the security agreement by Sections 9-201 and 1-205(4), the conduct of the secured party of continually accepting late payments is rendered legally superfluous.²³⁵ Further, "[s]ince the secured party here is in the same position, by virtue of the non-waiver clause, as one who never accepted a late payment, we conclude that no notice was required before it could proceed with its contract remedies."²³⁶

2. Right to Rely

The tension between the interpretational hierarchy apparent from the language of Articles Nine and One, on the one hand, and the judicial desire to reach a perceived equitable result, on the other, is rarely more apparent than it was in *Cobb v. Midwest Recovery Bureau Co.*²³⁷ There, the debtor's Mack truck was repossessed after the secured party had not only accepted late payments regularly, but also charged the debtor late fees.²³⁸ In arguing for reversal of a jury verdict that included an award of punitive damages to the debtor, the secured party urged that the anti-waiver clause in the security agreement precluded a finding of wrongful repossession, and so precluded awarding punitive

²³⁴ *Id.* at 564, 419 N.E.2d at 121.

²³⁵ See, e.g., *Flagship Nat'l Bank v. Gray Distrib. Sys., Inc.*, 485 So. 2d 1336, 1340 (Fla. Dist. Ct. App.) ("If no reasonable consistent construction can be drawn, the express terms of the agreement control."), *review denied*, 497 So. 2d 1217 (Fla. 1986).

²³⁶ *Van Bibber*, 275 Ind. at 565, 419 N.E.2d at 122. Note that the court rejected the debtor's good faith argument that he should have been given notice prior to repossession of his mobile home. The court rejected the claim

[s]ince the security agreement here closely tracks the Uniform Commercial Code's provisions authorizing repossession upon default unless the parties have otherwise agreed, and since those provisions are not predicated on the giving of notice, we cannot say that there could be a lack of good faith based on the secured party's doing *that which the code clearly authorizes it to do*.

Id. at 566-67, 419 N.E.2d at 123 (emphasis added). This reasoning supports the thesis that only by reformulating the concept of good faith can we see its proper role in Article Nine. The court's statement that the secured party had the right to repossess the debtor's mobile home because such conduct is "authorized by Article Nine" begs the very question at issue. The point is that the court *did not even see the interpretation of good faith as an issue*, possessed as it was of an impoverished analytical framework.

²³⁷ 295 N.W.2d 232 (Minn. 1980). For other decisions yielding similar reasoning and results under the Right of Rely theory, see *Ford Motor Credit Co. v. Waters*, 273 So. 2d 96 (Fla. Dist. Ct. App. 1973); *Pierce v. Leasing Int'l, Inc.*, 142 Ga. App. 371, 235 S.E.2d 752, (1977); *Nevada Nat'l Bank v. Huff*, 94 Nev. 506, 582 P.2d 364 (1978); *Lee v. Wood Prod. Credit Union*, 275 Or. 445, 551 P.2d 446 (1976); *Ford Motor Credit Co. v. Washington*, 573 S.W.2d 616 (Tex. Civ. App. 1978).

²³⁸ *Cobb*, 295 N.W.2d at 234.

damages.²³⁹

The Supreme Court of Minnesota did not deny the potential effectiveness of the anti-waiver clause in similar cases, but followed the lead of most other jurisdictions that have considered the enforceability of anti-waiver clauses after the secured party has repeatedly accepted late payments.²⁴⁰ The court imposed a duty on the secured party to notify the debtor, as a prerequisite to enforcement of any right to repossess the collateral. The court stated that:

an established course of dealing under which the debtor (lessee) makes continual late payments and the secured party (lessor) accepts them does not result in a waiver of the secured's [sic] party's right to rely upon a clause in the agreement authorizing him to declare a default and repossess the chattel.

. . . [A] secured party who has not insisted upon strict compliance in the past, who has accepted late payments as a matter of course, *must*, before he may validly rely upon such a clause to declare a default and effect repossession, *give notice* to the debtor (lessee) that strict compliance with the terms of the contract will be demanded henceforth if repossession is to be avoided.²⁴¹

The basis for the court's notice requirement was estoppel: "[the secured party's] conduct had induced the justified reliance of the debtor in believing that late payments were acceptable."²⁴² The secured party had lulled the debtor into the belief that his late payments would continue to be accepted, creating a justified expectation of this practice in the debtor; it would be unfair to compromise this expectation without prior warning.

The court reasoned that the notice requirement works no ill effect upon the rights of the secured party, because the secured party may still enforce the security agreement according to its terms.²⁴³ The se-

²³⁹ See *id.* at 235.

²⁴⁰ See *id.* at 237.

²⁴¹ *Id.* at 236 (quoting *Nevada Nat'l Bank*, 94 Nev. at 512-13, 582 P.2d at 369) (citations omitted). In the first paragraph of the quote from the *Huff* opinion, the Nevada court confuses course of dealing with course of performance. See *id.* In addition, the court's argument that the parties' course of dealing (performance) modifies the terms of the security agreement fails to address the interpretational priority problem created by Section 1-205(4). See *id.*

²⁴² *Id.* This argument is strongly supported by the fact that the bank charged a late fee on nine separate occasions, thereby encouraging the debtor's belief that late payments were acceptable, although subject to a penalty. See *id.* at 234 n.1.

²⁴³ See *id.* at 237.

cured party need only disabuse the debtor of his belief that continued late payments will be tolerated. In this manner, "the debtor would be protected from surprise . . . [and] [t]he creditor is protected because, by the device of one letter, the creditor can totally preserve its remedies so that if the account continues in default, repossession could be pursued as provided in the contract without further demand or notice."²⁴⁴

3. Waiver of Express Terms

Several courts have held that an anti-waiver clause may itself be waived like any other provision in a security agreement.²⁴⁵ Thus, when the secured party has continually accepted late payments, it will be deemed to have waived the right to enforce some terms of the security agreement. These opinions are of questionable merit, since they fail to come to grips with the arguments and analyses of the other two positions and, moreover, fail to demonstrate how such a conclusion can be drawn given a careful reading of the Code.

The principal weakness in this position is the failure to recognize the mandate in Section 9-201 that "a security agreement is effective according to its terms." If secured parties put anti-waiver clauses in their security agreements precisely to avoid the traditional waiver argument that the right to accelerate upon default is waived by a course of conduct subsequent to the formation of the agreement of the parties,²⁴⁶ then the anti-waiver clause should have effect by altering that result. What the courts need to explain is why the addition of the clause does not change the analysis and, hence, the legal effect of conduct that amounts to a waiver of the right to accelerate upon default. Many courts use the same analysis whether or not there is an anti-waiver clause present in the security agreement.²⁴⁷ This approach is plainly inadequate, for the clause has the effect of putting the secured party "in

²⁴⁴ *Id.*

²⁴⁵ *See, e.g.,* *Smith v. General Fin. Corp.*, 243 Ga. 500, 500-01, 255 S.E.2d 14, 15 (1979) (evidence of repeated acceptance of late payments creates a factual dispute as to whether parties entered into a modified agreement); *Battista v. Savings Bank*, 67 Md. App. 257, 270, 507 A.2d 203, 209 (1986) (waiver of a contractual right to prompt payment or to repossess may be effected by conduct notwithstanding requirement that it be in writing); *Fontaine v. Industrial Nat'l Bank*, 111 R.I. 6, 10-11, 298 A.2d 521, 523 (1973) (rejecting defendant's argument that acceptance of payments made after plaintiff was in default would not constitute waiver of contractual rights).

²⁴⁶ *See* *Monarch Coaches, Inc. v. I.T.T. Indus. Credit*, 818 F.2d 11 (7th Cir. 1987); *K.B. Oil Co. v. Ford Motor Credit Co.*, 811 F. 2d 310 (6th Cir. 1987); *Wade v. Ford Motor Credit Co.*, 455 F. Supp. 147 (E.D. Mo. 1978); *Williams v. Ford Motor Credit Co.*, 435 So. 2d 66 (Ala. 1983).

²⁴⁷ *See, e.g., Smith*, 243 Ga. at 501, 255 S.E.2d at 15 (holding that it is a jury question whether an anti-waiver clause may itself be waived).

the same position, by virtue of the non-waiver clause, as one who never accepted a late payment."²⁴⁸ In short, these cases fail to explain why the anti-waiver clause is rendered ineffective by virtue of the very conduct it is designed to nullify.

There is one outstanding exception to this analytically weak line of cases, which is often cited for the proposition that an anti-waiver clause may itself be waived. In *Westinghouse Credit Corp. v. Shelton*,²⁴⁹ the Tenth Circuit, in a perspicuously written opinion, held that a secured party's course of performance in accepting late payments may indeed undermine the right of the secured party to exercise its rights upon default.²⁵⁰

The key analytical move in the court's opinion is its handling of the interpretive priority problem described above.²⁵¹ As indicated, the

²⁴⁸ *Van Bibber*, 275 Ind. at 565, 419 N.E.2d at 122.

²⁴⁹ 645 F.2d 869 (10th Cir. 1981).

²⁵⁰ See *id.* at 874.

²⁵¹ The court's entire argument on this point is contained in a lengthy footnote:

The district court alternatively held in effect that the contract was solely a "security agreement" within the meaning of . . . § 9-105(h), and . . . section 2-208, a provision in Article Two of the Uniform Commercial Code governing only sales, could not apply to a secured transaction governed by Article Nine. We disagree with both conclusions. Section 9-105(h) defines "security agreement" as "an agreement which creates or provides for a security interest." Section 2-208 on course of performance refers to "contracts for sale," not to "security agreements." Section 2-106(1) defines "contract for sale" as including a "present sale of goods," that is, "a sale which is accomplished by the making of the contract." Since Shelton's [the debtor's] contract both accomplished a sale and created a security interest, it is not only a "security agreement" as the district court held, but also a "contract for sale." Therefore, section 2-208 reaches it.

The district court's second conclusion that section 2-208 on course of performance applies only to Article Two sales and not to Article Nine secured transactions is also incorrect as a matter of statutory construction. The Uniform Commercial Code is written so that definitions appearing in any particular Article usually apply only to transactions governed by that Article. For example, "contract for sale" defined in section 2-106(1) has meaning only "in this Article [Two]." Similarly, "security agreement," defined in section 9-105(h) has meaning only "in this Article [Nine]." However, definitions in Article One of the Code have meaning "in this Act," that is, they are automatically made a part of each article in the Code. Thus, an Article Nine "security agreement" is first an Article One "agreement," which "means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208)." Official Comment 3 to section 1-201 says: "As used in this Act the word ['agreement'] is intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof, and of any agreement permitted under the provisions of this Act to displace a stated rule of law."

priority accorded the express terms of a security agreement by Sections 9-201 and 1-205(4) is such that express terms presumptively control when they are inconsistent with the parties' course of dealing or any applicable usage of trade.²⁵² The Tenth Circuit tries to avoid the priority problem by adding a fourth element to the interpretational matrix: course of performance.²⁵³ The definition of "Agreement" in Section 1-201(3) includes course of performance as a supplement to the express agreement of the parties, but does so by explicit reference to Section 2-208.²⁵⁴ Therefore, the question is whether course of performance- a concept important to the meaning of "Agreement" in Article Two -may also be used in the interpretational matrix for discerning the meaning of "Agreement" in Article Nine. The Tenth Circuit believes it can be so used.

In rejecting the District Court's conclusion that Section 2- 208 on course of performance applies only to sales transactions, the Tenth Circuit insisted that the entirety of the definition of "Agreement" in Section 1-205(3) is "automatically made a part of each article in the Code."²⁵⁵ The result of this reasoning is that in addition to including course of dealing and usage of trade, the "agreement of the parties" (their "bargain in fact") also comprises their course of performance.

[A]n Article Nine "security agreement" is first an Article One "agreement," which "means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of

Since "agreement" is defined partly in terms of course of performance, "security agreement" must be as well.

Westinghouse Credit, 645 F.2d at 872 n.3 (citations omitted). For further analysis of this point, see T. QUINN, *supra* note 227, ¶ 2-208[A][3], at S2-98 (Cum. Supp. No. 2 1987).

²⁵² See *supra* note 220 and accompanying text.

²⁵³ *Westinghouse Credit*, 645 F.2d at 872 n.3. Course of performance is defined in Article Two as follows:

Where the contract *for sale* involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

U.C.C. § 2-208(1) (1987) (emphasis added).

²⁵⁴ See also U.C.C. § 2-202(a) (1987) ("Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208).").

²⁵⁵ *Westinghouse Credit*, 645 F.2d at 872 n.3.

trade or course of performance as provided in this Act (Sections 1-205 and 2-208)." Since "agreement" is defined partly in terms of course of performance, "security agreement" must be as well.²⁵⁶

The significance of the court's conclusion in *Westinghouse Credit* that course of performance has the effect of modifying the agreement of the parties cannot be overstated.²⁵⁷ The importance of this proposition is brought into relief by the interpretational hierarchy set forth in Section 1-205(4). Recall that, in cases of inconsistency, the express terms of the parties' agreement are given interpretational priority over course of dealing and usage of trade. Course of performance is not explicitly subordinated to the express terms of the agreement.²⁵⁸ Therefore, because course of performance is not subordinate, at least in Article One,²⁵⁹ to the express terms of the parties' agreement, the court's contention that course of performance modifies the rights of the parties under the express terms of the security agreement seemingly is correct.²⁶⁰

B. Assessing the Judicial Responses

Despite their equitable and rhetorical appeal, neither the Right to Rely theory nor the Waiver theory can be sustained. Both theories suffer from significant analytical weaknesses not present in the Effective-

²⁵⁶ *Id.* at 872-73 n.3 (citations omitted).

²⁵⁷ For an analysis of the role of course of performance under Article Two, with specific reference to the relationships among Sections 2-208, 2-209, and "No Oral Modification" clauses, see Comment, *Role of Course of Performance and Confirmatory Memoranda in Determining the Scope, Operation and Effect of "No Oral Modification" Clauses*, 48 U. PITT. L. REV. 1239 (1987). At common law and under the Restatement (Second) of Contracts, these clauses are unenforceable. See RESTATEMENT (SECOND) OF CONTRACTS § 283 comment b (1981); *cf. id.* § 148 comment b ("[N]o oral modification" clause is enforceable only under U.C.C. § 2-209(2)). The severity of the reversal worked by Article Two on the common law is, as one commentator puts it, "softened" by U.C.C. § 2-209(5), which permits retraction of a waiver "unless the retraction would be unjust in view of a material change of position in reliance on the waiver." See E. FARNSWORTH, *supra* note 21, § 7.6, at 474-77.

²⁵⁸ Course of performance is not even mentioned in Section 1-205, and it is mentioned in comment 2 to that Section only to distinguish it from course of dealing. See U.C.C. Section 1-205 & comment 2.

²⁵⁹ This is the logic of the Tenth Circuit's opinion in *Westinghouse Credit*. If course of performance is a source for the meaning of "Agreement" in Article One, then a reader of Section 1-205 is inexorably led to the conclusion that, by virtue of the fact that course of performance is not subject to the interpretational priority rule set forth in Section 1-205(4), course of performance has equal footing with, if not priority over, express terms, course of dealing, and usage of trade.

²⁶⁰ This reading of the interpretational priorities is incorrect. See *infra* note 273 and accompanying text.

ness of Express Terms analysis. Nevertheless, the proposed method will show that the remedial outcomes reached by the two former approaches ultimately prove to be correct. The proposed method's analysis, however, is significantly different in form and substance from the analyses in these other two approaches. In the end, neither justice nor the Code will suffer: each will be better for the effort.

Take the Right to Rely theory first. Proponents of this theory are caught in a hopeless paradox. They insist that anti-waiver clauses are not rendered ineffective by the secured party's course of performance, yet they seek to impose—as a sort of normative overlay to Article Nine—a duty on the secured party to give notice to the debtor before exercising any rights upon default. This view is paradoxical for the very reason given by the Indiana Supreme Court in *Van Bibber*:²⁶¹ as a matter of logic, the anti-waiver clause puts the secured party that has continually accepted late payments in exactly the same position as one who has not. The only way the anti-waiver clause can be “effective” is if it voids the legal significance of the secured party's course of performance (the continual acceptance of late payments). If the anti-waiver clause does not have this effect, then it has no effect at all.

Proponents of the Right to Rely theory face a second, related problem in the source of the duty of notification imposed upon the secured party. The essence of the Right to Rely theory is estoppel: the secured party should not be permitted to take advantage of a state of mind or expectation of the debtor that the secured party itself has induced. The source of the estoppel argument cannot be the Code, as the Code contains no substantive estoppel provision. Section 1-103, however, indicates that the equitable principle of estoppel remains relevant “[u]nless displaced by the [Code's] particular provisions.”²⁶² But this puts us back to the first argument against the Right to Rely theory: if Section 9-201 has any meaning, it means that a security agreement containing an anti-waiver clause “is effective according to its terms.”²⁶³ The anti-waiver clause is either effective or it is not. If it is not, then Section 9-201 cannot be read to displace the equitable defense of estoppel. In the end, the anti-waiver clause must be effective precisely because the principle of estoppel is subject to Section 9-201, not the other way round.²⁶⁴

²⁶¹ See *Van Bibber*, 275 Ind. at 565, 419 N.E.2d at 122.

²⁶² U.C.C. § 1-103 (1987).

²⁶³ *Id.* § 9-201.

²⁶⁴ The precise interpretive question is whether U.C.C. § 9-201 “displaces” the equitable principle of estoppel incorporated into the Code through U.C.C. § 1-103. Professor Summers believes that equitable (as opposed to legal) principles are not dis-

The waiver argument, as mentioned above, comes in two forms, only one of which merits close attention.²⁶⁵ The better argument, however, the Tenth Circuit's in *Westinghouse Credit*, rests upon an erroneous construction of the definition of "Agreement" in Section 1-201(3). The argument fails because "course of performance" is not part of the interpretational matrix for the meaning of "Agreement" in Article One; "course of performance" is a concept whose application is restricted to Article Two. Consequently, it has no role in Article Nine.

How did the Tenth Circuit come to believe that course of performance has any place in Article Nine? Indeed, it is correct to construe Section 1-201(3)'s definition of "Agreement" as a supplement to the definition of "Security Agreement" in Section 9-105(1)(l). While the definition of "Agreement" applies generally to all Articles of the Code, not everything mentioned in Section 1-201(3) can be so exported.²⁶⁶

The meaning of "Agreement" in Section 1-201(3) is defined as "the bargain of the parties in fact."²⁶⁷ The definition refers to a list of possible elements or indicia of the actual agreement of the parties. One of those elements, course of performance, is mentioned in Section 1-201(3), but it is followed by a direct reference to Article Two, specifi-

placed by particular Code provisions unless

the text and comments [of a given provision] . . . address the issue and explicitly displace the general equitable principle by name.

.
But, contrary to my view of the Code, there are various judicial pronouncements—mostly dicta—to the effect that the mere presence of a Code section relevant to the facts of the case ipso facto displaces any otherwise applicable law.

Summers, *supra* note 206, at 938, 940. For a narrower reading of Section 1-103, see Hillman, *Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code" Methodology*, 18 B.C. INDUS. & COM. L. REV. 655, 709-10 (1977) ("[S]ome courts' methodologies reflect the realization that the Code is more than a normal statute; that it is a unified source of solutions to commercial law problems. These courts have therefore looked to the principles and policies of the Code to fill in gaps and to interpret vague or overly broad language. If other courts begin to adopt this methodological approach and follow the priority system advocated here, then the overriding purposes of the Code of uniformity, simplicity, clarity, and modernization of commercial law will not be thwarted.").

²⁶⁵ For an example of the weaker version of the argument, see *Smith v. General Fin. Co.*, 243 Ga. 500, 501, 255 S.E.2d 14, 15 (1979) ("[A] provision in a contract against waiver of contractual rights may itself be found by the jury to have been waived.").

²⁶⁶ See 1 G. GILMORE, *supra* note 160, § 11.1 at 333 ("Under the Code drafting scheme, the definitions of all terms [not merely their mention] which are relevant to more than one of the substantive Articles are lodged in § 1-201 . . .").

²⁶⁷ U.C.C. § 1-201(3) (1987). The Code contains no elaboration of the concept of "bargain of the parties in fact." For discussion of the concept, see Murray, *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 4-5 (1981).

cally to Section 2-208. By this reference did the Code drafters²⁶⁸ intend that Section 2-208 on course of performance be incorporated into the meaning of "Security Agreement" in Section 9-201(3) through the definition of "Agreement" in Section 1-201(3)? This is the specific contention of the Tenth Circuit, and it cannot be sustained.²⁶⁹

Simply stated, the Tenth Circuit's reading of Section 1-201(3) is inconsistent with the language and structure of the provision. "Course of performance" is not defined in Article One for good reason: it is a concept of specific applicability.²⁷⁰ It applies only to sales transactions involving "repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other."²⁷¹ As comment 1 to Section 2-208 puts it: "[t]he parties themselves know best what they have meant by their words of agreement, and their action under that agreement is the best indication of what that meaning was."²⁷²

Even if the Tenth Circuit's construction of Section 1-201(3) were correct, and course of performance as defined in Section 2-208 were part of the general meaning of "Agreement" in Section 1-201(3), the question of Section 2-208's interpretational subordination of course of performance to the express terms of the parties' agreement would still be unanswered.²⁷³ So long as express terms control inconsistent course

²⁶⁸ Of course, I am referring here to Llewellyn, because he drafted Articles One and Two. See Wiseman, *supra* note 11, at 467.

²⁶⁹ In *Borg-Warner Acceptance Corp. v. First Nat'l Bank*, 307 Minn. 20, 238 N.W.2d 612 (1976), the court addressed precisely the question whether there exists any Article 9 equivalent to Section 2-208:

To permit evidence of subsequent conduct to be introduced to vary the unambiguous terms of a security agreement is contrary . . . to . . . the basic premise of the U.C.C. "The fundamental purpose of Art [sic] 9 of the code is to make the process of perfecting a security interest easy, simple, and certain"

If it was open for a court, in every case, to go beyond the terms of the security agreement and to determine the "bargain of the parties in fact," the code's goal of increasing certainty in financing transactions would be stymied.

Id. at 24-25, 238 N.W.2d at 614-15 (quoting *James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. 277, 295, 194 N.W.2d 775, 786 (1972)).

²⁷⁰ See Dugan, *supra* note 222, at 340.

²⁷¹ U.C.C. § 2-208(1) (1987).

²⁷² *Id.* comment 1.

²⁷³ In other words, the interpretational priorities set forth in Article 1 are duplicated in Article 2. Section 2-208(2) states as follows:

The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).

of dealing, course of performance, and usage of trade,²⁷⁴ the validity of anti-waiver clauses cannot be challenged.²⁷⁵

The structure of Section 2-208 mirrors that of Section 1-205 in at least one important way: course of performance is expressly subordinated to the express terms of the parties' agreement. This is consistent with the Code's general approach to contract construction, reflected in both Sections 1-205 and 2-208, which is to accord [presumptively] the greatest evidentiary weight to express terms of the parties' agreement. One cannot, as the Tenth Circuit failed (or chose not) to notice, adopt limited portions of one interpretational framework (Article 2) and incorporate them into another (Article 1).

²⁷⁴ The parties are free to state the extent to which statutory terms are to be considered part of their agreement and the lexical ordering of the terms vis-à-vis their interpretive priority, thereby displacing the statutory hierarchy in Section 1-205(4).

Section 1-205 not only defines what is a course of dealing or usage of the trade but expressly states that although the express terms of an agreement shall be construed whenever reasonable as consistent with the course of dealing or usage of the trade, the express terms of the agreement control where such construction is unreasonable. Thus, to this extent, the statute is inconsistent with prior case law. *Hint.* This, of course, is an invitation to incorporate a provision in the contract that any UCC definition is not controlling and to supply your own. You may do this with any definition. Now, therefore, how to change the effect of 1-205? Simply restated it provides that the four principal elements are to be weighed in interpreting a disputed contract in their order of priority are: (1) express terms, (2) course of performance (as noted, defined by Section 2-208), (3) course of dealing, and (4) usage of trade. The lawyer who is familiar with Article 1 may eliminate any of these elements or otherwise change their order of priority.

Miller, *Hints and Helps to be Found in Article 1 Definitions*, 4 U.C.C. L.J. 223, 225 (1972).

²⁷⁵ Chancellor Hawklund has recently had occasion to consider the priority question in the sales context. What he says about the priority of terms in sales contracts is applicable equally to security agreements. This is the case because Article One's priority scheme applies throughout the Code. Hawklund's comments about the nature of the Code's priority system apply to any Code-governed transaction; exactly what terms fit into this consistent priority structure will depend on the nature of the transaction in question.

The courts must give first priority to express terms, second priority to course of performance, third priority to course of dealing, fourth priority to usage of trade, and last priority to statutory terms.

These priorities reflect the relative ability of the various concepts to determine the parties' actual intent. As the most reliable evidence of that intention, *an express term* of the contract controls any inconsistent implied term. Course of performance is considered the next best test of the parties' intention because it relates to the very contract involved in the dispute, unlike course of dealing which relates to the sequence of conduct between the parties prior to the transaction at hand and may include dealings other than the current transaction. Because both course of performance and course of dealing involve the parties to the current dispute whose activities may reveal their own special way of doing business, these are better tests of meaning than is trade usage. Trade usage reflects only the normal conduct of the trade in a particular vocation or community and may not describe the idiosyncracies of particular members.

Hawklund, *Sales Contract Terms Under the U.C.C.*, 17 U.C.C. L.J. 195, 197 (1985) (emphasis added).

There is no way, save for creative misreading, to avoid the Code's interpretational prioritization of the several elements that the meaning of "Agreement" comprises. Whether the analysis proceeds under Article One or, as in *Westinghouse Credit*, under Article Two, the outcome is the same: express terms are the primary source for the meaning of the parties' agreement. The effect of this interpretational hierarchy can be mitigated only through the employment of a supereminent²⁷⁶ principle that cannot be displaced by the agreement of the parties. It is to such a principle, good faith, that we now return our attention.

C. *Good Faith and Anti-Waiver Clauses*

Anti-waiver clauses pose precisely the sort of interpretive problem that can be resolved only by resort to a supereminent principle. At bottom, the problem involves a tension between the parties' right to strike their own deal within the confines of Article Nine and the Code's requirement that contract rights be enforced in good faith.²⁷⁷ As the review of the judicial approaches to anti-waiver clause cases has shown, courts have yet to find a coherent explanation for their resolutions of this tension. The reconceptualization of good faith suggested above is an attempt to, among other things, construct an explanatory framework for resolving this tension without doing violence to the language of the Code. The requirement of Section 205 of the *Restatement (Second) of Contracts*, that a contract be enforced in accordance with the reasonable expectations of the parties, provides the basis for evaluating secured parties' attempts to enforce anti-waiver clauses when the course of performance between the parties evinces a waiver of the right to enforce the clause. Incorporation of Section 205 into Article Nine transactions facilitates this analysis.

As the argument in Part II demonstrated,²⁷⁸ the meaning of a concept is a function of the point or purpose it serves in legal discourse. By reconstructing the original understanding of good faith in a fashion consistent with Section 205 of the *Restatement*, the supereminent principle of good faith is given a conceptual content consistent with the actual practices of courts.²⁷⁹ In short, the existing discursive structure is

²⁷⁶ I refer to "good faith" as a supereminent principle because the parties cannot disclaim the obligation by their agreement. See *supra* note 198.

²⁷⁷ See U.C.C. § 1-203 (1987).

²⁷⁸ See *supra* notes 56-112 and accompanying text.

²⁷⁹ Of course, courts are themselves important participants in the discourse of law. In attempting to ground arguments for the meaning of, for example, statutory terms, judges are forced to construct explanatory frameworks from the extant materials of the discursive structure. The three approaches to anti-waiver clauses are incommensurable because the explanatory frameworks of each perspective do not coincide. In other

reconstructed in a manner that makes litigation outcomes doctrinally (and discursively) coherent.

To see the doctrinal incongruity more clearly, consider again the decisions of courts advocating the Right to Rely and Waiver theories. Under each approach, the courts are seeking to protect the justified expectations of the debtor.²⁸⁰ One purpose of the reconstructed conception of the Code conception of good faith is to respect the debtor's beliefs when they are grounded in, and engendered by,²⁸¹ the conduct of the

words, the data is theoretically overdetermined (multiple theories account for the same data). The reconstructed conception of good faith advanced here provides just such a unitary framework.

²⁸⁰ The argument with respect to the "justified expectations" of the debtor is not reducible to a waiver analysis. The presence of the anti-waiver clause requires that the analysis move to a different, more expansive, plane. Consider:

When a lender accepts late payments on a note, the lender waives its right to accelerate payments due on the note or foreclose against the collateral supporting the note as a result of the late payments it accepted. The waiver is usually effective even though the contract calling for the payments contains a clause that "time is of the essence" or an anti-waiver clause. Courts deciding these cases properly reason that a lender, by its conduct, may waive its "time is of the essence clause" or anti-waiver clause.

A related and more difficult question, is whether a lender who establishes a pattern of accepting late payments has "waived" its right to insist on future timely payments or has consented to an extension of the due date of future payments. The argument in support of this position is that the indulgence of the lender in not insisting on, and enforcing, timely payments is evidence of an agreement that the borrower's failure to make timely payment is not a default. Many courts hold that if a pattern of accepting late payments is established, lenders may not insist on strict compliance with the terms of the contract. These courts find that because this course of conduct by the lenders lulls debtors into a habit of making late payments, it is inequitable to require timely payments without reasonable advance notice of the lenders' intentions to do so. What constitutes reasonable advance notice has not been defined. Presumably, the notice must have been given a sufficient amount of time before the payment is due to enable a creditworthy borrower an adequate opportunity to find alternative financing.

Bahls, *Termination of Credit for the Farm or Ranch: Theories of Lender Liability*, 48 MONT. L. REV. 213, 221-22 (1987).

²⁸¹ Permitting the secured party to lull the debtor into a state of belief of which the secured party then takes advantage violates the Code's requirement of "fundamental integrity in commercial transactions." *Skeels v. Universal C.I.T. Credit Corp.*, 335 F.2d 846, 851 (3d Cir. 1964); see also *Regardie, Accounts Receivable Financing: The Case for Notice to the Borrower on Default*, 16 U.C.C. L.J. 3, 8-9 (1983) ("Such factors as promises and representations by the lender to the borrower, the course of conduct between the parties, the acquiescence by the lender in prior defaults, and the existence of other aggravating circumstances may arise in various situations to justify a conclusion that the lender violated the statutory obligation of good faith by not providing the borrower with advance notice of its actions and the opportunity to obtain alternative financing before declaring a default.").

It is important to emphasize that the argument for a reconstructed conception of good faith is not a proposal for a test tied to mental states of the debtor. Were this the

secured party.²⁸² That purpose — enforcement of the security agreement consistent with the debtor's justified expectations — brings each and every one of those cases, their differences notwithstanding, within the ambit of a reconstructed conception of good faith.

No litmus test exists for ascertaining what, in all cases, will constitute the "reasonable" expectations of the debtor. Nevertheless, it is pos-

argument, the proposed norm would scarcely be different from traditional estoppel theory. What is important is not the fact that the secured party engendered a particular state of mind in the debtor and then took advantage of the debtor's expectations. What is at stake are the expectations of the debtor at the time the debtor came to agreement with the secured party. Further, there is no requirement that the debtor have an actual mental event (thought) with regard to what the secured party might or might not do in the future. All that is required is that at the time of agreement, a reasonable debtor would have thought that the secured party would not do anything that would put the debtor at financial risk greater than that which the debtor reasonably understood she was undertaking.

The relationships among the basis of the bargain test, good faith, and reliance come together in a recent, and very well reasoned, opinion by the Supreme Court of Oregon. In *Best v. United States National Bank of Oregon*, 303 Or. 557, 739 P.2d 554 (1987), a plaintiff class sued, questioning the validity of a bank's service charge for processing checks returned for insufficient funds. After the trial court granted summary judgment for the bank, and the appellate court reversed in part, the supreme court entertained an appeal. The depositors claimed that the bank had an obligation to set the NSF fees in good faith and had breached that obligation by charging fees in excess of the bank's actual costs for processing the NSF checks. *See id.* at 561, 739 P.2d at 556-57. The opinion contains a discussion of the positions of Professors Summers and Burton on good faith as well as Section 205 of the *Restatement (Second) of Contracts*. The court held explicitly that the purpose of good faith is "to effectuate the reasonable contractual expectations of the parties." *Id.* at 563, 739 P.2d at 558. Not only is good faith not necessarily measured by reasonable commercial standards, *see id.*, there is no requirement that an individual plaintiff have any specific expectation at all: all that is required is that the trier of fact be able to draw the "inference that the depositors reasonably expected that the Bank's NSF fees would be priced similarly to those checking account fees of which the depositors were aware . . ." *Id.* at 565, 739 P.2d at 559 (emphasis added). What this test amounts to is the absence of any requirement that a customer have any expectation with respect to the bank's conduct regarding NSF charges. The customer need believe only that the bank would act in matters not explicitly discussed in a manner consistent with what was discussed (this inference is drawn from the court's distinction between charges of which the customer was aware (e.g., monthly and "per check" charges) and those of which the customer was not aware (specifically, the NSF charges). *See id.* at 565, 739 P.2d at 559.

²⁸² The same is true in other areas of lender conduct where the lender engenders expectations on the part of the debtor, which the lender then fails to meet. In discussing a series of recent cases involving suits against lenders for failure to lend, one commentator states:

The common thread that runs through these "commitment to lend" cases is that a court is likely to find that the lender failed to act in good faith if the prospective borrower changed position in reliance upon what a court perceives as a reasonable expectation that a loan will be made, whether that expectation arises from documents or verbal assurances, and the lender then seeks to disclaim its commitment.

Weissman, *supra* note 18, at 5-6.

sible to articulate parameters for such an analysis. For example:

1. Was there anything in the circumstances that would put the debtor on notice that the secured party would not refrain from exercising its rights upon default?; 2. Did the secured party ever tell the debtor it believed her to be in default?; 3. Did the debtor have any prior credit experiences that would have alerted her to the fact that failure to pay on time (as opposed to failure to pay at all) exposed her property to the risk of repossession without prior notice?; 4. Did the secured party ever notify the debtor that late payments were a breach of the security agreement?²⁸³ 5. Was the anti-waiver clause a negotiated term of the security agreement?;²⁸⁴ 6. Did the secured party's loan officer ever bring the anti-waiver clause to the debtor's attention?; 7. Is the debtor sufficiently experienced (sophisticated) in credit matters to know that late payments are an indulgence on the part of the secured creditor and not a waiver of any written terms of the security agreement?; 8. Did the secured party ever afford the debtor the opportunity to obtain credit elsewhere before moving against the collateral?²⁸⁵ 9. Is the debtor more than one or

²⁸³ See *Ford Motor Credit Co. v. Jordan*, 168 S.E.2d 229, 233 (N.C. App. 1969) (acceptance of late payments is not a waiver of the right to declare a default where the debtor receives written notices to the effect that late payments are a breach of the security agreement). Notification that late payments were a breach of the security agreement would protect the debtor "from surprise and from a damaging repossession by forewarning that late payments would no longer be acceptable." *Cobb*, 295 N.W.2d at 237; see also *Flick & Replansky*, *supra* note 18, at 245 ("To add further support to an argument that the bank has not waived its rights in accepting late payments, perhaps a bank should send notices to borrowers from whom it receives and accepts late payments, stating that late payments constitute an event of default under the loan agreement and that the borrower should not rely on the bank's acceptance of one payment as an indication that future late payments will not result in the loan being called.").

²⁸⁴ On the normative and legal consequences of standardized contract terms, see Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983); see also Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOOD HALL L.J. 5, 20-22 (1984) (arguing that contracts of adhesion find their legitimacy in the context of a modern bureaucracy).

²⁸⁵ On this point, consider the following excerpt from the charge to the jury in *K.M.C. Co. v. Irving Trust*:

The financing agreement gave Bank the right to determine, in the exercise of its discretion, whether to advance funds to Borrower and, if so, how much to advance. . . . Under the law, members of the jury, there is an obligation of good faith and fair dealing which is implied in every contract. This duty of good faith and fair dealing emphasizes faithfulness to an agreed upon common purpose and consistency with the justified expectations of the other party. . . . The obligation of good faith and fair dealing in contracts calls for the fulfillment of the contract without searching for excuses, however plausible, for non-performance. . . .

two payments in arrears?²⁸⁶

With these parameters in mind, consider again the facts of *Van Bibber v. Norris*. The debtor (Norris) purchased a mobile home from a seller (Van Bibber) who operated a mobile home park in which the newly-purchased home would sit on land leased to the debtor by the seller.²⁸⁷ The sale transaction was financed by a local bank (American Fletcher National Bank and Trust Company) that supplied the seller/trailer park operator with pre-printed, integrated purchase and sale/promissory note/security agreement forms containing an anti-waiver clause.²⁸⁸ After the sale was accomplished, the seller assigned the loan to the bank on a full repurchase basis.²⁸⁹ The loan agreement called for 84 consecutive payments of \$68.31 for a total in payments of \$5,738.04.²⁹⁰ Norris was late in 57 of his 59 payments. The maturity date of the loan was twice extended.²⁹¹ Owing to animosity between Norris and Van Bibber, Norris moved his mobile home to another facility.²⁹² Shortly thereafter, he was arrested on an unrelated criminal

Good faith and fair dealing may require a party to a contract to give notice to the other party of a contract that a particular pattern of doing business under a contract is going to be changed.

It is for you the jury to determine whether or not such a pattern of doing business was established between the parties, if notice of a change of any such pattern was necessary to the proper execution of the contract and, if so, whether Bank breached its duty of good faith and fair dealing by not giving notice that it was changing that pattern of doing business under the contract.

Memo Op. No. 3-82-365 (N.D. Tenn. July, 1983), *aff'd*, 757 F.2d 752 (6th. Cir. 1985), *quoted in* D. ROME, *supra* note 167, § 8.04[1], at 8-16 to 8-17.

In discussing *K.M.C.*, Rome comments that:

The borrower argued that it was entitled to notice of the intended changes sufficient to afford the borrower an opportunity to seek substitute financing. The jury agreed and the borrower, whose business allegedly collapsed when checks bounced, was awarded damages many times more than the amount of the secured loan. The jury found the bank's conduct to be arbitrary and capricious.

D. ROME, *supra* note 157, § 8.04[1], at 8-17.

²⁸⁶ See *Ash v. Peoples Bank*, 500 So. 2d 5, 7 (Ala. 1986) (holding that one instance of largess does not create a "pattern.").

²⁸⁷ *Van Bibber*, 275 Ind. at 559, 419 N.E.2d at 118.

²⁸⁸ See *id.* at 557-58, 419 N.E.2d at 117-18.

²⁸⁹ See *id.* at 560, 419 N.E.2d at 119. Such arrangements are referred to as "recourse financing." If the debtor defaults in his payments to the bank, the bank can then require the seller to buy the loan back from it. See generally BLACK'S LAW DICTIONARY 1147 (5th ed. 1979) (defining lender's recourse right as "[t]he right of a holder of a negotiable instrument against a party secondarily liable, e.g. prior endorser").

²⁹⁰ See *Van Bibber*, 275 Ind. at 557, 419 N.E.2d at 117.

²⁹¹ See *id.* at 559, 419 N.E.2d at 118.

²⁹² See *id.*

charge.²⁹³ The bank then decided to repossess the mobile home, and dispatched Van Bibber to effect the repossession while Norris was still in jail.²⁹⁴ The repossession occurred at a time when Norris was current with the bank²⁹⁵ and, in fact, had paid 70 percent of the contract price.²⁹⁶ Van Bibber subsequently repurchased the mobile home, but its contents were destroyed in a fire.²⁹⁷

What is most striking about the facts of *Van Bibber* is that the secured party²⁹⁸ chose to repossess at a time when the debtor was current in his payments. Additionally, repossession occurred when the debtor was nearing the end of the term of payments; the bank had an equity cushion²⁹⁹ such that, as a matter of financial security, there was no pressing need to repossess the collateral at that time.³⁰⁰ If there ever was a time when the debtor should not have feared repossession, this was it: he was current and had been led by the bank's behavior to believe that late payments would be both tolerated and accepted.

At no time during the course of accepting Norris' 57 late payments did the bank or Van Bibber ever tell Norris that late payments were a breach of the agreement, nor did anyone ever tell Norris he was in default. The anti-waiver clause was never discussed with Norris, nor did he have any contact with the bank to discuss his tardy performance. All he had was his "knowledge" of the bank's conduct in continually accepting his late payments. One can only speculate as to Norris' sophistication in matters of secured financing; it is probably safe to assume that his understanding of this particular transaction was no better than that of any other consumer debtor; so long as he made his payments, he would keep his home. Like checking account customers, it is important to emphasize that Norris brought this expectation to the transaction. Was his expectation reasonable? Because the bank never disabused him of the notion that late payments were acceptable, he had

²⁹³ See *id.* at 560, 419 N.E.2d at 119.

²⁹⁴ See *id.*

²⁹⁵ See *id.*

²⁹⁶ See *id.* at 569, 419 N.E.2d at 124.

²⁹⁷ See *id.* at 561, 419 N.E.2d at 119.

²⁹⁸ Strictly construed, at the time of repossession the secured party was the bank, not Van Bibber. As the facts of *Van Bibber* make clear, however, the "real (secured) party in interest" often has a hand in monitoring the transaction and effectuating repossession. See *id.* at 560-61, 419 N.E.2d at 119.

²⁹⁹ The difference between the value of the collateral and the debt is the "equity cushion." See Note, "Adequate Protection" and the Availability of Postpetition Interest to Undersecured Creditors in Bankruptcy, 100 HARV. L. REV. 1106, 1116 n.55 (1987) (defining "equity cushion" as "an excess of value of the collateral over the value of the secured creditor's claim").

³⁰⁰ Additionally, the bank's security never was in jeopardy owing to the recourse nature of the financing. See *Van Bibber*, 275 Ind. at 559, 419 N.E.2d at 118.

no reason to think otherwise.

In addition to the reasonableness of Norris' belief that the bank would continue to accept late payments, the facts also suggest that the conditions under which repossession was effected were themselves unfair. On any construction of the concept of "community,"³⁰¹ it cannot be anything but unfair to repossess a debtor's residence when he is in jail and therefore utterly precluded from objecting to the repossession. The unfairness of the situation is all the more egregious given that at the time of repossession, Norris was current in his payments. It is at the very least doubtful that anyone in the relevant community, be it the community at large or the financial community, would move to repossess collateral under such circumstances; there is no business justification for such conduct.

In summary, when a purposive approach is taken to determining the meaning of good faith, and that meaning is reconceptualized in a manner consistent with the purposes of good faith articulated in Section 205 of the *Restatement (Second) of Contracts*, the enforcement of anti-waiver clauses in security agreements is open to question. While it is difficult, if not impossible, to state in advance when and under what conditions courts should refrain from enforcing anti-waiver clauses, the analysis advanced here suggests that, within certain parameters, a considered judgment of the question can be made. This is surely an improvement over the current state of the doctrine which, as has been shown, is in disarray.

CONCLUSION

Interpretation is at the center of law. When lawyers argue cases, and judges decide those cases, each is engaged in looking forward and backward simultaneously.³⁰² To see where the law must go, we need to know where it has been and how it has achieved its current state. By focusing our attention on the evolutionary³⁰³ character of law, we gain

³⁰¹ See *supra* note 155 and accompanying text (arguing that "community" should usually be taken to mean "financial community").

³⁰² Dworkin characterizes his "Law as Integrity" approach in much the same way:

Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative.

R. DWORKIN, *supra* note 12, at 225.

³⁰³ "Evolution" is here used as a metaphor for "conceptual development." For an

an insight into how it should develop further.³⁰⁴ As this Article argues, the logic of legal discourse is such that participants in the discourse must, to discern the meaning of law, commit to disclosing that law's point or purpose. As we have seen in the discussion of the history of good faith under the Code, discerning a coherent point or purpose can be difficult when it involves settling matters of history.

I hope this effort demonstrates that the recent dialogical turn in interpretive legal theory need not be limited to the realm of public law.³⁰⁵ The exciting prospects for theoretical advancement held out by

analysis of the concept of evolution as an explanatory tool in legal historiography, see Sinclair, *The Use of Evolution Theory in Law*, 64 U. DET. L. REV. 451, 471-77 (1987) (critical examination of use of evolution theory in legal analysis by judges and legal scholars).

³⁰⁴ In the end, the enterprise of adjudication must be seen as essentially prudential—"halfway between an ethics of principles, in which those principles univocally dictate action—*Fiat justitia, ruat coelum*—and an ethics of consequences, in which the successful result is all." E. GARVER, *MACHIAVELLI AND THE HISTORY OF PRUDENCE* 12 (1987); see also B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 19 (1985) ("Answering a practical question at a particular time, in a particular situation, I shall be particularly concerned with what I want *then*.").

³⁰⁵ The subject of dialogical interpretation in constitutional theory was the focus of a panel at the recent annual meeting of the Eastern Division of the American Philosophical Association. Among other things, the panel participants, Bruce A. Ackerman, Cass Sunstein, Frank Michelman, and Drucilla Cornell, considered the role of republican political theory as a paradigm for the analysis of constitutional questions. While it is, indeed, the case that republicanism is an element in our constitutional history, it is doubtful that, with its pronounced emphasis on civic virtue, it can have any but a minor role to play in any political theory that takes seriously the notion of individual spheres of private right. On republicanism in the Western political tradition, see G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1969); see also J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* at vii-ix (1975) (placing Florentine political thought in pre-Renaissance political tradition and discussing the influence of Machiavellian republicanism in 17th and 18th century Europe and the New World); M. TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 10-15 (1988) (examining theories of judicial review emphasizing the incompatibility of the liberal and republican political traditions); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 16 (1986) (exploring the "problem of legal imperialism and especially its relation to personal freedom and self-government"); Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 14-17 (1987) (criticizing approaches in Supreme Court jurisprudence as it relates to differences between societal groups and concluding that the Court tends to perpetuate its own unexamined preconceptions regarding the nature and legal implications of difference); Sunstein, *Interest Groups and American Public Law*, 38 STAN. L. REV. 29, 85-87 (1985) (proposing enhanced judicial scrutiny of legislative process and outcome in order "to ensure that what emerges is genuinely public rather than a reflection of existing relations of private power"); Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 128 (arguing "that the current law of equal protection is not self-contradictory, but a more or less principled response to a more or less principled understanding of what the Equal Protection clause is about"). One of the unexplored themes in the law review literature is the connection between republicanism and rationalism. Republicanism is built upon the moral foundation of virtue, specifically civic virtue. The connection with

developments in philosophy and related disciplines for the continued expansion of anti-foundationalist epistemologies³⁰⁶ must, of necessity, be directed to the domain of private law. More importantly, as the arguments here suggest, there simply is no need³⁰⁷ for the analysis of the

rationalism is the question of the extent to which legal theorists can, or want to, argue for the ahistorical, incontestable validity of virtue as a moral property. One problem is how to reconcile such a desire with modernity, specifically the role of historicism as the key element in modernity. For a characteristically well-informed discussion of the many facets of historicism, see G. IGGERS, *THE GERMAN CONCEPTION OF HISTORY: THE NATIONAL TRADITION OF HISTORICAL THOUGHT FROM HERDER TO THE PRESENT* 295-298 (rev. ed. 1983).

Another, more pressing dilemma, is the close conceptual tie of republicanism with conservatism. For an exploration of these questions, in the context of Straussian political theory, see Wood, *The Fundamentalists and the Constitution*, N.Y. REV. BOOKS, February 18, 1988, at 33-40 (discussing relation between constitutional theory and the conservative political philosophy of Leo Strauss). For a different reading of the role of republicanism in American political thought, one that attempts a reconciliation with liberalism, see Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987) (discussing 18th century liberalism and its relation to traditions of Protestant Christianity and classical republicanism in America during Revolutionary and Early Republic periods).

For a view of civil society with a pronounced emphasis on private spheres of autonomous individual sovereignty, see G. HEGEL, *THE PHILOSOPHY OF RIGHT* (T.M. Knox trans. and ed. 1967); see also P. STEINBERGER, *LOGIC AND POLITICS: HEGEL'S PHILOSOPHY OF RIGHT* 199 (1988) ("The individual, upon entering the larger world outside of his various families- the world beyond his constitutive social connections - encounters others as strangers with whom he many [sic] be involved simply and solely as a matter of convenience or economic necessity."); Cornell, *Institutionalization of Meaning: Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1183 (1988) ("[T]he truth of the sphere of private right is to be found in the reality of relations of reciprocal symmetry . . ."); Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 298 (1985) ("Hegel's dialogic perspective can be translated into a regulative ideal by which we can direct our praxis . . .").

³⁰⁶ An excellent introduction to these enterprises is R. BERNSTEIN, *supra* note 117. An important work of antifoundationalist synthesis is R. RORTY, *supra* note 180. For a thorough, but idiosyncratic, analysis and critique of Rorty's views, with specific, detailed criticism of his treatment of Gadamer's hermeneutics, see Munz, *Philosophy and the Mirror of Rorty* in *EVOLUTIONARY EPISTEMOLOGY, THEORY OF RATIONALITY, AND THE SOCIOLOGY OF KNOWLEDGE* 345, 367-70 (G. Radnitzky & W.W. Bartley III eds. 1987).

³⁰⁷ One cannot step outside language to check theory against reality. The implication for truth is that "objective truth" is no more and no less than the best idea we currently have about how to explain what is going on." R. RORTY, *supra* note 180, at 385. The relative merits of Rorty's pragmatism are assiduously and intelligently reviewed in C. PRADO, *THE LIMITS OF PRAGMATISM* 135-62 (1987) (extended critique of Rorty's philosophical views).

Claims for objective truth wear many labels, the most widely touted of which is "realism." Semantic realism, the view that the meaning of words is governed by how things are in the world and not how people believe they are, is defended by Michael Moore. See Moore, *supra* note 14, at 287 ("Judges should guide their judgments about the ordinary meanings of words by the real nature of things to which words refer and not by the conventions governing the ordinary usage of those words."). For a similar view, one that consciously adopts a semantics of "natural kinds," see Brink, *Legal The-*

content of law to proceed from an axiological perspective external to the

ory, *Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 111-12 (1988). For a critique of Brink's position, see Patterson, *Realist Semantics and Legal Theory*, 2 CAN. J. L. & PHIL. — (1989) (forthcoming).

Despite the self-description of his theory as "realist," Moore advocates a conventionalist approach much more consistent with the skepticism he (incorrectly) attributes to Rorty. See Moore, *supra* note 14, at 309. The nature of Moore's conventionalism comes through in the following paragraph:

The meaning of words like "death," therefore, is not to be found in some set of conventions; meaning is neither a set of standard examples, nor a set of properties conventionally assigned to a symbol. The meaning of a word like "death" is only to be found in the best scientific theory we can muster about the true nature of that kind of event. By assuming that there are such true natures of natural kinds of things, the theory of meaning presupposed by our usage is aptly termed a *realist* theory of meaning.

Id. at 300.

Notwithstanding the obvious problem of explicating how a community of inquirers decides which among several theories is "best," Moore's position gains absolutely nothing by the claim that there is a "true nature" of death. Moore tries to convince us of the truth of realism (semantic and metaphysical) by advancing the claim (making the assumption) that "there are such true natures of natural kinds of things." What he fails to do is to draw a connection between the theory and reality. Of course, he cannot do this because he would have to step outside his theory (and outside language) and compare it (or, as the early Wittgenstein would say, "lay it up against") with/to reality. Not only does Moore refrain from claiming this can be done, he renders such proof unnecessary by making the thoroughly conventionalist move of saying that "the meaning of 'x' is nothing more than our best theory of 'x'." What more does Moore get when he adds to his conventionalism the claim "there is a true nature of 'x' "? How do we (ever) know whether or not the meaning of "x" comports with what Moore refers to as its "true nature?" Moore never tells us.

The problem with Moore's picture is the same for all realists:

[I]t takes as already determined both the way the world is and our understanding of how our interpretations take it to be. The realist of course recognizes that we do not know in *advance* how the world is. But once we have some definite interpretations of the world, we can use them as the basis for our actions, which in turn test the adequacy of our interpretations. If our actions fail to achieve their aims, something must be wrong with the interpretations they were based on. If our actions succeed, this success of course does not entail that their underlying interpretations do accord with the reality they interpret. But if a wide variety of actions in differing circumstances generally succeed, the best explanation for their success is that those interpretations at least approximately accord with the way those objects really are. But where do we acquire our understanding of what our various interpretations do say about the world and of what would count as success in our actions? The realist needs to give some account of understanding such that we can understand how our interpretations take the world to be independent of how the world actually is. Otherwise the alleged independence of object and interpretation can never get off the ground. Sentences and practices do not have ready-made meanings, nor do they acquire meaning by convention. (How could the parties involved understand what they were agreeing to?) They acquire meaning only in their performance or use.

J. ROUSE, *supra* note 88, at 154; see also M. LUNTLEY, LANGUAGE, LOGIC AND EXPERIENCE: THE CASE FOR ANTI-REALISM 39-78 (1988) (sophisticated review of the varieties of realism).

discourse of law.³⁰⁸ The legitimacy of courts is a direct function of the extent to which their decisions reflect the normative values inherent in the existing discursive structure. Nothing said here suggests otherwise.

The difficulty of the historical task, however, pales in comparison to the interpretive burden of conceptual reconstruction. While the attempt here to reconstruct the meaning of good faith has been limited to one context, the reach of the argument is greater than that one context would suggest. Rarely, if ever, do legislators expect their work to remain static and unchanged by courts. But this is particularly true in the case of the Code, given the fact that its drafters invite judicial enhancements that accord with the basic tenets of the document. Given this fact, it is indeed curious that the courts have labored for so long under a conception of good faith that has been eclipsed in the greater body of contract law. And yet, so is the current state of things.

These remarks should not be read to advance a rigid, acontextual distinction between the law "as it is" and "as it ought to be."³⁰⁹ The possibility of being so read suggests why the present Article can be only a prolegomenon. What has been sketched here is an invitation to approach interpretive questions in law from a perspective different from those usually encountered in the literature. The next step in the analysis is the development of a theory of legal judgment complementary to the purposive analysis advanced here. Such a theory would, at a minimum, enrich our institutional ontology beyond a conception of law as "rule" and "principle."³¹⁰ More importantly, it would endeavor to show how the faculty of judgment is always at work in legal reasoning without being reducible to schematic rule or principle.³¹¹ Alas, these are matters for another occasion.

³⁰⁸ I have referred to "external" points of view more than once and wish to be clear about what I mean. My position differs from Dworkin's in *Law's Empire* on this key point: for me, the point or purpose of a practice must come from within the practice and not be imposed on the practice by an interpreter. Dworkin rejects this and claims that the purpose imposed on a practice must be such as "to make it the best possible example of the genre to which it is taken to belong." R. DWORKIN, *supra* note 12, at 52.

³⁰⁹ From what has been said, I hope it is clear that I regard such distinctions as more illusory than real. For an assessment of some current attempts to break free of the formalism/relativism dichotomy, see Gordley, *Legal Reasoning: An Introduction*, 72 CAL. L. REV. 138, 140 (1984) ("[T]he conventional view [of interpretation] establishes a false dichotomy.").

³¹⁰ See J. WALLACE, MORAL RELEVANCE AND MORAL CONFLICT 65 (1988) (The difficulties associated with rule-following are not ameliorated by the introduction of principles).

³¹¹ See L. LLEWELLYN, BEYOND METAPHYSICS?: THE HERMENEUTIC CIRCLE IN CONTEMPORARY CONTINENTAL PHILOSOPHY 105 (1985) ("Practical wisdom is not a capacity to apply rules mechanically.").