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# Having One's Property and Eating it Too: When the Article 9 Security Interest Becomes a Nuisance

Lawrence Ponoroff

*Michigan State University College of Law*, [lponoroff@law.msu.edu](mailto:lponoroff@law.msu.edu)

F. Stephen Knippenberg

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HAVING ONE'S PROPERTY AND EATING IT TOO:  
WHEN THE ARTICLE 9 SECURITY INTEREST  
BECOMES A NUISANCE

*Lawrence Ponoroff\**  
*F. Stephen Knippenberg†*

INTRODUCTION

That the Uniform Commercial Code (hereinafter the “Code” or “U.C.C.”), at least as originally conceived,<sup>1</sup> was an extraordinary accomplishment, perhaps the most successful endeavor of its kind, is beyond cavil.<sup>2</sup> But the crowning achievement was saved for the last—

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\* Dean and Mitchell Franklin Professor of Private and Commercial Law, Tulane University Law School.

† Floyd and Martha Norris Chair and Professor of Law, University of Oklahoma College of Law.

1 Originally published in the early 1950s, the Uniform Commercial Code has been periodically updated, including, over the past fifteen years, the substantial revision of virtually every article of the Code. Some commentators have questioned whether these revisions have eroded the Code’s initial refinement, simplicity, and balance. (Put another way, whether the Code has become less inspirational and more prescriptive.) For further discussion of this difference in drafting style, see Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 204–06 (2000).

2 Professors White and Summers refer to the U.C.C. project as “[t]he most spectacular success story in the history of American law.” Fred H. Miller, *The Uniform Commercial Code: Will the Experiment Continue?*, 43 MERCER L. REV. 799, 808 (1992) (citing JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 3 (3d ed. 1988)). The Article is, according to one scholar, “the crowning achievement of the UCC project, and perhaps the entire uniform law enterprise.” Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 571 (1998); see also Edward Rubin, *Efficiency, Equity and the Proposed Revisions of Articles 3 and 4*, 42 ALA. L. REV. 551, 557 (1991) (noting that for

Article 9. Powerful, creative, comprehensive yet elegant,<sup>3</sup> Article 9 is generally regarded as the most innovative of the Code's articles. Proceeding from the assumption that secured credit is a good thing—perhaps the best thing—Article 9 would be the means to facilitate secured lending.<sup>4</sup> This would be accomplished by making secured lending simple, cheap, and, well, secure.<sup>5</sup>

Secured credit might be made simple, cheap, and certain through a variety of expedients, from skeletal, idiot-proof financing statements with little potential for drafting error, to bright-line rules for creating and perfecting the security interest. What “facilitates” secured credit more than any of those, however, is an idea that underlies the whole regime of secured credit—that is, the reigning conceptualization of the security interest as “property.” Because the security interest has found its way into that particular and historically hallowed legal category, Article 9's secured parties are figures of privi-

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commercial law scholars of their generation, the greatest conceptual achievement in the field was Article 9). Even the reporters for Revised Article 9 displayed appropriate reverence in tinkering with what they described as perhaps the most successful statute ever conceived. Steven Harris & Charles Mooney, *A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously*, 80 VA. L. REV. 2021, 2021 (1994). Doubtless, the most stunning achievement of Article 9 is the elimination of the bewildering array of pre-Code security devices (the chattel mortgage, pledge, conditional sale, and so forth) together with the equally bewildering array of rules that governed them.

3 Although the principle draftsman of Article 9 was Grant Gilmore, this style of drafting is most commonly associated with Karl Llewellyn, primary architect of the Code, and, in both legislative drafting and judging, has been referred to as the Grand Style or Grand Tradition. See generally Karl Llewellyn, *On the Current Recapture of the Grand Tradition*, 9 U. CHI. L. SCH. REC. 6 (1960), reprinted in *JURISPRUDENCE* 215 (1962) (discussing the hallmarks of this style and extolling its virtues).

4 The first half of the twentieth century witnessed the invention of a dizzying array of disparate security devices, each governing a particular pattern of personal property financing, and each boasting its own terminology, limitations, rules of priority, etc. By the late 1940s, the law of chattel security was decidedly nonuniform and excruciatingly complex. The seminal treatment of pre-Code security devices can be found in 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY*, 1-286 (1965). It was against this backdrop that the primary drafters of Article 9, Gilmore and Allison Dunham, undertook to establish a unified statute covering all forms of personal property financing transactions, imposing uniformity, order, and predictability. See *id.* 1-400.

5 See pre-revised U.C.C. § 9-101 cmt. (1972) (“The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty.”).

lege among all creditors, enjoying a pervasive "property priority" under state law and even in bankruptcy.<sup>6</sup>

Of course, if one group of creditors is to be privileged, another must necessarily be deprived—these are principally unsecured creditors who cannot reach assets encumbered by security interests to satisfy their claims, and, again, irrespective of whether they assert those claims in or out of bankruptcy. The descriptive and functional antithesis of secured creditors, unsecured creditors own no interest cognizable as property; their claims are solely in personam. For that reason, the unsecured creditor withers before the ownership interest of the Article 9 secured party, and it makes not a whit of difference how the unsecured claim was acquired (i.e., whether by consent or as redress for an injury committed by the debtor). It is difficult to imagine a set of circumstances better calculated to precipitate debate, and so it has. The property priority of Article 9 has been challenged as inefficient by some,<sup>7</sup> inequitable by others,<sup>8</sup> and all to no avail.<sup>9</sup> The impact of de-

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6 As the U.C.C. has been adopted in one version or another in every state, state law distribution rules refer, in fact, to *priority* rules. Those govern disputes arising between unsecured creditors and lien creditors (who became secured the hard way) and Article 9 secured parties. The long and the short of it is, where secured parties have perfected their security interests, they trump the lien creditors. U.C.C. § 9-317(a)(2) (2006) [all references to the U.C.C. are, unless otherwise indicated, to the most recent version of the U.C.C., which was published in 2006]. In bankruptcy, a trustee deploying the power of a hypothetical lien creditor is likewise subordinate to the perfected security interest. See 11 U.S.C. § 544(a) (2000). The treatment afforded secured claims in bankruptcy has always been a matter of controversy. See generally David Gray Carlson, *Secured Creditors and the Eely Character of Bankruptcy Valuations*, 41 AM. U. L. REV. 63 (1991) (arguing that valuation theories developed by bankruptcy courts are neither objective nor subjective but instead are subjective).

7 We refer here, of course, to the extensive body of literature on the distributive consequences of secured credit consequences, that is, for unsecured creditors. Much of that discourse—the so-called puzzle literature—was devoted to the question whether secured credit was efficient. In the 1970s, prominent legal scholars began to question fundamental assumptions upon which secured credit as an institution rests, such as the conventional thinking that secured credit expands credit markets and makes more credit available. Early sightings are in the work of Thomas Jackson and Anthony Kronman. See, e.g., Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143 (1979). That work proposed that the justification for secured credit was to be found in the net gain realized from reduced monitoring costs, not in some mythical net gain in the form of an increase in high risk loans that, but for secured credit, would not be made at all. *Id.* at 1153. Above all, Jackson and Kronman had exposed a curiosity—the conventional rationale for secured credit could not explain the existence of what appeared to be an inefficient institution. *Id.* at 1158–61. The explicit declaration of secured credit to be a puzzle, together with the challenge to solve it, was issued thereafter by Professor Alan Schwartz. See Alan Schwartz, *Security Interests and Bankruptcy Priorities: A Review of Cur-*

claring the security interest to be property does not, however, end at the level of discreet individual priority disputes.

The property priority granted a secured claimant, coupled with expansion in the forms of collateral amenable to capture under Article 9 ushered in by the 1998 revision,<sup>10</sup> create the opportunity to

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*rent Theories*, 10 J. LEGAL STUD. 1 (1981). There followed a torrent of puzzle articles. See, e.g., James J. White, *Efficiency Justifications for Personal Property Security*, 37 VAND. L. REV. 473 (1984). The efficiency debate is “efficiently” summarized in Jay L. Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, 831–43 (2004).

8 In the wake of the failure of the law and economics literature to provide a solution to the puzzle of secured credit, only the “folk theory” (the conventional premise that secured credit made credit easier to be had) was left standing. Lawrence Ponoroff & F. Stephen Knippenberg, *The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy*, 95 MICH. L. REV. 2234, 2257 (1997). How secured credit can exist if it is inefficient is irrelevant to the present Article—it does. However, its attendant costs to unsecured creditors, and justifying secured credit on a normative basis, are of central concern. See also *id.* at 2258 (“[F]olk theory does not offer a normative justification at all.”).

Another group of scholars seem to have recognized this issue, pointing out the harmful effects worked on some classes of unsecured creditors in bankruptcy owing to the priority of secured creditors. The group, led in its early incarnation by Professor Lynn LoPucki, was branded “Sympathetic Legal Studies” by Harris and Mooney, *supra* note 2, at 2045, or the shorthand, if unflattering, “Symps.” The label is likely unmerited in that others have offered proper law-and-economics efficiency explanations for the same sort of adjustments to priority rules proposed by the Symps. See, e.g., Lucian A. Bebchuk & Jesse M. Fried, *The Uneasy Case for Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 913–21 (1996). On the other hand, whereas the worst the finance literature has to say about secured credit is that it is, or might be, inefficient, LoPucki declares it “blight.” See Lynn M. LoPucki, *The Unsecured Creditor’s Bargain*, 80 VA. L. REV. 1887, 1914 n.104 (1994).

In any event, it is reasonably accurate to say that, on the Symp view, some unsecured creditors are victims of secured credit and the priority given secured creditors in bankruptcy. *Id.* at 1896–1902. Briefly, Professor LoPucki submits that secured credit enables the debtor and its secured creditors to enjoy a kind of subsidy at the expense of an array of unsecured creditors. *Id.* at 1920–21. Unsecured creditors, of course, are not privy to the bargain between the debtors and the secured party that generates the subsidy, either because they did not transact voluntarily with the debtor, or because they are too uninformed and unsophisticated to recognize that it is being imposed on them. *Id.* at 1924–31.

9 See *infra* note 10.

10 Revised Article 9 became available for enactment by the states in 1999, with a delayed effective date of July 1, 2001. U.C.C. § 9-701 (2006). In its final form, it represented a complete victory for the conveyancing model of security by making it easier than ever before to create and perfect security interests in virtually anything and everything with accompanying changes in the priority rules that offer even stronger protection for the security interest against other claimants. See generally Julian B. McDonnell, *Is Revised Article 9 a Little Too Greedy?*, 104 COM. L.J. 241, 250 (1999) (expressing concern that, collectively, the new provisions on scope, filing and

render the interests of unsecured creditors as a group worthless from the get-go through so-called "judgment-proofing." Judgment-proofing is a simple matter of the debtor incurring debt secured under the terms of an "all-assets" financing statement in an amount that is, or more likely becomes, in excess of the liquidation value of its assets—and often foreseeably so. In this, security unchecked may impose a threat to the entire liability system.<sup>11</sup> That result, however, does not have to flow from the prevailing understanding of security as property. It is our contention that if the security interest *is* property, then secured credit deployed as a judgment-proofing scheme is a *misuse* of property. As in all matters of misuse, the law should supply a remedy. The remedy in the case of secured credit, however, has not been obvious, perhaps because those who have sought such a remedy have always done so by challenging the basic precepts of the property-based conception of security. A more fruitful approach, we believe, is to indulge the property metaphor on its own terms and then find a solution within the entailments that naturally flow from the metaphor.

The tort of nuisance has long safeguarded the quiet enjoyment of landowners from disturbance in the form of unwelcome, harmful activity conducted on neighboring property. That is to say, the considerable freedom of use that attends private land ownership is not without boundaries, and those boundaries are drawn somewhere at the edges of a neighbor's quiet enjoyment. With property *rights* come property *responsibilities*, and we would submit that it is analytically inconsequential whether those rights are real or personal, corporeal or incorporeal.

Bewildering it is that a culture long intolerant of a nuisance that threatens the quiet enjoyment of land should be so at ease with an equally, if not more, noxious nuisance created by a personal property interest—namely, the denigration of the rights of unsecured creditors through the misuse of security. There is no currently recognized tort of nuisance to regulate the unreasonable, even reprehensible, use of

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priority could encourage preemptive filings designed to judgment-proof enterprises fearing tort liabilities or other unsecured claims).

11 This is a major premise of Professor LoPucki's article, Lynn M. Lopucki, *The Death of Liability*, 106 YALE L.J. 1, 14–19 (1996). The liability system, as LoPucki describes it, centers around the satisfied judgment. *Id.* at 14. With the value of an insolvent debtor's assets conveyed away to the secured creditor, nothing remains for general creditors, either in or out of bankruptcy, rendering the basic component of the liability system worthless. *Id.* Professor LoPucki's theses quickly became the object of scholarly attention expressed in a series of replies and rejoinders in the literature. See, e.g., Steven L. Schwarcz, *The Inherent Irrationality of Judgment Proofing*, 52 STAN. L. REV. 1 (1999); James J. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability*, 107 YALE L.J. 1363 (1998).

secured credit. But that is hardly to say that secured credit cannot be deployed after a fashion prejudicial to neighboring interests in a credit community—in other words, after a fashion that is eerily reminiscent of a private nuisance. This suggests that perhaps the time has come to “discover” a tort that redresses that wrong in the same fashion as the ancient tort of private nuisance responds to unreasonable excesses by landowners.

In this Article, therefore, we maintain that secured credit, when perverted to accomplish a *de facto* judgment-proofing scheme, is a nuisance, and a nuisance appropriately “abated” through the existing and well-accepted principles of subordination. To establish this proposition, in Part I we discuss the security interest as a member of the *legal* category “property,” a conception of security emphatically embraced and reinforced on revision of Article 9. In addition, we try to articulate why the understanding of security as property has been so persistent and difficult to uproot.

In Part II, we examine and evaluate the implications of inclusion of the security interest in the *conceptual* category of property with reference to insights into categorization that have emerged from recent work in cognitive linguistics. Much of what we do in law is about categorizing, such that these insights into human conceptual systems shed new light on the development of law, and thereby offer the opportunity to consider the transformation of legal doctrine from a fresh perspective.

Having accepted (without necessarily agreeing with) the notion of the security interest as entailing a conveyance of property, and also explained the conceptual consequences that flow from that category, in Part III we turn to an excursus into the law of nuisance as a corollary of the legal category “property.” Then, in Part IV, we conflate the discussion, making the case that nuisance doctrine offers a workable and defensible rubric to ferret out and condemn the use of security as a device for judgment-proofing. Lastly, in Part V, we propose what we believe to be the remedial response most neatly tailored to abate the “nuisance,” that being full or partial subordination of the secured claim.

## I. THE SECURITY INTEREST AS A MEMBER OF THE LEGAL CATEGORY PROPERTY

### A. *The Good Ship "Conceptual Alternatives" Has Sailed . . .*

The security interest, we are instructed, owes its existence to a security agreement that "creates or provides for it,"<sup>12</sup> suggesting, it would seem, that the concepts by which security is understood are mainly those same legal concepts that structure the law of contracts.<sup>13</sup> In fact, however, there is fundamentally very little about security, as we have come to regard it, that depends on conceptual structures other than those that derive from property law. The evidence is everywhere, and the fact that security is about property, plain and simple, is frankly granted.<sup>14</sup> It is a matter on which there is nearly universal accord, albeit not universally cheerful accord.<sup>15</sup>

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12 U.C.C. § 9-102(a)(73) (2006). This aspect of the definition of "security agreement" was also found in the 1972 version of the statute. *See* pre-revised U.C.C. § 9-105(1)(l) (1972).

13 Of course, the security agreement is in many regards just that—an agreement. U.C.C. § 9-203 contains statute of frauds and consideration (value given) requirements. But the security agreement in its most significant sense is understood as something of a *deed*. The controversial features of Article 9 (namely priorities and consequent implications for unsecured creditors) are a product of the property concepts and its attendants, most notably, the imperative *nemo dat*. In this singular regard, the security agreement is a conveyancing document. For the most part, the role of contract doctrine is limited to defining the relationship of the debtor and secured creditor. *See generally* F. Stephen Knippenberg, *Future Nonadvance Obligations: Preferences Lost in Metaphor*, 72 WASH. U. L.Q. 1537, 1571–80 (1994) (offering an account of the security agreement as contract and the metaphors that structure the contract relationship).

14 References in the literature which take as a given that security is property are common. *See, e.g.*, James W. Bowers, *Whither What Hits the Fan?: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution*, 26 GA. L. REV. 27, 59 (1991) (referring to the secured creditor as a co-owner of the collateral with the debtor). In *The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973 (1983), Professor James Rogers states, "The notion that the secured creditor's remedial right is a 'property' right may derive much of its intuitive force from the perception of the mortgage on Blackacre as the paradigm of secured financing." *Id.* at 992 n.74. The idea that the creation of a security interest is a conveyance is thus largely unquestioned and deeply entrenched in doctrine. But the idea of the security interest as property first becomes an express policy justification for secured credit at the hands of Harris and Mooney. *See* Harris & Mooney, *supra* note 2, at 2024–25, 2047–66.

15 Professor LoPucki, for example, is not convinced security is property (or, perhaps, that it should be) in every way. Rather, he regards that position to be only a "theory" (and a bad one, he believes) by which security has come to be understood and justified. *See* LoPucki, *supra* note 8, at 1947–48, 1952–54; *see also* Carl S. Bjerre,



There have been sensible challenges to the conveyance model of security,<sup>16</sup> but they have largely fallen on deaf ears as far as the lawmakers are concerned.<sup>17</sup> Article 9 clings relentlessly to this philosophical supposition, more so than ever in the revision, and efforts to discredit or dislodge it have, in a word, failed. Rather than flail away further at the hegemony of the property-based understanding of security, we think at this stage it is more productive to inquire why it has emerged as hegemonous. Unquestionably, there are many reasons, but we posit three that are not only plausible, but we believe also revealing in determining where we go from here.

First (and this has nothing directly to do with the property model) is the metaphysics of objectivism, discussed more fully below,<sup>18</sup> but consisting essentially of a set of epistemological convictions that hold that the world of experience is a world ordered without regard to human conceptual systems. On the objectivist account, things, phenomena, and events stand in implicit and largely static association, possess innate characteristics, and occupy naturally occurring categories. Objectivist assumptions pervade nearly every intellectual endeavor,<sup>19</sup> and in law find expression as “formalism,”<sup>20</sup> the notion of positive legal rules capable of producing results with the reassuring predictability of a mathematical postulate. From this

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*Secured Transactions Inside Out: Negative Pledge Covenants, Property and Perfection*, 84 CORNELL L. REV. 305, 349 n.178 (1999) (discussing critiques of the security-as-property metaphor); Steve Knippenberg, *The Unsecured Creditor's Bargain: An Essay in Reply, Reprisal, or Support?*, 80 VA. L. REV. 1967, 1972 n.22 (1994) (“The notion that the creation of a security interest is a transfer of property is deeply rooted in doctrine and is clearly the dominant conceptualization of security.”).

16 The most notable, perhaps, being the Warren “carve-out” proposal, which one of the authors had involvement in drafting. See Kenneth N. Klee, *Barbarians at the Trough: Riposte in Defense of the Warren Carve-Out Proposal*, 82 CORNELL L. REV. 1466 (1997); Elizabeth Warren, *An Article 9 Set-Aside for Unsecured Creditors*, 51 CONSUMER FIN. L.Q. REP. 323 (1997).

17 Professor Charles Mooney, one of the co-reporters for the Article 9 revision process, described the reaction to the carve-out proposal at the Drafting Committee as having “died for lack of a first.” See LYNN M. LOPUCKI & ELIZABETH WARREN, *SECURED CREDIT* 659 (5th ed. 2006).

18 See *infra* notes 35–37 and accompanying text.

19 This is a philosophical heritage traceable to Kant and Descartes. See generally JONATHAN BENNETT, *KANT'S ANALYTIC* 130 (1966) (stating that for Kant, “self-consciousness is possible only to a being who has experience of an objective realm”); RENE DESCARTES, *RULES FOR THE DIRECTION OF THE MIND* (1628), reprinted in 1 *THE PHILOSOPHICAL WRITINGS OF DESCARTES* 9, 9–76 (John Cottingham et al. trans., 1985) (discussing twenty-one rules by which problems are simplified through intuition and deduction). Not even mathematics escapes objectivist postulates. See GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS* 368–69 (1987).

20 See *infra* notes 40–41 and accompanying text.

fiercely rational orientation, propositional answers are derived that promise certainty in a manner that alternative imaginative and metaphoric structures of thought on their face do not.<sup>21</sup> Propositional answers, no less an appealing commodity in legal reasoning than in any other endeavor, are doubtless especially attractive in the context of the law governing banks, finance companies, merchants, and their lawyers. The superimposition of syllogistic reasoning on what may in fact be largely metaphoric reasoning processes, as we shall discuss, creates an arguably false but nonetheless comforting sense of determinacy.

Second (and this is directly relevant to the conveyance theory of security), to model security on property concepts invokes a powerful set of real and emotive associations unique to private property ownership, and particularly ownership of land. Early in the history of the Republic, good citizenship and a host of other highly revered virtues were closely associated with the ownership of land.<sup>22</sup> Beyond this (and far beyond this), property ownership is closely bound with notions of liberty: "Property was important for the exercise of liberty, and liberty required the free exercise of property rights . . . Without security [protection], property lost its value."<sup>23</sup>

Finally, on a related but individual level, the dimensions of the concept of property—the most salient of which is "boundedness"—were seen as assuring personal autonomy, privacy, and "freedom from the collective."<sup>24</sup> The boundary image, central to traditional concep-

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21 See *infra* text accompanying notes 39–43.

22 See Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 474–76 (1976) (discussing Jefferson's notions about land ownership, independent labor, and politics). In the mid-eighteenth century, every American colony, save one, limited the suffrage to those who owned land. Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 337 (1989). There was popular consensus that there was no real independence without private property ownership. *Id.* Chief among the concerns associated with creating a new government was protection of private property. Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, in *LAW AND THE ORDER OF CULTURE* 162, 162–63 (Robert Post ed., 1991). Adams once remarked, "[V]ery few men who have no property, have any judgment of their own." Letter from John Adams to James Sullivan, in 9 THE WORKS OF JOHN ADAMS 376 (C. Adams ed., Boston, Little Brown and Co., 1864).

23 Nedelsky, *supra* note 22, at 164. The author continues, "Property effectively captures this link between liberty and security in that it literally loses its meaning without security. We mean by property that which is recognized to be ours and cannot easily be taken from us—hence the connection between property and . . . law and government." *Id.* at 165.

24 This, of course, is consistent with Charles Reich's renowned article, *The New Property*, 73 YALE L.J. 733 (1964). In calling for a new definition of property, Reich asserts: "Property draws a circle around the activities of each private individual or

tions of property, offers an unparalleled symbol of autonomy and individual freedom.<sup>25</sup>

In short, the concept of property is a powerful rhetorical device. Understanding security in terms of “property” implies a close affiliation with that device, and pronouncing the security to be “property” thus captures a set of highly revered associations. That, it seems to us, diminishes mightily the prospect of unseating the conveyancing metaphor now or in the future.<sup>26</sup> To exalt the security interest to the level of property is to corroborate and firmly embed the Article 9 first-in-time priority into the legal landscape in a manner that assures the supremacy of secured creditors for a long time to come.<sup>27</sup> To control the metaphor by which secured credit is understood is to control presumptively the outcome in priority disputes between secured and unsecured creditors. In the most recent reform, the drafters of Revised Article 9 controlled the metaphor, with predictable consequences.<sup>28</sup>

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organization. Within that circle the owner has a greater degree of freedom than without. . . . Within, he is master, and the state must explain and justify any interference.” *Id.* at 771.

25 Nedelsky, *supra* note 22, at 166–67; see also Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 328–30 (1980) (claiming that the conceptual shift in the early twentieth century from property as “thing ownership” to the bundle of rights metaphor devalued the serviceability of property in defining the boundaries between the individual and the state).

26 The alignment of security with property exploits allied notions: the sanctity of freedom of contract and free alienability of property. They may be part of the basis for property priority generally. See Ponoroff & Knippenberg, *supra* note 8, at 2261. There is a tasty irony in the association of secured credit with property and the noble entailments that follow from that association. If early on property ownership was symbolic of autonomy, virtuous labor, and liberty, the prospect of a debtor having possession of collateral while its value resided in a creditor was regarded as fraud. See, e.g., *Clow v. Woods*, 5 Serg. & Rawle 275, 279–80 (Pa. 1819). These courts reasoned that the debtor with possession of the mortgaged collateral was in a position to dupe other creditors into the mistaken belief that the encumbered asset would be available to satisfy their unsecured claims in the event of default. Of course, Article 9 resolved the “ostensible ownership” problem—the problem that the collateral in the hands of the debtor looks precisely the same after its value has been conveyed away to the secured creditor as it did before. See U.C.C. § 9-205 cmt. 2. However, the problems associated with the redistributive effect of security, obviously, remain.

27 Simply put, we believe those who are convinced more secured credit is better than less will not relinquish the powerful ally they find in property as a legal category. See Elizabeth Warren, *Making Policy with Imperfect Information: The Article 9 Full Priority Debates*, 82 CORNELL L. REV. 1373, 1386 (1997) (“The credit-constriction claim is the most forceful weapon in the arsenal of the proponents of full priority.”).

28 See *supra* note 17 and accompanying text.

Assured of priority, so the theory goes, the purveyors of debt financing will more readily part with their capital and more readily accept risk that would be intolerable without the comfort of collateral to hedge the risk of insolvency. Affordable (and, ergo, abundant) credit—undeniably a good thing in terms of promoting entrepreneurial activity and sustaining business growth—nevertheless sours if not disciplined in some manner to ensure the reasonable alignment of risk and reward.<sup>29</sup> Among other salutary effects, the threat of withdrawal of the privileges attendant to taking security might encourage secured lenders to engage in more rational credit decisions, as well as more careful monitoring of credit once extended, albeit possibly at somewhat higher credit costs in certain cases.<sup>30</sup> To be sure, a more balanced approach to the revision of Article 9 might have perhaps produced such a result and done so in a far more efficient fashion than we propose here. Certainly the proposals were out there, but they were dismissed before they arrived.<sup>31</sup> They were dismissed precisely because they were at odds with the drafters' commitment to a conveyance model of security.

And so, we are resigned to the fact that no paradigm shift is in the offing, not in our lifetimes and probably well beyond. Revised Article 9 has seen to it that propositional reasoning and an objectivist approach to legal categories will continue the intractable, outcome-required definition of security as "property" in the most ontological sense of the term. But that is by no means to suggest that alternative insights into conceptual categories cannot inform analysis and yet enable law transformation aimed at a more equitable distributive balance, or at least do so in the most egregious cases. The potential of those insights to accomplish both is explored in Part II, but first we offer a more detailed explanation of the contours and consequences of the conventional view of legal categories that controls our contemporary understanding of security. It is then against that backdrop that

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29 See *infra* text accompanying notes 101–08; *infra* note 209 and accompanying text.

30 The empirical evidence is, frankly, still unanswered. Cf. Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625, 638–58 (1997) (offering some empirical evidence on what motivates parties to elect between secured and unsecured credit). However, even accepting the proposition that full priority rules effectively lower the cost of credit, this still begs the question of whether that is a good thing. Ultimately, the answer to that question depends on whether the reduction in the price of credit imposes costs on other parties, like unsecured creditors, in excess of the savings derived from security. See Warren, *supra* note 27, at 1388–92 (identifying other costs to consider beyond purely the price of credit).

31 See Janger, *supra* note 2, at 575; see also *supra* note 17 (discussing the rejection of the carve-out proposal in the Article 9 revision process).

we consider the perceptiveness and the possibilities offered by an alternative approach to categorization of legal concepts as it applies to law in general, and security in particular.

### B. *The Objectivist Account of Legal Categories*

While it is convenient for many purposes to understand security in property terms, the conception of the security interest *as property* is by no means required.<sup>32</sup> It is one thing to say that security is conceptually defined *with reference to* property concepts and something else again to observe that it is *property* in an a priori sense.<sup>33</sup>

But that distinction, as fundamental and consequential as it may be, is often blurred or even lost because legal categories have come to be understood generally in conventional terms. And the conventional view has it that conceptual categories in law as elsewhere must be constructed by reference to necessary and sufficient indicia or conditions for category membership.<sup>34</sup> In turn, those conditions are existentially determinate as are the categories they define. They are not, that is to say, dependent upon any contribution from the cognitive operators of the reasoner, but enjoy an ontological status quite apart from mental (conceptual) categories.<sup>35</sup> A thing is inherently "*P* or not *P*" because it is possessed or not of the characteristics naturally residing in the category at hand. Category membership, as it comes to be determined, is therefore objectively verifiable by comparison to a set of conditions that obtain in the natural world external to human con-

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32 See Lawrence Ponoroff & F. Stephen Knippenberg, *Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh Start?*, 70 N.Y.U. L. REV. 235, 299 (1995) (arguing that the conveyance model of security leads to dysfunctional analysis of conversion of assets from nonexempt to exempt immediately before bankruptcy); Ponoroff & Knippenberg, *supra* note 8, at 2284–86 (calling for a value-based, priority account of secured claims in bankruptcy instead of the prevailing conveyance model). As Professor Bjerre puts it, "[T]here is no ineluctable reason to consider . . . security interests as property . . ." Bjerre, *supra* note 15, at 363. There have been inroads on the conceptual monopoly. For instance, in bankruptcy, a secured creditor's secured claim is limited to the value of the collateral, not the collateral itself. 11 U.S.C.A. § 506(a) (West 2000 & Supp. 2006). The notion that a security interest does not necessarily encompass the right of possession is inconsistent with the concept of security as property in every particular. See Peter F. Coogan, *Article 9—An Agenda for the Next Decade*, 87 YALE L.J. 1012, 1028–30 (1978) (suggesting that the Code had moved incrementally away from the concept of security as property to a conception of the security interest as a priority claim).

33 See Ponoroff & Knippenberg, *supra* note 8, at 2285.

34 We refer here, of course, to the classical view of categories. It is, however, more than a view; rather, it is regularly taken as empirical fact. See LAKOFF, *supra* note 19 at 6; Bjerre, *supra* note 15, at 355.

35 See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 122–25 (1980).

cepts.<sup>36</sup> Under the conventional view, then, it is the business of conceptual categories not simply to emulate but literally to replicate objective reality, and they are at their worst when they befoul it by introducing imaginative principles.<sup>37</sup>

For this to occur, conceptual categories are, or must be, precise representations of categories as they exist in the world external to the reasoner. And so, on this view, our conceptual categories are algorithmic. They are correct when the symbols they make use of mirror the reality they purport to represent. Otherwise, they are incorrect and there is neither room for near nor far membership.

As noted earlier,<sup>38</sup> the conventional view proceeds from objectivist assumptions about the world of experience,<sup>39</sup> and in law finds expression in the dogma of formalism. The formalist strategy, so familiar by now as to be second nature in traditional legal analysis, is to abstract principles from cases, then apply those principles to succeeding cases.<sup>40</sup> The principles themselves, on boiling away the factual content of the cases from which they are gleaned and extracted, now purport to be amenable to disinterested application in subsequent fact-rich cases by neutral judges. The neutrality can be supposed, so long as the principles are properly understood and brought

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36 The popular view of conceptual categories "understands categorization either as about natural sets of objects in the world or, when it recognizes categorization as humanly constructed, as about objects with ascertainable properties or criteria that establish their commonality." Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1108 (1989) (explaining the work of Lakoff and Johnson on conceptual categories). The associated epistemology is sometimes referred to generally as "objectivism." See MARK JOHNSON, *THE BODY IN THE MIND* 196 (1987); LAKOFF, *supra* note 19, at 157-84. On the objectivist account, the world is comprised of various phenomena, events, and objects inherently possessed of naturally occurring characteristics, properties and relationships. These are mind-independent. *Id.* at 8-11; see also RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* 8 (1983) (using the term "objectivism" in the same sense as Lakoff and Johnson).

37 Professor Bjerre states it nicely: "Every categorization question thus has a simple, yes or no answer; the object either belongs or does not belong, and no intermediate result is possible. Under this view, we categorize stimuli based solely on objective criteria that are independent of the imagination . . . . *The categorization process is computer-like in its objectivity, impersonality and bipolarity.*" Bjerre, *supra* note 15, at 355 (emphasis added) (footnote omitted).

38 See *supra* text accompanying notes 20-21.

39 See *supra* notes 36-37.

40 The methodology is familiar. Principles are abstracted from cases to be restated as legal propositions. Thereafter, it is only a matter of bringing the propositions to bear on the facts at hand. See Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 155 (1981).

to bear, because the principles themselves transcend their concrete instantiations in particular cases.<sup>41</sup>

In this way, objectivism is quietly but forcefully at work in law. The objectivist program generally insists that knowledge results from discovering concepts, which directly reflect an objectively verifiable state of affairs in the physical world, that are in no way dependent on subjective interpretation.<sup>42</sup> Formalism presumes a uniquely *correct* resolution of legal issues: rights are rights, privileges are privileges, a thing is property or it is not, and, if it is, it is property for all purposes, and that is that.<sup>43</sup> This is the sense in which the security interest comes to find inclusion in the conceptual category determined to be "property."

## II. AN ALTERNATIVE VIEW OF CATEGORIES: PROPERTY AS A RADIAL CATEGORY

### A. *Insights of the Cognitive Sciences into the Nature of Categories*

Beginning in the 1980s, research in the cognitive sciences and linguistics developed the insight that imaginative cognitive devices are central to human knowledge, understanding, and rationality.<sup>44</sup> The view of human cognition to emerge from that work has been referred to by its chief architects as "experientialism,"<sup>45</sup> and stands in sharp contradistinction to the underlying precepts of objectivism. The case was made that metaphor, for example, is a pervasive and critical component of human reasoning processes.<sup>46</sup> Metaphoric concepts are

41 See Knippenberg, *supra* note 13, at 1560–61.

42 See JOHNSON, *supra* note 36, at xxi–xxiv. At the root of objectivism, then, is an epistemology of transcendentalism.

43 See Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 881–90 (1989).

44 "Without imagination, nothing in the world could be meaningful." JOHNSON, *supra* note 36, at ix; see also LAKOFF & JOHNSON, *supra* note 35, at 3 (making the claim that ordinary human conceptual systems are metaphoric).

45 See LAKOFF, *supra* note 19, at xv; see generally LAKOFF & JOHNSON, *supra* note 35, at 226–28 (noting that experientialism denies both that absolute truth exists and that it is necessary to function successfully). The methodology suggested by the insights of the experientialist program has been brought to bear in legal analysis from time to time. See, e.g., Bjerre, *supra* note 15; Knippenberg, *supra* note 13; Ponoroff & Knippenberg, *supra* note 32; Ponoroff & Knippenberg, *supra* note 8; Winter, *supra* note 36.

46 See, e.g., Gerald W. Casenave, *Taking Metaphor Seriously: The Implications of the Cognitive Significance of Metaphor for Theories of Language*, 17 S.J. PHIL. 19 (1979); Paul Ricoeur, *The Metaphorical Process as Cognition, Imagination, and Feeling*, 5 CRITICAL INQUIRY 143 (1978). The most comprehensive, systematic, and important treatment of the role of metaphor in human cognition is to be found in the work of Lakoff and Johnson. See, e.g., LAKOFF, *supra* note 19, at 276–78; LAKOFF & JOHNSON, *supra* note 35,

much more than rhetorical contrivances to be consigned to the domain of the poetic.<sup>47</sup> Rather, in direct contravention to the objectivist account, experientialism teaches that our metaphoric concepts are central to cognitive operations.

Metaphoric reasoning is primary in complex thought; that is to say, it is fundamental to all but the most rudimentary concepts,<sup>48</sup> and, of equal import, it is unavoidable. The essence of metaphoric reasoning makes it possible to understand and reason about concepts that lack natural dimensions of their own in terms of other well-defined concepts,<sup>49</sup> and to do so without declaring the former *to be* the latter in a literal sense. A simple example from legal doctrine serves to illustrate. The concept, "contract," is partially delineated by the metaphor, "a-contract-is-a-container-for-the-contracting-parties." The metaphoric concept is evident in the language. For instance, parties "enter into the contract" and "cannot get out of the contract."<sup>50</sup>

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at 61–105; JOHNSON, *supra* note 36, at 65–100. They refer to their account of human rationality and associated epistemology as "experiential realism" or, simply, "experientialism." See LAKOFF, *supra* note 19, at xv. Other scholarly exegesis of metaphor has been undertaken by rhetoricians and other language scholars, among them Max Black. See MAX BLACK, *MODELS AND METAPHOR* 25–47, 49 (1962). For a more complete listing, see Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053 (1989).

47 See JOHNSON, *supra* note 36, at 112 ("[M]etaphors . . . are not merely convenient economies for expressing our knowledge; rather they *are* our knowledge . . ."); see also LAKOFF & JOHNSON, *supra* note 35, at 5 ("The metaphor is not merely in the words we use—it is in our very concept of an argument. The language of argument is not poetic, fanciful, or rhetorical; it is literal.")

48 Rudimentary concepts are those apprehended directly through our senses, from interaction with our physical surroundings. They include such concepts as "up-down," "containment," "verticality," "part-whole," "front-back," and so forth. LAKOFF & JOHNSON, *supra* note 35, at 57. These are "natural kinds of experience," as they have naturally occurring dimensions and so are directly understood on their own terms—not in terms of other concepts—without the necessity of sophisticated cognitive mechanisms such as metaphoric reasoning. *Id.* at 117–19. These experiences are meaningful because they recur endlessly as we interact with our physical surroundings. JOHNSON, *supra* note 36, at 13. These recurring patterns are the basis for kinesthetic image schematic structures, or "image schema." *Id.* at 28–30.

49 This is the essence of the experientialist claim. For example, the concept "trouble" lacks natural dimensions of its own, and so must be understood indirectly through the metaphor, "trouble-is-a-container." The emergent concept, "containment," partially delineates the concept "trouble," such that we can understand ourselves as being "in trouble," or unable to "get out of trouble." LAKOFF & JOHNSON, *supra* note 35, at 29–32. The stick-like, simple structure of image schematic concepts, such as "containment," allow for this kind of cross-conceptualization. *Id.* at 29.

50 Of course, the single ontological metaphor does not offer a complete understanding of the target concept. Instead, the metaphor highlights one aspect of the concept under consideration. Multiple metaphors must be deployed to enrich other



Another vital component of human rationality, and of immediate relevance to this Article, is categorization.<sup>51</sup> The process is critical to making sense of our experience and, as shown above, it can influence our understanding of legal concepts. The insights of the experientialist program have shown that human conceptual categories are *not* (or do not have to be) constructed around mind-independent objects with innate properties that are perfunctorily compared with a set of naturally occurring conditions of category membership.<sup>52</sup> To the contrary, categories, like other components of rationality, are dependent upon imaginative, or creative, conceptual principles.<sup>53</sup>

While other types of conceptual category structures have been catalogued,<sup>54</sup> the “radial” category is directly apposite for present purposes and exists in sharp contrast to the conventional view of categories that has pervaded legal thought and reasoning. Radial categories are ideational constructs of rationality. According to the experientialist view, radial categories are structured around a central category member, or so-called “best example.”<sup>55</sup> This is the category prototype.<sup>56</sup> Categorization then entails determining if, and the degree to which, a stimulus under consideration shares properties with the central category member.<sup>57</sup> The extent and level of sharing—the degree to which the stimulus is representative of the category as expressed through the category prototype—determines relative membership.

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aspects of the concept to arrive at meaning. For instance, contract obligations are also understood metaphorically as physical burdens. JOHNSON, *supra* note 36, at 35.

51 See LAKOFF, *supra* note 19, at 5 (“There is nothing more basic than categorization to our thought, perception, action, and speech.”).

52 JOHNSON, *supra* note 36, at 24.

53 Under the experientialist view, categories are conceptual, that is to say, constructs of imaginative human perception, rather than inherent properties of objects. *Id.* at 23–28. Thus, conceptual categories are not slices of reality trapped and mimicked symbolically; rather, they are our reality. They are the means by which experience is organized and made meaningful. For an excellent, manageable summation of these principles, see Winter, *supra* note 36, at 1148–56.

54 See Lakoff, *supra* note 19, at 287–88 (describing, for example, graded and scalar categories).

55 Bjerre, *supra* note 15, at 356.

56 Professor Bjerre offers the simple but instructive example—the conceptual category “cup.” *Id.* at 356–57. After noting the failure of the objectivist account of conceptual categories to account for the manner in which we deploy that category in experience, he explains: “The radial approach offers a much more satisfactory explanation: the prototypical characteristics of a cup can be said to be exemplified by a coffee cup or a teacup, and everything else to which we apply the word ‘cup’ shares one or more of those characteristics according to various principles.” *Id.*

57 See *id.* at 355–56. For an extended discussion of the context of legal categorization, see Winter, *supra* note 36, at 1148–59.

The radial model thus admits of "graded" membership, in a manner that conventional categories do not,<sup>58</sup> such that category members may be understood to "radiate" from the category prototype.<sup>59</sup> Where the reasoner is persuaded (although, actually, most categorization occurs at the unconscious level<sup>60</sup>) that there is a correspondence of characteristics and a sufficient degree of correspondence, category membership is assigned and awarded. Otherwise, it is denied.<sup>61</sup>

It is important to recognize that characteristic sharing is not limited to literal sharing. Correspondence of characteristics can indeed, and frequently do, occur at the nonliteral level. For instance, a potential member might share traits with the category prototype at the metaphoric level through extension.<sup>62</sup> The principle is illustrated using the security interest as an example in Part II.B., which follows.

### B. *Property Understood as a Radial Category*

The legal conceptual category "property," like any other conceptual category, can be structured radially.<sup>63</sup> This produces a much more nuanced and contextualized understanding of the concept and what it means to be a member of the category than can be had under the conventional view. The central member, or category prototype, might be the "house,"<sup>64</sup> and its salient features would include at least the following: a physical locus and stability over time. The house is

58 See *supra* text accompanying note 43.

59 See LAKOFF, *supra* note 19, at 91–114.

60 "Ontological metaphors . . . are so pervasive in our thought that they are usually taken as self-evident, direct descriptions of mental phenomena." LAKOFF & JOHNSON, *supra* note 35, at 28.

61 This is not the same as asserting that category membership is assigned on the basis of necessary and sufficient conditions. Rather, it is to say that, "At some point, the resemblance of a stimulus to a prototype grows weak enough (though it may still exist) that people do not include the stimulus in the category. This point is determined not by any objective measure, but by tacit social convention. This convention is presumably based, in turn, on a balance between the usefulness and the confusion that would result from inclusion." Bjerre, *supra* note 15, at 356 & n.202; see also LAKOFF & JOHNSON, *supra* note 35, at 145 (making a similar point).

62 Four such principles have been identified and described, including extension by metaphor. For a truncated but enlightening account of the principles of extension illustrated utilizing the legal category "property," see Bjerre, *supra* note 15, at 355 & n.202.

63 Our treatment of the conceptual category "property" as a radial category draws on the work of Professor Bjerre. See *id.* at 354–64.

64 *Id.* at 357 n.208. As Professor Bjerre explains:

While this choice is not inevitable, it is strongly justifiable. In my own unscientific survey . . . the image most strongly called to nearly everyone's mind by the word property was the single-family house surrounded by land. It is

utile and functional. It offers, among other things, safety, security, and a place of residence. It has value and so represents a source of wealth. It is freely alienable by the owner, who has the nearly absolute right to deploy its value according to his or her whim. Value added by way of improvements inure to the benefit of the owner. The house quite literally serves to exclude others than the owner and the owner has the right to exclude as well. So what do houses have to do with security interests?

Under the radial model, the security interest finds its way into the legal category "property" not because it is a house of course, but owing instead to the characteristics it shares with the category prototype, literally and nonliterally.<sup>65</sup> Literally, the security interest is alienable; it represents a form of wealth and, arguably, is the product of the owner's labor.<sup>66</sup> But it is obvious that the security interest is more representative of the prototype at the metaphoric level, the level at which there is a closer correspondence of traits that explain inclusion of the security interest in the property category. For example, the security interest in inventory, accounts, and other self-renewing forms of collateral enjoys stability or duration.<sup>67</sup> The security interest itself is

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also the meaning most likely to be carried by a layperson's use of the term: 'Get off of my property!'

*Id.* Because central membership is a matter of cultural consensus, central members may come and go over time as the common perception as to the best representative of the category changes. See Winter, *supra* note 36, at 1172-74 (describing the changing conception of the term "park" in the context of an ordinance prohibiting vehicles in city parks). Professor Jeanne Schroeder, though she does not analyze property as a radial category in the terms supplied by the experientialist program, nevertheless undertakes to isolate and describe prototypical property. She posits that a grasped tangible object may be at the center of the conceptual category. Jeanne L. Schroeder, *Some Realism About Legal Surrealism*, 37 WM. & MARY L. REV. 455, 491 (1996). Schroeder's account of prototypical property forms part of the basis for her earlier article, Jean L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994) [hereinafter Schroeder *Bundle of Stix*] (examining Jeremy Waldron's definition of Property).

65 Professor Bjerre illustrates the literal and nonliteral sharing of characteristics using the patent, as well as the security interest, as examples. Bjerre, *supra* note 15, at 359-61.

66 Bjerre acknowledges that, perhaps, there is a lingering bias against the notion that lending is "productive work." The form-of-wealth characteristic might, however, as easily be expressed as the form-of-protection trait. *Id.* at 360 n.217.

67 *Id.* at 361. This is the so-called floating lien, frequently expressed in the familiar, cloud-over-a-river metaphor. The fluctuating mass of self-renewing collateral is conceptualized as a gestalt, a single entity that grows and shrinks. See also Knippenberg, *supra* note 13, at 1580 (making the claim that Gilmore's "unitary view" of the security interest is based on the metaphor, "the-security-interest-is-an-expanding mass" in the context of future advances).

not a tangible thing, but one of the most singular remedies available to the secured creditor is the right to seize the tangible personal property.<sup>68</sup> The right to seize the collateral is conflated with the collateral seized, creating a recognizable, nonliteral correspondence with the traits of the tangible category prototype.<sup>69</sup> The security interest literally offers “security”—protection, that is to say—from intruders in the form of other creditors who would lay claim to the collateral; and the secured creditor has the right to exclude others (other claimants) who endeavor to gain priority to the collateral.

The security interest is thus a member of the property category by dint of radial extension from the category prototype accomplished metaphorically.<sup>70</sup> On acknowledging that the security interest is property, *but only* by virtue of radial extension of a conceptual category, the way is cleared to do a critical examination of judgments about the merits (or demerits) of security. By critical examination, we mean an assessment of the impact of security, and more particularly the rules relating to the priority of secured claims, on a basis other than propositional results dictated by an unyielding assertion that security *is* property.

This brings us to Revised Article 9. It is likely that the revision process of the 1990s was the last great opportunity for granting that secured credit might be usefully conceived of as property, but that it need not be so for all purposes. It was an opportunity, that is to say, to acknowledge the property/conveyance metaphor to be precisely that—a metaphor—no less and certainly no more.<sup>71</sup> The revision process presented a forum to entertain models other than the prevailing conveyance model in response to legitimate anxiety over the dis-

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68 U.C.C. § 9-609 (2006).

69 Bjerre, *supra* note 15, at 361. “At work here . . . is a metonymy [where the part stands for the whole, as in the expression, ‘All hands on deck!’]: when we speak of a security interest as property, we understand the right to seize the collateral in terms of the collateral itself.” *Id.* at n.220 (alteration in original).

70 The phenomenon of radial extension also accounts for the fact that category members may share little in common with each other.

71 Metaphoric mapping, with the inferential consequences arising from importing entailments to the target domain, allows rational inferences about the target concept. The point to be taken is this: metaphoric reason is, by hypothesis, partial. Since source and target concepts do not correspond dimension-by-dimension, no one source concept can fully elaborate a target concept. Multiple metaphors must be deployed to provide multiple levels of meaning. The failure to recognize that insight forecloses the introduction of additional source metaphors to enrich meaning, and hides the differences between source and target concepts. See LAKOFF & JOHNSON, *supra* note 35, at 10; see also Knippenberg, *supra* note 13, at 1571 (making the same point).

tributive effects of secured credit on unsecured creditors. The abiding concern that secured credit, and near-absolute priority afforded properly perfected secured claims, unfairly externalized risk (yielding distributive injustice) were certainly raised, and vigorously so,<sup>72</sup> but ultimately were dismissed by the drafters without much pause and certainly without much consideration.<sup>73</sup> In the end, security remained property absolutely. The opportunity for law transformation at the direct conceptual level has thus come and gone. However, the wholesale embracement of the traditional property-based account of security in the revision does not foreclose further consideration within the perimeters established and dictated by that model, as we turn to next.

*C. The Conveyance Model, Nemo Dat, and the Consequences for the Credit Community*

To call the security interest “property” is to import entailments, or epistemic consequences, associated with that legal category. Those entailments are the basis for the irresistible property priority of secured claims that dominated the Article 9 revision process. In this section, we detail some of the entailments allied with the legal category property, as well as consideration of their consequential significance for secured credit.

A familiar metaphor structures our understanding of property in the most elemental manner. Both the historical and contemporary system of American property law rest squarely on the metaphor of

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72 In at least academic circles, the process was something of a showdown on these matters. Proposals designed to ameliorate or annul the distributive effects on unsecured creditors came from both predictable sources and strange bedfellows. See Bebhuck & Fried, *supra* note 8, at 899–900; Warren, *supra* note 16, at 323–25.

73 See *supra* note 17 and accompanying text; see also Steven L. Harris & Charles W. Mooney, Jr., *How Successful Was the Revision of U.C.C. Article 9: Reflections of the Reporters*, 74 CHI.-KENT L. REV. 1357, 1358–60 (1999) (suggesting a sensitivity on the part of the Revised Article 9 Drafting Committee to the interests of unsecured creditors). Professor Janger provides an exceptional treatment of the events and discourse of the revision meetings. See generally Janger, *supra* note 2. In that article, he describes two fundamental kinds of reform in the revision effort. One he characterizes as reform aimed at “simplicity,” the other at “safety.” See *id.* at 573–74. Reforms of the first type had in mind the ease and certainty with which secured creditors might go about their business. For example, long-standing technical matters that have plagued the filing system were addressed. See, e.g., Lynn M. LoPucki, *Why the Debtor’s State of Incorporation Should Be the Proper Place for Article 9 Filing: A Systems Analysis*, 79 MINN. L. REV. 577, 593–619 (1995). It appears there was much consensus on those issues. Janger, *supra* note 2, at 573. Not so, the issues and accompanying proposals concerning distributive justice and the priority of secured creditors. *Id.*

ownership as a collection of distinct, though homologous, rights or interests—the celebrated “bundle of sticks.”<sup>74</sup> It is that metaphor—the favorite of the inspired notion that ownership can be fragmented—which allows the owning of nearly anything in bits and pieces, for this period of time or that, whether the thing owned be tangible or ethereal.<sup>75</sup> Fragmented ownership admits the ingenious possibility that constituent ownership interests can part company to be held in different hands at once, and that possibility allows the imaginative divorcement of possession and use, on the one hand, from its value,<sup>76</sup> on the other, as by mortgage or hypothecation.<sup>77</sup> So it is that the use and enjoyment of an object of ownership may reside in the

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74 The metaphor is familiar to every law student. Among the most renowned of “sticks” is possession. The holder of this stick is entitled to continue in possession against all but the “true owner,” presumably a figure with more sticks. See R.H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 NW. U. L. REV. 1221, 1230 (1986). Under the common law, possession is, so to say, the origin or root of property ownership. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985). An early sighting of the metaphor can be found in BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 129 (1928). For an unusual treatment of, among other things, the bundle metaphor, see Schroeder, *Bundle-O-Stix*, *supra* note 64.

75 Thus, possession can be divorced from other interests (e.g., the right to sue for damages for injury to property). The notion of fragmented ownership likewise motivates the prospect of ownership for specified intervals of time necessary to the concepts associated with estates in land. See generally WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* §§ 2.1–17 (3d ed. 2000) (discussing present and future estates).

76 A second, ontological metaphor requires that value be understood as a thing, so that it might be given, measured, and so forth. Once conceived of (metaphorically) in that way, the metaphor can be elaborated, so that value can be transferred away—conveyed—while other aspects of ownership remain in the hands of others. See Knippenberg, *supra* note 15, at 1971–73; Ponoroff & Knippenberg, *supra* note 32, at 314; see also Schroeder, *Bundle-O-Stix*, *supra* note 64, at 239 n.2 (“[I]n contemporary legal discourse the most common conception of property is the bundle of legally protected interests, held together by competing and conflicting policy goals. The removal of one or more sticks from the bundle should have no particular implications for the legally protected interests that remain.”).

77 We use the terms “mortgage” and “hypothecation” in a broad sense here, so as to include not only real estate, but similar interests in personalty, both tangible and intangible. Indeed, dividing ownership and isolating its member parts so that they might lead independent economic lives enables far more than this. It means that the places we occupy may not belong to us at all, that the things we use daily in our work and home life are often not altogether ours exclusive of the ability of another to successfully assert a claim to them. Ownership in part is central to every transaction with any claim to sophistication or consequence beyond the absolutely fundamental.

debtor, with its value detached and relocated in the secured creditor.<sup>78</sup>

An inescapable imperative emerges from the metaphor of ownership as a bundle of sticks or (the less whimsical) bundle of rights. Once dealt out of the bundle, property rights cannot be dispensed from the same bundle a second time. This ordinance finds expression in the proverbial commercial law maxim, *nemo dat quod habet*. The ruling on the matter is not arbitrary, but follows necessarily from understanding property according to the bundle metaphor.<sup>79</sup>

On the conventional property-based account of security, the security agreement is more deed than contract.<sup>80</sup> The value stick passes out of the bundle and into the coffers of the secured creditor, where it is irreclaimably beyond the reach of unsecured creditors,<sup>81</sup> both those who voluntarily transacted with the debtor (e.g., trade creditors), and those upon whom the claim was foisted (tort creditors).<sup>82</sup> Since the security interest is property, while the interests of unsecured creditors are not, the value deeded away is gone. Thus ends any priority battle between secured and unsecured creditors. If this is the beginning and

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78 See Knippenberg, *supra* note 15, at 1972.

79 See *supra* note 71 and accompanying text (discussing entailments and metaphoric mapping).

80 Harris & Mooney, *supra* note 2, at 2051–52; see also Knippenberg, *supra* note 15, at 1972 (suggesting that the security agreement is a kind of deed because it is more an instrument of conveyance than an instrument setting the rights and obligations of the parties); Ponoroff & Knippenberg, *supra* note 8, at 2287 (discussing the consistency of the security interest with the conveyance metaphor, which allows for a physical transfer of lien rights from the debtor to the creditor).

81 See Ponoroff & Knippenberg, *supra* note 8, at 2262.

82 This is the essence of Professor LoPucki's claim that security cannot be decently justified. He submits that unsophisticated, unsecured creditors are ignorant of the risks of secured credit, and so do not bargain meaningfully with the debtor who has encumbered his assets. LoPucki, *supra* note 8, at 1916–20. Tort claimants, of course, do not bargain with tortious debtors, nor do they have the opportunity to decline to "transact" with the debtor from whom they seek recovery. See generally *id.* at 1896–1902 (noting that a substantial portion of unsecured debt of persons filing bankruptcy was owed to "reluctant" creditors such as tort claimants). An early sighting of the proposition that tort claimants should be awarded priority over secured creditors can be found in Christopher M.E. Painter, Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times*, 36 STAN. L. REV. 1045 (1984). Others have followed, for example, Rebecca J. Huss, *Revamping Veil Piercing for All Limited Liability Enterprises: Forcing the Common Law Doctrine into the Statutory Age*, 70 U. CIN. L. REV. 95 (2001); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565 (1991). But see Knippenberg, *supra* note 15, at 1980–82 (arguing that LoPucki's insistence on tort victim priority can be seen as a shift in management responsibility from the debtor to the secured creditor, which, while arguably justified, must first be defended on some explicit normative basis).

end of analysis, then the first-in-time priority rule that squeezes out unsecured creditors is both inevitable and intractable.

The consequences that attend pronouncing the security interest property are also the sum and substance of the so-called "property-based defense" of security.<sup>83</sup> On creation of the security interest, value in the collateral is conveyed to the secured creditor such that it is no longer accessible to other creditors seeking to satisfy their claims. Prevailing outcome-required analysis premised on the extant conveyance model and its chief feature, the principle of *nemo dat*, assures the first-in-time priority rule that favors the secured creditor, but there is more.

Starting from the implicit, but still unsubstantiated assumption that the credit is good, the more the better, and that secured credit is best, the proliferation of rules to enhance security became paramount in the development of the commercial law over the past half-century. For this to occur, creation and perfection of the security interest certainly had to be "facilitated."<sup>84</sup> More to the point, however, the security interest would be "property," bestowing it with a set of powerful political and emotive associations, not to mention a commanding priority unique to property.<sup>85</sup> Further, Article 9 would abstain from providing a definition of personal property and fixtures, the stuff to which the security interest might attach, so that an endless parade of

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83 See generally Harris & Mooney, *supra* note 2, at 2025–37 (arguing that giving security for debt neither harms nor increases the risk to a debtor's unsecured creditors); Stephen J. Harris and Charles W. Mooney, Jr., *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 82 CORNELL L. REV. 1349, 1356–70 (1997) (arguing that subordinating secured credit to unsecured claims would materially reduce the availability of credit to parties that need it most such as distressed businesses). As noted earlier, security has been assailed both on the grounds that it is inefficient in a macroeconomic sense, and simply unfair to unsecured creditors. See *supra* note 7 and accompanying text; see also Theodore Eisenberg, *The Undersecured Creditor in Reorganizations and the Nature of Security*, 38 VAND. L. REV. 931, 953–55 (1985) (noting that a secured creditor's interest should be regarded as no more than a priority claim limited to the value of the collateral).

84 See *supra* note 5 (noting the vision of the drafters of Article 9 was to make secured credit cheap and easy). This was likewise the continuing (and expanded) mission of the revision process. See Steven L. Harris & Charles W. Mooney, Jr., *The Article 9 Study Committee Report: Strong Signals and Hard Choices*, 29 IDAHO L. REV. 561, 577–80 (1993) (discussing the recommendations made in the 1992 report of the U.C.C. Permanent Editorial Board's Article 9 Study Committee, for which the authors also served as reporters).

85 See *supra* notes 80–81 and accompanying text; see also *infra* note 109 and accompanying text (noting that security interests constitute prioritized property).



newly emerging interests might become collateral, and, thereby, succumb to the secured party's property claim.<sup>86</sup>

As more interests are promoted to the status of "property," more interests become available for hypothecation. The security interest—conclusively understood to be property in those interests<sup>87</sup>—is freighted with all the implications associated with property.<sup>88</sup> An expanding list of collateral, in turn, invites more "cross-boundary" conflicts<sup>89</sup> and further intrusion upon the status and interests of unsecured creditors.<sup>90</sup> Because the interests of the latter are perceived as less than property, however, they stand no chance in the battle for assets with the perfected security interest. All conflicts are

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86 The scope of Revised Article 9, like its predecessor, continues to reach any transaction, regardless of form, that creates a consensual security interest in personal property or fixtures, unless explicitly excluded from the article. U.C.C. § 9-102(12)(B) (2006) and § 9-104 (1972); U.C.C. § 9-109(a) (2006) and § 9-102 (1972). Although the basic scope of the rule remained intact, the revision expanded the scope of Article 9 in several key respects, including the sale of most payment intangibles (§ 9-109(a)(3)) and elimination of the exclusion for deposit accounts (defined in § 9-102(a)(29)). Likewise, Revised Article 9 also covers sales of promissory notes (defined in U.C.C. § 9-102(a)(65)), largely included to facilitate securitization of this type of instrument. Furthermore, the scope of Article 9 does reach some real estate-like interests. Fixtures, as noted, have always been available as collateral (*see* U.C.C. § 9-334), and obligations may be used as collateral though those obligations might themselves be secured by real estate interests. U.C.C. § 9-109(b). In addition, an Article 9 security interest can be taken in the non-Article 9 security device (mortgage or lien) that secures the obligation, provided the obligation and device are "coupled." U.C.C. § 9-109 cmt. 7. At the same time, personal property is nowhere defined in Article 9. Simply put, if a thing is not realty, it is personalty, and its value may be conveyed in the form of a security interest.

87 Professor Schroeder makes the case that the drafters of the U.C.C., in disclaiming the relevance of title and embracing, instead, the bundle of rights paradigm, restated the antiquated relationship of property to things—property reified: "[T]he legal realists rejected the notion of title, not because it was unitary or objective, but precisely because it was insufficiently *physical*. . . . They demanded that not only goods—which are by definition physical things—but also acts and words must become *tangible*." Schroeder, *Bundle-Of-Stix*, *supra* note 64, at 310. Moreover, "[i]n order to make property tangible, the drafters identified property in the good with the good itself. Property interests in the good are made, as nearly as possible, equivalent to sensuous contact with the good." *Id.*

88 *See infra* notes 134–35 and accompanying text.

89 *See supra* note 10.

90 *See also* LoPucki, *supra* note 11, at 18 ("The effect [of simplifying secured credit] was to increase dramatically the proportion of encumbered assets in the American economy."). The impact of expanding secured credit was apparent in bankruptcy liquidations where distribution to unsecured creditors was significantly reduced. *Id.*

resolved *ipso facto* in favor of the secured claim, save for the precious few circumstances where Article 9 deigns to command otherwise.<sup>91</sup>

If secured credit is a thing to be encouraged, it would seem the expansion of security accomplished under the revision of Article 9 amounts to felicitous progress about which there should be much rejoicing. On that view, the expansion of security would be something akin to the development of a modern economy, with its costs to be born by dilution of what are regarded as tangential interests necessarily crowded out in the process.<sup>92</sup> But there are insidious differences to be noted as well.

First, the institution of secured credit does not await an emerging interest to be declared property by any authority external to Article 9 itself. This is assured, in part, by the lack of definition of personalty.<sup>93</sup> On the bundle of rights conception, value is but one stick extracted from the bundle that constitutes property ownership, such that the object of the security interest from which the value has been conveyed must, by definition, itself be property.<sup>94</sup> The conceptual imperialism of the property metaphor, confirmed and reiterated in the revision process, thus effectively endows Article 9 itself with the capacity to determine what interests might be called property.

Next, the prevailing ideation of the security interest enjoys a Blackstonian-like conceptualization of property.<sup>95</sup> That paradigm, however, in the world of real property in which it developed, necessarily involved conflict when competing interests collided,<sup>96</sup> as well as attendant rules and limitations to resolve such conflicts in a manner that accommodated those interests. In a world where conflicts do not arise, or are summarily dismissed in most cases,<sup>97</sup> it is possible to entertain a definition that awards the security interest a status of property amounting to absolute dominion.<sup>98</sup> The point to be made is that

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91 The basic priority rule in U.C.C. § 9-201(a) (2006) confers a blanket priority on the secured claim over essentially the whole world. The balance of the specific priority rules in subpart 3 of Part III of Article 9 then operate as exceptions to the general rule, including the occasional elevation of nonsecured claimants, as in the case of certain non-Article 9 liens arising by operation of law. U.C.C. § 9-333.

92 See *infra* notes 136–38 and accompanying text.

93 See *supra* text accompanying note 86.

94 See *supra* note 76.

95 See *infra* notes 129–35 and accompanying text.

96 See *infra* notes 138–42 and accompanying text.

97 See *supra* note 91.

98 Where neighboring property owners undertake no activities which intrude on the absolute dominion of the other, no conflict arises. Absent cross-boundary conflicts, it matters little whether both are regarded as enjoying absolute dominion and the attendant freedom from interference that is implied. See also *infra* notes 136–38

where the interests of unsecured creditors are not dignified with the classification “property,” there are no cross-boundary conflicts that are not instantly resolved simply because security is property and the competing unsecured interest is not.

Finally, cross-border conflicts would be avoided in the realm of secured credit whether or not the rights and interests of unsecured creditors were regarded as property. Although enshrined with the paramount rights of real property, the security interest is not an interest in land. Thus, with its first-in-time priority, it has heretofore been insulated from scrutiny as a nuisance even of the watered-down variety that emerged with the shift to the modern economy.<sup>99</sup> In sum, the security interest as property, unlike a property interest in land, has no natural enemies. In this, the security interest is property of a special and exalted sort, presenting a singular example of eating one’s cake and having it to boot.

#### D. *Nemo Dat Gone Mad: Security as a Judgment-Proofing Strategy*

Where a debtor either has no assets, or has assets inaccessible to judgment creditors through execution, that debtor is effectively judgment proof.<sup>100</sup> There are several strategies by which a debtor may be rendered judgment proof, including secured credit, the most ancient—if no longer the most common—method.<sup>101</sup> Under that strategy, the debtor issues debt secured by a pervasive lien on its assets in an amount that immediately or seasonably thereafter exceeds the liquidation value of the encumbered assets, which thus become instantly inaccessible to unsecured creditors, certainly those without judgments and even those whose claims have been reduced to judgment. Now, with no further risks to be incurred, and all external discipline dissipated, the fun begins.<sup>102</sup>

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and accompanying text (discussing the concept of absolute dominion in the context of indirect invasion).

99 See *infra* note 140 and accompanying text.

100 LoPucki, *supra* note 11, at 1 n.4. “The liability system works solely through the entry and enforcement of money judgments. Debtors can defeat it by rendering themselves judgment proof.” *Id.* at 14.

101 LoPucki identifies and describes four judgment-proofing strategies: secured debt strategies, ownership strategies (by shuffling assets to subsidiaries or through asset securitization), exemption strategies, and foreign haven strategies. *Id.* at 14–38. More recently, “on-shore” havens might be added to the list. See John K. Eason, *Home from the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning*, 52 FLA. L. REV. 41, 53–63 (2000).

102 See Steven Shavell, *The Judgment Proof Problem*, 6 INT’L REV. L. & ECON. 45, 47–54 (1986) (discussing the suboptimal incentives in terms of exercising ordinary

Recent years have witnessed the emergence of a lively debate among academic commentators regarding the limits of liability-limiting techniques, or, more colorfully stated, about a phenomenon that has come to bear the moniker “judgment-proofing.”<sup>103</sup> While judgment-proofing strategies are not by any means confined to the ability under Article 9 to subordinate unsecured claims to secured debt,<sup>104</sup> clearly the ability under Article 9, as revised, for creditors to engage in broad all-asset lending has contributed to the concern.<sup>105</sup> The current regime allows corporate borrowers and their secured lenders to

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care, purchasing liability insurance, etc., that occur once debtors have effectively judgment-proofed themselves).

103 For a sampling of the debate, see LoPucki, *supra* note 11, 14–19; Lynn M. LoPucki, *The Essential Structure of Judgment Proofing*, 51 STAN. L. REV. 147, 149–50 (1998) (suggesting that by creating judgment-proof structures, creditors lose the practical ability, albeit not the legal right, to enforce their claims); Schwarcz, *supra* note 11, at 17–28 (1999) (suggesting that LoPucki is wrong because economic analysis makes it irrational for arms-length business transactions to be used as judgment-proofing schema); White, *supra* note 11, at 1371–74 (arguing based on empirical analysis that LoPucki is wrong because the percentage of companies' assets hypothecated to secured debt has not been increasing). There has also been a rich literature devoted, if not to judgment-proofing per se, then to the related issue of imposing limits on limited liability, particularly with respect to tort claims, in order to create appropriate investment incentives and to reduce cost externalization. See, e.g., Leebron, *supra* note 82; Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203 (2002); Henry Nasmann & Reiner Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991).

104 See *supra* note 101. For an overview of the mechanics of asset securitization, see Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133 (1994).

105 While beyond the scope of this Article—the nuisance metaphor may be an equally suitable way of thinking about challenging judgment-proofing mechanisms in these other contexts as well, such as securitization transactions, on the basis that transfer of the securitized assets to the bankruptcy remote subsidiary is a misuse of property, thus enhancing the case for recharacterizing the transfer as either a loan or a fraudulent conveyance. See generally David Gray Carlson, *The Rotten Foundations of Securitization*, 39 WM. & MARY L. REV. 1055, 1111–12 (1998) (maintaining that Bankruptcy Code policy favors treating securitized assets in the same fashion as secured loans). Although not binding necessarily in a federal bankruptcy proceeding, another important goal in the revision of Article 9 was to expand protection for and to facilitate securitization transactions. See Steven L. Schwarcz, *The Impact on Securitization of Revised UCC Article 9*, 74 CHI.-KENT L. REV. 947, 953–55 (1999) (discussing the ways in which Article 9 attempts to make the perfection process clearer and more practical); see also Edward J. Janger, *The Death of Secured Lending*, 25 CARDOZO L. REV. 1759, 1761 (2004) (citing recently adopted statutes that have “gerrymander[ed] state property law to provide a safe harbor for securitization transactions” and that provide an effective opt-out from Article 9).

externalize virtually all of the costs of insolvency.<sup>106</sup> This is most obvious in, but not necessarily limited to, the case of tort liability.<sup>107</sup> Exacerbated by the divergent motivations that sometimes emerge from the separation of ownership and management,<sup>108</sup> Article 9 arguably facilitates the extension of more credit than is optimal, at least from the perspective of distributional fairness. The statute's embracement of full priority, and the concomitant subordination of unsecured claims, makes this a logical but, as we hope to show, not a necessary, result.

In its present form, secured credit is manifestly an ideal construct by which to judgment-proof debtors. The hegemony of the conveyance model, and the corresponding principle of *nemo dat*, together, ensure priority for perfected secured creditors as surely and inexorably as night follows day. In other words, in the grand scheme of things, the property-based tenets on which security has come to be

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106 See Bebchuck & Fried, *supra* note 8, at 899–900 (explaining that the full priority for secured claims, when combined with the distortions already created by limited liability, leads firms “to underinvest in precautions and overinvest in risky activities that externalize harm to other parties”).

107 G. Eric Brunsted, *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 BUS. LAW. 499, 539 (2000) (suggesting that a firm's inability to pay unsecured claims is more detrimental to tort victims than trade creditors); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 431 (2000) (“Tort victims have no control over the type of legal entity that injures them. Consequently, to make the amount recovered by a tort victim depend upon the legal form of the organization responsible for the tort is to permit the externalization of accident costs, and indeed to invite the choice of legal entity to be governed in important part by the desire to seek such externalization.”); Charles W. Hendricks, *Offering Tort Victims Some Solace: Why States Should Incorporate a 20% Set-Aside Into Their Versions of Article 9*, 104 COM. L.J. 265, 268–71 (1999) (urging adoption by the states of the Warren “carve-out” proposal); Janger, *supra* note 2, at 606 (pointing out that the availability of secured credit, when coupled with limited liability, could seriously erode the effectiveness of the tort liability system); Note, *Switching Priorities: Elevating The Status of Tort Claims in Bankruptcy in Pursuit of Optimal Deterrence*, 116 HARV. L. REV. 2541, 2561–62 (2003) (making the case that the elevation of tort claims in bankruptcy would alleviate the externalization of liability in both liquidations and reorganizations).

108 See also Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 568 (2003) (pointing out that shareholders of public companies are not in a position, legally or practically, to monitor and regulate the decisions of the day-to-day managers of the firm); Lawrence Ponoroff, *Enlarging the Bargaining Table: Some Implications of the Corporate Stakeholder Model for Federal Bankruptcy Proceedings*, 23 CAP. U. L. REV. 441, 484–86 (1994) (discussing the sometimes incongruent interests of owners and professional managers in relation to initiation of bankruptcy). For a more general discussion of the agency problems inherent in the divergent interests of corporate managers and shareholders, see Elizabeth Chorvat, *You Can't Take it With You: Behavioral Finance and Corporate Expatriations*, 37 U.C. DAVIS L. REV. 453, 485–87 (2003).

understood create systematic opportunities, if not actual incentives, for judgment-proofing.

Indeed, judgment-proofing through secured credit is simply the outcome of the ordinary operation of priority rules based on property ownership. Secured creditors have an ownership interest in the debtor's assets because the security is denominated to be "property," while judgment and other unsecured creditors own no property. Thus, the priority battle is over before it is pitched.<sup>109</sup>

### III. SIC UTERE TUO, UT ALIENUM NON LAEDAS

While there is, and has been, much criticism of the priority awarded secured credit,<sup>110</sup> none, so far as we are aware, has proposed a rubric by which misuse of security might be arrested other than by challenging the basic precepts of the conveyance model—an exercise of interesting intellectual interest, but no more likely to have a practical effect than a knight on horseback is likely to do damage to a windmill by charging it with a lance. In this Part, therefore, we propose a rubric for redressing the use of security as a judgment-proofing scheme that operates squarely within the boundaries of the property model.

The approach we advance is suggested by the very decree that has declared security to be property, as emphatically confirmed in Revised Article 9. That is, with property rights come property responsibilities. In the law relating to real property, the very law that has come to structure the contemporary understanding of Article 9, one way in which property responsibility is imposed is through the law of nuisance, a tort that polices unreasonable uses of land. It is our belief that the doctrine of nuisance similarly offers a workable and conceptually compatible model for policing the misuse of security. To explore this possibility, an excursus into the law of nuisance is in order as follows.

Nuisance law<sup>111</sup> is rooted in profoundly held convictions about a landowner's unqualified right to prevent physical intrusion upon his

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109 In fact, we think it inaccurate to refer to a "priority dispute" in this context at all, as we believe that phrase implies the ordering of distribution among like claimants. Secured creditors own the collateral; judgment creditors have no cognizable property, so there is no real dispute about priority that can in fact arise between them.

110 See *supra* notes 103–07 and accompanying text.

111 The word, nuisance, has its etymology in the Latin, *nocumentum*, from which it found its way to become the French, *nuisant*, the present participle of *nuire*, which means "[t]o be hurtful, injurious, or prejudicial . . . to jeopardize, to harm; to stand in the way, to be an obstacle or hindrance." THE NEW CASSELL'S FRENCH DICTIONARY 516 (1962); see Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and*

land.<sup>112</sup> Nuisance, that is to say, has its origins in the law of trespass.<sup>113</sup> As a cause of action, private nuisance has been something of a utility player, called upon to right wrongs against property and property-like rights where redress cannot neatly be had otherwise.<sup>114</sup> While the law of nuisance is far from elegant conceptually,<sup>115</sup> its evolution, and the historical context of that evolution, are observable and revealing for present purposes.

The prototype of the conceptual category “trespass”—of which nuisance is a theoretical offspring—is the unprivileged entry in the

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*Future*, 54 ALB. L. REV. 189, 192 (1990) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 617 n.7 (5th ed. 1984)).

112 “The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter; but the King of England cannot enter!” William Pitt, Earl of Chatham, Speech on the Excise Bill Before the House of Commons (Mar. 1763) in OXFORD DICTIONARY OF QUOTATIONS 515, 515 (4th ed. 1992); see also WILLIAM BLACKSTONE, 2 COMMENTARIES \*3 (private property entails the prerogative of “total exclusion of the right of any other individual in the universe”).

113 Private and public nuisance share the name “nuisance,” but their heritage is quite different. Private nuisance, as noted in the text, has its lineage in the law of trespass and is aimed at the protection of interests related to land, if, in some cases, those interests seem far removed from what are by consensus property interests (e.g., “use and enjoyment”). See KEETON ET AL., *supra* note 111, § 87, at 618. Private nuisance, then, is a civil wrong, a tort. Public nuisance was a parallel development, but distinct from private nuisance: public nuisance was a crime against the crown. *Id.* at 617. At the same time, the same acts constituting a public nuisance and so a crime may likewise constitute a private nuisance giving rise to a civil remedy in tort. Moreover, private individuals may seek a civil remedy in tort for public nuisance. *Id.* at 617–18. The result is a conflation of the two concepts at the margins, such that the difference in the two, as a practical matter, may only be one of degree. That is, private nuisance affects one or few, while public nuisance impacts greater numbers of the public. STOEBUCK & WHITMAN, *supra* note 75, § 7.2, at 417–18. For an extended discussion of public nuisance, see Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755 (2001).

114 KEETON ET AL., *supra* note 111, at 616 (“[Nuisance] has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.” (footnotes omitted)). For a compilation of commentary on the meaninglessness of the term “nuisance,” see Jeremiah Smith, *Torts Without Particular Names*, 69 U. PA. L. REV. 91, 109–12 (1921).

115 Justice Blackmun complained that nuisance law was altogether unprincipled. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting). Common law nuisance has also been variously referred to as a “garbage can,” William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942), and a “mongrel.” F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949). While not particularly flattering appellations, the malleable and ill-defined perimeters of nuisance doctrine make it ideal for adaptation and, ergo, for our purposes.

person of the trespasser,<sup>116</sup> but entry in the form of some tangible thing wielded by or under the trespasser's control will do.<sup>117</sup> Both constitute physical invasion by the trespasser, one directly and one indirectly.<sup>118</sup>

At a certain point, one strays from the prototype category member (physical entry of the trespasser) altogether into the derivative category "nuisance."<sup>119</sup> In conventional terms, trespass is distinguished from nuisance in that the former involves physical intrusion, while the latter does not.<sup>120</sup> The conceptual demarcation is quite distinct, even if the boundary often blurs owing to a seemingly crude distinction that conceives of large objects as instruments of trespass, but small

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116 STOEBUCK & WHITMAN, *supra* note 75, § 7.1, at 411. Originally, the distinction between trespass and nuisance turned on the characterization of the physical intrusion as direct or indirect. Direct invasion constituted trespass, while indirect invasion constituted nuisance. The characterization was necessitated by the old forms of action. Trespass was the appropriate action for direct physical invasion, but offered no remedy for indirect physical invasion, which, instead, was left to an action on the case. KEETON ET AL., *supra* note 111, at 622. The distinction between direct and indirect invasion atrophied with the disappearance of the old forms of action. *Id.* The difference between the torts thereafter was cast in terms of the nature of the interest to be protected. Trespass disturbed exclusive possession of land, while nuisance was an affront to its use and enjoyment. *Id.*

117 "Instrumentalities that can cause trespass are generally objects . . . that have size and weight, whereas nuisances are generally caused by 'nonphysical' forces such as noise, odors, and vibration." STOEBUCK & WHITMAN, *supra* note 75, § 7.1, at 412; *see also* KEETON ET AL., *supra* note 111, at 619–20 (defining nuisance as "an interference with the use and enjoyment of the land" and providing examples of the "different ways and combinations of ways" in which this interest may be invaded).

118 Another important imaginative device of rationality is metonymy. Whereas metaphor is a matter of understanding one concept or entity *in terms of* another concept, metonymic reasoning entails one entity *standing for* another. In the expression, "all hands on deck," for instance, the hand *stands for* the whole sailor. LAKOFF & JOHNSON, *supra* note 35, at 35–40. In the same way, unprivileged entry in the form of objects, projectiles, wandering animals, and so forth under the indirect trespasser's control constitute trespass. *See* STOEBUCK & WHITMAN, *supra* note 75, § 7.1, at 411 and accompanying notes.

119 This is not intended as a casual use of the term, "category," rather, we use it in the experientialist sense. On the experientialist account, categories are conceptual, as distinguished from the common objectivist view of categories as naturally occurring, independent of human conceptual categories. LAKOFF, *supra* note 19, at 266–68. For the objectivist, by contrast, categories are defined by the inherent properties of their members and are mind-independent. *See supra* notes 34–43 and accompanying text.

120 *See supra* note 116.



objects as nuisance-creating agents.<sup>121</sup> Much turns on whether the object or objects are visible to the naked eye.<sup>122</sup>

If the agents of nuisance, unlike trespass, do not disturb possession, private nuisance is nevertheless a tort against interests initially associated with property ownership.<sup>123</sup> Traditionally, the interest invaded has been deemed to be the "use and enjoyment" of the land by the possessor;<sup>124</sup> although providing a workable definition of "use and enjoyment"<sup>125</sup> (and particularly to do so in terms of property<sup>126</sup>) has proved to be a challenge. The point to be taken is that the parameters of common law nuisance are not especially well delineated in ap-

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121 See STOEBUCK & WHITMAN, *supra* note 75, § 7.1, at 412. The distinction between nuisance and trespass based on the size of the instrumentality involved may seem arbitrary or frivolous at first glance; however, on understanding nuisance and trespass as conceptual categories, it becomes perfectly sensible. The prototype of the conceptual category "trespass" is physical intrusion of the trespasser's person. *Id.* § 7.1, at 411. The metaphor, "objects are extensions of the person manipulating them," admits direct physical intrusion in the form of some instrumentality wielded by the trespasser into the category, trespass. Intrusion in the form of objects with insignificant mass is too remote from the central category prototype for category membership.

122 Dust, insects, and even smoke occupy physical space and have substance, however inconsequential, but these are generally regarded as nuisance-causing agents, not instruments of trespass. KEETON ET AL., *supra* note 111, at 71.

123 Ownership interests protected from private nuisance include interests less than fee absolute ownership. For instance, tenants for a term, mortgagors in possession after a foreclosure, even those in adverse possession enjoy interests recognized as protected from nuisance. *Id.* at 621.

124 This does not, however, define public nuisance, which requires no injury to real property; instead, public nuisance and private actions for public nuisance arise on injury to public rights, though such rights might include an injury to real property. See generally Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 96 (1998) ("The public nuisance action stems from the injury a private use inflicts on public rights, which may occasionally mean harm to real property owned by the public, but is more often an injury to common pool resources . . .").

125 According to the Second Restatement of Torts:

"Interest in use and enjoyment" also comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land is often as important to a person as freedom from physical interruption with his use or freedom from detrimental change in the physical condition of the land itself.

RESTATEMENT (SECOND) OF TORTS § 821D cmt. b (1979).

126 STOEBUCK & WHITMAN, *supra* note 75, § 7.2, at 416 ("How should we define the property interest that the law of nuisance protects? Is it necessary to say that the plaintiff has a specifically defined property interest in light, air, and view, as discrete kinds of 'property,' or should we define the protected property interest more broadly as use and enjoyment of the land?").

plication.<sup>127</sup> The formula for stating the action, however, is quite clear,<sup>128</sup> and, more important for present purposes, there is little confusion about the essence of nuisance law, which is to address uses of property that injure the interests of another or a community of others.

The conceptual history of nuisance law begins with the Blackstonian conception of property.<sup>129</sup> It corresponds roughly to contemporary popularly held conceptions of property,<sup>130</sup> which equate property to things, land, or personalty, actually *owned*.<sup>131</sup> This conception has, however, always been inadequate for law, which generally regards property as describing a *relationship* between the owner and the things themselves. In other words, things are not property, rather, things are merely the *subjects* of property.<sup>132</sup>

In any case, Blackstone described property to be "sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the right of any other individ-

127 KEETON ET AL., *supra* note 111, at 549-50.

128 According to the Restatement, "[a] private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land." RESTATEMENT (SECOND) OF TORTS § 821D (1979). First, there must be some intentional conduct that amounts to interference with the use and enjoyment of land. *Id.* § 822.

The phrase "interest in the use and enjoyment of land" is used . . . [by the] Restatement in a broad sense. It comprehends not only the interests that a person may have in the actual present use of land for residential, agricultural, commercial, industrial and other purposes, but also his interests in having the present use value of the land unimpaired by changes in its physical condition.

*Id.* § 821D cmt. b. Second, there must, indeed, be a resulting interference from that conduct. *Id.* § 821F. Third, the interference must result in harm (significantly, the requirement is satisfied on showing a devaluation of the nuisance victim's property). *Id.* § 826. Finally, the interference must be unreasonable. *Id.*

129 See *supra* text accompanying note 95.

130 BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 97-100, 113-67 (1977). This is the lay notion of property ownership as dominion over things.

131 See, e.g., Francis S. Philbrick, *Changing Conceptions of Property in the Law*, 86 U. PA. L. REV. 691, 691 (1938) ("A layman thinks of property as a man's belongings, or as the things that a man owns."). The fact is, the "layman" conceives of property in terms of objects or things not because the layman is insipid, but because that conception is perfectly serviceable for the layman's purposes. *Id.* at 694-95. One might spend a highly successful lifetime acting in every regard on a concept of the universe that supposes the sun revolves around the earth like a ball on a string. In the course of the day for most of us, that conception is as serviceable as any other. A different conceptualization is required only when the other fails to accommodate the endeavor at hand. See *id.* at 696 ("Changing culture causes the law to speak with new imperatives, invigorates some concepts, devitalizes and brings to obsolescence others.").

132 See STOEBUCK & WHITMAN, *supra* note 75, § I.I, at I.

ual . . . .”<sup>133</sup> Blackstonian notions of unitary ownership of land, with all of its domineering political associations, implied an equally potent corollary: “[A]bsolute dominion . . . conferred on an owner the power to prevent any use of his neighbor’s land that conflicted with his own quiet enjoyment.”<sup>134</sup> Of course, stated in the negative, the same principle meant circumscribing the rights of owners to develop or use their land in contradiction of the principle of absolute dominion.<sup>135</sup>

In an economy centered on land ownership, that contradiction presented relatively few actual conflicts.<sup>136</sup> Direct invasion was dealt with by trespass, and obnoxious uses short of invasion that interfered with quiet enjoyment were circumscribed as nuisances.<sup>137</sup> Nineteenth-century economic developments, however, meant novel and expanding uses of land that began to produce more nettlesome conflicts.<sup>138</sup> Gradually, the contradiction between corresponding rights and obligations of property ownership was not only exposed, but brought to highly problematic relief. The indirect invasion that necessarily attended novel uses were, of course, instantly met with the law of nuisance, which proscribed strictly any interference with use and enjoyment. Strict liability for nuisance meant the costs of remedying

133 2 BLACKSTONE, *supra* note 112, at \*2.

134 MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 31 (1997) (footnotes omitted). For Blackstone, property owners had to desist from even lawful uses that offended the use and enjoyment of neighboring owners, upon whom “it is incumbent . . . to find some other place to do that act, where it will be less offensive.” *Id.* (quoting 2 BLACKSTONE, *supra* note 112, at \*217–18). According to Vandeveld, the two essential components of Blackstone’s conception were the presence of a physical thing, which might be the object of property, and the notion that ownership of that thing was exclusive and absolute. Vandeveld, *supra* note 25, at 331.

135 It is a matter of the “entitlement to make noise versus the entitlement to have silence, the entitlement to pollute versus the entitlement to breathe clean air.” Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090–91 (1972).

136 See Halper, *supra* note 124, at 101 (“While there may be cross-boundary annoyances, in an agrarian economy, where land is wealth, not many land uses conflict. Those that do can be subjected to an ‘act at your peril’ rule of strict liability, without much damage to the economy.” (footnotes omitted)).

137 *Id.* at 100.

138 As professor Halper explains:

[N]ew kinds of active uses, dynamic, voracious and large-scale, came to swallow up land and people. Those uses often, virtually always, conflicted with the old ones. They involved speed and machinery and emissions and smells and discharges and noise and steam and the plethora of other “less salubrious consequences” of industrial and extractive enterprises.

*Id.* at 101 (footnotes omitted).

the injury had to be internalized in derogation of profits, and so also in derogation of development.<sup>139</sup>

It quickly became apparent that common law nuisance doctrine was antithetical to late nineteenth-century industrial growth and expansion.<sup>140</sup> The prognosis for nuisance was clear—to begin with, strict liability had to go<sup>141</sup> and negligence would, to some degree, take its place.<sup>142</sup>

What, then, of nuisance as a symbol of egalitarian creed—the idea that property is “qualitatively identical among property owners regardless of the owner’s birth, character, wealth, creed or ideology . . .”?<sup>143</sup> The erosion of nuisance entailed a simultaneous erosion of the sacred institution of property, and so threatened the egalitarian ideology it signified. While courts were unwilling to go so far as to

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139 *Id.* at 103; see also David Abraham, *Liberty and Property: Lord Bramwell and the Political Economy of Liberal Jurisprudence, Individualism, Freedom, and Utility*, 38 AM. J. LEGAL HIST. 288, 297–98 (1994) (describing strict liability as essentially a dead weight on industrial development).

140 In short, utilitarian principles would prevail through one means or another. Essentially, solitary or small-scale landholders asserting their Blackstonian ownership in an endeavor to halt offensive neighboring uses were either denied recovery or limited to damages. The cost of maintaining the Blackstonian notion of absolute dominion, to include freedom from offensive uses by one’s neighbor, was too high. That is to say, large-scale, economically attractive activities reasonably conducted would not, in the end, be compelled to internalize the cost of preserving Blackstonian property concepts. The late-eighteenth-century Mill Acts dramatically illustrate the point. HOROWITZ, *supra* note 134, at 47–53. To encourage the building of mills, a number of states passed acts that foreclosed trespass and nuisance to landowners complaining of their lands being flooded by neighboring mills. *Id.* at 47–48. Generally, these acts would effectively eliminate the customary action for trespass and nuisance: punitive damages, permanent injunction, and self-help abatement. *Id.* at 48. The Mill Acts represent “some of the earliest illustrations of American willingness to sacrifice the sanctity of private property in the interest of promoting economic development.” *Id.* at 47.

141 The impact on development from nuisance doctrine was also ameliorated by denying injunctive relief in favor of damages. The remedy was determined by balancing the equities, i.e., balancing the harm to the complaining party as against the social utility of the injury-causing activity. STOEBUCK & WHITMAN, *supra* note 75, § 7.2, at 418–19. This was the “American Rule” from early on. Halper, *supra* note 124, at 109–13.

142 See Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1830 to 1920*, 59 S. CAL. L. REV. 1101, 1139 (1986) (“To mid-nineteenth-century conceptualists, negligence-based nuisance doctrine held out the hope of assimilating nuisance law to the prevailing fault theory of tort liability. The doctrine imposed liability for most land uses only if the defendant negligently conducted the use.”). Deficiencies in negligence-based nuisance doctrine, however, prevented it from becoming firmly entrenched in nuisance law. *Id.* at 1146.

143 Halper, *supra* note 124, at 104.

deprive nuisance doctrine of its property heritage,<sup>144</sup> nevertheless the conception of property as connoting absolute dominion, comprehending freedom from offending uses by neighboring property owners, was simply incompatible with industrial development.

The transformation from agrarian to industrial economy also saw erosion of the political and economic importance of solitary ownership of land. Unitary ownership of anything was exploded into fragmented rights and relations by Hohfeld.<sup>145</sup> These could be divided and subdivided, distributed and redistributed, or “even made to disappear as if by magic . . . .”<sup>146</sup>

Moreover, the very definition of property, theretofore securely anchored in inherited associations with land or other *things*, was forced from its object-ownership moorings.<sup>147</sup> The legal category “property” was suddenly pressed into service to govern an array of incorporeal rights and interests which supplanted land in economic significance in an industrial, capitalistic economy.<sup>148</sup> The universe of property expanded enormously to the degree that some observers

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144 See Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 74 (1979) (discussing the weakness of utilitarian considerations in failing to explicitly recognize antecedent or natural rights that the law was not called upon to create).

145 See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning II*, in FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 65, 67 (Walter W. Cook ed., 1923). It might be more accurate to say Hohfeld chronicled the explosion rather than precipitated it. Professor Jeanne Schroeder, who offers an extended treatment of the bundle of sticks metaphor, declares that on unveiling his bundle analysis, Hohfeld wrote the epitaph commemorating the already dead “ancestral” concept of property. Schroeder, *Bundle-O-Stix*, *supra* note 64, at 239–40. Hohfeld’s familiar recharacterization of property as a set of legal relations, together with A.M. Honore’s contributions to the bundle of rights model, are analyzed and critiqued in J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996).

146 Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY, 69, 69–70 (J. Roland Pennock & John W. Chapman eds., 1980).

147 See also Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 536 (2005) (discussing early, value-based views on property and the absence of such views from modern theory).

148 These are the “capitalized assets” that are the hallmark of a modern industrial market—stock ownership, copyrights, patents, good will and the like. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 12 (1927). Grey observes:

The transformation of a preindustrial economy of private proprietors into an industrial economy . . . presupposes that the entrepreneurs, financiers, and lawyers who carry the process through have the imagination to liberate themselves from the imprisoning concept of property as the simple ownership of a thing by an individual person. They must be able to design new forms of finance and control for enterprise, which can take maximum

predicted that virtually every interest or right threatened to lay claim to that status, diluting the concept to the point of meaninglessness.<sup>149</sup>

The emergent bundle metaphor defined property without conceptual reference to unitary control and dominion over things. It described a set of self-sufficient rights and usages no different, perhaps, from other legal rights. When property law principles are indistinguishable from those of other doctrinal systems, it seems to deprive property of the status of a distinct legal category.

The perceived disintegration of property into a bundle of sticks, with its potential for fragmented ownership, might also be said to render the general concept of ownership meaningless. Where sticks are held by several, who is the owner? What is more, if the concept of property requires no reference to a physical thing owned, the way is clear to declare anything of value to be property. Then again, if everything is property or can be the subject of property, then, perhaps nothing is property and property ceases to be an important legal category.<sup>150</sup>

However that may be, the report of the death of property was premature.<sup>151</sup> As a legal category, property has by no means lost its power to decide disputes and it does so with mundane regularity. The oppressive property priority awarded secured claims offers a stunning example. Under a proposition-based program which resolves legal is-

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advantage of . . . forms that fractionate traditional ownership and that create claims remote from tangible objects.

Grey, *supra* note 146, at 75–76.

149 “The protection of value rather than things . . . greatly broadened the purview of property law. Any valuable interest potentially could be declared the object of property rights. This . . . was a development that threatened to place the entire corpus of American law in the category of property.” Vandeveld, *supra* note 25, at 329.

150 In Thomas Grey’s words, “[w]e have gone . . . in less than two centuries, from a world in which property was a central idea mirroring a clearly understood institution to one in which it is no longer a coherent or crucial category in our conceptual scheme. The concept of property and the institution of property have disintegrated.” Grey, *supra* note 146, at 74.

151 “[P]roperty as an economic and legal practice continues to flourish. Property concepts have not come crashing down in the face of this arcane, arid, and acontextual legal argument. The Hohfeldian approach refuses to analyze contemporary property qua property on the grounds that property is dead as an analytical category. The marketplace, however, needs to account for property and continues to build the protective belt of auxiliaries.” Schroeder, *Bundle-O-Stix*, *supra* note 64, at 300; see also Bell & Parchomovsky, *supra* note 147, at 531 (suggesting that the “bundle of sticks” metaphor is obsolete and proposing a unified theory of property predicated on the insight that property law is organized around creating and defending the value inherent in stable ownership).

sues by recourse to conventional categories, to designate an interest *property* is not a thing to be taken lightly.<sup>152</sup>

Likewise, then, nuisance doctrine remains intact as well. To be sure, breasting the winds of changing conceptions of property certainly left a different nuisance doctrine than that which absolutely protected land ownership. But if the right to use and enjoyment of property without interference no longer enjoys its former absolute dominion and glory, nuisance remains a property watchdog and its application to security conceived as property is where we turn attention next.

#### IV. NUISANCE DOCTRINE AS A RUBRIC TO CONSTRAIN THE MISUSE OF SECURED CREDIT—PUTTING A STOP TO JUDGMENT-PROOFING

For present purposes, we are neither challenging the prevailing property model nor proposing an alternative conceptualization of security.<sup>153</sup> What we would argue is only that if all of the dimensions of the now accepted source concept "*property*" are imprinted on the target concept "*security*," there is ample justification to warrant limiting the secured creditor's legal rights (and remedies) when the exercise of those rights, understood as property rights, interfere unreasonably with the competing rights of a community of others—that is to say, when the security interest becomes a nuisance. Put another way, the rights of secured creditors as *property owners* should not exceed unqualifiedly the rights of other property owners in the fashion that the priority rules of Article 9, operating in isolation, would demand.

As we have pointed out in the previous Part, the protection of property rights, while expansive, is not absolute. In the real property context, when the use of one's property interferes with the reasonable enjoyment of adjacent property, nuisance law can be invoked to constrain the offending use (i.e., to limit the otherwise unfettered rights

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152 See *supra* notes 70–72 and accompanying text.

153 This is something we have, however, done in the past, at least in the context of a bankruptcy proceeding. See Ponoroff & Knippenberg, *supra* note 8, at 2289–96. Once it is recognized that the security interest is not a thing that is *property*, but rather represents a dynamic relationship that for some purposes we have come to understand conceptually through the prism of the property metaphor, we (and more importantly courts) are no longer consigned irrevocably to understand the security interest as property, with all of the entailments associated with that concept, for all purposes. In essence, then, we are freed to bring to bear competing conceptualizations that more accurately, and more fairly, characterize the relationship between the debtor, the secured party, and others with a cognizable economic stake in that relationship. Although a tantalizing prospect, our assertion in this Article is far less intrepid than that.

of ownership). Analogically, the same methodology cannot only be applied to an Article 9 *property* interest, but we would maintain needs to be so employed in order to reconcile appropriately these rights with the rights of other claimants in and to the same property. Thus, the question becomes when does the Article 9 security interest, and the benefits of the prioritization entitlements it enjoys, impinge on other interests in the credit community to the point that the security interest becomes a nuisance from the broader perspective of aggregate social utility? In other words, to say that secured credit is beneficial to the well being of the commercial order is meaningless unless and until the limits on the truth of that assertion are explored.

The ideation of security as property in Article 9 did not render wholly irrelevant the application of other, non-Code doctrines, which, proceeding from the property model, might be pressed into service to alter this result in extraordinary cases. There is, further, a pragmatic as well as a normative value in harmonizing application of these doctrines with the concept of the security interest as property, and it is here that we believe the nuisance metaphor—itsself a species of property law—may have something to say that is not only consonant with the prevailing positive law abstraction of security as property, but actually flows directly from it at the core conceptual level.

We make no claim that judgment-proofing amounts to nuisance in the conventional sense. In addition, we advocate neither the expansion of the tort of nuisance generally to embrace injury to intangible interests in specific personalty by analogy, nor otherwise recommend the creation of a cause of action to limit use of personal property, including security in all cases. Rather, we believe simply that certain misuses of security, including most notably judgment-proofing, belong in the conceptual category nuisance. We further maintain that there are good historical and contemporary reasons to put it there.<sup>154</sup> Judgment-proofing has been indicted in the literature which describes its costs.<sup>155</sup> What we offer here is a conceptual redux that assembles and restates those costs in a few recognizable, doctrinally stipulated terms.

The experiment contributes to the discourse in two ways: First, the threats posed by judgment-proofing are gathered under relatively determinate markers that elicit widely familiar associations.<sup>156</sup> Sec-

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154 See *infra* note 175 and accompanying text.

155 See *supra* notes 100–03 and accompanying text.

156 The idea here is to disentangle judgment-proofing from the general debate over the worth of the institution of secured credit generally. See *supra* note 7 and accompanying text (summarizing fairness and efficiency questions raised by secured credit). Judgment-proofing, *nemo dat* gone mad as we put it, is relocated for discrete



ond, distillation and consignment of judgment-proofing to the nuisance domain supplies a manageable doctrinal response to this practice and a remedial opportunity in more or less conventional bankruptcy (arguably non-conventional state) law terms.<sup>157</sup> In short, understanding judgment-proofing *in terms* of nuisance doctrine in service of meaning introduces doctrinal demarcation and response manageability through a simple heuristic structure. With that, we turn to our explication of nuisance as a conceptual category.

There are doubtless a number of ways in which the conceptual category “nuisance” might be explained and described.<sup>158</sup> We believe, however, that among them, nuisance might usefully be understood as a radial category, just as we have suggested that the concept “property” can be understood as a radial category.<sup>159</sup> Moreover, an account of nuisance as a radial category furnishes an explanatory perspective that sheds an illuminating glint to highlight our purposes in this Part. Specifically, it is our claim that judgment-proofing is likewise a conceptually natural member of that radial category, and we propose therefore the application of nuisance tenets in that context to enable systematic decision response management.

A single prototype or best example of the conceptual category nuisance is difficult to identify, but none is required. Any of a number would do. Our own informal inquiries suggest one serviceable possibility, namely, the discharge of dust<sup>160</sup> from one property for the landowner’s recreational use which travels to neighboring property

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analysis on an abuse basis. Simply put, the injuries worked by judgment proofing are reassembled under the few household terms from nuisance. The nature of those threats is thus understood on conceptual grounds on which there is accord.

157 The strategy is to provide decision makers an accessible, off-the-rack means of capturing and killing judgment-proofing schemes. Nuisance is long-standing and conceptually seasoned, and its essential mission largely a matter of agreement. See *supra* notes 129–52 and accompanying text. Nuisance doctrine is therefore readily and widely available to decision makers.

158 See *supra* note 54 and accompanying text (noting that cognitive linguistics has identified several conceptual category types).

159 Space does not permit a rigorous discussion of nuisance as a radial category, but a detailed account is unnecessary for present purposes. The treatment of property as radial category offered in Part II.B should serve to demonstrate how the analysis proceeds.

160 While our choice of a central case is based upon our informal survey of our colleagues, the factual instantiations in the cases are consistent with that choice and offer a wide array of examples. The one we selected seemed to spring irresistibly to the minds of most when asked to pick a best example. The other most common responses elicited on asking for a common or most common nuisance were: barking dogs, funeral homes, rank or obnoxious odors, smoke, and noise. Responses included all, and they are easily elicited.

and devalues it. The stories available in the case law suggest a host of related radial members, and also the point at which extension fails. They suggest as well some of the most salient features which define the prototype.

Offending activity that produces substances short of dust or the like is, within both the conceptual and legal categories, nuisance. For instance, smoke is regarded as a nuisance-causing substance where it crosses property lines to disturb neighbors or devalue their property.<sup>161</sup> Considerable extension from the prototype is tolerated: odors, noise, and light have all been ruled agents of nuisance.<sup>162</sup>

Gases, odors, even noise and light, are not conceptually problematic, or not seriously so—they are simply metaphoric extensions of dust or other substances. But other activities have been declared a nuisance within the legal category, though they produce nothing perceptible, at the literal or nonliteral level that journeys to adjacent property. For instance, an undertaking business is a nuisance-causing activity, but produces nothing easily understood as crossing property lines.<sup>163</sup> That radial extension is obviously acceptable, from which we conclude sufficient resemblance to the category prototype.

The implication may be that resemblance to the best case in that particular is essential neither for membership in the conceptual category "nuisance" nor, for that matter, the conventional legal category. It may also be that, assuming enough resemblance to the prototype on other grounds, marginal resemblance by metaphoric extension will do. We believe two features or traits seem to identify the central case: first, the use of something one owns within sufficient proximity, literally or metaphorically, so as to injure something belonging to another.<sup>164</sup> Second, there is no good reason for the offending use; that is, the good, if any, that is derived from the offending use is outweighed by the corresponding injury to neighboring interests.<sup>165</sup>

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161 See *Holman v. Athens Empire Laundry Co.*, 100 S.E. 207, 210 (Ga. 1919) (stating that smoke constitutes a nuisance when it "produce[s] a visible, tangible, and appreciable injury to property.").

162 *Exxon Corp. v. Yarema*, 516 A.2d 990, 1002 (Md. Ct. Spec. App. 1986) (stating that "[a]ll tangible intrusions, such as noise, odor, or light fall within the realm of nuisance"); see also *supra* notes 121–22 and accompanying text (differentiating nuisance from trespass in conceptual terms).

163 *Howard v. Etchieson*, 310 S.W.2d 473, 474 (Ark. 1958).

164 The best example here may be pecuniary loss from visible, physical injury to land. See *KEETON ET AL.*, *supra* note 111, at 627.

165 The balance schema is widely distributed across any array of concepts. For an account (and critique) of the balance schema in the law, where it becomes a specialized version of propositional reasoning, see *JOHNSON*, *supra* note 36, at 90–96.

Turning to the relationship between certain uses of security and the category prototype, the “use of property” (derived from the dust-creating activity in the central case) is shared by the deployment of security to judgment-proof at the literal level. In the case of the category best example, the interest (land ownership) is sufficiently proximate (literally) to the place of the nuisance-creating conduct to be devalued by that conduct. The proximity of the secured creditor’s unsecured creditor neighbors is easily established metaphorically. At the nonliteral level, the community of unsecured creditors is within injury-causing range of the security interest wielded to judgment-proof the debtor.<sup>166</sup> The presence of an interest susceptible to injury is a feature shared at the literal level by the category prototype and the unsecured creditor, as is the devaluation of the interest.<sup>167</sup>

In the prototype we described for discussion purposes, the nuisance-causing conduct is recreational—it has value only to the party undertaking it. The same is easily said of secured credit employed as a judgment-proofing scheme—the correspondence is likely literal. It would prove difficult, indeed, to find an argument claiming judgment-proofing is of value to anyone save the secured party and, perhaps, the debtor’s current managers.<sup>168</sup> With the aggregate utility of secured credit generally still very much debated,<sup>169</sup> the use of secured credit to judgment-proof at the expense of unsecured creditors seems difficult to justify on any commercially rational, let alone equitable, basis. Indeed, once the risk of firm failure has been entirely externalized, the incentives and controls that promote prudent business decision making are eschewed, and in their place is substituted a set of stimuli and inducements that encourage decisions favoring the taking

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166 The rights of unsecured creditors are within the sphere of influence, if you will, of the secured claim. The unsecured creditors, it might be said, are the financial neighbors of the secured creditor. The proximity is, of course, nonliteral.

167 See *supra* note 100 and accompanying text (pointing out that the rights of judgment creditors are worthless where the debtor is judgment proof). The money judgment, standing alone, might be described as little more than official acknowledgement by the authority issuing it that the creditor’s case for liability, whether based on contract or tort, is made. That is not to say, on the other hand, that a case might not be made for regarding in some sense the rights of unsecured creditors as representing a *property* right, or at least a nascent property right. See *infra* text accompanying notes 173–74.

168 LoPucki, *supra* note 11, at 14–30 (suggesting how the debtor may benefit from judgment-proofing schemes); see also *supra* notes 101–02 and accompanying text (discussing judgment-proofing strategies).

169 See *supra* notes 7–8.

of risk wholly disproportionate to any reasonable assessment of potential return.<sup>170</sup>

If we hypothesize a borrower that, because of the nature of its current and historic business operations, faces a serious risk of insolvency due to, for example, contingent and unliquidated tort liability (e.g., a tobacco company), one sees the beginnings of an argument that the system of prioritization in favor of the firm's secured lenders might operate as an unreasonable interference (i.e. a nuisance-causing event) with the property rights of its unsecured creditors who have no real or practical opportunity to bargain for the same advantage. When this occurs, some limitation of full priority, or perhaps another other remedy, such as alter ego liability to pull more assets into reach, may be called for under suppletory doctrines such as the notion of enterprise liability in the case of artificially fractured corporate structures<sup>171</sup> or fraudulent transfer law where the leveraging through secured financing has left the firm with unreasonably small capital.<sup>172</sup> We take this question up in Part V below, but, first, a threshold inquiry needs to be addressed: namely, are "property" interests being invaded at all when the nature of the prejudiced claims is purely contractual in nature?

We believe the answer is clearly "yes," justified on one of two bases. First, while perhaps purely nascent in form, the right of unsecured creditors to reduce their claims to judgment and secure or satisfy those judgments through execution on the debtor's property is intrinsically and notionally no less a "property" right than the secured creditor's claim to future property, which is and always has been clearly recognized in Article 9.<sup>173</sup> Second, were the same rights assigned to secured creditors they would most certainly be classified as personal property collateral within the scope of Article 9. Indeed, Article 9 is itself largely an exercise in the classification of things, the most basic of which is the first inquiry undertaken to determine whether the collateral is real estate. If not, and not otherwise excluded, the property, and the taking of an interest in the property, is subject to Article 9.<sup>174</sup> Stated another way, if the rights of such creditors were hypothecated, the drafters had no qualms about including

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170 See *infra* notes 180–81 and accompanying text.

171 See, e.g., Katherine D. Kale, *Securitizing the Enterprise: Enterprise Liability and Transferred Receivables in Bankruptcy*, 20 *BANKR. DEV. J.* 311, 314 (2003) (discussing "the possibility of imposing enterprise liability through agency principles in order to draw transferred receivables back into the estate of the bankrupt parent corporation").

172 See *infra* note 188 and accompanying text.

173 U.C.C. § 9-204 (2006).

174 See *supra* notes 91–93 and accompanying text.

them in the taxonomy of personalty and declaring the interest conveyed an Article 9 security interest. Logically, if such rights can be regarded as property after they are hypothecated, then surely they must also be so before the interest actually arises.

The predicate for designating a judgment-proofing scheme as a species of the conceptual category nuisance derives from Grant Gilmore's original observation that security was never designed to permit borrowers to hypothecate "all that they may ever own in the indefinite future" to a creditor willing to make a loan that, in light of the risks entailed, should probably never have been made in the first place.<sup>175</sup> Stated another way, there must be some limiting considerations on the ability of debtors to overleverage simply because creditors can overcollateralize.<sup>176</sup> Moreover, the fallout (and bankruptcy bailouts) witnessed in the wake of the leverage buyout exuberance of the late 1980s is a telling reminder that we cannot count on the discipline of the market alone to control such excesses.<sup>177</sup> Indeed, had the principals in those transactions known that they might have to bear the risks and costs associated with their highly speculative investment decisions,

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175 1 GILMORE, *supra* note 4, §7.12, at 248–49. This observation also formed the basis for the Warren carve-out proposal. See Warren, *supra* note 16, at 324 (citing Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 627 (1981)).

176 Warren, *supra* note 16, at 323–34. A more elegant solution, if for no other reason than that it would have constrained the misuse of secured credit within the four corners of Article 9 itself, the carve-out proposal went nowhere with the Revised Article 9 Drafting Committee because of the committee's blind allegiance to the property/conveyance model of security. See *supra* notes 16–17 and accompanying text. The assignment of security to the category "property," understanding that category in a conventional rather than a radial or other metaphoric sense, might be lamented, but it cannot be ignored. Our proposal differs then from the carve-out proposal less in substance and more in approach, as we suggest a rubric for taming the worst abuses of security within the contours of the prevailing property model.

177 See generally Barry L. Zaretsky, *Fraudulent Transfer Law as the Arbiter of Unreasonable Risk*, 46 S.C. L. REV. 1165, 1180 (1995) (discussing the "inherently risky" nature of leveraged buyouts). In this classic analysis of the application of fraudulent transfer law to LBO transactions, Professor Zaretsky pointed out that an LBO lender would often receive collateral as well as a high interest rate and substantial fees. *Id.* at 1192. The risk that this senior collateralized lender would not be repaid was, thus, relatively small, while the potential profits loomed large. This created an incentive to pursue a transaction even if there was a relatively high risk of failure. At the same time, however, from the perspective of non LBO creditors, who before the transaction stood to be repaid in full, the loss upon failure of the enterprise was likely to be substantial without the corresponding potential reward in the event of success. The act of judgment-proofing a debtor through the issuance of secured debt produces precisely the same risk/reward premium for the secured lender and risk/reward penalty for unsecured lenders. *Id.*

it is unlikely that the credit that fueled many of those transactions would have been available in the first place.

It is our contention that when full priority rules result in a transfer of value from unsecured creditors to secured creditors, which in itself we suppose is neither good nor bad, enforcement of these rules warrant greater scrutiny. Specifically, when this result occurs in any given situation, the appropriate inquiry is not only whether the phenomenon is theoretically defensible in terms of net social savings or utility, but also whether it is defensible in the context of fairness inter se among the parties involved in the transactional dynamics in which it occurs. It is in this regard that we have suggested that it is not defensible when the all-encompassing security interest has been employed by corporate managers of a distressed entity to leverage the debtor firm to levels that exceed the liquidation value of the firm and, thereby, allow management and the principal financier to ignore the reasonable risks of business failure.

Invariably, this occurs when all of the debtor's available assets have been hypothecated as collateral; that is, security becomes not simply—as intended—a vehicle to assure repayment of a debt, but rather a mechanism for shifting the entire risk of firm collapse to unsecured creditors. In other words, when security becomes a license to gamble with “other people's money,”<sup>178</sup> the form has been used to perpetrate a wrong that cries for a remedy, or, to call into service the property-based concepts we discussed earlier, the perverse incentives facilitated by full credit prioritization have become a nuisance.<sup>179</sup> Moreover, when the debtor, or debtor's management, has lost any *raison d'être* to seek the long-term interests of the firm by taking appropriate steps to operate with both reasonable care and ordinary bus-

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178 By “other people's money,” we mean specifically, the services and supplies provided by general unsecured creditors and the value to which tort victims would otherwise have been entitled in compensation for their injuries. See Shavell, *supra* note 102, at 45 (“An injurer will treat liability that exceeds his assets as imposing an effective financial penalty only equal to his assets; an injurer with assets of \$30,000, for example, will treat an accident resulting in liability of \$100 000 identically with an accident resulting in liability of only \$30 000.”).

179 See Bell & Parchomovsky, *supra* note 147, at 602–03 (advocating that nuisance theory should be recast and expanded from one that focuses on interference with “use and enjoyment” to one that regulates directly against uses of property that impair the value of adjacent property owners). This approach to nuisance is even more directly apposite to our argument inasmuch as secured claims by definition appropriate value from unsecured claims. While we do not assert that this a basis for interference with the Article 9 priority rules in every case, we could maintain that it becomes so when the effect is to appropriate all value and, in so doing, leave unsecured creditors exposed to unreasonable risks that would not otherwise exist.

iness prudence,<sup>180</sup> and the secured creditor has no incentive to constrain these tendencies,<sup>181</sup> arguments based on the supposed efficiency of secured credit become rather feeble and attenuated.

The 1998 amendments to Article 9 which eliminated virtually all exclusions of the types of personal property in which a valid security interest can be granted, and married that expansion in scope with a very successful undertaking to make the taking of security “as easy, inexpensive, and reliable as possible,”<sup>182</sup> have exacerbated the likelihood that judgment-proofing behavior will occur. If the company, succumbing to the temptations created by that condition, then fails because the “gamble” doesn’t pay off, two consequences follow: (1) the debtor likely will lack the liquidity necessary to effectuate a successful reorganization, and (2) on liquidation, or even in the rare case where the debtor is able to emerge from Chapter 11, the secured debt will exceed the value of the collateral, thereby effectively eliminating all liability except to the secured creditor, whose claim will be equal to or exceed the value of the reorganized debtor or its remaining assets, as the case may be.

In our view, the use of secured credit to judgment-proof the debtor is a striking example of the radial category nuisance. The resemblance to the prototype through shared features on what we regard to be natural extension is instantly recognizable.<sup>183</sup> To put it bluntly, the use of security to judgment-proof injures the community of one’s unsecured neighbors and benefits no one but the secured party<sup>184</sup>—it stinks of nuisance. Our thesis, then, is that the security interest either becomes a nuisance, or at least merits greater scrutiny as potentially constituting a nuisance, when the debtor has encum-

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180 See generally Aleta G. Estreicher, *Beyond Agency Costs: Managing the Corporation for the Long Term*, 45 *RUTGERS L. REV.* 513 (1993) (discussing the differing interests and motivations of shareholders and non-shareholder managers of public companies from the perspective of the long-term economic best interest of the firm).

181 See Note, *supra* note 107, at 2254–55 (explaining that secured creditors lose the incentive to monitor anything other than the value of their collateral, including managerial decisions regarding investments and risk, when they do not bear the costs of those risks).

182 Carl S. Bjerre, *International Project Finance Transactions: Selected Issues Under Revised Article 9*, 73 *AM. BANKR. L.J.* 261, 307 n.219 (1999) (quoting Harris & Mooney, *supra* note 2, at 2021 (1994)).

183 See *supra* text accompanying notes 166–68.

184 Bear in mind that the supposed “benefit” to the secured creditor is also somewhat ephemeral if the blanket lien on all assets is substituted for an informed credit decision. See Note, *supra* note 107, at 2555. Indeed, all creditors, including secured creditors, are better off if the firm takes appropriate precautions to manage the reasonable risks of conducting its business.

bered all or most of its assets with no provision, such as insurance, for internalizing the reasonably foreseeable risks of its operations. Identification of these circumstances *post hoc* is a relatively easy matter compared to identification *ex ante*, but this is a task in which courts routinely engage; for example, in application of fraudulent transfer law—both in and out of a bankruptcy situation.<sup>185</sup>

Theoretically, of course, the incurring of secured debt should never alone cause this circumstance to occur, unless the amount of the actual debt secured is artificially inflated to deliberately mislead unsecured creditors, inasmuch as the assets encumbered are simply traded for the proceeds of the secured loan. That is, the balance sheet is altered in composition but overall net worth is unaffected.<sup>186</sup> But where the debtor is financially unstable and at risk of investing the loan proceeds ill advisedly, a situation more likely to be present in all-asset financing cases simply because the secured lender had the leverage to negotiate such draconian terms as a condition of the credit in the first place,<sup>187</sup> the externalization of risk to all but the secured lender is inevitable. Indeed, both the Bankruptcy Code and the Uniform Fraudulent Transfer Law recognize as a constructively fraudulent transfer one that leaves the debtor with unreasonably small

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185 See *infra* notes 188–90 and accompanying text.

186 This argument has also been raised in response to criticisms of securitizations and other forms of structured financing transactions as judgment-proofing schema, namely, that in these deals, assets of one kind are simply exchanged for assets of another kind in an arm's-length transaction. That is to say, the originator will receive proceeds equal in value to the assets sold, thus not diminishing the value of the originator's estate. See, e.g., Schwarcz, *supra* note 11, at 12–16 (arguing that only if the originator disposes of the proceeds is there judgment-proofing; securitization in and of itself is not a judgment-proofing technique). One response to Schwarcz's argument is that securitization, while not itself sufficient to judgment-proof a firm, is a useful component of a judgment-proofing technique: first securitize, then distribute the proceeds to claimants. See Lynn M. LoPucki, *The Irrefutable Logic of Judgment Proofing: A Reply to Professor Schwarcz*, 52 STAN. L. REV. 55, 59 (1999). The same logic applies in the case of secured loans. See *infra* note 187.

187 In the case of larger companies, where there is a separation of ownership and management, agency issues further elevate the risk of imprudent use of the funds because of management's personal incentive to make high payoff, but high risk, investments that may not be in the long-term best interests of the company. See *supra* note 108 and accompanying text. This is particularly so if the borrower firm was experiencing financial difficulties to begin with, which, in turn, is precisely the kind of situation in which secured lenders will have the motivation and the leverage to effectively encumber all the debtor owns.



capital in relation to actual or anticipated business activities in which the debtor is currently engaged or plans to engage.<sup>188</sup>

Of course, to sustain the fraudulent transfer analogy, the assets remaining after the security transfer must not only be unreasonably small, but what was returned to the debtor in exchange for the security interest must be of *less than* reasonable economic equivalence.<sup>189</sup> This can be difficult to establish under a pure fraudulent transfer analysis, as evidenced by cases willing to indulge the fiction of equivalence even in the situation where the value goes to a third party, such as redeemed shareholders or a seller-corporation in the leveraged buyout scenario.<sup>190</sup>

It is at this juncture that we believe the nuisance analysis has a great deal to offer in providing a counterweight to the opportunities for mischief created by Revised Article 9's vast expansion of and deference to secured credit. This is not to suggest by any stretch of the imagination that every extension of secured debt is nefarious, or even that the value judgments made by the drafters relative to the correlation between the good of the economy and the relaxing of most restraints on secured financing were wrong. It is only to recognize that, at the same time, the confluence of limited liability and the expansion of secured debt has created the potential for abuse which, under the current doctrinal scheme, has no natural predator—a bad thing no less in the world of finance than in nature.

Affordable credit, the shibboleth constantly trotted out in defense of full priority, if a good thing to a point, is also not a “holy grail” to be pursued oblivious to collateral damage. The possibility that, if abused, the privileges normally associated with the taking of security may be withdrawn through application of the nuisance model creates a powerful incentive for secured lenders to make more rational credit decisions than they have reason to make under the cur-

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188 11 U.S.C. § 548(a)(1)(B)(ii)(II) (2000); UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2)(i), 7A U.L.A. 301 (1999). Unlike “insolvency,” “unreasonably small capital” is not defined by the UNIF. FRAUDULENT CONVEYANCES ACT §§ 2, 5, 7A U.L.A. 22–23, 105 (1999). This has engendered confusion over the relationship between these concepts: some courts have equated a finding of equitable insolvency (inability to pay debts as they come due) with that of unreasonably small capital. *See, e.g., MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 943 (S.D.N.Y. 1995). The better view, however, is that unreasonably small capital denotes a financial condition short of equitable insolvency. *See* Bruce A. Markell, *Toward True and Plain Dealing: A Theory of Fraudulent Transfers Involving Unreasonably Small Capital*, 21 IND. L. REV. 469, 498 (1988).

189 11 U.S.C. § 548(a)(1)(B)(i).

190 *See, e.g., In re R.M.L., Inc.*, 92 F.3d 139, 151 (3d Cir. 1996); *Mellon Bank, N.A. v. Metro Commc'ns, Inc.*, 945 F.2d 635, 646–48 (3d Cir. 1991).

rent regime. And if that does increase the cost of credit in certain cases, then, again, we would submit that this cost is a fairer reflection of the internal risk of the transaction.

In short, the ascendancy of the property-based account of security does not mean, or have to mean, that secured claims will always trump their unsecured counterparts. What we have tried in summary fashion to illustrate is that by approaching the categorization of security as property in metaphoric rather than conventional terms, while still remaining true to the core conceptual analogy (i.e., property), Article 9 can be reconciled dynamically with the other legal systems and principles from which it cannot operate in isolation. These include, among others, property-based systems and principles designed to reconcile cross-boundary conflicts and, in this context, to promote distributional fairness.

## V. REMEDY

If the security interest is determined to be a nuisance—an abuse of purposive intent and form—what is the appropriate remedial response? The answer, we believe, already exists in the academic literature, and that is subordination to some extent of the secured party's legal entitlement to full priority.<sup>191</sup> Certainly we do not contend that every case where the debtor's assets are or become insufficient to satisfy the totality of claims against the debtor is an appropriate case for loss of full priority. But when the debtor's assets are or become so inadequate as not to cover *any* claims save that of the secured lender, the predicate for examining a re-ordering of legal priorities becomes far more compelling.

The largely academic debate over full versus partial priority largely occurred in the years and months leading up to the revision of Article 9;<sup>192</sup> and, in light of the provisions of the final approved, and now universally-adopted, version of the statute might seem a dead let-

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191 See Bebchuk & Fried, *supra* note 8, at 905–06 (proposing subordination in bankruptcy of full priority in the case of nonconsensual creditors and other weekly adjusting or nonadjusting creditors); see also Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*, 82 CORNELL L. REV. 1279, 1286–88 (1997) (arguing that full priority is inconsistent with the requirement of explicit consent to subordination); *supra* note 106 (arguing that full priority to secured claims encourages firms to engage in riskier behavior than optimal because they do not internalize the cost of these risks). Other remedial responses to judgment-proofing accomplished through securitization have also been proposed. See authorities cited *supra* note 103.

192 See, e.g., Lucian Arye Bebchuk & Jesse M. Fried, *A New Approach to Valuing Secured Claims in Bankruptcy*, 114 HARV. L. REV. 2386 (2001); Warren, *supra* note 27.

ter.<sup>193</sup> This is of course another artifact of the triumph of the “security interest as property” model, but it only needs be so if one takes a formalistic view of the statute rather than one that harmonizes its positive law provisions with its purposive objectives and applicable non-Code doctrine.

It is our contention, for the reasons previously stated, that the deliberate, or even improvident, judgment-proofing of the debtor by means of incurring secured debt in excess of the liquidation value of the firm’s assets sets forth an example of when it may be appropriate to conceptualize the secured creditor’s property interest as a nuisance. In turn, this should allow—wholly within the framework of the property metaphor that has come to dominate how security is understood—for some limitation on the secured creditor’s rights in relation to the parties victimized by the nuisance; i.e., unsecured creditors at whose expense the scheme was hatched. But what is the legal basis for reordering priority? Surely, it is not found in the four corners of Article 9 itself, which has unconditionally embraced full priority. Moreover, because of the bankruptcy law’s recognition and enforcement of the state law rights and interests that creditors bring with them into a federal bankruptcy proceeding, full priority of secured credit has become a basic principle of bankruptcy as well. Although one could question fairly whether the imaginative associations entailed in the understanding of a security interest that pervade under state law necessarily have to and should endure in the context of a collectivized proceeding,<sup>194</sup> a more practical answer already exists. That answer begins with the Bankruptcy Code itself, which codifies the bankruptcy courts’ inherent statutory authority to invoke their equitable powers to subordinate for distribution purposes all or any part of an allowed claim.<sup>195</sup>

As it has been interpreted by the courts, harking back to its origins in the Supreme Court’s opinion in *Pepper v. Litton*,<sup>196</sup> the doc-

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193 See Warren, *supra* note 16, at 325; see also *supra* notes 71–73 and accompanying text (proposing a revision of Article 9 that would effectuate the set-aside proposal).

194 See Ponoroff & Knippenberg, *supra* note 8, at 2289–96 (urging adoption of a value-based conceptualization of secured claims in bankruptcy as an alternative to the property-based account that pervades under state law based on a normative view of bankruptcy policy that recognizes the interests of noncreditor constituencies).

195 11 U.S.C. § 510(c) (2000). The purpose of the doctrine is to allow bankruptcy courts “to reprioritize the order of allowed claims based on the equities of the case, rather than to allow or disallow the claim in the first instance.” Rafael Ignacio Pardo, Note, *Beyond the Limits of Equity Jurisprudence: No-Fault Equitable Subordination*, 75 N.Y.U. L. REV. 1489, 1490 (2000) (quoting *In re County of Orange*, 219 B.R. 543, 559 (Bankr. C.D. Cal. 1997)).

196 308 U.S. 295 (1939).

trine of equitable subordination has generally, but not always, been predicated on some form of "creditor misconduct."<sup>197</sup> In this sense, equitable subordination has been understood to differ from fraudulent transfer analysis, the latter having at its core a focus on the debtor's conduct (or misconduct, as the case may be). However, on two occasions in 1996, the Supreme Court of the United States, while rejecting any categorical subordination of claims in favor of a case-by-case approach, declined to overrule several circuit court decisions applying a no-fault standard on a case-by-case basis.<sup>198</sup> In effect, the Court left intact at least three circuit court decisions ordering equitable subordination in the absence of creditor misconduct in order to protect innocent creditors from misconduct by the debtor.<sup>199</sup> Thus, arguably, statutory authority for remediating a nuisance by adjusting the priority of claims in bankruptcy is already extant. The willingness of courts to do so, however, and the appropriateness of such action in the face of the general bias in bankruptcy to enforce state law entitlements and enforce statutory priorities, would be open to serious question in the absence of an analogous form of relief under applicable non bankruptcy law, which has been thought not to exist. That assumption, however, has now been cast into considerable doubt.

In an intriguing article, Professor David Gray Carlson has suggested a basis for eschewing the metaphors that have dominated fraudulent transfer law and equitable subordination, and in their place substituting a way of thinking about these areas of law that not only more accurately captures their underlying policy aims and practical implications, but that also recognizes an inherent kinship between the two doctrines.<sup>200</sup> Specifically, Carlson observes that the metaphoric concepts that have traditionally come to structure these doctrines in commercial discourse—"avoidance" in the case of fraudulent transfers and "demotion" with respect to equitable subordination—are the wrong concepts because, while they may produce serendip-

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197 The case most frequently cited for this proposition is *Benjamin v. Diamond* (*In re Mobile Steel Co.*), 563 F.2d 692, 699–700 (5th Cir. 1977).

198 *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 228–29 (1996); *United States v. Noland*, 517 U.S. 535, 543 (1996).

199 *Burden v. United States* (*In re Burden*), 917 F.2d 115, 119–20 (3d Cir. 1990); *Schultz Broadway Inn v. United States*, 912 F.2d 230, 233–34 (8th Cir. 1990); *In re Virtual Network Servs. Corp.*, 902 F.2d 1246, 1249–50 (7th Cir. 1990).

200 David G. Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination*, 45 WM. & MARY L. REV. 157 (2003).

itously the "right" result in many cases, they fail to produce the desired result in marginal but no less important cases.<sup>201</sup>

Professor Carlson's analysis shows that, in each instance, the remedy is actually the same; namely, expropriation and transfer of specific *property* rights.<sup>202</sup> By replacing the concepts of "avoidance" and "subordination" with the single notion of *transfer*, Carlson convincingly demonstrates that commercial discourse is brought into "closer identity with its actual logical structure."<sup>203</sup> Under this approach, two seemingly inconsistent remedies, invoked in response to different misdeeds, are harmonized by the recognition that in either case what actually occurs is an assignment of one creditor's claim to those harmed by the inequitable conduct.

The intuition that what actually transpires, whether the misconduct is challenged under the fraudulent transfer law or the doctrine of equitable subordination, is transfer of specific property rights, exposes an even more important insight for present purposes. That is, although ordinarily understood as a uniquely federal remedy, Carlson's research and analysis reveals that "equitable subordination is simply the fraudulent transfer remedy in disguise and that both remedies can be considered to be within the competence of state law to achieve."<sup>204</sup> In other words, equitable subordination, if essentially the fraudulent transfer law as applied in the context of a collective proceeding, must (despite frequent disavowal<sup>205</sup>) exist as part of the general common law of the states, and Carlson makes a compelling case that it does.<sup>206</sup>

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201 *Id.* at 164–65 (noting that in the "average" case, the proper characterization of the remedy makes no practical difference, but that the concept of "avoidance" incorrectly implies a return of value to the debtor in the rare fraudulent transfer case where a surplus exists, and "demotion" fails to adequately explain what transpires when subordination is to some but not all creditors).

202 *Id.* at 165 ("What is really going on in *all* cases is a *transfer* of specific property rights.").

203 *Id.* at 162.

204 *Id.* at 164.

205 *See id.* at 163 n.17 (citing 9281 Shore Rd. Owners Corp. v. Seminole Realty Co. (*In re* 9281 Shore Rd. Owners Corp.), 187 B.R. 837, 852–54 (Bankr. E.D.N.Y. 1995); Greenfield v. Shuck, 867 F. Supp. 62, 70 (D. Mass. 1994); *In re* SPM Mfg. Corp., 163 B.R. 411, 413 (Bankr. D. Mass. 1994); *In re* Poughkeepsie Hotel Assocs. Joint Venture, 132 B.R. 287, 292 (Bankr. S.D.N.Y. 1991); Primex Plastics Corp. v. Lawrence Prods., Inc. No. 89 Civ. 2994 (JSM), 1991 WL 183367, at \*6 (S.D.N.Y. Sept. 12, 1991)).

206 Carlson, *supra* note 200, at 218–19 (pointing to examples from New York and other states). Under Carlson's analysis, equitable subordination essentially works as an assignment of the claim of one creditor to the creditors harmed by the first creditor's conduct. *Id.* at 200. So understood, it is functionally and analytically distinct from what occurs when a transfer is set aside or avoided as fraudulent.

The implications of this insight for remedying a nuisance-creating security interest are obvious. It affirms that courts, both in a bankruptcy context and out, faced with a security transfer that abuses the form, have the power and authority to transfer back the value improperly misappropriated from unsecured creditors by adjusting relative priorities. Moreover, this can be legitimately accomplished without disturbing the prevailing conceptualization of the security interest as property since, by definition, the transfer that is contemplated by the remedy is fundamentally a transfer recognized on long-standing property concepts and doctrine. Historically, of course, the related principles of security of property and *nemo dat*—the debtor's ability to convey that which it owns and the rule of derivative title<sup>207</sup>—have always been limited by the law of fraudulent transfer which effectively proscribes certain property transfers perceived to prejudice unduly innocent creditors.<sup>208</sup> The effect of finding a particular transfer to fall within the categorical parameters of a fraudulent transfer is to require that the transferee return back that which was conveyed for the benefit of the debtor's other creditors. All we are suggesting is that such a "transfer" can also be accomplished, when the misconduct consists of judgment-proofing through use of secured debt by ordering the whole or partial subordination of priority—thereby, resulting in, effectively, an abatement of the nuisance.

The reordering of priorities in this manner in circumstances when all available assets have been conveyed to secure financing is not simply a mechanism to redress managerial excess or creditor misconduct in specific instances where it occurs. The recognition of such a nuisance-like remedy should also, we believe, have a salutary *in terrorem* effect in terms of promoting more control and discipline over excessive risk taking. In other words, if the combination of full priority and the corresponding bankruptcy rules which implement that principle fails to deter and even encourages judgment-proofing schema by facilitating the externalization of firm failure, then the adjustment of those legal rules to ensure that all creditors share in the risk of nonpayment should promote overall social utility.<sup>209</sup>

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207 See *Mitchell v. Hawley*, 83 U.S. (16 Wall.) 544, 550 (1872) ("No one in general can sell personal property and convey valid title to it unless he is the owner. . . . *Nemo dat quod non habet.*").

208 See, e.g., *Sturtevant & Keep v. Ballard*, 9 Johns. 337, 343 (N.Y. Sup. Ct. 1812) ("The law, in every period of its history has spoken a uniform language, and has always looked with great jealousy upon a sale or appropriation of goods, without parting with the possession, because it forms so easy and so fruitful a source of deception.").

209 See Warren, *supra* note 27, at 1388 ("The ultimate question is not whether a partial priority scheme might cause some constriction in lending. . . . The real ques-

Stated another way, abatement of the “nuisance” created by the only parties at the bargaining table—the debtor and the particular creditor advantaged by the scheme—by requiring the transfer back for unsecured creditors of some portion of that value upon firm failure would certainly result in a more equitable sharing of the loss in that case. Beyond that, however, it would also assist in ensuring that that future credit decisions appropriately factor into the analysis a realistic and prudent assessment of the debtor’s financial prospects and the likelihood of insolvency. Furthermore, it would create rational incentives, even after the initial extension of value, for secured creditors to monitor and thwart managerial decisions that eschew conventional risk calculations in pursuit of short-term but low probability riches.<sup>210</sup> In sum, if more credit is available, or available at a lower cost, simply because the providers of that credit have no motivation or reason to factor the true cost of credit into the lending decision, then it is far from clear to us that this is something the commercial law should embrace. Thus, the conventional arguments against diluting Article 9’s full priority regime collapse under the weight of their own internal illogic, and the road is cleared to fashion a remedy suited to redress the “security interest as a nuisance” phenomenon as and when it occurs.

#### CONCLUSION

The introduction of equity or equity-like notions into the Article 9 priority scheme has been questioned as potentially undermining commercial certainty and efficiency.<sup>211</sup> But, in the absence of malleable equitable controls, what are the constraints on secured credit? Thanks to the conceptual monopoly owned by Article 9, most especially in its revised version, the security interest is property for all ends, assuring the secured creditor property priority on a field of play where other claimants hold no interest dignified by that label. What is more, unlike other property interests, the security interest has come to occupy the elevated but questionable status of property endowed with immunity from conventional property misuse or abuse controls, most notably for our purposes, the nuisance doctrine.<sup>212</sup> We challenge that

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tion is how the efficiency arguments, even if they were unambiguously true, stack up against other considerations [such as community sensibilities and fairness].”).

210 See *supra* notes 106–08 and accompanying text for discussion of the perverse incentives created by the property-based account of security.

211 See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 24-19 (4th ed. 1995) (entitled, “Weird Cases: The Creeping Infestation of Article 9 Priority Rules by ‘Principles of Law and Equity’ and other Cases on the Fringe of Title 9”).

212 See *supra* Part III.

immunity as irrational on the grounds of distributive inequity, as well as the systemic adverse impact it creates in the form of perverse incentives simultaneously bearing on lender-imposed discipline and managerial accountability.<sup>213</sup>

It is, we would contend, unreasonable, not to mention illogical, to maintain that the property regime that attends Article 9 should partake of some but not all of the principles of the conveyancing model that apply with respect to other forms of property transactions. Thus, assuming a security interest is understood metaphorically to convey an interest in property, ownership of that interest, like any other property interest, does not carry with it the absolute and unfettered right to interfere with the legitimate interests of others. Borrowing from the source concept that has, for better or worse, dominated the Article 9 revision process—namely, property law doctrine and analysis—it is our position that when the debtor has through security allowed or conspired (which is really of no moment) with creditors to permit management to ignore the normal risk calculations associated with investment decisions by shifting that risk to potential tort victims, small trade creditors, and arguably even current equity,<sup>214</sup> some limitation on the normal rules of prioritization are appropriate to abate the nuisance. The remedial underpinnings that form the basis for such limitations are analogically already extant in the prevailing doctrines of fraudulent transfer law and equitable subordination, properly understood. When implicated, those concepts, which Article 9 cannot rationally exist independent of or immune from, are remedied through transfer back of the misappropriated assets, in this context transfer back of all or some of the priority interest through subordination.

But if secured creditors are compelled by the possibility of a subsequent reordering of priority to factor now a risk premium into the cost of lending, will not the inevitable effect be to raise the cost of credit or limit the availability of credit to suboptimal levels? This, of

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213 The point is not theoretical—the impact of these incentives is real, measurable, and, it would appear, growing. See LoPucki, *supra* note 11, at 17–18 (describing the effects of cheap and easy secured credit on distribution to unsecured creditors in bankruptcy). The risk is particularly acute in the case of firms operating on the precipice of insolvency where secured lenders, knowing they are protected up to the value of their collateral, are less inclined to monitor and control unduly risky investment decisions, and managers, with nothing to lose, are encouraged to engage in just such activities. See *supra* note 108 and accompanying text.

214 Most literature focuses on tort victims. See *supra* note 107. We do not. While tort claimants are the most sympathetic casualties of judgment proofing, they are, by far, not the only ones who suffer at the hands of a bankruptcy system that, for the most part, enforces state law priority rules.



course, is the traditional efficiency-based apology in favor of an uncompromisingly strict full priority regime. What we (and before us, others)<sup>215</sup> have attempted to show is that argument begs the question because it is predicated on an unstated, but highly dubious, assumption that more credit is *always* preferable to less. From that premise, it naturally follows that the lower the cost of credit the better as well, since this in turn ensures an abundance of credit. Without desiring to rehash the by now hackneyed efficiency debate,<sup>216</sup> the more honest proponents of full priority do not contest that this rule promotes the externalization of cost, but rather maintain that those costs are justified by the corresponding benefits of secured credit and, accordingly, are optimal. That proposition, however, has yet to be proved. In the meantime, the point at present is simply that any rule that permits lenders to ignore all of the reasonably foreseeable costs of doing business cannot be defended simply on the basis that this lowers the cost of credit.

Currently, through the conveyance model, the Article 9 security interest partakes only of the advantages associated with the legal category "property." It does not partake of property limitations and responsibilities that apply with respect to at least some other forms of property transactions. It certainly is not subject to any limitations on use. These conditions strike us as the perfect formula for the abuse of secured credit in the form of judgment-proofing, the perfect formula for creating a nuisance.

In the end, our proposal to rectify that situation is, again, a relatively modest one. The nuisance doctrine to regulate unreasonable uses of property, and the remedial doctrine, equitable subordination, are already in place. The nuisance concept offers a manageable set of standards by which abuse of secured credit may be identified and given a familiar name, and its deleterious effects may be uprooted through the adjustment of priority.

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215 Several subordination proponents have argued that affording full priority for security interests in bankruptcy leads to suboptimal, inefficient precautions against risk. See, e.g., Leebron, *supra* note 82, at 1584 (concluding limited liability permits corporations to externalize risk, with the result that corporations engage in behavior that is inefficient); Warren, *supra* note 27, at 1387–88 ("The incursions on priority in tax law, in statutory liens, and in bankruptcy, make clear that fostering as much lending as possible is not the only goal of any commercial law system. The goal is always one of balance."); see also Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1216–17 (2005) (critiquing contractualist theories of bankruptcy law as creating the risk of the same sorts of losses from maladjustment of claims as those that exist in a full priority secured credit regime from the presence of maladjusting unsecured creditors).

216 See *supra* note 7.