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FUTURE NONADVANCE OBLIGATIONS: PREFERENCES LOST IN METAPHOR

F. STEPHEN KNIPPENBERG*

Every law student learns that in tort events occur in a chain, that in contract minds meet, that in property rights are gathered in bundles. It seems reasonable to suppose that on some level everyone who studies law knows these images for what they are—mere metaphors, characterizations of things in one domain of experience in terms of things from another, perhaps wholly unrelated, domain.¹ At least it would appear safe to assume as much in the cases of causal chains, meeting minds, bundles of rights, and the like.

Leaving aside such artifacts of the legal imagination as have accumulated along the way in the evolution of doctrine, and excluding from consideration such otherwise cognitively unmanageable fields of study as, say, constitutional law, with its “penumbras,” “ripeness,” and “standing,”² surely there are curricular safe harbors where understanding can be had directly without resort to fanciful allusion. Commercial law, a collection of crisp, utilitarian rules governing the no-nonsense stuff that occupies merchants, bankers, and their lawyers, springs irresistibly to mind.

Teaching a course in secured transactions or bankruptcy is enough to

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1. “*The essence of metaphor is understanding and experiencing one kind of thing in terms of another.*” GEORGE LAKOFF & MARK JOHNSON, *THE METAPHORS WE LIVE BY* 5 (1980). The discussion that follows draws extensively on the works of Lakoff and Johnson who jointly advanced Experientialist cognitive theory, beginning with *The Metaphors We Live By*. This inaugural work was followed by MARK JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON* (1987), and GEORGE LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987), which together supply the empirical grounding of the Experientialist position, locate that position within philosophical and language theory contexts, and elaborate Experientialist postulates to account for a broad range of human cognitive activities.

There have been several theories on the cognitive aspects of metaphor proposed by linguists, philosophers, and others, including Comparison theory, Ionic Signification theory, and the Verbal Opposition theory. For a useful summary of these and the epistemological issues they raise and address, see 5 *THE ENCYCLOPEDIA OF PHILOSOPHY* 284 (1967).

2. See *infra* note 3 and accompanying text (discussing Professor Winter’s metaphoric analysis of standing doctrine).

disabuse nearly anyone of the notion that these are, finally, subjects free of imaginative devices like metaphor. For students in an Article 9 course, for instance, the first several weeks are mainly a struggle to consign ideas like *priority* and *attachment* to the provinces of existing conceptual referents, in the familiar company of which they become meaningful. *Priority* is a concept which inevitably must be understood in terms of more prosaic instantiations of the concepts *on-top-of*, *above*, or *ahead of*, developed elsewhere in conceptual experience. (In a fight, the winner is on top of the vanquished, winners finish ahead of losers, and so on.) It must be understood, that is to say, metaphorically.

Apart from my own classroom intuitions, in recent years there has emerged a cognitive theory, Experientialism, which makes the case that metaphor may be the single most pervasive cognitive mechanism of *all* complex thought. This Experientialist insight, that metaphor is central to cognitive operations, has important implications for legal discourse.³ Legal doctrine, after all, is no more or less the product of ordinary human cognitive principles than other intellectual endeavors,⁴ and its metaphoric expression is much more than language employed to make discourse more memorable and trenchant.

Nor is any substantive area of the law free of metaphor. There is no comfort to be taken even in the practical, homely concepts generally associated with the law of the merchant. The underlying assumption of this Article is simply that the concepts by which commercial law is understood are metaphoric concepts. I use the analytic method suggested by Experientialism to make and support two basic claims. First, attention to the metaphoric bases of legal doctrine opens new avenues of discourse to disclose, explain, and thereby perhaps avoid, points of doctrinal impasse

3. In a series of poignant and insightful articles, beginning with *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988), Professor Steven L. Winter has conclusively demonstrated the value to legal discourse of this new scholarship from the cognitive sciences. In the article, he observes: "The law is committed to the use of reason. New discoveries about the nature of reason, therefore, have a natural and necessary place in legal scholarship. To fail to recognize them ultimately would be to deny the role of reason in the law." *Id.* at 1382. Professor Winter establishes the serviceability of Experientialist theoretical principles in his analysis of the law of standing that proceeds from an explication of its underlying metaphors. As he puts it, "[t]he key to understanding—and to unlocking the barrier of standing law—lies in appreciating that the term 'standing' is a metaphor." *Id.* at 1382-83 (citation omitted). Professor Winter locates the dysfunctionality of standing doctrine and proposes a functional substitute framework for the doctrine's reconstitution. *Id.* at 1478-1508.

4. This point is an explicit premise in Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for the Law*, 137 U. PA. L. REV. 1105, 1106 (1989).

encountered by ordinary textual analysis. Second, explication of the metaphors by which legal doctrine is understood reveals how metaphoric concepts on which there is widespread consensus stipulate the parameters of discourse across an unsuspected range of issues.

The vehicle I use for this discourse is the lingering metaphysical debate between two preeminent commercial law scholars, Grant Gilmore and Peter Coogan, over the *true nature* of the Article 9 security interest, which is necessarily called into question when deliberating on the priority of secured future advances in the face of an intervening judgment lien. Part I outlines the elements of the debate in conventional terms.

Part II offers an overview of the Experientialist epistemology and the role it assigns to metaphor in thought. The overview prepares the way for an explication in Part III.A. of the metaphoric concepts by which Article 9 is understood. Part III.B. makes explicit the underlying metaphoric concepts inherent in the opposing doctrinal positions taken in the Coogan-Gilmore debate on the question of future advance priorities. It also seeks to demonstrate how those concepts stipulated the terms on which the debate could be carried out, and how they spread to frustrate analysis of a related but distinct priority issue, the priority treatment of what have been termed future *nonadvance* obligations under Article 9.

Part IV describes another incarnation of the Coogan-Gilmore debate and the practical consequences of the hiding power of metaphoric reasoning. In this Part, I propose that Gilmore's metaphor of the unitary security interest, having infected the controversy over secured future nonadvance priorities under state law, has been carried to the bankruptcy arena, foreclosing consideration of secured nonadvance obligations as entailing preferential transfers. As a matter of bankruptcy policy, transfers to secure future nonadvance obligations are otherwise excellent candidates for avoidance.

An implicit claim throughout is that acknowledgement of the metaphoric nature of human conceptual systems advances exposition of doctrine beyond argument about internal consistency of legal rules taken as a priori propositions. While this clears the way for reconsideration and transformation of law, it does so without surrender to radical subjectivism and the sense of ennui that follows from the prospect that legal rules are endlessly manipulable. Legal concepts are reassuringly grounded in shared experience that serves as their conceptual basis.

I. THE COOGAN-GILMORE DEBATE

A. *Future Advance Priorities*

Article 9 arranges the life of a security interest according to axioms of creation, validity, perfection, priority in distribution, and default and repossession.⁵ A consensual security interest begins with an agreement exhibiting the intent that a security interest be created.⁶ The security interest attaches⁷ and becomes enforceable, however, only upon the coincidence of three obligatory conditions: there must generally be a writing (in commemoration of the security agreement) meeting certain formalities;⁸ the debtor must have rights in the collateral to be the subject of the interest;⁹ and the secured party must have given value.¹⁰ Of particular interest here is the

5. See Peter F. Coogan, *The Intelligent Lawyer's Guide to Secured Transactions*, in 1 SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, ch. 2, §§ 2.01-2.06 (Peter F. Coogan et al. eds., 1994). Article 9 is not, in fact, strictly ordered in quite this way. For example, Part 3, having to do with priorities, follows Part 2 governing matters of creation and validity, includes provisions relating to perfection, and precedes Part 4 on filing. Nevertheless, the organization proposed in the text describes the experiential life of the security interest with a fair degree of accuracy, and it is the standard conceptual organization given Article 9 by the familiar treatises. See, e.g., GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (1965); JAMES J. WHITE & RICHARD S. SUMMERS, UNIFORM COMMERCIAL CODE chs. 22-25 (3d ed. 1988).

6. Section 9-105(1)(l) defines a security agreement as "an agreement which creates or provides for a security interest." U.C.C. § 9-105(1)(l) (1990). A security interest, in turn, is defined in § 1-201(37) as "an interest in personal property or fixtures which secures payment or performance of an obligation." There are, however, nonconsensual security interests as well. See, e.g., § 9-113 (governing security interests arising under Article 2 on sales).

7. "The term 'attach' is used in . . . [Article 9] to describe the point at which property becomes subject to a security interest." U.C.C. § 9-303 cmt. 1 (1990).

8. The writing must contain a description of the collateral and the debtor's signature. U.C.C. § 9-203(1)(a) (1990). Its function is evidentiary, § 9-203 cmt. 2, and is thus in the nature of a statute of frauds, § 9-203 cmt. 3. Accordingly, the writing may be dispensed with where the secured party takes possession of the collateral to evidence the security interest. § 9-203(1)(a).

9. U.C.C. § 9-203(1)(c) (1990). Just what is meant by "rights in the collateral" is not made explicit in Article 9. It appears that while mere possession is not enough, absolute ownership is not required. It is worth noting that the debtor is not required to have rights in the collateral at the time the security agreement is signed and value is given by the secured creditor, as in the case of an obligation secured by receivables and inventory which are regularly depleted and restored to various levels. For a discussion of various battles fought over the question of what constitutes sufficient rights in the collateral to satisfy the statutory requirement, see WHITE & SUMMERS, *supra* note 5, § 26-2.

10. U.C.C. § 9-203(1)(b) (1990). In general, this section has proved mainly uninteresting—that is, it has not given the courts much trouble, although there are a few cases in which it was unpersuasively argued that a secured party gives no value for a security interest securing a preexisting claim. See generally WHITE & SUMMERS, *supra* note 5, § 26-2.

value requirement, although for the moment it is enough to say that value is regarded as given upon the extension of credit or the making of a binding commitment to extend credit *in futuro*.¹¹

Once created, a valid, enforceable security interest is eligible to be perfected, a matter of some importance since it is perfection that decides a secured party's priority position relative to the claims of others to the collateral.¹² Perfection is accomplished on fulfilling the requirements necessary to validity just enumerated, together with an additional notice-giving step,¹³ usually the filing of a financing statement.¹⁴ While the

11. U.C.C. § 1-201(44)(a) (1990).

12. "A perfected security interest may still be or become subordinate to other interests . . . but in general after perfection the secured party is protected against creditors and transferees of the debtor and in particular against any representative of creditors in insolvency proceedings instituted by or against the debtor." U.C.C. § 9-303 cmt. 1 (1990).

There are precious few claims subordinated to an unperfected security interest. *See, e.g.*, U.C.C. § 9-301(1)(b) (1990) (providing that an unperfected security interest is subordinate to the claim of a lien creditor whose lien arose prior to perfection). Similarly, in the case of two secured parties who have extended credit to the debtor on the strength of the same collateral but neither of whom has filed or taken possession of the collateral to perfect, the first to become perfected has priority. *See* § 9-312(5) cmt. 5.

There are exceptions. For example, as between two secured parties, both of whom file to perfect their security interests, the first to file, rather than the first to perfect, has priority on the grounds that the later filer discovered, or should have, the earlier financing statement admonishing searchers of the yet-to-be-perfected security interest. *Id.* There is also an exception for purchase money security interests. *See* § 9-312(2)-(4).

13. *See* U.C.C. § 9-402 cmt. 2 (1990). The "notice filing system" referred to in the comment is a concept borrowed from the Uniform Trust Receipts Act, and nominally is an instrument of public notice to would-be lenders against collateral already encumbered by an Article 9 security interest. *See* Peter F. Coogan, *Public Notice Under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice Filing"*, 47 IOWA L. REV. 289, 290 (1962) (comparing the requirements of the traditional filing statements with the less rigorous requirements of notice filing). To the degree it suggests that public notice is the exclusive or even primary function of the Article 9 filing system, however, the term "notice filing" may be somewhat misleading. Article 9 adopted the notice filing system as much to avoid fanatical attendance upon documentary details that characterized the preCode law governing interests in personal property to secure indebtedness. Professor Baird has argued that the notice-giving function of the system was intended to alleviate problems in the narrow case of competing secured creditors, whereas in reality its principal function is one of availing a secured party to stake its claim to the collateral after the fashion of a prospector for minerals. *See* Douglas G. Baird, *Notice Filing and the Problem of Ostensible Ownership*, 12 J. LEGAL STUD. 53, 62 (1983). *See also* F. Stephen Knippenberg, *Debtor Name Changes and Collateral Transfers Under 9-402(7): Drafting from the Outside-In*, 52 MO. L. REV. 57, 61-63 nn.23-30 (1987) (discussing the notice and "claim-staking" functions of the financing statement).

14. There are, in fact, three methods of perfection. In some cases, the secured party may at its election either file to perfect or take possession of the collateral. *See, e.g.*, U.C.C. §§ 9-302(1), 9-305 (1990) (providing that a security interest in goods may be perfected by filing or taking possession at the option of the secured party). In other cases, the security interest can only be perfected by taking

conditions for perfection must at some point coalesce, they need not arise in any special order. For example, filing, notionally the final step, might well precede any or all of the steps necessary to validity (say, the drafting of a security agreement); a security agreement may be executed in advance of the debtor's acquisition of rights in the collateral; either or both may either precede or succeed filing; and so on in as many combinations as the number of steps will allow.¹⁵

In any event, generally speaking, priority is very much a matter of becoming perfected before other secured parties in cases where two secured parties have competing interests in the same collateral, or, in other cases, of becoming perfected before an unsecured creditor acquires a judicial lien and levies on the collateral.¹⁶ To have priority is to have the first opportunity to sack the debtor's encumbered personalty to satisfy an outstanding, unsatisfied claim.¹⁷

Against the background of the life of a security interest we turn to what has come to be called the Coogan-Gilmore debate,¹⁸ referring to the exchange between Grant Gilmore and Peter Coogan on how correctly to conceptualize the security interest.¹⁹ The Coogan-Gilmore debate results from facially incompatible concepts of the security interest, namely, the

possession, § 9-304(1) (requiring that a security interest in instruments be perfected by taking possession of the instrument), or only by filing, §§ 9-302 to 305 (covering cases where the collateral is accounts receivable). There are a few instances in which a security interest is perfected on attachment without more. *See, e.g.*, § 9-302(1)(d) (regarding purchase money security interests in consumer goods). Of course, where the collateral is a debtor's inventory or equipment, taking possession is not an option as a practical matter, and, in any event, most security interests are perfected by filing. WHITE & SUMMERS, *supra* note 5, § 26-2.

15. *See* U.C.C. § 9-303(1) & cmt. 1 (1990).

16. This particular rule of priority, contained in U.C.C. § 9-301(1)(b) (1990), is especially relevant to the upcoming discussion of future advance and nonadvance secured obligations.

17. "The usual outcome in a priority conflict under the Code is that the winning party satisfies himself *in full* out of the collateral before the subordinate party satisfies himself to *any extent*." WHITE & SUMMERS, *supra* note 5, § 24-2, at 1126 (emphasis added).

18. For an introduction to the Coogan-Gilmore debate, see David Gray Carlson & Paul M. Shupack, *Judicial Lien Priorities Under Article 9 of the Uniform Commercial Code: Part I*, 5 CARDOZO L. REV. 287, 350 (1987); Harry M. Flechtner, *Inflatable Liens and Like Phenomena: Converting Unsecured Obligations into Secured Debt Under U.C.C. Article 9 and the Bankruptcy Code*, 72 CORNELL L. REV. 696, 721 (1987); and Jeanne L. Schroeder & David Gray Carlson, *Future Nonadvance Obligations Under Article 9 of the UCC: Legitimate Priority or Unwarranted Squeeze-Out?*, 102 BANKING L.J. 412, 418 (1985).

19. Coogan seems to have first discovered and raised the point. *See* Peter F. Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the 'Floating Lien'*, 72 HARV. L. REV. 838, 868 (1959) [hereinafter Coogan, *Floating Lien*]. Gilmore took up the question in his monumental treatise, 2 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 935 (1965).

multiple view championed by Coogan, and the unitary view advanced by Gilmore.²⁰ To understand how there can remain at this late date a controversy over something so fundamental as the very nature of the Article 9 security interest,²¹ it is necessary to understand something of the priority dispute involving the secured party who seeks to satisfy an obligation stemming from multiple advances made intermittently to its debtor.

When matters are so ordered that the secured creditor and debtor anticipate more than a single extension of credit in the course of their relationship,²² it may fairly be asked whether value is given afresh with each advance, spawning a series of discrete security interests, or whether a single security interest is created on the first advance, with subsequent advances acting only to affect the extent of the obligation secured by that single interest.²³

Coogan's view is that a new and separate security interest arises with

20. I borrow the terms "multiple view" and "unitary view" from Schroeder & Carlson, *supra* note 18, at 418-19.

21. Schroeder and Carlson remark, "[I]t is late in the day to be wrangling over the exact nature of a security interest under Article 9 . . ." *Id.* at 412. Given that the first official text of the Uniform Commercial Code was published in 1952, it would seem the concept would by now have been so far developed and elaborated that nothing remains to be said of it. On the other hand, the fact that this is not the case seems entirely unremarkable when it is understood that concepts, like the security interest, are metaphoric and by definition incomplete to begin with.

22. After a long spell of common law and statutory reticence on the subject (what the drafter of comment 5 to § 9-204 calls "a vaguely articulated prejudice against future advance agreements"), a security interest securing advances yet to be given was made unarguably respectable by § 9-204(3). U.C.C. § 9-204(3) (1990).

Notwithstanding that § 9-204 seems to usher in a new era of tolerance for future advance lending on a secured basis, it seems the value and utility of these transactions was, in fact, recognized at least as early as the nineteenth century. Bruce A. Campbell, *Contracts Jurisprudence and Article 9 of the Uniform Commercial Code: The Allowable Scope of Future Advance and All Obligations Clauses in Commercial Security Agreements*, 37 HASTINGS L.J. 1007, 1008 (1986) (quoting *Ackerman v. Hunsicker*, 85 N.Y. 43, 47 (1881), a New York Court of Appeals decision that recognized the validity of mortgages to secure future advances or liabilities). Indeed, it has been proposed that comment 5 to § 9-204, quoted from above, is misleading, in that the preCode law governing chattel security was favorably disposed to secured future advance lending. Campbell, *supra*, at 1020. *See also infra* note 35.

23. It is a question fairly asked because U.C.C. § 9-203(1)(b) (1990) provides that giving value is one of the three conditions of attachment, but does not require that value precede or follow the other conditions in some prescribed formal procession. *See supra* note 15 and accompanying text. Section 9-303(1) concomitantly anticipates that the final step to perfection (of which attachment, with its three conditions, is taken as one) might well, and frequently does, precede attachment. *See also* § 9-312(5)(a) (ranking priority among conflicting security interests according to filing (perfection step) or perfection (filing or other perfection step plus attachment)). With each subsequent advance—subsequent, that is, to all other conditions of attachment—multiple attachments, and so separate instances of perfection, become a conceptual possibility.

each extension of credit, and that the lender accumulates multiple perfected security interests on making multiple advances.²⁴ In Gilmore's view, the value requirement is a touchstone which, once visited on the first extension of credit, requires no further attention.²⁵ Value is given with the first advance, and that is that. On Gilmore's unitary view, a single perfected security interest safeguards the aggregation of obligations; the single security interest expands and contracts as additional extensions of credit and payments on the debtor's account are made.²⁶ The expansion and contraction are accompanied of necessity by a corresponding blossoming and withering of the debtor's equity in the collateral.

The circumstances that gave rise to the Coogan-Gilmore debate and its practical consequences are best appreciated in the context of a simple illustration. Suppose that on January 1 Lender and Borrower sign a security agreement creating a security interest in equipment in which Borrower has rights, and that Lender advances \$100,000.²⁷ That same day, Lender files a financing statement. As of January 1, Lender (now properly referred to as a "secured party"²⁸ in the argot of Article 9) has a perfected security interest²⁹ protecting the advance against default by Borrower (now properly the "debtor"³⁰ in Article 9 parlance).

Suppose further that two additional advances of \$100,000 each are thereafter made, one on January 15, the other on January 30.³¹ Should the debtor default on the obligation, now measured by the three advances, it is clear the secured party is in a position to move against the collateral to satisfy so much of the \$300,000 obligation as the value of the collateral will allow.³² As between the debtor and the secured party, the matter is

24. See Coogan, *Floating Lien*, *supra* note 19, at 868.

25. 2 Gilmore, *supra* note 19, at 937-38.

26. See 2 *id.*

27. Thus are satisfied the three requirements for the attachment, hence validity and enforceability, of an Article 9 security interest. See *supra* notes 6-11 and accompanying text.

28. U.C.C. § 9-105(1)(m) (1990).

29. U.C.C. § 9-303(1) (1990).

30. U.C.C. § 9-105(1)(d) (1990).

31. Such advances might be made "pursuant to commitment" or might be discretionary. An advance is made pursuant to commitment where "the secured party has bound himself to make it." U.C.C. § 9-105(1)(k) (1990). For the significance of this distinction, see *infra* notes 41-42.

32. Under U.C.C. § 9-201 (1990), the "security agreement is effective according to its terms between the parties . . ." In the illustration, the terms include the future advance clause. The secured party's rights upon default may be provided for in the security agreement, subject to certain limitations, § 9-501(1), and are delineated throughout Part 5 of Article 9. See, e.g., § 9-503 (secured party's right to take possession of the collateral upon default); § 9-504(1) (secured party's right to sell, lease, or otherwise dispose of the collateral); § 9-502 (secured party's right to direct account debtors obligated

entirely one of *enforcing* the security interest, such that when or even whether the security interest is perfected are questions of no moment.³³ Whether the unitary view or multiple view enjoys hegemony is, at this point, correspondingly irrelevant.

Suppose now, that, an intervening third player asserts a claim to the collateral, a claim that finds its way into the interstice between the January 15 and January 30 advances. On January 20, a creditor, a trade creditor, let us say, whom the debtor owes \$100,000, acquires a judicial lien and levies on the equipment subject to the security interest. There ensues a dispute in which the secured party ventures to satisfy the entire \$300,000 debt representing the cumulated advances, and in which the trade creditor (now a lien creditor)³⁴ hopes to limit the secured party to a recovery measured by the January 1 and January 15 advances totalling \$200,000, the advances made prior to the time the trade creditor achieved the status of lien creditor. Otherwise, if the collateral brings \$300,000 or less on disposition, the lien creditor is “squeezed-out”³⁵ by the last advance and must look to other assets—of which there may be none—in the effort to satisfy its claim.

Under the 1962 version of Article 9, there was but a single provision to consult on the priority question under circumstances like those in our

to the debtor to make payments to the secured party on the debtor's default).

33. Whether there are several perfected security interests or a single perfected interest is a question that the *enforcement* of the secured party's rights under Article 9 presents no occasion to entertain. The family of rights the secured party may exercise against the debtor arise under U.C.C. § 9-201 (1990) and Part 5 of Article 9, and are identical under either conception.

34. A lien creditor is “a creditor who has acquired a lien on the property involved by attachment, levy or the like” U.C.C. § 9-201(3) (1990).

35. The term makes an early appearance in the drafter's comment accompanying the 1972 amendments. General Comment on the Approach of the Review Committee for Article 9, para. E-44, *reprinted in* 3 U.L.A. 30 (1992). The term becomes a powerful image in the hands of Schroeder & Carlson, *supra* note 18, with which to challenge the unitary view.

By no means did lenders first come to provide for future advances in loan agreements with the adoption of Article 9. There is doctrine antedating the Code that developed in response to real estate lending practices. Early literature discussing the securing of future advances in the context of real estate lending include Gerald L. Blackburn, *Mortgages to Secure Future Advances*, 21 MO. L. REV. 209 (1956), and Albert P. Jones, *Mortgages Securing Future Advances*, 8 TEX. L. REV. 371 (1930). The principles that came to govern future advances and real estate mortgages seem to have been applied indifferently to preCode chattel mortgages as well. *See* Blackburn, *supra*, at 224. *But see* 2 GILMORE, *supra* note 19, at 923. Gilmore states: “With . . . statutes on the real estate side and with the priority provisions of Article 9 . . . , it is unlikely that the law of future advances will continue to be the same for both real property and personal property security arrangements.” 2 *id.* at 924 n.6 (citing Donal C. Collimore, *Comparison of Real Property Mortgages and Security Interests in Chattels to Secure Future Advances*, 36 CONN. B.J. 463 (1962)).

A standard treatment of future advance clauses and preCode chattel mortgages can be found in GEORGE E. OSBORNE, *HANDBOOK ON THE LAW OF MORTGAGES* § 114 (1951).

illustration, section 9-301(1)(b), which awarded priority to the lien creditor if the lien arose prior to the secured party's becoming perfected. Dutifully returning to the relevant provisions concerning perfection, we are only reminded that perfection eventuates on the coincidence of filing and the conditions necessary to attachment. Of the metaphysical question, whether a single perfected security interest arose on January 1 with the initial advance, or whether additional, discrete security interests appeared with the January 15 and January 30 advances, the 1962 Code had nothing to say.³⁶ In default of an answer, it was impossible to follow the first-in-time decree, inasmuch as the question, who was first, was left very much up in the air by this conceptual lapse.³⁷

Both Coogan and Gilmore responded to the question left open under the 1962 version of section 9-301, although why they chose to address the issue at the conceptual level is not clear.³⁸ In any event, proceeding from Coogan's multiple view, there existed in our hypothetical on January 1 and January 15 two distinct perfected security interests individually securing

36. California responded to the missing priority rule by resort to preCode law, which was introduced into that state's version of the U.C.C. through a nonuniform amendment. See Uniform Commercial Code, ch. 819, § 9312(7), 1963 CAL. STAT. 1849, 1984 (repealed 1965). In general, the provision followed the unitary view by dating priority for future advances from the time the original security interest was perfected. Following a stinging indictment of the provision as overbroad in Peter F. Coogan, *Intangibles as Collateral Under the Uniform Commercial Code*, 77 HARV. L. REV. 997, 1021 (1964) [hereinafter Coogan, *Intangibles*], California repealed the subsection. Act of July 15, 1965, ch. 1379, sec. 17, § 9312, 1965 CAL. STAT. 3285, 3293.

37. "Formulat[ing] a concept of the security interest created by the multiple disbursements of a future advances arrangement" seemed an exercise in "Heraclitian metaphysics." Comment, *Priority of Future Advances Lending Under the Uniform Commercial Code*, 35 U. CHI. L. REV. 123, 134 (1967) [hereinafter Comment].

38. That is to say, Coogan and Gilmore might simply have treated the issue as a priority dispute without explicit statutory resolution, reasoned their way to principled, albeit opposing, priority rules, and left open the question of the nature (concept) of the security interest.

One of the doctrinal bases Coogan identified as lending support to the unitary view is U.C.C. § 9-201 (1958), which provides that a security agreement is effective according to its terms against the debtor, purchasers, and others. Coogan warned secured parties against relying on the concept of a single security interest in any event, since in § 9-201 "[t]he question facing us is not whether the security agreement is effective, but whether a particular security interest arising under that agreement is effective as against . . . [a judgment lien creditor]." Peter F. Coogan & Nahum L. Gordon, *The Effect of the Uniform Commercial Code Upon Receivables Financing—Some Answers and Some Unresolved Problems*, 76 HARV. L. REV. 1529, 1550 (1963) [hereinafter Coogan & Gordon, *Receivables Financing*]. The commentators also noted that "[s]ection 9-201 says nothing about either priorities or security interests." *Id.*

For a summary of the textual support in the 1958 Code for each of the two views, see Comment, *supra* note 37, at 137-39.

each of the \$100,000 advances made on those dates.³⁹ The subsequent advance on January 30 became the subject of yet another perfected security interest from the time that advance was made. For the January 30 advance, all other requirements for attachment, and therefore perfection, were met as of January 1, poised in readiness for the extension of value on that date. But value arrived on January 30, fifteen days after the trade creditor's judgment lien had insinuated itself between the second and third advances. The result: the trade creditor is entitled to satisfy its lien out of the collateral after the secured party has foreclosed on the debtor's equity to the extent of the *pre-lien* advances.

Under Gilmore's unitary view, the advance on January 1 created a single perfected security interest that endured throughout the life of the financial relationship. The succeeding advances, those made on January 15 and January 30, did no more than vary the contours of the single, ceaselessly extant perfected interest.⁴⁰ Employing this image, no interstice developed in the security interest between the January 15 and January 30 advances through which the trade creditor's lien might find its way to priority.

It is the latter feature of the unitary image that moved Coogan to argue for the multiple view. Gilmore's view permitted a secured party to persist in making advances with the associated obligations to repay them consuming the debtor's equity in the collateral after the intervention of other creditors, leaving nothing thereof out of which the intervenor might satisfy its claim. Coogan believed the prospect of this sort of squeeze-out to be pernicious.⁴¹ Gilmore, of course, was acutely aware of the threat of

39. Gilmore regarded Coogan's conceptualization to represent "the obvious answer." 2 GILMORE, *supra* note 19, at 935.

40. See 2 *id.* at 937-38.

41. See Coogan, *Floating Lien*, *supra* note 19, at 868; Peter F. Coogan, *The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code*, 81 HARV. L. REV. 1369, 1398-99 (1968) [hereinafter, Coogan, *Federal Tax Lien Act*]. See also U.C.C. § 9-312, official reasons for 1972 change, at n.5 (1990) (adopting Coogan's squeeze-out rationale).

This is perhaps as good a place as any to point out that Coogan and other advocates of the multiple view distinguish between future advances made at the discretion of the secured party and those made pursuant to commitment. Coogan argues for priority to be awarded the intervening lien creditor in the former case, but would give priority to the secured party in the latter. See Coogan, *supra*, at 1398-99.

Carlson and Shupack, who argue forcefully for Coogan's multiple view under some conditions, seem to agree that the case for priority of the secured party who makes postlien advances pursuant to a commitment in the security agreement is stronger than the case for the secured party making discretionary advances. See Carlson & Shupack, *supra* note 18, at 369. Their agreement, however, is qualified on the grounds that "the reasons for seniority for these security interests are only as strong as the secured party's commitment. The definition of 'commitment' [in U.C.C. § 9-105(1)(k)] is quite loosely written." *Id.* They expose the prospect that a secured creditor might dilute the contractual

squeeze-out that abided in the image created by his unitary view, but dismissed it on the ground that all the while the debtor's equity in the collateral was diminished by the mushrooming debt, in other quarters the value of the debtor was enhanced by the advances themselves.⁴²

In any event, the *priority* dispute between the future advance lender and the lien creditor was settled by the 1972 Amendments to Article 9, which largely reflect Gilmore's unitary view.⁴³ (Although whether it has been

commitment to make future advances by the simple expedient of a flabby definition of default in the security agreement. *Id.*

42. See 2 GILMORE, *supra* note 19, at 939. Gilmore rejected the distinction between discretionary and obligatory advances, the "advances made pursuant to commitment" of U.C.C. § 9-105(1)(k), as meaningless. 2 GILMORE, *supra* note 19, at 938. Gilmore explained that contracts to lend money are not specifically enforceable, and other remedies that might be available to the disappointed borrower are either outside the possibility of recovery or anaemic beyond the point of being worth the trouble to use. 2 *id.* at 926. For Gilmore, then, the future advance lender would have priority over intervening lien creditors as to obligatory and discretionary advances alike. He conceded, however, that a rule preserving the distinction might be useful "as a way of avoiding a hard and fast rule in a situation where the equities seem to be in even balance." 2 *id.* at 938.

Carlson and Shupack, unlike Gilmore, would draw such a distinction in favor of a secured party bound to make future advances and against one who had not, but like Gilmore are skeptical of the distinction. See Carlson & Shupack, *supra* note 18, at 347-52. Their concern, however, is not with *having* a distinction, but is instead with the practical difficulties of drawing it in the face of a secured party's ability to define default in a self-serving fashion that would render the distinction impotent. See *generally id.*

43. See U.C.C. § 9-301(4) (1990). Subsection (4) makes it clear that there will be occasions when the claim of a future advance lender will be subordinate to the claim of an intervening lienholder, the likes of the trade creditor in the illustration carried forward in the text. On the other hand, and notwithstanding the suggestion in the language "only to the extent that" of a secured creditor brought to heel, there is little cause for lien creditors to rejoice in the provision. As a close reading reveals, there are precious few priority disputes from which the lienholder will emerge victorious against the future advance lender. It should also be noted that other related priority issues were also resolved under the 1972 amendments, not just that between secured parties and judicial lien creditors. The amendments anticipated as well priority disputes between future advance lenders and other Article 9 secured creditors, see § 9-312(7), and between future advance lenders and buyers of the collateral, see § 9-307(4). Buyers receive the most protection against future advances, and competing secured parties the least, with lien creditors occupying an intermediate position between the two.

I suppose the 1972 amendments should be applauded for clearing up three knotty future advance priority issues left over from the 1962 Code. But, by way of drafting history, that was not the driving consideration behind the three provisions added. In fact, § 9-301(4) was adopted to capitalize on 26 U.S.C. § 6323 (1988), the Federal Tax Lien Act of 1966. For further discussion, see Carlson & Shupack, *supra* note 18, at 420-21; and Schroeder & Carlson, *supra* note 18, at 349-52. For an extended discussion of the Act and lien priorities generally, see William T. Plumb, *Federal Liens and Priorities—Agenda for the Next Decade*, 77 YALE L.J. 228 (1967). The most thorough treatment of the Act is provided in WILLIAM T. PLUMB, *FEDERAL TAX LIENS* (3d ed. 1972). For a discussion of the Act's relationship to Article 9, see Coogan, *Federal Tax Lien Act*, *supra* note 41. For an article devoted exclusively to § 6323 as it relates to § 9-301(4), see Edward Dauer & David Stern, *U.C.C. § 9-301(4) [1972] vs. IRC § 6323(c)(1)(A)(ii) [1966]*, 8 U. Tol. L. Rev. 51 (1976).

resolved for the better is open to argument.)⁴⁴ More important for present purposes, if the future advance priority dispute was resolved, the *conceptual* dispute over the nature of the security interest, I am convinced, was not.⁴⁵ It lingered to fluster discourse upon priority issues raised in the context of future *nonadvance* obligations, testimony to the fact that such questions are rarely put to rest permanently.

B. Future Nonadvance Obligations

Future nonadvance obligation is the term from the literature⁴⁶ to describe

44. Dauer and Stern argue that U.C.C. § 9-310(4) (1972) is flawed in that it falls short of the level of priority allowed secured parties under the Federal Tax Lien Act. Dauer & Stern, *supra* note 43, at 61. *But see* Carlson & Shupack, *supra* note 18, at 351-52 (arguing that § 9-301(4) goes too far in protecting discretionary advances).

45. Compare Flechtner, *supra* note 18, at 727 n.143 with Carlson & Shupack, *supra* note 18, at 347 n.255 and Carlson & Schroeder, *supra* note 18, at 418, for the argument that the 1972 Amendments adopted Coogan's multiple view. Certainly, the provision does not adopt the multiple view expressly. Nor are we driven inescapably to that conclusion by anything the provision necessarily implies. To the extent a lien creditor prevails under some circumstances, U.C.C. § 9-301(4) (1990) is unarguably consistent with Coogan's characterization. But to the extent it awards priority to future advance lenders, it is equally consistent with Gilmore's conceptualization (and it is to a very large extent indeed, *see supra* note 43).

In short, the 1972 Amendments did not, in my estimation, institutionalize either Gilmore's or Coogan's metaphor. However, it may be that priority disputes, like the one presented in the context of future advances, might be resolved one by one; every possible variation cannot be anticipated, and the question of whether a concept of the security interest has been established statutorily can thus be an important one. *See also infra* Part IV.

46. *See, e.g.,* Julian B. McDonnell, *The Priority of Future Advances and Other Future Obligations Under the Revised Article 9*, in 1C SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ch. 21B, §§ 21B.02[6][b], 21B.04 (Peter F. Coogan et al. eds., 1994); Julian B. McDonnell, *The Floating Lien Revisited: The Journey Continues*, in 1A *id.*, ch. 7, § 7.04[3][b]; Schroeder & Carlson, *supra* note 18, at 419. The term also appears in the leading case on the nonadvances, *Dick Warner Cargo Handling Corp. v. Aetna Business Credit, Inc.*, 746 F.2d 126, 131 (2d Cir. 1984). One commentator characterizes nonadvance obligations as "floating debt," underscoring those features nonadvance obligations share with floating liens. *See* Jack B. Justice, *Secured Transactions—What Floats Can Be Sunk*, 24 VILL. L. REV. 867, 896 (1979).

In *UNI Imports, Inc. v. Aparacor, Inc.*, 978 F.2d 984 (7th Cir. 1992), the Seventh Circuit announced that, were the Illinois state courts to rule on the matter, they would follow *Dick Warner Cargo* to the effect that § 9-301(4) does not apply to limit priority of future nonadvance obligations. At the same time, in *UNI Imports* the court found that the security agreement on the basis of which the secured party claimed priority for its nonadvances against an intervening lien creditor had expired at the time of levy. The court left "for another day the question whether a secured creditor is entitled to priority for obligations incurred in connection with postlien advances paid out within 45 days of the levying of a judgment lien that are made pursuant to an unexpired agreement." 978 F.2d at 992 n.6. It is worth mentioning that, notwithstanding the endorsement of *Dick Warner Cargo* by the Permanent Editorial Board, *see infra* note 64, the Seventh Circuit seemed to find the result in *Dick Warner Cargo* less than convincing, 978 F.2d at 990, and ironic, *id.* at 991.

an obligation owed a secured creditor *not* associated with an extension of capital, credit, or other value advanced directly to the debtor.⁴⁷ Nonadvance obligations might include, for example, debt stemming from interest,⁴⁸ from transaction commitment fee obligations,⁴⁹ or from collection and foreclosure costs to a creditor that attend a debtor's default. Future nonadvance obligations may be certain, as in the case of interest, or contingent, as in the case of costs associated with collection,⁵⁰ but in either event they are *future* in the sense that they arise after the initial obligations imposed by the security agreement.⁵¹

Suppose that on January 1 Bank and Debtor come to terms in a loan agreement which includes all the usual documents, among them a security agreement that gives Bank a security interest in Debtor's inventory and receivables. The security agreement provides that, should Bank be compelled to defend its claim to the collateral against the claims of third

47. Article 9 allows for the securing of both payment obligations and performance obligations. See U.C.C. § 1-201(37) (1990). Performance obligations might include a duty to insure the collateral against loss, restrictions against absolute or security transfers, and a duty to maintain the collateral. A host of other performance obligations might be secured as well, from covenants not to compete to performance of sales and exclusive distribution contracts. See, e.g., *John Miller Supply Co. v. Western State Bank*, 199 N.W.2d 161 (Wis. 1972) (requiring evidence of parties' intent or course of dealing to find future contingent liability on executory contracts to be covered by security agreement). One commentator has remarked that "[a]lthough the Code and commentators have spent much effort on classifying types of collateral, they have not worried much about the taxonomy of secured obligations." Campbell, *supra* note 22, at 1066.

In Article 9, one kind of nonadvance obligation, that associated with recovering collateral-related expenses as a part of the secured debt, gets explicit treatment. The provision, U.C.C. § 9-207 (1990), applies only upon the secured party's coming into possession of the collateral, whether before default (in the case of pledge) or after (in the case of foreclosure on default of an obligation secured by a nonpossessory security interest). In either case "reasonable expenses" (including the cost of any insurance and payment of taxes or other charges) of preserving and maintaining the collateral are annexed to the secured obligation.

48. See, e.g., *Dick Warner Cargo*, 746 F.2d at 127; *First Nat'l Bank & Trust Co. v. Security Nat'l Bank*, 676 P.2d 837, 839 (Okla. 1984). *Dick Warner Cargo* is the leading case on future nonadvance obligations. See also *infra* note 52 and accompanying text.

49. See, e.g., *Dick Warner Cargo*, 746 F.2d at 128.

50. See, e.g., *In re Midas Coin Co.*, 264 F. Supp. 193 (E.D. Mo. 1967) (holding that debtor's obligation to repay overdrafts in its checking account was a secured obligation), *aff'd per curiam sub nom. Zuke v. St. Johns Community Bank*, 387 F.2d 118 (8th Cir. 1968).

51. Unsecured nonadvance (arguably) obligations also find their way to secured status by assignment in either of two ways. First, unsecured claims might be assigned to a secured party. Second, the secured creditor might assign its security interest to an otherwise unsecured creditor. For an in-depth discussion, see Flechtner, *supra* note 18, at 697-98. For an earlier treatment of assignments that convert unsecured obligations to secured debt, see Charles A. Shanor, *A New Deal for Secured Creditors in Bankruptcy*, 28 EMORY L.J. 587, 607 (1979). Nonadvance obligations converted from unsecured to secured debt as voidable preferences are considered *infra* Part IV.

parties, the resulting costs become an obligation of Debtor, and that Debtor's performance of the obligation will be secured by the same collateral as secures the principal debt attributable to the extension of credit.

Consider now that Trade Creditor, a supplier of raw materials necessary to Debtor in fabricating its inventory, goes unpaid, sues to judgment, and procures a lien on June 1. Thereafter, Bank is compelled to defend its security interest against a third party and, although successful, incurs substantial defense costs that are certain in amount as of July 1.⁵² The costs are spontaneously annexed to the secured obligation for which the collateral is liable.⁵³

Meanwhile, Trade Creditor has levied on Debtor's inventory and receivables. The value of the collateral proves insufficient to discharge all three obligations—the debts due from the initial advance, Trade Creditor's lien, and Bank's defense costs—in full. Bank's prior access to the collateral to satisfy the initial advance is not open to argument,⁵⁴ but it remains to be

52. The illustration is roughly abstracted from the leading, and somewhat controversial case, *Dick Warner Cargo*, 746 F.2d at 127. After being batted back and forth between the district court and Second Circuit, the case ultimately became a new battleground for the Coogan-Gilmore debate. It found resolution at the hands of Judge Friendly, who, adopting Gilmore's unitary view, concluded that Aetna's attorney's fees, paid after Warner's lien had attached, were nevertheless prior to Warner's claim. *Id.* at 134. Aetna's claim was prior because a single security interest was created and perfected before Warner became a lien creditor. Warner's garnishment was dismissed. *See* Schroeder & Carlson, *supra* note 18, at 426-30. For a detailed discussion of the particulars of the financing arrangement in that case, *see id.* at 414-16. *See also* Flechtner, *supra* note 18, at 698-701.

In its intermediate stages, before final resolution in the Second Circuit, *Dick Warner Cargo* was the subject of extensive discussion by Professors Carlson and Shupack. *See* Carlson & Shupack, *supra* note 18, at 359. In a comprehensive account of the Code provisions implicated, their extended textual analysis led them to conclude that Aetna's postlien expenses should be subordinated to Warner's claim. *See id.* at 362. Judge Friendly's subsequent ruling in favor of Aetna on the point received a stinging critique by Professors Schroeder and Carlson in an equally thoughtful article. *See* Schroeder & Carlson, *supra* note 18, at 426-35. The two articles taken together are the definitive conventional treatment of the case and the issues it raises.

But also worthy of note is Professor McDonnell's discussion of the case and associated issues. *See* McDonnell, *supra* note 46, § 21B.04[1]. While not as extensive as the two articles noted above, his discussion offers a well-considered alternative treatment that drives him to adopt a position in accord with *Dick Warner Cargo*.

53. As between a secured party and its debtor, the affixing of any obligation, initially at least, is not a matter of priority or perfection, but of creation and validity. The annexing of obligations resulting from future advances and "other value" is expressly authorized by U.C.C. § 9-204(3) (1990). For a discussion of the statutory (Code) authority for advance and "other value" and its preCode roots in real property law, *see* Campbell, *supra* note 22, at 1021-26.

54. That priority question involves only a routine application of U.C.C. § 9-301(1)(b) (1990), which, by its negative implication, grants priority to the secured party under whichever view, Gilmore's

decided whether the residual value of the collateral is to be distributed in satisfaction of the secured nonadvance obligation or the lien.

It is evident that the squeeze-out of the lien creditor is no less an eventuality of the nonadvance transaction than it is of the future advance obligation.⁵⁵ The effect for the lien creditor is identical: if Bank is permitted to satisfy all the obligations provided for in the security agreement, the ensuing nonadvance obligation from Bank's defense costs consumes Debtor's equity in the inventory as surely as an obligation occasioned by future advances made subsequent to a judgment lien. The normative priority question raised is also identical: should the secured party be permitted to satisfy the postlien, nonadvance obligation out of the collateral, leaving nothing of the debtor's equity for the lienholder?

The U.C.C. does not mention nonadvance obligations as such,⁵⁶ although it is likely the drafters believed them to be the proper subject of an Article 9 security interest.⁵⁷ What they believed about the priority position of

or Coogan's, one happens to hold.

55. "In fact, the squeeze-out danger is greater in the case of nonadvances, since the secured party can harm the intervening third party by incurring collection costs without the collusion of the debtor [whereas the debtor would be involved in the decision to increase the secured obligation through additional advances] or without any counteracting benefit to the debtor and its other creditors." Schroeder & Carlson, *supra* note 18, at 430.

56. For that matter, before the 1972 Amendments added U.C.C. § 9-301(4), § 9-312(5) (priority of future advances where the competing claimants are both Article 9 secured parties), and § 9-307(3) (priority of future advances where another purchases the collateral), the Code had little to say about future advances.

U.C.C. § 9-204(3) (1990) does expressly authorize the securing of obligations from future advances or other value given, but future nonadvances involve no distinct exchange of value apart from that giving rise to the original, primary obligation. Gilmore, the principal drafter of Article 9, indicates tacit approval of nonadvance obligations, provided they are related to the original advance of value. *See* 2 Gilmore, *supra* note 19, at 920, 932. U.C.C. § 1-201(37) (1990) defines security interest as an interest that secures payment or performance of an obligation without further requirement that the obligation arise out of an advance of value. The definition is arguable if not certain statutory authority for the securing of nonadvance obligations.

The Coogan-Gilmore debate never explicitly addressed itself to nonadvance obligations, although Gilmore condemned the use of so-called "dragnet clauses" in some cases. *See* 2 GILMORE, *supra* note 19, at 932; *see also* Carlson & Shupack, *supra* note 18, at 356 n.295 (stating that while "he did not focus on the matter, Professor Gilmore confounded future 'advances' and future 'other value'").

57. As with future advance arrangements, there is a body of literature addressing nonadvance obligations under preCode real estate and chattel mortgage law. Of primary concern to that literature and in the cases was the so-called "dragnet clause" or "anaconda mortgage." In the usual sort of controversy, the agreement between the mortgagor and mortgagee would provide that all indebtedness of the mortgagee, whatever its nature and whenever arising, would be secured by the mortgage without regard for the relationship, or lack of relationship, of the indebtedness to the original obligation. *See, e.g.,* Berger v. Fuller, 21 S.W.2d 419, 421 (Ark. 1929).

Courts disfavored dragnet clauses and responded to them with strict construction against mortgagees

secured nonadvance obligations relative to intervening judgment liens is unknown, or at least unclear.⁵⁸ In any event, the issue of distributive priorities and future nonadvances revived the Coogan-Gilmore debate, a reminder that such matters are rarely put to rest permanently. Opposing positions taken on the priority issue divide neatly along the lines of the unitary and multiple views.

If analysis begins with the unitary view, priority clearly belongs to the secured creditor, with the lien creditor squeezed out by postlien, nonadvance obligations. The race to priority begins and ends with the creation and perfection of the security interest, and, with all other conditions met, all that is required for a perfected security interest is that value at some point be given. While the security interest may evolve into something quite different in its contours as advance and nonadvance obligations are harvested, it is the very same security interest, perfected and therefore prior from the time it first arose.

It seems then that the multiple view must deny priority to postlien nonadvance obligations. On the conceptual level, however, the route to that conclusion is less clear than it is in the case of future advance obligations. For Coogan, the secured creditor accumulates as many perfected security

who drafted them, refusing to recognize antecedent debts as secured unless identified with specificity in the agreement of the parties, and recognizing subsequent debts only when so related to the primary obligation secured as to invite inference of consent by the mortgagor. *See* National Bank of Eastern Arkansas v. Blankenship, 177 F. Supp. 667 (E.D. Ark. 1959), *aff'd sub nom.* National Bank of Eastern Arkansas v. General Mills, Inc., 283 F.2d 574 (8th Cir. 1960).

A thoroughgoing discussion and critique of the same-relatedness test can be found in Campbell, *supra* note 22, at 1040-55. Cases discussing dragnet clauses are assembled in Annotation, *Debts Included in Provision of Mortgage Purporting to Cover Unspecified Future or Existing Debts ("Dragnet Clauses")*, 172 A.L.R. 1079 (1948), and Milton Roberts, Annotation, *Debts Included in Provision of Mortgage Purporting to Cover All Future and Existing Debts (Dragnet Clause)—Modern Status*, 3 A.L.R. 4th 690 (1981). *See generally* Flechtner, *supra* note 18.

58. Professors Schroeder and Carlson offer three possible explanations for the lack of treatment of nonadvance priority by the Article 9 Review Committee assigned the task of drafting the 1972 Amendments. First, they propose, the Committee might simply have overlooked the matter, but assumed Coogan's multiple theory applied to future advances, while Gilmore's unitary theory applied to nonadvance obligations. This they reject, in part on the grounds that the "assumption does not take into account the fondness of the Article 9 drafters for formal purity." Schroeder & Carlson, *supra* note 18, at 422. Next, they suggest the possibility that, while nonadvance obligations were overlooked, the Review Committee would, should the question be put to it, answer that the multiple theory applies to all aspects of the obligation secured, a possibility which, if nothing else, "at least accords formalist integrity to the drafting committee." *Id.* at 423.

Finally, and this is the explanation they find most plausible, the drafters did not overlook nonadvance obligations; rather, they began with the presumption that the multiple theory defined the security interest in all cases, but carved out an exception for certain future advances in § 9-301(4). *Id.*

interests as it makes advances; consequently, there are as many races to priority as there are security interests. The same could be said of future nonadvance obligations, with the priority position of each obligation similarly determined by the point at which a nonadvance obligation arises relative to a competing lien.⁵⁹ But it is value that is required for attachment, and while future advances are undeniably value, it would seem that most nonadvances are not.⁶⁰

To find individuated security interests perfected at intervals of nonadvance obligations is therefore something of an odd notion. It entails the conflation of the two concepts, the future advance and the future nonadvance, into a single conceptual category: value given. However that may be, the multiple view is regarded to entail that nonadvance obligations incurred future of a creditor's lien are later finishers in the race to priority and, accordingly, must be subordinated to the rights of the lien creditor.

Leaving aside the conceptual lapse in the multiple view, when the Coogan-Gilmore debate is relocated in the context of future nonadvance transactions, Gilmore's enriched estate reply cannot stand. Gilmore was willing to tolerate lien creditor squeeze-out by future advances on the

59. This is the view taken by Professors Schroeder and Carlson, *see supra* note 18, at 434-35, and Professors Carlson and Shupack, *see supra* note 18, at 368-70.

60. Professors Carlson and Shupack state that interest, costs of preserving collateral, and costs of collection are by no means future advances, but are instead the "other value" of which § 9-204(3) speaks. Carlson & Shupack, *supra* note 18, at 354, 356 n.292. Because a security interest cannot attach, and cannot, therefore, become perfected until value is given, there can be no perfected security interest as to future nonadvances until the nonadvance value out of which they arise is given. *Id.*

Certainly, interest, costs of preserving collateral borne by the secured party, collection costs arising on default, and attorney's fees do not fit comfortably within the term "advance," which, while not expressly defined in the Code, certainly seems to "connote . . . an affirmative transfer of funds to the debtor." Carlson & Shupack, *supra* note 18, at 354. Whether this same provision authorizes the annexing of such obligations as attorney's fees, interest, and the like turns on the generosity with which one is willing to define the term "other value." Interest, the cost of using another's money for a time, and costs of preserving the collateral borne by a secured party in possession, are arguably accommodated by the definition of value in § 1-201(44) without much struggle. Interest is the subject of express treatment in § 9-504(1)(a), collection costs in the case of the secured party in possession is the express topic of § 9-207(2). Both can be taken as something of value conferred upon the debtor. Carlson & Shupack, *supra* note 18, at 353.

Finding interest, collections costs, and so forth to be other future value brings them within § 9-204(3). If they are not, it remains clear that obligations arising out of such expenditures are, in any event, obligations that can be safeguarded with an Article 9 security interest. *See supra* notes 47, 51 and accompanying text. So far as the debtor, liable in either case, is concerned, whether nonadvance obligations are authorized under § 9-204(3) as debts from advances of "other value," or whether they are authorized elsewhere as simply a kind of obligation that can be secured is a matter of indifference. The characterization is dispositive where a secured party and lien creditor compete for the same collateral.

grounds that depletion of the debtor's estate is offset by the future advances themselves. Despite their inability to reach the collateral subject to the security interest, lien creditors would have recourse to the debtor's remaining property, now presumably enhanced by the advances, to satisfy their claims. But the rationale fails conspicuously where erosion of the debtor's equity is attributable to nonadvance obligations annexed to the secured debt to be treated as one with the principal obligation.⁶¹ In such cases the estate "receives" only nonadvance "value."

The failure of the enriched estate argument to justify squeeze-out under the conditions created by future nonadvance obligations has been documented in the literature and argues powerfully against the unitary view.⁶² Nevertheless, the unitary view triumphed in the leading case on the question⁶³ and has since been endorsed by the Permanent Editorial Board.⁶⁴ Are we to surmise from these inroads that the multiple view is somehow wrongheaded, an incorrect conceptualization of the security interest, whereas the unitary view describes its true nature?

Further discussion of the unitary and multiple views on such terms is unlikely to add fresh insight. I propose instead to explore the matter at a different level of discourse, using the analysis suggested by recent work in cognitive theory which emphasizes the significance of metaphor in rational thought.

II. THE ROLE OF METAPHOR IN HUMAN COGNITION

A. *The Objectivist Tradition*

It is no revelation to remark that we act and interact with our environment as dictated by our thought processes, by the conceptual systems we bring to experience. But how do our concepts arise? What engenders them? And, however they arise and whatever their source, what do our concepts represent? Are they imaginative structures by which experience is forcibly ordered for our own ends, or are they abstract likenesses of an external objective reality, such that a concept is *true* when it is a faithful representation of that reality, but *false* otherwise?

The latter notion is one of a number of related epistemological

61. See Schroeder & Carlson, *supra* note 18, at 433.

62. See, e.g., *id.* at 434-35; Carlson & Shupack, *supra* note 18, at 368-70.

63. See *Dick Warner Cargo Handling Corp. v. Aetna Business Credit, Inc.*, 746 F.2d 126 (2d Cir. 1984); see also *UNI Imports, Inc. v. Aparacor, Inc.*, 978 F.2d 984 (7th Cir. 1992).

64. See U.C.C. § 9-301(4) cmt. 8 (1990), PEB Commentary No. 2, 3B U.L.A. 606 (1990).

convictions held in common by philosophical positions that might collectively be referred to as *Objectivism*.⁶⁵ Objectivism posits that the world consists of objects, events, and phenomena innately possessed of various properties standing in certain relation to one another. These sets of conditions occur naturally in the world external to cognitive processes; they are, so to say, mind-independent.⁶⁶

65. The term "Objectivism" does not identify a particular school of thought in philosophy or elsewhere. It is used here in the sense given it by Bernstein to refer to a set of assumptions that define a general view of the world, thought, language, and meaning: "By 'objectivism,' I mean the basic conviction that there must be some permanent, a historical matrix or framework to which we can ultimately appeal in determining the nature of rationality, knowledge, truth, reality or goodness or rightness." RICHARD BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* 8 (1983). This is the sense in which Johnson and Lakoff use the term. *See, e.g.*, JOHNSON, *supra* note 1, at 196. Professor Winter summarizes Objectivism in terms of three fundamental themes:

First, [Objectivism] treats the world as filled with determinate, mind-independent objects with inherent characteristics unrelated to human interactions. Second, it 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. Finally, it treats reasoning as about propositions and principles that are capable of "mirroring" those objects and accurately describing their properties and relations. Winter, *supra* note 4, at 1108. Objectivist presumptions and their evolution are discussed and critiqued at length in RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979). Objectivist themes in recent theories of semantics are surveyed in JOHNSON, *supra* note 1, at xxix-xxxv (discussing Objectivist notions at work in Model-theoretic Semantics, Situation Semantics and other influential theories of meaning). Objectivism has various familiar instantiations, including metaphysical realism and formalism. *See infra* note 66.

Objectivism may also be understood as the antithesis of subjectivism and radical relativism, which, in the interest of convenience, I treat here as one. Where objectivism has it that properties, relations, categories, and structures occur naturally, subjectivism holds that these are entirely relative to the purposes and conceptual systems of the reasoner, and that such constructs vary infinitely across cultures and over time. *See* LAKOFF AND JOHNSON, *supra* note 1, at 224. On the subjectivist view, reality is very much an individual matter. For a summary account contrasting the objectivist and subjectivist theories, *see id.* at 185-92.

There is, of course, no single brand of subjectivism or relativism, but countless versions varying from what I have referred to as radical relativism. Even Whorf, "the most celebrated relativist of this century," was not a radical relativist. LAKOFF, *supra* note 1, at 304.

66. Thus, my desk has a front, back, top, and bottom whether or not I have the good sense to appreciate those existential relationships among its parts. The philosophical context of Objectivism is neatly summarized in JOHNSON, *supra* note 1, at xxv-xxix; LAKOFF & JOHNSON, *supra* note 1, at 184-94; LAKOFF, *supra* note 1, at 8-16.

Objectivist presumptions about reality beat a path to a predictable view of knowledge, reason, language, and meaning, that is, to a predictable epistemology. Standing as it does on an externalist view of the world, Objectivism presupposes the possibility of a uniquely correct, God's-eye perspective which, were we able to escape human circumstances—our physiological and cultural constraints—long enough to adopt it, would reward us with correct, uncluttered knowledge of reality.

Knowledge, then, transcends human thought processes, and the task of cognition in acquiring knowledge is to identify, abstract, and translate objective reality into conforming mental constructs or concepts. Concepts of the correct sort are symbolic analogues wherein reality is directly embalmed, and

To think our way to unmediated concepts, it is incumbent upon us to purge the cognitive act of physiological, cultural, and other confounding influences that threaten to infect reason.⁶⁷ Implicit in these convictions is that reason, pure reason, is *disembodied* in the sense that it cannot be reached from a beginning point of adulterating perceptions,⁶⁸ emotions, or imagination. The latter are aspects of human cognition, but they introduce distinctly human agencies into cognitive processing, and knowledge of the kind to which they lead is inescapably mediate. They are best quarantined somewhere in the extra-rational quarters of the cognitive apparatus.⁶⁹

These convictions are strikingly illustrated in the Objectivist position on conceptual categories. We categorize all manner of entities, events, activities, and situations continually as part of our fundamental reasoning processes, although much categorizing is undertaken unconsciously.⁷⁰ On the Objectivist account, categories of the mind are, or ought to be if they

they are instances of reason insofar as they have been liberated from subjective influences that contaminate knowledge. See JOHNSON, *supra* note 1, at xxiv-xxv; see also LAKOFF, *supra* note 1, at 173.

These are the salient features of what Professor Moore refers to as “metaphysical” (as distinguished from “legal”) realism. See Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 881-90 (1989).

67. Lakoff characterizes Objectivism on this particular in the following way: “If human beings are to have real knowledge, then the idiosyncracies of human organisms had better not get in the way.” So that, “[w]hat the human body does not do, on the Objectivist account, is add anything essential to concepts that does not correspond to what is objectively present in the structure of the world.” LAKOFF, *supra* note 1, at 174.

68. Objectivism allows that the perceptual apparatus is the source of information about the external world necessary to establishing correspondences between reality and the symbols that comprise our conceptual systems. Our perceptual mechanisms, however, are imperfect. On the one hand, there is some knowledge that is simply outside the perceptual capacity to capture and transmit, and, on the other, our perceptions may simply mislead or deceive us. *Id.* at 174.

69. Reasoning to immediate knowledge must proceed from our purely rational side which interposes nothing between concepts and direct knowledge of external reality. On the Objectivist view, rationality is essentially disembodied; it consists of pure abstract logical relations independent of subjective processes in the reasoner’s mind. It is usually granted that images, metaphorical projections, and analogical leaps may be part of our mental processes But such cognitive processes are regarded by objectivists as mere ‘psychological’ processes irrelevant to the logical reconstruction and evaluation of rational judgments.

JOHNSON, *supra* note 1, at xxiv. Rationality for the Objectivist is transcendental, in keeping with Objectivist metaphysics, such that “correct reason is viewed [by the Objectivists] as symbol, symbol-manipulation that accurately mirrors the rational structure of the world.” LAKOFF, *supra* note 1, at 175.

70. As Lakoff puts it, “[c]ategorization is not a matter to be taken lightly. There is nothing more basic to our thought, perception, action, and speech.” LAKOFF, *supra* note 1, at 5. For example, “[e]very time we see something as a *kind* of thing . . . we are categorizing. Whenever we reason about *kinds* of things . . . we are employing categories. Whenever we intentionally perform any *kind* of action . . . we are using categories.” *Id.* at 5-6.

are to be taken seriously, representations of categories *as they are* in the world, and categories in the world are defined by necessary and sufficient properties.⁷¹ A thing is either *P* or *not P* by virtue of the inherent features it shares (or does not share) with other category members.⁷²

For the Objectivist, then, cognition is algorithmic, and concepts depend for correctness upon the correspondence of the symbols they employ to the realities they presume to represent. From this, two particularly repressive inferences follow. First, knowledge of the world is not relative to human goals and purposes, but is indifferent to them. Second, reasoning to knowledge cannot implicate imaginative aspects of human cognition, which belong to the nonrational side of our nature.

One such imaginative device is metaphor,⁷³ a term used here not in the popular sense of the rhetorical artifice, but in a much broader sense to include metaphoric concepts. Metaphoric concepts are those fashioned or modeled on another and different concept.⁷⁴ For example, when I reason about the concept *time*, I may for my own purposes come to regard it as

71. This is the classical theory of categories. In fact, this view of categories has never really been thought of as a theory; rather, it has been an empirical given. *Id.* at 6.

72. Assigning, from experience, something membership in a conceptual category is an exercise in identifying necessary and sufficient conditions of membership that define the category as it is *out there*. The conditions themselves, together with the category they define, are existentially determinate. The degree to which a *conceptual* category accurately imparts knowledge can be directly measured against external reality. That category membership can be empirically confirmed or refuted because properties necessary and sufficient for membership have ontological status in the external world irrespective of human concepts. Of course, this leaves little room for the influences of human conceptual systems, and “strongly constrains what categories of the mind can be like.” LAKOFF, *supra* note 1, at 165. See also Moore, *supra* note 66, at 878-79 (discussing strong and diluted versions of metaphysical realism).

73. “In the objectivist tradition, metaphor is of marginal interest at best, and it is excluded altogether from the study of semantics (objective meaning). It is seen as only marginally relevant to an account of truth.” LAKOFF & JOHNSON, *supra* note 1, at 210. That Objectivism holds metaphor in low regard is predictable from Objectivist ontology and epistemology. Concepts are established by symbol manipulation to reach literal correspondence to external conditions. Metaphor cuts across the boundaries of experience to state a relationship between experiences from different domains, projecting the elements from one domain to another and asserting a meaningful correspondence between them. In postulating an identity between different domains of experience, metaphoric structures deny the Objectivist assumptions of a reality defined by fixed, mind-independent properties, relations, and categories. See JOHNSON, *supra* note 1, at 66-67. See also Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 188-92 (1981), for a brief discussion of metaphor, the problems it raises for the Objectivist tenets of formalism, and its significance in legal analysis.

Metaphor is also threatening to the Objectivist tradition because of its roots in the imagination which might “lead us away from the truth and toward illusion.” LAKOFF & JOHNSON, *supra* note 1, at 191. See also *infra* note 78. Traditional jurisprudence shares this distrust of metaphor. See *infra* note 81.

74. For an Experientialist definition of metaphor, see *supra* note 1.

a valuable commodity or resource and might remark under various circumstances that it has been *saved, wasted, squandered, or well spent*. An imaginative construct confounded with purpose, the metaphoric concept, *time is a resource*, contributes nothing in the way of knowledge.⁷⁵ In short, Objectivist postulates brook no active role for human understanding in structuring reality.⁷⁶

Objectivist metaphysics is not merely the stuff of debate among erudite philosophers. Objectivist postulates, in one form or another, have dominated occidental intellectual activity for two thousand years.⁷⁷ The philosophy of external realism that characterizes Objectivism so far pervades our pursuits that it has been the unstated beginning point in virtually every aspect of the human endeavor from philosophy to mathematics.⁷⁸ There are few provinces that have not been invaded by Objectivist

75. Under Objectivist rule, metaphorical devices are thus relegated to the domain of the poetic and rhetorical where it is irrelevant that they distort rather than define reality. See LAKOFF, *supra* note 1, at 165-66. For a brief but enlightening discussion of the views of Aristotle, Hobbes, Locke, and others on metaphor, see LAKOFF & JOHNSON, *supra* note 1, at 189-92. For a short history of theories of imagination, beginning with the Platonic tradition and including a detailed discussion of Kant's insights, see JOHNSON, *supra* note 1, ch. 6.

76. Anything not having to do with establishing objective correspondence must, by definition, be excluded from cognitive operations. Imaginative aspects of the cognitive apparatus would introduce nonobjective considerations into the process and contaminate a concept under construction. Johnson summarizes the Objectivist view on imagination as follows:

[T]he conflation of reason with imagination can only lead to relativism.

. . . [And, only by avoiding relativism can we] avoid a frightening indeterminacy in our experience. There lurks in most of us a gnawing fear that, should Objectivism prove untenable, the floodgates holding back the raging currents of relativism would be opened forever. We would all drown in the ensuing chaotic inundation.

JOHNSON, *supra* note 1, at 195, 198.

77. "The myth of objectivism has dominated Western culture, and in particular Western philosophy, from the pre-Socratic to the present day. The view that we have access to absolute and unconditional truths about the world is the cornerstone of the Western philosophical tradition." LAKOFF & JOHNSON, *supra* note 1, at 195. For that matter, "the Greeks precluded us from even raising the kinds of issues . . . [the experientialists] wanted to address." *Id.* at ix.

The heritage in Western philosophy is traceable primarily to Descartes and Kant. Descartes was devoted to the notion that knowledge must be founded on the certain. He also argued for a dichotomy of the body and mind, such that rationality is essentially disembodied. See generally RENE DESCARTES, *Rules for the Direction of the Mind* (1628), in 1 THE PHILOSOPHICAL WRITINGS OF RENE DESCARTES 7 (John Cottingham et al. trans., 1985). Kant acknowledged a greater role for sense perceptions in the acquisition of knowledge, but preserved a dichotomy between reason and bodily experience whereby we may sometimes experience things "as they appear" instead of "as they are in themselves." See, e.g., JONATHAN BENNETT, KANT'S DIALECTIC 52 (1974); JONATHAN BENNETT, KANT'S ANALYTIC (1966).

78. For instance, "[m]athematics is commonly assumed to be transcendently true—true of pure mathematical entities in some abstract 'Platonic' realm. The existence of mathematical truth is commonly taken as a demonstration that rationality is transcendental." LAKOFF, *supra* note 1, at 368.

metaphysical precepts, and the law is by no means among those institutions that have escaped their influence.

Conventional legal analysis is deeply rooted in the Objectivist tradition.⁷⁹ Its methodology involves coaxing abstract principles from cases and other legal authority, instituting the principles abstracted as propositions, then reinstantiating the derived propositions in succeeding cases.⁸⁰ Since the

In an intriguing treatment, Lakoff challenges Objectivist presumptions concerning mathematics as transcendental and offers an Experientialist alternative view of the subject. *Id.* at 353-65.

For a fascinating critique of Objectivist metaphysics in the context of biological taxonomy, see *id.* at 185-95.

79. Of course, it has for some time been the subject of attack, launched in earlier times by Llewellyn and his realists, and in more recent times by, for instance, the critical legal studies movement. For a discussion of Llewellyn and the legal realists, see WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973). Professor Moore has described contemporary postrealism as "interpretivism," a brand of anti-Objectivism that sets out to avoid any metaphysical debate as insoluble and so deserving of no more scholarly attention: "An interpretivist is someone who claims not to have a metaphysics or an epistemology because, she thinks, she does not need them for the activity in which she wishes to engage, namely, interpretation." Moore, *supra* note 66, at 890. Illustrative of the interpretive philosophy is the work of Richard Rorty. *Id.* at 893. Illustrative of the interpretivist position in legal theory is the work of Stanley Fish, Robert Cover, and Ronald Dworkin, in descending order of ambitious adherence to interpretivist principles. *Id.* at 891-92.

In any case, Externalist principles—the principles of Objectivism expressed as formalism in jurisprudence—seem to have survived the attacks. See *infra* note 80.

80. "The formalist theory of adjudication asserts that legal disputes can be . . . resolved by recourse to legal rules and principles, and the facts of each particular dispute." A formalist judge deduces a decision from these two sources alone. Moore, *supra* note 73, at 155.

Notwithstanding the fact that formalism has often been an easy target of attack in the literature, see, e.g., Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908), Professor Moore makes the case that formalism is "far from dead," and identifies and discusses recent incarnations. Moore, *supra* note 73, at 163, 165-67. Professor Winter identifies Objectivist postulates at work in, for example, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 783 (1987); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959); and even in the otherwise anti-Objectivist position taken in Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804 (1983). See Winter, *supra* note 4, at 1109 n.8.

Formalism, and with it, a host of consistent Objectivist tenets, were powerfully revitalized in recent times with the introduction of economic analysis in the law by Judge Posner. See, e.g., RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW (4th ed. 1992), reviewed in Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (criticizing the book for its single-mindedness). Cf. Moore, *supra* note 73, at 165. Posner-inspired analysis of commercial law generally, and bankruptcy particularly, has been at the center of scholarly discourse on those subjects for more than ten years. See, e.g., Thomas H. Jackson & Anthony T. Kronman, *Secured Financing Among Creditors*, 88 YALE L.J. 1183 (1979); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditor's Bargain*, 91 YALE L.J. 857 (1982); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987), to name only a few of the earlier works. However fashionable and well-represented in the scholarly journals, the scholarship of law and economics has been the subject of sustained criticism. Two of its

propositions themselves transcend their concrete origins, the sense is that they are susceptible of independent, objective application. Reasoning from transcendent principles is therefore presumed to lead to value-neutral results in individual cases, to results uncontaminated by the subjective impulses of decisionmakers.⁸¹

This has been the analytic course of the Coogan-Gilmore debate. The pattern has so far consisted of inducing the true nature of the security interest from the textual materials of Article 9, adopting either the unitary or multiple view on that basis, then stating the conclusion as an a priori proposition decisive of future advance and nonadvance priority issues.

B. An End to the Tyranny of Objectivist Epistemology: Experiential Realism

As mentioned in the introduction to the present treatment, there has recently emerged a school of thought, denominated experiential realism (Experientialism) by its authors,⁸² that has come to regard metaphor as primary in cognition.⁸³ En route to that conclusion, Experientialism refutes to incredulity the epistemological tenets associated with the Objectivist tradition. Whereas Objectivism holds that structures, categories, sets, and models are a priori features of external reality, Experientialism discards once and for all the notion that reality is naturally organized according to mind-independent constructs.⁸⁴

most active critics include Elizabeth Warren, *see, e.g. Bankruptcy Policy*, U. CHI. L. REV. 775 (1987), and David Gray Carlson, *see, e.g., Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341 (1987); *Bankruptcy Theory and the Creditor's Bargain*, 61 U. CIN. L. REV. 453 (1992).

81. Given that traditional legal method operates on the basis of Objectivist metaphysical presumptions, it is no surprise that "[m]uch legal thought assumes metaphors distort and that only propositions and rigorous logic are proper bases of legal reason." Winter, *supra* note 4, at 1162. Professor Winter provides an in-depth critique of Cohen's criticism of legal metaphor as "transcendental nonsense" in the law. *Id.* at 1162-71. He catalogs the metaphors at the basis of Cohen's realistic and rational substitutes for fictions and metaphors. The intent, however, is not to criticize Cohen, but, I believe, to demonstrate emphatically his point that "[m]etaphor is inevitable in legal analysis because it is central to human rationality; it is a primary mode of comprehension and reasoning." *Id.* at 1166. *See also* Moore, *supra* note 73, at 188-92.

82. Experiential realism is the term used by Lakoff and Johnson to describe the new cognitive theory they authored. *See* LAKOFF, *supra* note 1, at xv.

83. "A metaphor is not merely a linguistic expression (a form of words) used for artistic or rhetorical purposes; instead, it is a process of human understanding by which we achieve meaningful experience that we can make sense of." JOHNSON, *supra* note 1, at 15.

84. "[O]bjectivist philosophy fails to account for the way we understand our experience, our thoughts, and our language." LAKOFF & JOHNSON, *supra* note 1, at 210. Lakoff argues that "all of the objectivist doctrines concerning human thought and language are problematic if not downright wrong.

On the Experientialist account, structures, categories,⁸⁵ properties, and relationships have no ontological status in the world external to cognitive operations. Instead, those conditions owe their existence to human cognitive processes. The structures and relations that we see in the external world of experience are the fruits of cognitive efforts to structure and organize experience in a meaningful way relevant to human purposes. Our concepts, under the new order, do not symbolically incarcerate “slices of reality”: they are that reality.

Experientialism has made overwhelmingly the case that the principles by which concepts are established are unqualifiedly imaginative⁸⁶ and

These arguments . . . present problems for anyone who holds *any* of these doctrines.” LAKOFF, *supra* note 1, at 158. The central challenge is to Objectivist epistemology, but Experientialism refutes in part Objectivist metaphysics as well. *Id.*

The Experientialist program does, however, share some common ground with the Objectivist tradition, in that both assume a reality external to the human cognitive apparatus, a commitment to the possibility of stable knowledge, and a rejection of the notion that one conceptual system is as good as the next. *Id.* The principal distinction between Objectivism and Experientialism is that the form not only assumes an external reality, but “assumes that reality is *correctly* and *completely* structured in a way that can be modeled by set-theoretical models—that is, in terms of entities, properties, and relations.” *Id.* at 159. In this, Objectivism goes beyond basic realism.

Experientialism may thus be understood as occupying “a middle ground between Objectivism and Relativism [radical relativism]” of the kind argued for by Rorty, Kuhn, or Bernstein. JOHNSON, *supra* note 1, at 196. The philosophical stance of Experientialism owes a debt to Putnam’s internal realism. *See* LAKOFF, *supra* note 1, at 266.

85. The basic claim is that categories are *conceptual*, defined not by inherent properties of objects as the Objectivists would have it, but on the basis of interactional properties and prototypes, both of which are a matter of human constructs as opposed to a priori properties. *See* LAKOFF & JOHNSON, *supra* note 1, at 122-25.

On the Experientialist view, conceptual categories are built around complex combinations of concepts (which may themselves be organized as an assemblage of structural metaphors) called *idealized cognitive models*, or “ICMs.” These models may be understood as folk theories by which a category is defined. (This is, of course, in sharp contrast to the Objectivist view which sees categories as defined by necessary and sufficient conditions.) Prototypes, or central category members, are prototypical with reference to ICMs. Divergence from prototype yields either nonmembership, or, perhaps, graded membership in the category. For an excellent example of the application of the Experientialist theory of categories in jurisprudence, see Winter, *supra* note 4, at 1148-56.

86. “Without imagination, nothing in the world could be meaningful.” JOHNSON, *supra* note 1, at ix.

Another instrument of cognition is metonymy. In metonymy, one entity is taken to *stand for* another. It differs from metaphor, which involves understanding one entity *in terms of* another. An example of a special case of metonymy, called *synecdoche* (part stands for the whole) by grammarians, illustrates the distinction. In the expression, “all hands on deck,” the hands *stand for* the person. *See* Lakoff & JOHNSON, *supra* note 1, at 35-40. Metonymic models and their role in conceptual categories are discussed at length throughout LAKOFF, *supra* note 1.

embodied.⁸⁷ Perhaps the most pervasive and powerful imaginative device is the capacity for metaphor,⁸⁸ the ability to fashion metaphoric concepts briefly alluded to earlier. It is the capacity to structure a concept by comparing aspects of experience from different domains to establish conceptual correlations and analogies between them.

C. *The New Place of Metaphor in Cognition*

On the Experientialist view, only rudimentary concepts are directly grasped from experience.⁸⁹ A fundamental source of our concepts is the kinesthetic image schematic structure, or *image schema*.⁹⁰ Image schemas emerge from recurring, recognizable patterns in experience, principally of repeating patterns associated with our physical orientation in, and interactions with, spatial reality, such as when we manipulate objects, move about, and so forth. Because these patterns are repeating, they are recognizable;⁹¹ otherwise, it would be impossible to function in the

87. By *embodied*, it is meant that concepts are grounded in preconceptual, physical experience, and are not abstract representations of conditions immanent in experience. Knowledge, under the Experientialist regime, transcends neither the reasoner nor the reasoning process. See JOHNSON, *supra* note 1, at 206.

88. See LAKOFF & JOHNSON, *supra* note 1, at 3. The claim of Experientialism, then, is that our ordinary conceptual system is mainly metaphorical, that most concepts are understood in terms of others. *Id.* at 56. "Metaphors are not merely convenient economies for expressing our knowledge; rather, they *are* our knowledge . . . of the particular phenomena in question." JOHNSON, *supra* note 1, at 112.

89. By rudimentary, I mean concepts understood directly, without metaphor. These consist mainly of the ubiquitous spatial concepts, such as up-down, verticality, and containment. LAKOFF & JOHNSON, *supra* note 1, at 57.

Experience here refers both to our physical interactions with the external world and our social and cultural interactions as well. Some aspects of experience are universal, while others are culture-specific. Physical and cultural experiences are not isolated episodes, but are understood as experiential gestalts. Some experiences are "natural kinds of experience" with natural emergent dimensions (e.g., parts, stages, and so on) and are directly grasped on their own terms. Others lack natural dimensions and must be grasped indirectly through metaphor. *Id.* at 120.

90. The Experientialist use of the term "schema" derives from Kant, who regarded schema as nonpropositional, imaginative structures. See generally BENNETT, KANT'S ANALYTIC, *supra* note 77, at 141-52, for an account of Kant's schematism. The Experientialist position runs counter to mainstream view on the nature of schemata. JOHNSON, *supra* note 1, at 19. A detailed discussion of Kant's understanding of image schema and its influence on the Experientialist view can be found in *id.* at 147. Points of departure from Kant's understanding are discussed in *id.* at 156-65. For a detailed account that locates the Experientialist view on image schema in the context of recent cognitive research, see *id.* at 19-28.

91. Consider, for example, Johnson's description of the force schema:

We begin to grasp the meaning of physical force from the day we are born (or even before). We have bodies that are acted upon by "external" and "internal" forces such as gravity, light, heat, wind, bodily processes, and the obtusion of other physical objects. Such interactions constitute our first interaction with forces, and they reveal patterned recurring relations

physical world about us.⁹² These repeating patterns become embodied as image schematic concepts which, by virtue of their bodily basis, are meaningful in the most fundamental way.⁹³

Image schemas, then, may be understood as generalizations or abstractions of recurring patterns in experience.⁹⁴ As generalizations, they can be projected onto other aspects of experience wherein salient dimensions of the pattern are perceived. An illustration may prove helpful here. One of the more pervasive image schemas so far identified (and, as it happens, one central to the treatment of the Article 9 priority question that follows) is the *container* schema.⁹⁵ We conceive of our bodies as themselves containers continually filled and emptied of the food we consume, the air we breathe, the liquids we drink, and so on. Moreover, we experience things outside ourselves as containers, as having an inside and an outside established by some boundary, such that we regularly regard ourselves and other entities as contained. From these regular and repeating patterns of containment

between ourselves and our environment. Such patterns develop as meaning structures through which our world begins to exhibit a measure of coherence, regularity, and intelligibility.

JOHNSON, *supra* note 1, at 13.

92. "If we are to experience our world as a connected and unified place that we can make sense of, then there must be repeatable pattern and structure in our experiences. Image schemata are those recurring structures of, or in, our perceptual interactions, bodily experiences, and cognitive operations." *Id.* at 79.

93. LAKOFF & JOHNSON, *supra* note 1, at 57. The beginning point for reasoning about abstract concepts, then, is the embodiment of experience, the kinds of physical experience common to human beings because of our physical forms (e.g., we walk upright) as constrained by the physical environment in which we find ourselves (e.g., we are located in a world with gravity, a certain topography and other physical constants). See JOHNSON, *supra* note 1, at 51.

94. Although generalizations, image schemas are not abstractions in the sense of propositions, "in that they are not abstract subject-predicate structures . . . that specify truth conditions." JOHNSON, *supra* note 1, at 23. That is, they do not identify an existing or natural set of relations between symbols and a represented reality. *Id.* at 29.

95. *Id.* at 21. Several other image schemas have been identified and described. For example, there is a *part-whole* schema, which has its bodily basis in our experiencing our bodies as unified wholes, but also as structured by individuated constituent parts. This schema, with *whole*, *part*, and *configuration* structural elements, leads to our understanding other objects in the world as having a whole-part structure as well. The *center-periphery* schema is comprised of the structural elements, an *entity*, *center*, and *periphery*, and has its bodily basis in our awareness of our bodies as consisting of a center, trunk, and radiating peripheral appendages. Other image schemas include the *up-down*, *linear order*, *front-back*, *link*, and *balance* schemas. See generally LAKOFF, *supra* note 1, at 272-75 (summarizing the bodily basis and structural elements of these image schemas).

The *balance* schema is of special interest because of its role in structuring the concepts in Article 9, see *infra* Part III, as is the *source-path-goal* schema. The latter has its bodily basis in our physical movements from one place to the next from a beginning point, along a path of contiguous locations in a defined direction, to a point of destination. LAKOFF, *supra* note 1, at 275.

experience emerges the *container* image schema.⁹⁶

Directly comprehended image schematic concepts that emerge from experience, like *front-back* and *containment*, are sharply delineated by their natural dimensions. So that we may refer to and take action with respect to the physical world in which we find ourselves, it proves useful to relocate imaginatively, to project, the dimensions of our emergent concepts onto other constituents in our physical environment. Accordingly, we speak of being *in the forest*, or *in the meadow*, as though they are containers inherently, when, in fact, there is no reason to suppose either forests or meadows to be containers other than the convenience of so regarding them for our own ends and understanding.⁹⁷

Projecting emergent concepts from one aspect of physical experience to another aspect of physical experience is, however, short of metaphor. Projections of the sort discussed above deploy the structural elements of image schema all within the physical domain. *Metaphor*, on the other hand, involves the process by which concepts from one domain, called the *source* domain, are employed to structure concepts from another, *different* domain, called the *target* domain.⁹⁸ In this way, sharply delineated concepts with

96. The *container* schema, like all image schemas, is an abstraction of the recurring pattern which is its experiential basis. It is not a rich image. (For example, the *container* schema is not the same thing as the mental image or *picture* of, say, furniture contained within the bounds of a room.) Rather, it is a generality occupying a mental space and consists of a few basic parts or *structural elements*. For instance, the *container* schema has the structural elements, *interior*, *boundary*, and *exterior*, LAKOFF, *supra* note 1, at 272, which, taken together, form a gestalt that comprises the embodied pattern of the image schema. JOHNSON, *supra* note 1, at 41. Since it is a generality, the *container* schema can be deployed across a range of experiences to organize and make them comprehensible where there is a perceived fit of schematic structural elements. LAKOFF, *supra* note 1, at 272. For a detailed explication, see JOHNSON, *supra* note 1, at 21-23.

97. We likewise conceive of our visual field as a container for the entities within it, as evidenced by such expressions as "the ship is coming into view," "I have him in sight," and "I can't see him—a tree is in the way." LAKOFF & JOHNSON, *supra* note 1, at 30. Both conceptions, of course, are products of our own physical orientation in the environment. We perceive ourselves as containers and project that in-out orientation onto other physical objects around us. *Id.* at 29. It is important to recognize that clearings in the woods, for instance, are not inherently containers. Rather, containment is a property "we project onto it relative to the way we function with respect to it." *Id.* at 161.

98. To understand one thing in terms of another thing of the same kind involves projection. However, to understand one thing in terms of another and different kind of thing involves metaphorical projection. LAKOFF & JOHNSON, *supra* note 1, at 170-71. For example, to say, "the deer is behind the boulder," is to project our own front-back orientation onto the boulder and the deer, i.e., to understand one kind of *physical* thing (the boulder) in terms of another *physical* thing (the physical orientation of our bodies). Because the projection occurs entirely within the physical domain, metaphor is not implicated. To say, on the other hand, "inflation is on the rise," requires metaphor: inflation must be understood as a physical substance, and to understand it as "rising" depends upon a projection of the orientational metaphor, *more is up*, from the physical domain to the abstract domain wherein is located

natural dimensions, like containment, center-periphery, and source-path-goal,⁹⁹ permit the structuring of concepts that are without natural dimensions and are, therefore, ill-delineated.¹⁰⁰ Thus, we are able to speak of (and conceive of) someone as being “in trouble” or as being “in love” because we have a concept of containment that emerges from the physical (source) domain with which to structure and make meaningful the abstract concepts *trouble* and *love* in the emotional (target) domain.¹⁰¹

The way in which we structure the concept *time* offers an especially instructive illustration of these principles at work. Time is a concept without natural dimensions of its own and so must be apprehended indirectly through metaphor. This necessity is reflected in a variety of expressions used in talking and reasoning about it. For example, expressions like, “the time will come when,” “the time is past,” “the time is approaching,” and “we look forward to the time when,” reveal the underlying metaphor *time is a moving object*.¹⁰²

the concept of inflation on the rise. *Id.*

99. See *supra* notes 95-96 for a discussion of additional schemata.

100. The basic insight of Experientialism is that much of our experience must be understood indirectly through metaphor. Concepts like emotions, various human institutions, and other abstractions are *experienced* directly, but lack natural dimensions and cannot be *understood* directly. See LAKOFF & JOHNSON, *supra* note 1, at 115.

101. This cross-conceptualization is possible because of the simple structure of image schemas, the fact that they are comprised of a few basic parts and relations that may be metaphorically elaborated across a wide range of experiential domains. *Id.* at 28.

For example, Johnson has shown that a wide variety of senses of the word “out” are connected as metaphoric elaborations of the in-out and container image schemas. Consider the following nonspatial senses of the term “out”:

He told his story, leaving out none of the details.

He tried to get out of our contract.

The truth finally came out.

See JOHNSON, *supra* note 1, at 34. All these senses are the product of metaphoric projection of image schema from physical experience. Johnson states:

Numerous cases, such as *leave out*, *pick out*, *take out*, etc., can be either physical bodily actions that involve orientational schemata, or else they can be metaphorically oriented mental actions. What you pick out physically are spatially extended objects; what you *pick out* metaphorically are abstract mental or logical entities. But the relevant preconceptual schema is generally the same for both senses of *picking out*.

Id.

States, such as emotional states like *love*, *trouble*, *depression*, and *health*, are sometimes understood as containers, LAKOFF & JOHNSON, *supra* note 1, at 31-32, and sometimes as destinations.

102. The concept of objects moving across space from one point to the next metaphorically structures the concept *time*, and expressions, such as “time flies,” unavoidably follow suit as linguistic realizations of this metaphoric concept. “Since metaphorical expressions in our language are tied to metaphorical concepts in a systematic way, we can use metaphorical linguistic expressions to study the nature of metaphorical concepts . . .” LAKOFF & JOHNSON, *supra* note 1, at 7.

The concept is partially structured by our experience of palpable objects moving through physical space, the salient features of which are *mapped* onto our experience of *time*, so that the well-delineated emergent concept from the source domain (the experience of objects traversing physical space) informs and structures the ill-delineated concept in the target domain (our experience of the concept of time).¹⁰³

A feature of metaphoric mapping merits attention here. When one concept is modeled on another, epistemic knowledge about the source domain is imported to the target domain. That is to say, metaphoric mapping brings with it metaphoric entailments. Entailments can be understood as the inferential consequences associated with the source concept. For example, the *container* schema has the structural elements interior, exterior, and boundary that emerge from the recurring experience of physical containment. In the physical domain, there are a number of consequences associated with boundedness: e.g., freedom of the thing contained from physical forces outside the container; limitation of the forces at work within the container; and fixing of the locus of the thing contained. Those consequences—entailments—of containment implied by the internal structure of the *container* image schema travel with it to the target domain and provide the basis for rational inferences drawn about the

The concept of time is also partly defined by an *orientational* metaphor based on the *front-back* image schema. Orientational metaphors are so-called because they are premised on image schemata that emerge from patterns of spatial orientation recurring in physical experience (e.g., the emergent concepts *up-down*, *front-back*, and *near-far*). Of course, these orientations are relative to correlates established by the kinds of bodies we have; that is to say, our orientations are relative but not arbitrary.

Like other emergent concepts, orientational concepts are rooted in preconceptual experience and have a bodily basis. For instance, the *front-back* schema emerges from our experiencing our bodies as having fronts and backs relative to other entities in the physical world. Moving objects are given a front-back orientation, with the status *front* awarded to that part of the object trained in the direction of motion.

Given that the concept *time* is partially structured by the *time-is-a-moving-object* metaphor, time is likewise conceived as having a front-back orientation, as evidenced in expressions like “she faced the future head-on,” and “he cannot face tomorrow.” The two metaphors cohere by virtue of their grounding in the physical experience of objects and of objects moving through space. See LAKOFF & JOHNSON, *supra* note 1, at 41-45.

This discussion by no means exhausts the ontological metaphors by which time is understood. For example, time is understood to be a container (e.g., “she’ll never make it in time,” and “he can finish the test in an hour”). See *id.* at 59.

103. See LAKOFF & JOHNSON, *supra* note 1, at 7-9; see also *id.* at 41-44. The metaphoric mappings by which the concept of time is partially structured are meaningful because the emergent concepts employed are directly meaningful at the physical level. An indefinite concept like *time* is intelligible because it can be understood in terms of ordered, highly delineated emergent concepts with crisp dimensions. It can be understood and contended with, in other words, because of the human capacity for metaphor.

target domain.¹⁰⁴

Ontological metaphors¹⁰⁵ (e.g., time is a moving object) are basic to our conceptual system, but they do not say a great deal about their target concepts. They are not, in other words, abundantly descriptive and so are not a rich source of meaning.¹⁰⁶ It is useful to treat time as an entity, a moving object for instance, so we might refer to and quantify it, but it is incompletely useful. Meaningfulness is immeasurably advanced where metaphoric concepts can be elaborated to provide whole systems of meaning. Ontological and orientational metaphors become the constituents of *structural* metaphors which are central to concepts and conceptual models. Structural metaphors are infinitely more fertile than their constituent metaphors because of the prospects for extensive elaboration to considerable detail.¹⁰⁷

104. See JOHNSON, *supra* note 1, at 22.

105. To understand aspects of experience, such as emotions, events, and activities as entities and substances, is to employ ontological metaphors. Lakoff and Johnson catalogue and elaborate upon several important examples. For instance, expressions like "inflation is lowering our standard of living," and "we need to combat inflation" reveal the ontological metaphor *inflation is an entity*. LAKOFF & JOHNSON, *supra* note 1, at 26. Our conceptual system is, of course, rife with ontological metaphors, without which it would be impossible to refer to, quantify, and reason about aspects of our experience without natural dimensions. For further discussion of entity and substance metaphors, see *id.* at 25-32.

106. In combination, however, ontological and orientational metaphors enable considerable reasoning about target concepts. LAKOFF & JOHNSON, *supra* note 1, at 25.

Oriental metaphors may organize entire systems of concepts in relation to one another. For example, the *up-down* schema that emerges from recurring patterns of physical interaction orients a number of abstract concepts in the nonphysical domain. The following expressions disclose the underlying orientational metaphor, *good is up/bad is down*: "Things are looking up," "she's at the pinnacle of her career," "he's low-down," "he sets high standards for himself," "we've bottomed-out," "things are going downhill," and "she graduated at the top of her class." *Id.* at 14-17.

In general, what is regarded to be good for people is conceptually oriented upward. The orientation is not arbitrary, but is born of orientational correlates in physical experience. For instance, healthy, well individuals are ordinarily upright, whereas unhealthy individuals are not: "He was down with a cold, but now he's up and about"; "she's been under the weather for a long time." Professor Winter discusses conventional *up-down* metaphors in the law (e.g., "they appealed to the *highest court*, the decision of which will be binding on the *lower court*"). See Winter, *supra* note 4, at 1144-45. A discussion of the coherence among the up-down spatialization metaphors in Western culture can be found in LAKOFF & JOHNSON, *supra* note 1, at 22-24 (explaining how, for instance, "more is better" coheres with "good is up").

107. See LAKOFF & JOHNSON, *supra* note 1, at 61. The experiential grounding of structural metaphors is discussed in *id.* at 61-68. It should be noted that metaphoric concepts are not indefinitely institutionalized, are not static:

If a new metaphor enters the conceptual system that we base our actions on, it will alter that conceptual system and the perceptions and the actions that the system gives rise to. Much of cultural change arises from the introduction of new metaphorical concepts and the loss of old ones.

Id. at 145.

The structural metaphor that partially defines the concept *argument* illustrates the point. A variety of idioms reveal that we conceptualize the activity of arguing in terms of the concept *war*.¹⁰⁸ We “win” or “lose” arguments, arguers “attack” one another’s “positions,” formulate “strategies,” “shoot holes” in opponents’ arguments, “lose or gain ground,” and so on. It is not that we merely *talk* about argument this way, rather we *conceive* arguers as “attacking” and “retreating” from argued positions, we conceive postulates as “indefensible” or “unassailable.”¹⁰⁹ The concept *argument* in the target domain is structured in part by the concept *war* from the source domain. There are ontological consequences as well, since the concept bears on the way we go about arguing.¹¹⁰ Where a cognitive program is metaphoric, that is, where concepts are formulated and structured by recourse to other concepts from different domains, understanding of experience is necessarily incomplete. Metaphoric structuring of concepts is, so to say, partial by definition.¹¹¹ Multiple metaphors that feature a range of aspects of a concept must therefore be employed in

The metaphor *time is money*, and its dissemination in the course of Westernizing the international community, illustrates the point. The metaphor does not alter reality, “[b]ut changes in our [perceptions of time, and an altered conceptualization of it] do change what is real for us and affect how we . . . act upon those perceptions.” *Id.* at 146. To recognize and acknowledge this characteristic of metaphoric reasoning is to facilitate transformation in the law.

108. See LAKOFF & JOHNSON, *supra* note 1, at 3-6; see also Winter, *supra* note 3, at 1410-11 (discussing how litigation is partially structured by the metaphoric concept *rational argument is war*).

109. “The metaphor is not merely in the words we use—it is in our very concept of argument. The language of argument is not poetic, fanciful, or rhetorical; it is literal. We talk about arguments that way because we conceive of them that way . . .” LAKOFF & JOHNSON, *supra* note 1, at 5.

110. *Id.* As Lakoff and Johnson observe: “We can actually win or lose arguments. We see the person we are arguing with as an opponent . . . Many of the things we *do* in arguing are partially structured by the concept of war.” *Id.* at 4.

111. Were the dimensions from the source and target domains identical in every particular, they would be the *same concept*. If, for example, every dimension of the experience of arguing corresponded completely with every dimension of the experience of war, the concepts would be identical. Of course, they are not, but because they are perceived to share a number of salient dimensions, the concept of argument is partially structured with reference to the concept of war.

To say that we understand one concept, argument, in terms of the other, war, is by no means to indicate that we do not know the difference. At the same time, our metaphorical concepts may be so pervasive and so deeply rooted as to be taken as literal descriptions. Consider, for instance, the prevalent ontological metaphor, *the mind is a brittle object*, in evidence in expressions like “his ego is extremely fragile,” “she was crushed,” “he cracked under pressure,” and “she finally snapped.” “[O]ntological metaphors like these are so natural and so pervasive in our thought that they are usually taken as self-evident, direct descriptions of mental phenomena. The fact that they are metaphorical never occurs to most of us.” *Id.* at 28.

arriving at meaning.¹¹² The capacity to focus on and highlight multiple aspects of experience enables an eminently richer concept of that experience.¹¹³

In concluding this overview of Experientialism, a few observations are in order. Experientialism rejects the a priori world of the Objectivist in favor of a vision of experience structured and made meaningful by internalized conceptual systems. Those systems are predicated on imaginative principles of cognition. The process is animated by human purposes subject to reevaluation and change. Necessarily, then, our concepts are somewhat indeterminate.

At the same time, if categories and other experience-organizing constructs are nowhere to be found except in our conceptual systems, they are nevertheless securely grounded in and constrained by very real physical and cultural experience external to the reasoner. Our conceptual system is constrained in a very real way by that experience, such that while concepts

112. Professor Winter provides a helpful illustration:

Suppose that we are standing by the ocean on a windless day. We might describe the sea as calm or flat. If it were a windy day, we might remark on the whitecaps or say that the sea was hoary or that the waves were rushing toward the shore. Each of these descriptions employs a metaphor, although some so common we no longer perceive them as such. Each metaphor tells us something about the ocean. At the same time, each metaphor is partial and incomplete; it hides or negates other truths about the ocean The waves may appear to rush toward the shore, and may . . . propel objects in that direction. But we also know . . . that the water actually moves in place in a circular motion. The surface of the sea may appear flat, but beneath the surface is a reality of valleys, ridges, trenches, and the like. While the surface may appear calm, there also may be a deadly current underneath. We would use another metaphor to describe that part of the sea's reality: We call it the *undertow*—as if some underwater tug had fastened a towline about our ankles with which to drag us out to sea.

Winter, *supra* note 3, at 1492.

113. The point about the partial nature of metaphoric structuring is an important one. By mapping a well-structured source concept onto a target concept to establish analogies between them, metaphor illuminates the dimly understood, and introduces coherence and order to concepts lacking natural dimensions and systematicity. This is the power of metaphoric reasoning, but also its limitation. A metaphoric concept usefully focuses on *some* aspects of a target concept, those aspects that suit the purposes of scrutiny, but it necessarily highlights them to the mutual exclusion of others. LAKOFF & JOHNSON, *supra* note 1, at 10. Those aspects eclipsed are lost to consideration. A more complete understanding of a concept requires that those aspects lost to view be brought back into focus.

Multiple metaphors that feature a range of aspects of a concept must therefore be employed in arriving at meaning. The more important the concept, the more likely it is to be highly developed. For example, Lakoff and Johnson offer ten distinct ontological metaphors by which the concept idea is understood, including: *ideas are food* (e.g., “half-baked ideas,” ideas as “food for thought”); *ideas are commodities* (e.g., “that’s a worthless idea,” “[h]e won’t buy that”); *ideas are cutting instruments* (e.g., “[h]e has a razor wit,” “[s]he cut his argument to ribbons”); and, *ideas are people* (e.g., “look at what his ideas have spawned,” “[t]he theory of relativity gave birth to an enormous number of ideas in physics”). *Id.* at 46-48.

are necessarily in some measure indeterminate and organic, they are in important respects stable, and not wildly indeterminate.¹¹⁴

Experientialism is not an invitation to embrace an “anything goes” relativism: in rejecting objectivism it does not deny a reality external to cognitive processing.¹¹⁵ The Experientialist alternative, then, is both relativist and realist.¹¹⁶

III. METAPHORIC EXPLICATION OF ARTICLE 9 AND THE UNITARY AND MULTIPLE VIEWS

A. *The Ontological and Structural Metaphors That Structure Article 9*

“The basic definition . . . illustrates how the drafters speak of a security interest as though it were a concrete thing. . . . It seems to have a location just as though it were a table, a house, or any other physical object of everyday life.”¹¹⁷

Metaphorical structuring, it has been noted, is necessarily incomplete and partial. In the law, as elsewhere, concepts from source domains focus on distinct aspects of a concept in the target domain, and the two in confederation offer a more extensively descriptive model than any single metaphoric concept acting alone could deliver.¹¹⁸ This is no less the case for the law governing secured transactions, Article 9. A complex of image schemata, metaphoric mappings, models, and other imaginative instruments of cognition operate in holistic combination to provide a fuller understanding of the concept of secured lending.

From the provisions of Article 9 and the expository comments that attend

114. “What subjectivism specifically misses is that our understanding, even our most imaginative understanding, is given in terms of a conceptual system that is grounded in our successful functioning in our physical and cultural environments.” LAKOFF & JOHNSON, *supra* note 1, at 94.

115. Rather, there remains a commitment to the existence of a real world external to human beings. *Id.* at 226. Similarly, the relativist epistemology of Experientialism does not propose there are no “truths,” only that “there is no absolute standpoint from which to obtain absolute objective truths about the world.” *Id.* at 193.

116. The suggestion is “that many of the problem areas for our culture may come from a blind acceptance of the myth of objectivism and that there is another alternative short of recourse to radical subjectivity.” *Id.* at 197.

117. Coogan, *supra* note 5, § 2.02[1][b].

118. See Winter, *supra* note 4, at 1106 (relating the study of law to that of politics, emotional argument, and literary criticism). Cf. Winter, *supra* note 3, at 1382-86 (explaining the human cognition model in which “human thought is grounded in physical experience and extended by means of idealized cognitive models and metaphoric projections”).

them can be garnered the ontological and thematic metaphors that structure the concept of the secured transaction. The cognitive model that characterizes Article 9, in other words, consists of ontological elements and an overarching structural metaphor according to which those elements are organized.

Let us first identify some of the recurring ontological elements. Article 9 itself is understood as a container for those transactions within its scope. Some transactions are *within* the article,¹¹⁹ while others are *excluded*, directly¹²⁰ or otherwise.¹²¹ This construct, then, is an instantiation of the *container* image schema, where the structural elements that compose the schema are mapped onto the nonphysical domain to yield the metaphor *Article 9 is a container for the transactions to which it applies*. The *security interest* is metaphorically cast as an entity. By virtue of the simple ontological metaphor¹²² *the security interest is an object*, it is figured a palpable thing to which we might refer as “arising,”¹²³ being “created,”¹²⁴ “attaching,”¹²⁵ as being “perfected”¹²⁶ or “assigned.” Treating the security interest as an entity, however, is minimally descriptive and can take us only so far in developing the concept. Thus, additional ontological metaphors are employed as well. For instance, the security interest is not simply an entity, but in particular it is a substance¹²⁷ which “attaches

119. Article 9 “applies to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures.” U.C.C. § 9-102(1) (1990).

120. See U.C.C. § 9-104 (1990) (listing excluded transactions which otherwise might fall within the broad terms of inclusion of U.C.C. § 9-102).

121. Some transactions clearly within § 9-102(1), and not expressly excluded by § 9-104, might still be implicitly excluded in application. See F. Stephen Knippenberg, *Tacit Exclusion: Defining Code Terms Using Extraneous Referents*, 39 SYRACUSE L. REV. 1261 (1988) (discussing the implicit exclusion of a transfer of an interest in liquor licenses for security).

122. See *supra* notes 105-07 and accompanying text for a brief discussion of ontological metaphors.

123. See, e.g., U.C.C. § 9-113 (1990) (regarding security interests arising under Article 2).

124. See, e.g., U.C.C. § 9-102(1)(a) (1990) (regarding creation of security interest by the parties).

125. The drafters viewed the security interest “as a limited interest which *adheres in or attaches to* personal property.” Coogan, *supra* note 5, § 2.02[1][a], at 2-8 (emphasis added).

126. See, e.g., U.C.C. § 9-303 (1990) (regarding perfection of security interests).

127. To regard the security interest as a substance is still to deploy an ontological metaphor, but of a particular type. Entity, substance, and container metaphors are all varieties of ontological metaphor. The point is that there is more at work here than simply reifying or *thingifying* the security interest.

The container schema is specially relevant to the Article 9 problem addressed later in this paper. Events are understood metaphorically as bounded objects and, therefore, as containers. Races, for example, with their beginning and ending points, are bounded in space and time and are viewed as containers. LAKOFF & JOHNSON, *supra* note 1, at 31. Important aspects of priority among creditors are understood metaphorically in terms of a race.

to"¹²⁸ and "continues in" the collateral¹²⁹ when the necessary conditions are met.

On attachment, the security interest becomes "enforceable" *against* the debtor and others.¹³⁰ The *force* image schema motivates¹³¹ this metaphor. The schema derives from recurring patterns in physical experience where force is encountered as the interaction of objects under compulsion.¹³² The schematic elements, including a path of motion along a vector, a source or origin of force, and objects acted upon,¹³³ are mapped onto the security interest to produce the metaphor *the security interest is a force exerted against the debtor and creditors*. Each of the two emergent concepts from the physical domain, *substance* and *force*, focuses on a different dimension of the security interest according to the purpose to be served by the concept.¹³⁴

The metaphoric concept of the security interest as a substance that exerts

128. See, e.g., U.C.C. § 9-203 (1990) (regarding attachment and enforcement of security interests).

129. See, e.g., U.C.C. § 9-306(2) (1990) (providing that "a security interest continues in collateral notwithstanding sale, exchange or other disposition").

130. U.C.C. § 9-203 (1990) (regarding attachment and enforceability of security interests).

131. *Motivation* is used here in the technical sense given it in cognitive theory. To say that the force image schema motivates a metaphor is to say that the metaphor *makes sense* in the context of the schema. The metaphor is not *predicted* by the motivating principle, that is, the extension is not required by the force schema, but the metaphoric extension is understandable in light of it and, thus, is not arbitrary. See LAKOFF, *supra* note 1, at 96.

132. Our daily interactions regularly involve the exertion of force,

either as we act upon other objects, or as we are acted upon by them. Therefore, in our efforts at comprehending our experience, structures of force come to play a central role. Since our experience is held together by forceful activity, our web of meanings is connected by the structures of such activity.

JOHNSON, *supra* note 1, at 42. For an extended discussion of the preconceptual gestalts for force, see *id.* at 42-64. Metaphorical projections of the force schema are considered in *id.* at 62-63.

133. See *id.* at 42-43.

134. Metaphoric choices are always made in service of understanding relative to our purposes and so are constrained by purpose. Our purposes are themselves constrained by experience out of which they arise. The experience in which purposes, and thereby the conceptual choices that give vent to them, are grounded is the product of our physical interactions with the environment as well as our cultural interactions. See LAKOFF & JOHNSON, *supra* note 1, at 117. What emerges from experience is a sense of what is experientially significant.

For example, as noted earlier, the concept of time is partially understood in terms of the metaphor *time is a resource*. The choice of the metaphor is motivated by the fact that, in Western culture, we experience time in that way, so that the metaphor naturally emerges from experience to highlight that aspect of the concept of time that is culturally preeminent. See LAKOFF & JOHNSON, *supra* note 1, at 66-67. For other purposes, it suits our ends to view time according to the metaphor *time is a moving object*, with the future oriented in front of us. See *supra* notes 102-03 and accompanying text.

The point to be taken is that the choices are not objectively mandated, but are a function of experiential grounding and utility. Time is by no means experienced in all cultures as a resource, nor in every culture do people "face the future." See LAKOFF & JOHNSON, *supra* note 1, at 42.

force—that is enforceable against someone—is coherent¹³⁵ with the received concept of the contract obligation.¹³⁶ Agreements, contracts, and obligations are understood metaphorically to be containers: we “enter into” agreements and are “bound by” our obligations, or we may try to “get out” or “back out” of our contracts. (I am here adopting the practice of referring to all three as the metaphor *obligations are containers*.)¹³⁷

135. When metaphors present a single image, they are said to be consistent, whereas multiple metaphors employed to provide layers of meaning by focusing on different aspects of a concept frequently are not. There is nothing surprising in this since concepts from a source domain do not stand in a one-to-one relationship to one another.

Consider, for example, the metaphor *time is a moving object*, which finds expression in a number of internally consistent statements, subcategories of the principal metaphor. Thus, “time flies,” “I am looking forward to this coming weekend,” and “don’t let this opportunity pass you by” are consistent, in that they present the same image of time as an object facing us and proceeding in our direction from the future, which is itself in front of us. See LAKOFF & JOHNSON, *supra* note 1, at 42. But we also conceptualize time as a stationary thing toward which we move, thus the expressions, “as we enter the ‘90s,” “as we near the end of the week,” and “we made it through this year without a hitch.” *Id.* at 43-44.

The metaphor *time is stationary and we pass through it* is not consistent with the metaphor *time is a moving object*, as they present different images. The metaphors are, however, *coherent*. That is, both entail that time passes from a point in front of us to points behind us. The two metaphors cohere in that both contain subcategories of the central metaphor *time goes past us from front to back*, and thereby share a common entailment. *Id.* at 44.

Professor Winter has shown how the metaphoric concepts by which litigation is understood, while not consistent, are coherent. He identifies the following metaphors that structure the concept: litigation is an ordeal; litigation is combat; litigation is a play; litigation is a religious ritual; and litigation is a game.

Apparently inconsistent metaphors, such as these . . . are coherent, and therefore work together, when they each have similar entailments. Each . . . shares entailments with the orientational “standing” metaphor: We stand at religious ceremonies; most of our fighting is upright (as in “stand up and fight like a man”); the notion of ordeal is often expressed through this metaphor (as in “if you can’t stand the heat, get out of the kitchen”); and the only people who always remain seated at a play are the audience.

Winter, *supra* note 3, at 1498-99.

136. As defined by the RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981), a contract is “a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” The Uniform Commercial Code focuses on a different aspect of contract, which it defines as “the total legal obligation which results from the parties’ agreement.” U.C.C. § 1-201(11) (1990). An agreement is “the bargain of the parties in fact.” § 1-201(3). An in-depth exposition of the metaphors that underlie contract is beyond the scope of this Article, but would doubtless prove a fascinating and productive enterprise, particularly in light of what some commentators have described as a shift from classical contract theory. See Richard F. Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193, 198-99 (1982); see also Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy*, 97 HARV. L. REV. 1223 (1984) (proposing and developing a consent theory of contract).

137. See, e.g., U.C.C. § 2-204 cmt. (1990) (“If the parties intend to *enter into a binding agreement*, this subsection recognizes that agreement as valid in law . . .”) (emphasis added). Obligations are also understood metaphorically as physical burdens. See JOHNSON, *supra* note 1, at 35.

Thus, the two metaphors, one of the security interest as an entity that exerts force, the other of the obligation or agreement as a container into which the debtor enters, while presenting two different images, nevertheless present coherent metaphors. Working in concert, they enable a more complete sense of the concepts of the security agreement and security interest as they relate to the debtor.¹³⁸

In general, then, the ontological metaphors that partially structure the conceptual model of the secured transaction consist in several substance and container metaphors. Having noted a few of them, we turn to the central metaphor that structures¹³⁹ the concept of the secured transaction as I believe it is proposed in the statute, namely, to yield the metaphor *the secured transaction is a journey*.

Consider the dimensions of the concept *journey* in the physical domain. A journey consists of a beginning point, a path, a direction, and an ending point.¹⁴⁰ The structure of Article 9 is similarly organized. In the life of a secured transaction, there is a *point of origin* (the creation of the security interest), and a *path* defined by interim, contiguous points (validity) through which "steps" are taken to a *destination* (perfection).¹⁴¹

Each of the component concepts for creation, such as the requirement

138. A variant of the container metaphor has to do with the secured party. The obligation, a container within which the debtor is bound, is itself conceived as contained, that is, as *secured*. WEBSTER'S NEW WORLD DICTIONARY 1214 (3d ed. 1988) defines "secure" as "free from danger, not exposed to damage" and "in safekeeping or custody." This particular case of containment, then, has a beneficent aspect in that it connotes a protective confinement in favor of the secured creditor.

139. See generally *supra* note 107 and accompanying text (discussing structural metaphors).

140. See LAKOFF & JOHNSON, *supra* note 1, at 89-91. The journey model is commonly employed to structure metaphorically a variety of abstract concepts. For instance, the journey model partially structures the concept *argument*, as reflected in a number of expressions used in talking about arguments: *we set out to prove our point, we arrive at a conclusion, or we may go in the wrong direction, argue in circles, go back over a point* or find that fellow arguers are *not following us*. *Id.*

The concept *love* is also understood partly according to the journey model, generating expressions like, "[o]ur marriage is *on the rocks*," "[t]his relationship is a *dead-end street*," and "[w]e've gotten *off the track*." *Id.* at 44-45. For additional examples, see LAKOFF, *supra* note 1, at 439 ("it's time to get on with your life" reflecting the metaphor *life is a journey*); *id.* at 435 ("do it over" disclosing the metaphor *an activity is a journey*).

141. See *supra* notes 6-11 and accompanying text, outlining in conventional terms the steps to creating and perfecting a security interest.

States, such as perfection, are understood through the ontological metaphor *states are substances*, and substances can themselves be understood metaphorically as containers. For instance, to remark, "we're out of trouble now" employs the metaphors *trouble is a substance* and *trouble is a container*. LAKOFF & JOHNSON, *supra* note 1, at 30-32. States, like perfection, may also be a *particular kind of container*, namely, they can be understood as locations (e.g., "he's in a world of trouble"), and can therefore be taken to be destinations, as spatial end-points in a journey. *Cf.* LAKOFF, *supra* note 1, at 275.

that a debtor have rights in the collateral, has an interesting metaphorical heritage that provides the background against which the journey metaphor is set. One of these, the requirement from section 9-203(1)(c) that the secured party give value, is of special relevance to the discussion that follows, and will receive attention here. The term "value," as it is defined in the U.C.C., imports a fundamental concept from contract, the concept of *exchange*.¹⁴²

The law of contract has relentlessly insisted, with some few exceptions, that a promise will be enforced only if the promisee gave something which induced its making, and, in times past, that the promisee either conferred some benefit upon the maker or himself suffered some detriment.¹⁴³ The ordinance that there be an exchange is captured in the consideration doctrine,¹⁴⁴ presumably to avoid the consequences that would follow were the law to compel performance of every promise uttered irrespective of the level of reflection that attended its making.¹⁴⁵

The *source-path-goal* image schema partially characterizes the cognitive

142. This, of course, is standard fare. "[T]he . . . law of contracts is confined to promises the law will enforce. It is therefore concerned primarily with *exchanges* because . . . courts have generally been unwilling to enforce a promise unless the promisee has given the promisor something in return for it." E. ALLEN FARNSWORTH, *CONTRACTS* 4 (1992). This requirement has been tied to our economic structure, the free enterprise system: "Such a system allocates resources largely by direct bilateral exchanges arranged by bargaining between individuals. In these exchanges each gives something to the other and receives in return something from the other." *Id.* at 6.

143. The requirement of a benefit comes from the action in debt which would not lie without a quid pro quo, FARNSWORTH, *supra* note 142, at 14, 20, and the requirement of a detriment from the action of assumpsit. *Id.* at 16, 20. The requirement of consideration in this sense, that is, so far as it was understood to require benefit and detriment, began to disappear around the end of the nineteenth century to be replaced by the bargained-for exchange, or bargain theory of contract. *Id.* at 43. Benefit and detriment, for example, is nowhere mentioned as part of the definition of consideration in the first *Restatement*. See *RESTATEMENT OF CONTRACTS* § 75 (1928).

In the *Restatement (Second)*, "a promise which is bargained for is consideration if, but only if, the promised performance would be consideration." *RESTATEMENT (SECOND) OF CONTRACTS* § 75 (1981). As a result, "[v]irtually anything that anyone would bargain for in exchange for a promise can be consideration for that promise. What matters under the bargain theory is 'the relation of reciprocal conventional inducement, each for the other.'" OLIVER W. HOLMES, *THE COMMON LAW* 293-94 (1881). Nevertheless, there is that about the value requirement of U.C.C. § 9-203(1)(c) (1990), both as the term is defined in U.C.C. § 1-201(44), and as it seems to have been implicitly taken in the arguments over future advance and nonadvance priorities, *see infra* notes 174-77 and accompanying text, that suggests the need for a benefit conferred is not completely dead.

144. "Among the limitations on the enforcement of promises, the most fundamental is the requirement of consideration," without which few promises will be enforced. FARNSWORTH, *supra* note 142, at 41.

145. "No legal system has ever been reckless enough to make all promises enforceable." *Id.* at 12. See also Morris R. Cohen, *The Basis of Contract*, 46 *HARV. L. REV.* 553, 572-73 (1932).

model of the exchange in which we see one party to the exchange as the source of consideration, the recipient party as the goal or destination, and a path traced between them along which the consideration (which, as in the case of the exchange of promises, is understood metaphorically) travels.¹⁴⁶ The concept of the exchange, however, requires more than this. The *source-path-goal* schema, with the special reciprocal adaptation, successfully evokes an image of objects tracing a path between parties, and while this is certainly a dimension of the exchange, alone it does not capture and distinguish the concept. It is the introduction of the *balance schema*¹⁴⁷ that distinguishes the exchange to make it something more than an instance of objects passing back and forth between parties.

The sense of equilibrium¹⁴⁸ that emerges from the *balance* schema

146. The *source-path-goal* schema received brief attention earlier as an example of one of the important image schemata so far identified in cognitive theory. Its structural elements, it will be recalled, consist of a *source* or beginning point, a *goal* or destination point, and a connecting *path* defined by a *direction* toward the goal. See *supra* note 95.

The schema is readily traceable to its origins in the world of spatial experience. From the time we are able to crawl across the nursery floor to reach some object of interest on other side, we find ourselves endlessly moving from one physical point to another. We travel from home to the office, from the family room to the kitchen, from one city, state, or country to the next. From these repeating patterns emerges the *source-path-goal* schema. JOHNSON, *supra* note 1, at 113. The schema is metaphorically mapped to define, for example, the concept of achieving our goals and purposes. In the resulting metaphoric concept, goals and purposes are metaphorically understood as destinations.

The metaphor *purposes are physical goals* is grounded in the path schema and in the metaphor *states are locations*. Progress toward a physical goal from a starting point along a path, the structural elements of the path schema, are mapped onto the experience of making progress toward the accomplishment of abstract goals (e.g., earning a law degree). Where the abstract goal is some state, like "euphoria," the state is understood as a final destination in the form of a physical locus. See *id.* at 113-15.

The correlation of physical destinations is not arbitrary, but is experientially based and systematic. Our goals are frequently to find ourselves in a new physical location, either for its own sake or with the intention of accomplishing some purpose in the new location. For an extended analysis, and an account of the basis for the mapping of structural details, see *id.* at 116-17.

147. The balance schema is ubiquitous and central to the way we think about the world across a broad range of experiences. Its physical basis is self-obvious: "First and foremost, balancing is something we *do*. The baby stands, wobbles, and drops to the floor. It tries again, and again, and again, until a new world opens up—the world of balanced erect posture." *Id.* at 74.

But the balance schema is more than a matter of learning to stand, walk, ride a bicycle, or similar physical experiences that immediately come to mind. *Systemic* balance emerges very early from bodily equilibrium or lack of it: "There is too much acid in the stomach, the hands are too cold, the head is too hot, . . . the mouth is too dry. In these and numerous other ways we learn the meaning of lack of balance . . ." *Id.* at 75. The closely allied preconceptual experience of internal bodily equilibrium likewise contributes meaning to the concept of balance. For a comprehensive discussion of the balance schema, its bodily basis, various senses, and metaphorical mappings, see *id.* at 74-96.

148. Johnson discusses metaphorical elaborations of the balance schema, *id.* at 80, and the interrelationship of its various senses, *id.* at 85. As to the *equilibrium* schema in particular, it results

animates the reciprocal transfers to yield the unique concept of the exchange.¹⁴⁹ The concept is thus a gestalt, in that the dynamic conjunction of the *source-path-goal* and *balance* schemata enables a concept greater than the sum of those component parts. What makes the exchange a concept distinct from a bland (empty of the unique implications of the exchange within contract) mutual transfer is the sense of disequilibrium or asymmetry, which arises where one party transfers something to another, and continues until the transferring party receives something in return.¹⁵⁰

The exchange metaphor finds its way into Article 9 through the definition of the term "value" in section 1-201(44), which does not offer a definition in the usual sense but proclaims the cases in which value is deemed given.¹⁵¹ In the context of the "value" application of the exchange in Article 9, the statutory characterization of the term defines the dimen-

from a "continuous mapping of symmetrical force vectors." *Id.* at 86. Metaphorical mappings to systemic balance, psychological balance, the balance of rational argument, legal/moral balance, and mathematical balance are described and explained as well. *Id.* at 87-96.

149. This explication, of course, does not comport with twentieth century bargain theory of contract which is indifferent to benefits bestowed and detriments suffered, *see supra* note 143, and is, in theory at least, indifferent to the sufficiency of consideration, an indifference reflective of the bargain theory as it is "epitomized in the *Restatement*." FARNSWORTH, *supra* note 142, at 69. Farnsworth also notes that, the bargain theory notwithstanding, "courts have not lost the habit of speaking of an 'adequate' consideration, a 'sufficient' or 'valuable' consideration." *Id.* at 68-69.

150. In *Restatement* terms, there must be a "bargain," an "exchange." RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981). What is exchanged are either mutual promises or a promise and performance. The exchange is, of course, metaphorically understood, conspicuously so in the case of bilateral contracts where a promise is given for "a return promise." *See id.* § 71(1). On the bargain view of the exchange, the requirement of an exchange is not an invitation to inquire as to whether the promisee's return promise produces an economic benefit to the promisor or corresponding economic detriment to the promisee. The only question permitted to be raised under the bargain theory is whether the return promise was bargained for, whether it was, in the language of § 71(2), "sought by the promisor in exchange for his promise."

A different aspect of equilibrium than that embodied in the exchange is captured by the metaphor expressed in the doctrine of mutuality of obligation. The focus is not upon something of worth passing back and forth between parties, but upon a mutuality of restriction resulting from obligations undertaken. Stated simply, under the doctrine of mutuality of obligation, if one party to a contract is not bound by its promise, perhaps because the promise proves to be illusory, then neither is the other party bound by its promise. 1A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 152, at 4 (1963). As Corbin puts it, mutuality of obligation expresses "the idea that each party is *under a legal duty* to the other." *Id.* (emphasis added).

151. U.C.C. § 1-201(44) (1990). As noted earlier, § 9-203(1)(b) requires that value be given as a condition of attachment of the security interest, without which the security interest is enforceable against no one. *See supra* note 10 and accompanying text. The provision does not state that value must be given by the *secured party*. *See* Flechtner, *supra* note 18, at 723-24; Justice, *supra* note 46, at 877. This creates complications where a secured party takes an otherwise unsecured claim by assignment. *See infra* Part IV.

sional “fit” with the exchange model—mutual transfers and an equilibrium of forces between the parties—sufficient to establish an enforceable security interest. The metaphoric model of the exchange legislates to this extent the creation of the relationships unique to the secured transaction. The exchange is thus an element of one of the steps to validity and, ultimately, to perfection, which are components of the central metaphor, *the creation and perfection of a security interest is a journey*.

Of the parties who may compete for a debtor’s property, one will be said to have *priority over*¹⁵² the claims of others to the collateral. Article 9 rules of priority thus add an additional metaphoric layer to the central journey metaphor. In the journey toward a perfected security interest, the object is priority in the distribution of assets.¹⁵³ The object, that is to say, is not only to finish, but to finish *first*. The movement from creation, through validity and perfection, to a position of priority is not merely a journey—it is a *race*.¹⁵⁴ The race is, in fact, a special case of journey, with which it shares the ontological elements (in specialized application) a beginning point (starting line), path (track), and destination (finish line). It is a special case by virtue of certain additional elements: a race is a journey wherein there are winners and losers, with accolades awarded to the party first to complete the journey, the winner of the race.¹⁵⁵

152. This is standard parlance, institutionalized in Article 9 and ubiquitous in the professional literature. See, e.g., 2 GILMORE, *supra* note 19. Section 9-301, for instance, “lists the classes of persons who take priority over an unperfected security interest.” U.C.C. § 9-301 cmt. 1 (1990). Section 9-312, establishing priorities among competing security interests in the same collateral, characterizes the concept of priority according to the same metaphor. U.C.C. § 9-312 (1990). See *infra* note 158 for examples from the text of the provision and the official comments.

153. The elaboration of the journey metaphor to that of the race is unnecessary where the characters involved in the secured transaction consist only of the secured party and the debtor. Once the journey through the steps to creating a valid security interest is completed, the secured creditor may exercise its right to dispose of the collateral in satisfaction of the secured obligation on the debtor’s default. See U.C.C. §§ 9-201, 9-501 (1990). Perfecting the security interest adds nothing to the secured party’s arsenal of rights vis-à-vis the debtor, nor does the failure to perfect diminish those rights. The point is simply to complete the journey to an enforceable security interest as in § 9-203.

154. The metaphor is at times explicit. In § 9-312(5) the drafter refers to the “race of diligence.” U.C.C. § 9-312 cmt. 5, ex. 2. (1990). Even where it is not explicit, the metaphor boils very near the surface in expressions that describe priorities in terms of the race in particular or competitions in general. For instance, priority is a something a creditor “wins,” § 9-312 cmt. 4, and is something for which a party must “qualify,” *id.* at cmt. 7, ex. 5. Compare § 9-313 cmt. 4(a) (security interest in fixtures which is filed first “can defeat a subsequent real estate interest”) with § 9-313 cmt. 4(b) (security interest in fixtures may have priority “as against” other real estate claimants).

155. Such it is that § 9-312, for instance, is frequently described in the literature as a “pure race statute,” on the basis of which, e.g., “the one who wins the ‘race’ to the courthouse to file is superior.” WHITE & SUMMERS, *supra* note 5, at 1037. The notion is embalmed in the aphorism, “First in time,

The journey metaphor is sufficient to define the life of the security interest only so long as the parties involved are limited to the debtor and secured party. On the introduction of other claimants to the collateral, the prospect of competition among them emerges. In the end, one must have priority over the others, and, in light of the journey metaphor, the elaboration to the race metaphor is natural.¹⁵⁶ Where, for example, two secured creditors have competing security interests in the same collateral, the first to have completed the journey, to have taken the necessary steps to arrive at perfection, is prior to the other, both in the sense of finishing ahead of the other and in the sense of earning superior status for its claim to the collateral.¹⁵⁷ The winner of the race is thus said to have *priority over*¹⁵⁸ the other secured party, who, accordingly, is said to have rights *subordinate to*¹⁵⁹ the earlier perfected security interest.

B. *The Metaphoric Concepts Underlying the Unitary and Multiple Views*

The Coogan-Gilmore debate over the nature of the security interest is a debate over the selection of the ontological metaphor to characterize it.

first in right.”

156. That is to say, the race metaphor emerges naturally from commercial lending experience. The choice of the race metaphor is not arbitrary. Awarding priority based on time of perfection or filing naturally evokes the gestalt of the race with which it is perceived to share key ontological elements. There are systematic correlations within the two experiences that motivate the metaphor.

Lakoff and Johnson illustrate the point in their discussion of the experiential basis of the structural metaphor discussed earlier, *argument is war*. See *supra* notes 108-11 and accompanying text. They identify a conversation as having some six experiential dimensions: participants, parts (turns at talking, etc.), stages (beginning, central part, and end), linear sequence, causation (“The finish of one turn at talking is expected to result in the beginning of the next turn.”), and purpose. LAKOFF & JOHNSON, *supra* note 1, at 78. These same dimensions that characterize conversation likewise constitute argument, but a sense of embattlement introduced into the experience transforms the former into the latter. See *id.* at 78-79.

157. This rule is set forth in U.C.C. § 9-312(5) (1990) governing priority among secured creditors with security interests in the same collateral.

158. See, e.g., U.C.C. §§ 9-312(2), (3), (5) (1990); *id.* cmts. 3, 4, 8; § 9-313(4); see also § 9-308 (“A purchaser of chattel paper or an instrument . . . has priority over a security interest in the chattel paper or instrument.”); §9-301 (entitled in part “Persons Who Take Priority Over Unperfected Security Interests”).

Priority is also partly understood through the simple ontological metaphor *priority is an object*, that can be *given*, see, e.g., § 9-312 cmt. 2, *taken*, see, e.g., § 9-309, or *retained*, *id.* cmt. 3.

159. U.C.C. § 9-312(5) (1990) does not use this term, but it is usual to describe the status of a claimant without priority in other contexts. See, e.g., § 9-301(1) (“[a]n unperfected security interest is subordinate to the rights of . . .”), and § 9-313(6) (“[a] security interest in fixtures is subordinate to a construction mortgage . . .”). One might certainly say something like, “security interest A is subordinate to security interest B under § 9-312(5)” without fear of raising an eyebrow.

Both views “thingify” the security interest, that is both treat it metaphorically as an entity, but under Gilmore’s conceptualization *the security interest is an expanding substance* that *attaches* when value is first advanced and *continues* until extinguished by one means or another.¹⁶⁰ The ontological metaphor, *the security interest is an expanding substance*, is coherent¹⁶¹ with the structural metaphor,¹⁶² *the security interest is a journey*. The image of an undifferentiated substance, attaching on the first advance and continuing thereafter but fluctuating in its contours, establishes the beginning and ending points of the *journey* through Article 9. Coogan’s metaphor, *the security interest is an entity created with each advance*, similarly coheres with the journey metaphor, but establishes a series of beginning points (a series of attachments), one for each security interest validated by individual advances.

Both metaphors, then, seek to operate within the journey metaphor. The inconsistent concepts present no normative conflict thus far because their entailments are of no practical consequence where there are no parties to be reckoned aside from the secured party and debtor. Gilmore’s metaphor entails that the ending point of the journey is the initial advance,¹⁶³ whereas Coogan’s metaphor allows for multiple ending points. Where the journey ends (whether with the initial or future advance) is immaterial as to the debtor, who is no more or less liable for future advance obligations under the one view than under the other.

The entailments that flow from each of the two characterizations do have practical consequences where a third-party claimant is implicated. Recalling our earlier illustration of the future advance transaction, the hypothetical unsecured creditor acquired its lien between advances, and the value of the collateral was inadequate to satisfy both the lien and the obligations from all the advances made by the secured creditor. If Gilmore’s individuated but formless substance presents a rather indistinct image, it is sufficiently definite to convey the certain picture of an intervening creditor’s lien compressed to a nullity as the security interest bloats with the debtor’s shriveling equity in the endeavor to satisfy a debt burgeoning from multiple advances.

160. Gilmore describes “one security interest” that “fluctuates in amount.” 2 GILMORE, *supra* note 19, at 936.

161. See *supra* note 135 for an explanation of metaphorical coherence and consistency.

162. Structural metaphors are discussed *supra* notes 106-07 and accompanying text.

163. This assumes, of course, all other requisites for creating and perfecting a security interest have been met. On the requirements, see *supra* notes 6-11 and accompanying text.

Coogan and others seized upon the expanding substance metaphor in arguing for the multiple view.¹⁶⁴ Through elaboration and extension of the metaphor to disclose the consequences of its entailments, the arguments are armed. For instance, both the intervening lienholder and debtor are said to be in need of protection against the security interest:¹⁶⁵ the debtor who would be prevented from “selling [his] equity,”¹⁶⁶ and the lienholder because she would be otherwise “sitting helpless”¹⁶⁷ before it with no hope of satisfying her lien, and so would be “squeezed out”¹⁶⁸ by the security interest. Gilmore’s expanding substance is no longer benign, or even neutral. Now, it is a threat against which the lienholder and debtor should be “protected.” It is also a very powerful threat before which the lienholder is “helpless.”

At Coogan’s hands, Gilmore’s amorphous substance¹⁶⁹ is exposed as a roiling, ominous, and all-consuming mass reminiscent of something from the low-grade horror films of the 1950s and 1960s. By elaborating and extending Gilmore’s undifferentiated substance metaphor, Coogan produces a highly charged image to challenge the unitary view. Against the backdrop

164. Indeed, Gilmore credits Coogan with suggesting the unitary concept in the first place. See 2 GILMORE, *supra* note 19, at 936 n.4 (citing Coogan, *Floating Lien*, *supra* note 19, at 867). Coogan, in turn, seems to accept credit from Gilmore in Coogan, *Federal Tax Lien Act*, *supra* note 41, at 1402.

165. See Peter F. Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 514 (1973).

166. Coogan, *Intangibles*, *supra* note 36, at 1029.

167. Coogan, *Floating Lien*, *supra* note 19, at 868.

168. In an intriguing and ingenious case study of substance metaphors, Lakoff demonstrates how the human emotion *anger* is conceptualized as a substance, a hot liquid, within a container, the human body.

We also know that intense heat produces steam and creates pressure on the container. This yields the metaphorical entailments:

Intense anger produces steam.

-She got *all steamed up*.

-Billy’s just *blowing off steam*.

-I was *fuming*.

Intense anger produces pressure on the container.

-He was *bursting with anger*.

-I could barely *contain* my rage.

-I could barely *keep it in* anymore.

LAKOFF, *supra* note 1, at 385.

169. Actually, the characterization, a single amorphous security interest, is Coogan’s, or at least Coogan’s and Gordon’s. See Coogan & Gordon, *Receivables*, *supra* note 38, at 1549; see also Coogan, *Federal Tax Lien Act*, *supra* note 41, at 1403 (describing the unitary security interest as “a single, balloon type of UCC-protected security interest which expands as more debt is covered by it and contracts as some debt is paid off”).

For other coherent characterizations in the literature, see, for example, Comment, *supra* note 37, at 135 (analogizing the security interest to “one big cloud that mushrooms as further advances are made”), and Justice, *supra* note 46, at 896 (describing “floating debt”).

of the elaborated contained substance metaphor, the lienholder and debtor become captives and victims of the security interest securing future advances.

Coogan's argument for denying priority to the future advance lender also operates coherently within the race metaphor. When value is first advanced to the debtor (assuming all other steps are taken), there exists from that point an enforceable, perfected security interest. The security interest, personified as a competitor, has completed the race to priority, has crossed the finish line. If a creditor subsequently acquires a lien, it is perfectly consistent with our knowledge of races to award priority to the secured party who, after all, was first to finish.

On the other hand, when a future advance is made sometime after the lien is acquired, the secured party appears to have finished the race at that time. However, to award priority to the secured creditor as to the future advance contradicts our knowledge of what happens in races, that is, the epistemic knowledge of the race that accompanies the race metaphor into the target domain of the secured transaction. The secured creditor seems to be completing the race later but finishing first nevertheless.¹⁷⁰ In giving priority to the lien creditor, the multiple view avoids a result that runs counter to our knowledge of races.

In contrast to the satisfying result of the multiple view, the unitary view appears to reach a conclusion at odds with the metaphors that structure the controlling concepts in Article 9. What saves the unitary view from an apparently dysfunctional result is that Gilmore's enriched-estate justification brings the analysis safely within the constraints of the guiding metaphor of the race to render the decision in favor of the secured creditor consistent with epistemic knowledge of competitions. This is accomplished in part through the coherence of the race and exchange metaphors, and in part through the conceptual alignment of the lien creditor with the debtor. We consider each principle in turn.

We have seen how the race metaphor coheres with the contained-

170. Coogan and Gordon ask, "[o]f course, S [secured party] would be *ahead of J* [judgment lien holder] for the [pre-lien advance]; however, would S also *be ahead* as to [post-lien advances] on the ground that it is secured by one amorphous security interest?" Coogan & Gordon, *Receivables*, *supra* note 38, at 1549 (emphasis added). In the context of a different but related priority dispute between secured creditors where both have perfected by filing financing statements, Coogan employs a supplementary metaphor that coheres with that of the race: "[S]ince A's filing had been made [earlier than that of a competing secured party, Y] his [A's] security interest . . . vaulted over the security interest of Y, which had been fully perfected ten days earlier." Coogan, *Floating Lien*, *supra* note 19, at 859 (emphasis added).

substance metaphor. The common entailment is the concept of containment. To conceptualize the collateral and the priority race to be containers is to establish *ontological* correspondences, correspondences between *entities* in the source domain (containers from the physical domain) and target domain (the collateral is a container for the security interest, the race a container for the competitors).¹⁷¹ It is also to establish certain *epistemic* correspondences as well, correspondences, that is, between *knowledge* about the source domain and knowledge about the target concept.

One example of epistemic correspondence has already been noted, namely, the knowledge of what happens to expanding substances in containers in the physical domain and what happens to lienholders and a debtor's equity when a security interest expands with multiple advance obligations.¹⁷² But the race metaphor shares epistemic correspondences with the exchange metaphor as well, so that the two metaphors, although not consistent, are coherent.

First, consider what we know about races. The race is a special kind of journey because it is partially structured by the concept of competition, and has the following ontological elements: a starting line, a finish line, competitors, winners, losers, and a reward or prize for the victor.¹⁷³ An epistemic element of competitions, hence the race, is the conviction that those who compete unfairly are not entitled to win, and those with an advantage over other contestants do not have to compete unfairly. Seriously

171. Consider again the metaphor *anger is a heated substance within a container, the human body*. See *supra* note 168. The ontological correspondences, the correspondences between entities in the defining concept and the defined concept, include: the container (source domain) is the body (target domain); the hot fluid (source) is anger (target); heat in a container (source) is heat in the body (target); agitation of contained fluid (source) is physical agitation (target). LAKOFF, *supra* note 1, at 387. The epistemic correspondences, correspondences of what we know about the source domain with the concept to be defined by the metaphor, include: the effect of fluid heat is heat within the container, internal pressure and agitation within the container (source), and the corresponding effect of anger is body heat, internal pressure within the body, and physiological agitation (target); when a contained fluid is overheated, the container explodes (source), whereas when anger exceeds the limits of the individual to container, she loses control. *Id.*

172. See *supra* note 169 and accompanying text.

173. Much epistemic knowledge is premised upon folk theory arrived at by cultural consensus. For example, in the *anger-is-a-hot-fluid* metaphor, *supra* notes 168 and 171, epistemic knowledge of the way in which contained hot liquids behave correlates to folk theory of the physiological effects of anger. On the common folk theory about these effects, anger yields increased body heat, internal bodily pressure, agitation and distortion of perception, and as anger increases, these physiological effects correspondingly increase. LAKOFF, *supra* note 1, at 381. The folk theory is instantiated in a variety of expressions, like, "he blew his stack" (internal bodily pressure), "cool down" (internal body heat), and "she was blind with rage" (distortion of perception). See *id.* at 383-85.

disadvantaged contestants do not meaningfully compete at all.

That conviction, I believe, is carried to the arena of the priority dispute and corresponds to the balance component of the concept of the exchange to accomplish coherence across metaphors. The concept of fairness is structured in part by the balance image schema.¹⁷⁴ Circumstances are fair when forces are evenly matched, when they are of *equal weight*.¹⁷⁵ The balance schema, I have claimed, is important in imparting the distinctive quality to the mutual transfer of objects or promises to produce the gestalt concept of the exchange.¹⁷⁶ The balance element is the point of commonality, the shared entailment of the concept of fairness as it relates to competitions—here, the race—and as it relates to the doctrinal requirement of consideration in the concept of the exchange and the need for balance.

For Coogan, the security interest that absorbs the debtor's equity to squeeze out the lien creditor, having finished the race to priority later (at the time of the postlien future advance) does not compete fairly. But the corresponding sense of balance entailed by the exchange metaphor offers Gilmore a basis on which to answer that charge within the framework of the same controlling metaphors. The late finish, if there is one, is justified because the future advance enriches the debtor's estate to restore balance at the level of the exchange. Something of value is made available to creditors disadvantaged by the special starting point of the future advance lender.¹⁷⁷ This reinstates the balance, albeit indirectly by derivation from the entailments of the exchange model, that renders the exchange "fair" and seems to fulfill any analogous requirement for fair competition required by the entailments of the race metaphor. It is the coherence of these entailments, shared by the game and exchange metaphors, that quiets the unsettling sense that accompanies an award of priority that otherwise smells of unjust enrichment.

At the level of metaphor, the distributive priority that follows from the

174. See *supra* notes 147-48 and accompanying text for a discussion of the balance image schema.

175. For an in-depth discussion of the various metaphorical senses and extensions of the balance schema, see JOHNSON, *supra* note 1, at 85-96. For an interesting discussion of the concepts of legal and moral balance in particular, and for a critique of the balance structure as it is employed in the special brand of consequentialist reasoning "widely accepted by lawyers, judges, social workers" and others, see *id.* at 90-95.

176. See *supra* text accompanying notes 148-50.

177. Notwithstanding that it has long been out of fashion to evaluate what is exchanged between bargainers in finding contract, see, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981), I believe Gilmore's enriched estate justification, taken together with the definition of the term "value" in U.C.C. § 101(44) (1990), invite an inquiry into the relative values of what has been exchanged in the contract—the security agreement—between the debtor and secured party.

unitary view seems conceptually dysfunctional, because it violates shared expectations of what happens in races. The race metaphor entails that those who finish first prevail, and to award priority to the postlien nonadvance obligation does not comport with that understanding. In the case of future advances, the integrity of that epistemic knowledge seems to be preserved derivatively in the restoration of equilibrium at the point the entailments of the exchange and race metaphors converge. Where a creditor is squeezed out by a security interest burgeoning with nonadvance obligations, equilibrium is not conceptually reinstated to quell the disturbing prospect of a competitor finishing last but prevailing nevertheless.

But neither is the multiple view maximally coherent. The concept of nonadvance obligations amounting to individual races, much like the concept of future advances so understood, stands in satisfying proximity to our epistemic knowledge of the race. That is, it more closely resembles epistemic knowledge of the race in its prototypical sense than does the unitary view, which avoids incoherence only by elaboration to cross-metaphor coherence. But the notion of the race ending with nonadvance obligations controverts the journey metaphor by replacing the value step to a perfected security interest with nonadvances. To treat future nonadvances in the same manner as future advances so far as distributive priorities are concerned also requires that the two concepts be conflated.

As they relate to future nonadvances, parallel exposition of the unitary and multiple views in terms of Experientialist cognitive theory proves only that both the unitary and multiple views are more or less confirmable at the level of metaphoric analysis, although neither yields entirely coherent results. There is nothing surprising in this, because it is only to say that conventional discourse on both sides of the question proceeds along the lines established by its own metaphoric premise, the race to priority. The exercise, in other words, is an exercise in translation and therefore cannot alone resolve the priority issue under consideration.

Bringing to light the metaphors at work does disclose, however, why the propositional arguments are not wholly satisfying and therefore seem inconclusive. The question addressed by the propositional arguments—*does the postlien, future nonadvance obligation or the creditor's lien finish first in the race to priority?*—invites only one answer—*either the nonadvance obligation is first or the creditor's lien is first*. It is the secured party who is prior if the race to priority ends with the creation and perfection of the security interest based on the initial advance. If the race to priority ends when the future nonadvance obligation becomes due, the lien creditor is first.

The answer is tautological because the underlying metaphor of the race can lead nowhere else. The conceptual battle is pitched within the confines of the race metaphor and its entailments, and the metaphor thus creates an expository imperative that locates the parameters of the debate according to its own terms. The results of the future nonadvance priority question addressed in terms of the Coogan-Gilmore debate is irresolute at the level of ordinary discourse, and this is so precisely because discourse cannot proceed beyond the bounds of its underlying metaphor.

What should be clear from the foregoing is that the concepts of the nonadvance obligation and the future advance obligation have been conflated in the discourse on the nature of the security interest. The explanation seems to be that the temporal dimension they share has been elevated to become controlling, such that they are treated as one on that basis alone. Certainly, future advances and nonadvances share their temporal positions in the future of the creation of the original security interest, but their dissimilarities are lost in the bargain.

There is nothing, however, that requires nonadvance obligations to be understood according to the same metaphor by which future advances are understood. On the theory that the race, unitary, and multiple metaphors are wrung dry of expository power in the case of future nonadvances, we might abandon them in thinking about distributive priorities.¹⁷⁸

The metaphor of the unitary security interest is just that—a partially descriptive model constructed out of perceived dimensional correspondences among target and source concepts. It is a metaphoric choice constrained by principles of consistency and coherence, measured with particular reference to the ontological and structural metaphors which by consensus structure Article 9. To state the unitary, or any other, view as a propositional truth, as a concept reflecting some objective state of affairs outside cognitive operations, is not to make it one. Nevertheless, the analytic program under state law has been to decide upon a concept of the security interest (and it seems the unitary conceptualization is prevailing), then to declare the selection as a proposition. The effects of this sort of formalism are obvious so far as deciding the priority status of future nonadvance obligations under state law. It is to foreclose alternate avenues of inquiry into priorities under Article 9 and to inhibit law transformation.

But the propositional treatment quietly works its way into other doctrinal

178. Cf. Donald R. Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 541 (1993); Christopher M.E. Painter, Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, The Worst of Times*, 36 STAN. L. REV. 1045 (1985).

fora as well. In the upcoming section, I suggest that acceptance of an analytic program that begins with the unitary metaphor as a proposition has infected the bankruptcy forum as well.

IV. FUTURE NONADVANCE OBLIGATIONS AS VOIDABLE TRANSFERS UNDER § 547 OF THE BANKRUPTCY CODE

Part III proposed that the metaphors of the journey and the race established the metaphoric parameters of the debate over the nature of the security interest. As they are central to structuring the concepts by which secured transactions are understood, they establish the allowable range of conceptual alternatives for the debate. The race metaphor thus enabled, yet delimited, the discussion of future advance priorities, channeling discourse in the direction of the nature of the security interest as multiple or unitary.¹⁷⁹

Part III also advanced the claims that the debate about the nature of the security interest as unitary or multiple became the conceptual imprimatur for discourse on future *non*advance obligations, and that the unitary metaphor seems to be achieving dominance. The general claim in Part IV is that the debate over the nature of the security interest has likewise been the conceptual beginning and ending point for deliberation on the status of future advance and nonadvance obligations in bankruptcy. The particular claim is that as the unitary view is awarded preeminence, it is being imported to the preference doctrine, there to obfuscate issues relating to avoidance of future nonadvance obligations.

A. Preference Doctrine in General

State law, in its ecumenical indifference to equal treatment of creditors *inter se*, does not condemn a debtor's preferential treatment of one creditor at the expense of another. By contrast, equal treatment of creditors similarly situated is emphatically *bankruptcy* policy.¹⁸⁰ So it is that the Bankruptcy Code, through § 547(b), will undo many transfers by a debtor to its

179. Certainly, the unitary and multiple metaphors are competing conceptualizations, but neither departs radically from the guidelines set by the journey and race metaphors. Both emerge naturally within that conceptual framework and both are coherent with it.

180. "[T]he preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor." H.R. REP. NO. 595, 95th Cong., 1st Sess. 177-78 (1978), *reprinted* in 1978 U.S.C.C.A.N. 5963, 6138. *See, e.g.*, 11 U.S.C. § 726(b) (1988) (providing for pro rata distribution of the estate within classes of claimants).

favorites on the eve of bankruptcy.¹⁸¹

The requirements for avoidance¹⁸² are a transfer of an interest of the debtor in property to or for the benefit of a creditor, made on account of an antecedent debt (a debt owed by the debtor before the offending transfer was made), and made within ninety days of the filing of the petition¹⁸³ while the debtor was insolvent.¹⁸⁴ Finally, the transfer must have improved the transferee's position as creditor: because of the transfer, the transferee will capture more estate property with which to reduce its claim than it would under the distributive provisions of the Bankruptcy Code alone.¹⁸⁵

181. The seminal article discussing the history and development of bankruptcy preference doctrine is Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713 (1985). For a consideration of preference law proceeding from the history of its philosophical premises, see John C. McCoid, II, *Bankruptcy, Preferences, and Efficiency: An Expression of Doubt*, 67 VA. L. REV. 249 (1981); Robert Weisberg, *Commercial Reality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3 (1986). See also Thomas H. Jackson & Anthony T. Kronman, *Voidable Preferences and the Protection of the Expectation Interest*, 60 MINN. L. REV. 971 (1976).

182. 11 U.S.C. § 547(b)(1)-(5) (1988).

183. Where the creditor is an insider, the period is extended from ninety days to one year. 11 U.S.C. § 547(b)(4)(B) (1988).

184. Under § 547(f), a debtor is presumed insolvent for ninety days preceding bankruptcy. 11 U.S.C. § 547(f) (1988). Where the transfer is to an insider, it is susceptible to avoidance for one year, but the trustee loses the presumption and so is put to her proof on the insolvency element. 11 U.S.C. § 547(g) (1988).

185. H.R. REP. NO. 595, 95th Cong., 1st Sess. 372 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6328. The transfer must have a preferential effect on the estate. See Countryman, *supra* note 181, at 733; Charles J. Young, *Preference Under the Bankruptcy Reform Act of 1978*, 54 AM. BANKR. L.J. 221, 224 (1980). The determination is made according to the following analysis. First, a Chapter 7 liquidation is hypothesized. This entails estimating the value of the debtor's assets as of the time the petition is filed. *In re Rimmer Corp.*, 80 B.R. 337, 339 (Bankr. E.D. Pa. 1987). See also *In re Tenna Corp.*, 801 F.2d 819, 821-24 (6th Cir. 1984). Next, the relevant distributive provision in straight bankruptcy (i.e., § 726) is consulted to calculate what the transferee would have received in Chapter 7 exclusive of the transfer. 11 U.S.C. § 547(b)(5)(A)-(C) (1988). See, e.g., *Braniff Airways, Inc. v. Exxon Co.*, 814 F.2d 1030, 1034 (5th Cir. 1987). The Bankruptcy Code does not state the certainty required of the calculation, but presumably something less than absolute certainty will do since the object of the calculation is only to decide whether the transferee received more in satisfaction of its claim than it would have received otherwise. See *Craig v. Minden Exch. Bank & Trust Co.* (*In re Craig*), 92 B.R. 394, 398 (Bankr. D. Neb. 1988). Finally, the result of the calculation is compared with the sum of the value of the property transferred and the amount the creditor would receive in the hypothetical straight bankruptcy. See *In re Lewis W. Shurtleff, Inc.*, 778 F.2d 1416, 1421 (9th Cir. 1985). By definition, where the transferee is an unsecured creditor and would receive anything short of 100% distribution in Chapter 7, its position is improved by a prepetition transfer of property. See *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458, 465 (6th Cir. 1991).

A corollary statement of the preferential effect requirement sometimes finds expression in cases involving transferees with fully secured or oversecured claims. Transfers to such creditors are sometimes said to have no preferential effect because they do not diminish the bankruptcy estate. This is because

The following illustration exemplifies the prototypical case for avoidance. C is an unsecured creditor with a \$100,000 claim against D. Within ninety days of the date D files for relief in Chapter 7, D makes a \$25,000 payment to C on account of the debt, reducing C's claim to \$75,000. What remains of the bankruptcy estate for distribution in the Chapter 7 case will permit a distribution to unsecured creditors of ten cents on the dollar. D's trustee now endeavors to recover the \$25,000 payment from C for the estate.

Under the stingiest of definitions, and certainly under the generous one found in the Bankruptcy Code,¹⁸⁶ the payment to C is a transfer of property.¹⁸⁷ Supposing the payment was made within the ninety-day preference period, it remains only to decide whether the payment was preferential in its effect.¹⁸⁸ The bankruptcy estate hypothesized is adequate to satisfy the claims of D's creditors at a level of ten per cent, so that \$10,000 would have been distributed to C on its allowed claim of \$100,000. If the \$25,000 payment is not retrieved, C will collect ten percent on the \$75,000 balance of its claim to garner a total of \$32,500. C is therefore better off for the payment and the transfer is avoidable by D's trustee.

The case of the security transfer, as distinguished from the absolute transfer in the form of payment in the example, brings us conceptually nearer to preference doctrine in relation to future nonadvance obligations. Security transfers, like absolute transfers, are subject to challenge and

payments to fully secured creditors are attended by a corresponding release of the debtor's equity in the collateral, which is thereby substituted for the property transferred. *See* Countryman, *supra* note 181, at 739-40 (tracing the diminution-of-the-estate principle to its pre-Bankruptcy Code origins, and finding it a generally correct but less "felicitous interpretation" of § 547(b)(5) than the preferential effect analysis called for by the express language of the provision).

186. Section 101(58) defines transfer to mean "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property." 11 U.S.C. § 101(58) (1988). "Put simply, 'transfer' includes . . . any event that results in eliminating or diluting the debtor's interest in property. The form and circumstances of the event are irrelevant, as are the nature and size of the interest that is transferred." 1 DAVID EPSTEIN ET AL., *BANKRUPTCY, PRACTITIONER TREATISE SERIES* 512 (1992).

187. Property is not defined in the Bankruptcy Code, but would appear to include any interest that might usefully be distributed to creditors in bankruptcy in satisfaction of their claims. *See, e.g.,* Danning v. Bozek, 836 F.2d 1214, 1217 (9th Cir.), *cert. denied*, 486 U.S. 1056 (1988); *see also*, 11 U.S.C. § 541(a)(1) (1988) (defining property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case").

188. The debtor is presumed insolvent for the ninety days preceding bankruptcy. *See supra* note 184.

avoidance as preferential.¹⁸⁹ A creditor to whom the debtor transfers an interest in property as security for a formerly unsecured debt within the preference period will be made to disgorge the interest transferred, not in the sense of disgorging a cash payment,¹⁹⁰ but in the sense of being forced to resume its former unsecured position, there to take its pro rata distribution along side other unsecured claimants.¹⁹¹ Where the transfer for security is avoided, the conveyance is undone, and the property enters the estate free of the lien.¹⁹²

Suppose that C in the illustration above had taken a security interest in D's equipment as collateral for the \$100,000 obligation, but that the equipment is valued at something more than the debt, say \$150,000. Again, D makes the \$25,000 payment on its account within the ninety-day preference period. Supposing all other details of the example to be as originally stated, C is no better off for the transfer, that is, the payment has no preferential effect. C's claim would be fully satisfied out of the collateral in any event,¹⁹³ and the \$25,000 does not increase C's recovery.

189. As indicated *supra* note 186, the term transfer is broadly defined in the Bankruptcy Code, sufficiently so to reach voluntary transfers for security, *see, e.g.*, *Vogel v. Russell Transfer, Inc.*, 852 F.2d 797, 798 (4th Cir. 1988), *Rubin Bros. Footwear, Inc. v. Chemical Bank (In re Rubin Bros. Footwear, Inc.)*, 73 B.R. 346, 355 (S.D.N.Y. 1987), and to reach involuntary security transfers as well, *see, e.g.*, *Decatur Contracting v. Belin, Belin, & Naddeo*, 898 F.2d 339 (3d Cir. 1990). Indeed, most preference litigation is over security transfers, the fixing of consensual and involuntary liens. STEPHEN E. SNYDER & LAWRENCE PONOROFF, *COMMERCIAL BANKRUPTCY LITIGATION* 10-41 (1989).

190. Section 547 says no more than that the trustee can avoid preferential transfers. 11 U.S.C. § 547 (1988). When a conveyance is undone, of course, the property must find its way to some quarter. Section 550(a) authorizes the trustee to retrieve the property from the transferee, and § 541(a)(3) includes such property in the estate. Where specific retrieval from the transferee is impossible or inequitable, the trustee may recover instead the monetary equivalent of the conveyance. 11 U.S.C. § 550(a) (1988). *See General Indus. v. Shea (In re General Indus.)*, 79 B.R. 124, 134-35 (Bankr. D. Mass. 1987).

191. The claim survives, but as an unsecured claim. 11 U.S.C. § 502(h) (1988).

192. The Bankruptcy Code is not a model of clarity on this point, thereby inviting alternate theoretical explanations of the effect of avoidance on liens. *See EPSTEIN ET AL., supra* note 186, at 203-07. Under any theoretical rationale, the practical consequence of avoidance is to rid property of the estate of the lien. *See SNYDER & PONOROFF, supra* note 189, at 10-4, 10-164.1.

193. The Bankruptcy Code provides an elaborate schedule of distribution in Chapter 7 for all sorts of claims, *see, e.g.*, 11 U.S.C. §§ 507, 726 (1988), but secured claims are not to be found among those listed. This may be because the "priority" of a secured creditor as to its collateral is a matter so obvious as to require no treatment, as one treatise suggests. *See EPSTEIN ET AL., supra* note 186, at 300. Or it may simply be that secured creditors are unconsciously taken to be conceptually nearer to owners with the debtor (after the fashion of tenants in common) rather than claimants, such that *priority* does not accurately express their relationship to the collateral. *Cf.* 11 U.S.C. § 506(a) (1988) (describing a secured creditor's "interest" in property of the estate); 11 U.S.C. § 725 (1988). In any event, the right of a secured creditor to the collateral or its proceeds, all of the proceeds if the creditor is undersecured

This state of affairs inspires the axiom, payments to a fully secured or oversecured creditor are by hypothesis not preferential.¹⁹⁴

B. *Principal Metaphors That Define Preference Doctrine*

Before assessing the avoidability of future nonadvance obligations, a brief explication of the metaphoric concepts in preference doctrine is in order. The organizing metaphoric principle is the ontological metaphor of the container. To be the subject of avoidance, transfers must occur *within* the preference period, as bounded by a date ninety days before filing and the time of filing the bankruptcy petition.¹⁹⁵ The preference period is itself, therefore, a container for events that occur within or without it.¹⁹⁶

The relevant event is a transfer of a debtor's property, which is metaphorically cast for this purpose according to the simple ontological metaphor, *the transfer is an entity*.¹⁹⁷ The transfer must occur while the debtor is insolvent. States, like insolvency and perfection, are understood

or fully but not oversecured, is beyond argument. See GEORGE M. TREISTER ET AL., FUNDAMENTALS OF BANKRUPTCY LAW 289 (2d ed. 1988).

194. See, e.g., *Mason & Dixon Lines, Inc. v. St. Johnsbury Trucking Co.* (*In re Mason & Dixon Lines, Inc.*), 65 B.R. 973, 977 (Bankr. M.D.N.C. 1986). I challenge this axiom as it relates to future nonadvance obligations. See *infra* note 203 and accompanying text.

195. There is as well a temporal component. Section 547(b)(2), for instance, requires that the debt on account of which the transfer sought to be avoided must have come ahead of the transfer of property. 11 U.S.C. § 547(b)(2) (1988). In subsection (b)(4) the transfer must have been made *within* ninety days *before* the filing of the petition (I am ignoring here the extended period for insiders). 11 U.S.C. § 547(b)(4) (1988). The time-frame of the preference period thus begins at a point defined by subsection (4) and ends with commencement of the bankruptcy case.

196. The concepts structuring preference doctrine are thus coherent with the journey metaphor that defines the life of the Article 9 security interest. See *supra* Part III.A. In some cases, preference doctrine seems to incorporate the journey metaphor directly, as in the exceptions from avoidance created for certain transfers in 11 U.S.C. § 547(c) (1988). For instance, § 547(c)(1) excepts from the trustee's avoiding power transfers both intended and in fact contemporaneous with—occurring at the same point as—new value extended to the debtor. Section 547(c)(2) excepts transfers made “*in the ordinary course*” of the debtor's business or financial affairs, while (c)(4) saves transfers if “*after such transfer*, such creditor gave new value to . . . the debtor” (emphasis added). Section 547(c)(5), the complex provision governing floating liens in inventory, similarly relies on the journey metaphor understood as a container, the bounds of which are established by beginning and ending points. 11 U.S.C. § 547 (1988).

197. The transfer is further defined by the source-path-goal image schema, by which something of value passes from one party to the next. This schema is discussed *supra* note 95. A more concrete instantiation of the schema involves the physical transfer of something tangible, money or goods. The security transfer, except in the case of the pledge (the possessory security interest of Article 9), entails no palpable transfer and must be comprehended metaphorically by reference to the well-defined dimensions of the physical transfer.

metaphorically as substances,¹⁹⁸ and the debtor must therefore occupy that state within the container of the preference period.

The debt is conceived of as an entity so that it may be fixed at a point coincident with, antecedent to, or subsequent to the offending transfer.¹⁹⁹ The temporal relationship is thus figured according to a linear schema. This conceptualization enables the debt to be fixed at some point along a metaphorical path. This adds an additional metaphoric layer to that of the preference period as container, further defining the transfer as a relevant event along the same linear path as the debt.

It is the entailments of these metaphors that count. Once it is concluded that a debt falls along the temporal path at a point ahead of the transfer, and once it is concluded the transfer is within the metaphoric container representing the preference period, the transfer is subject to the forces within that container, namely, avoidance.

The metaphoric concepts evident in preference doctrine are sometimes consistent but always coherent with the metaphors in Article 9. The notion of the preference period as container is consistent with the principle metaphor in Article 9, *the secured transaction is a journey*.²⁰⁰ The concept of the debt, transfer, and insolvency period as occupying various positions along a metaphoric line presents a different and simpler image than the journey metaphor, but is coherent with it. In the upcoming discussion of nonadvance obligations, it will become apparent that the consistency and coherence of the metaphors in the preference doctrine and Article 9 are significant because preference law directly incorporates the journey and race metaphors from Article 9.

C. *The Multiple and Unitary Metaphors in Preference Doctrine: Yet Another Forum for the Coogan-Gilmore Debate*

A comparison of two kinds of cases involving nonadvance obligations lends support to the claims made in the introduction to this Part. The first case, call it Type 1, is the sort from earlier discussion of state law priorities and future nonadvance obligations. Briefly, it involves nonadvance obligations, such as interest, commitment, and attorney's fees, liquidated at

198. See *supra* note 141 for an account of states as substances and substances as containers.

199. Debts and obligations, as earlier indicated, are understood metaphorically as containers and constraints that bind those owing them. See *supra* note 137 and accompanying text. Development of the concept beyond the simple entity metaphor is unnecessary in applying preference doctrine, however.

200. Journeys, races, and other events are understood metaphorically as containers. See *supra* note 127 and accompanying text.

some time future of an initial extension of credit and preceded by a security agreement and properly filed financing statement.²⁰¹ As before, it is assumed that the value of the collateral exceeds the face amount of the original debt that initially animated the secured transaction.

To these particulars is added a single complicating feature, the supposition that the nonadvance obligations are liquidated in amount within the ninety days before the debtor petitions for bankruptcy.²⁰² The question is thus whether a preference occurs as interest, commitment, and attorney's fees accumulate within the preference period.

Certainly, assuming the value of the receivables exceeds the face amount of the debt, there will be at some point a transfer of property, because a secured party will lay claim to so much of the collateral as is required to satisfy the nonadvance obligations. With each dollar the secured creditor spends on attorney's fees, with each month that passes during which interest and commitment fees accrue, more money is wrung from the debtor's equity. But for the conveyance of equity to meet the nonadvance obligations, the secured party would be left with an unsecured claim for its debtor's promise to pay them. Unless there is a one hundred percent distribution in bankruptcy, the secured party is obviously better off—it is able to satisfy its claim for nonadvance debt at one hundred cents on the dollar out of collateral.²⁰³ In bankruptcy, the leeching of a debtor's equity, coinciding precisely with each dollar of attorney's fees paid by the secured party, not only divests the debtor of equity, it reduces the value of an asset

201. See *supra* text following note 51 for the hypothetical.

202. For present purposes, it is unnecessary to hypothesize an unsecured creditor who acquires a lien between the creation and perfection of the original security interest and the liquidation of future nonadvance obligations.

203. The implication of the statement may at first seem heretical—transfers to oversecured creditors can be preferential. Of course, this contradicts the well-established axiom to the contrary: transfers to oversecured creditors are not preferential because they leave the transferee no better off than had the transfer not been made. See *In re EDC, Inc.*, 930 F.2d 1275, 1282 (7th Cir. 1991); *In re Hagen*, 922 F.2d 742, 745-46 (11th Cir. 1991); *Braniff Airways, Inc. v. Exxon Co.*, 814 F.2d 1030, 1033-40 (5th Cir. 1987). On reflection, the statement is not so startling after all. The axiom begins with the presumption of a fully secured creditor. Payments to such creditors simply amount to substituting one kind of property—cash—for another—the *pro tanto* liberation of equity from the lien.

But payments to a fully secured creditor where the security interest is voidable are functionally payments to an unsecured creditor, and the payments themselves may likewise be avoided. See, e.g., *In re Rubin Bros. Footwear, Inc.*, 73 B.R. 346, 354-55 (S.D.N.Y. 1987). In considering whether future nonadvance obligations are preferential transfers of equity to a creditor, to begin with the proposition that the creditor is fully secured begs the question. The creditor seeking to satisfy future nonadvance obligations out of a debtor's equity may hold a secured claim voidable under § 547, and may not be an oversecured creditor as to those obligations.

otherwise available for distribution to unsecured creditors. The liquidation (the fixing of the exact amount of the nonadvance debt, and thereby the fixing of the precise levels of equity needed to satisfy it) of future nonadvance obligations within ninety days of bankruptcy suggests avoidability.

Again, to invoke the avoidance power, § 547 requires that a transfer occur *within the preference period*, on account of an *antecedent* debt, and that it leave the secured creditor better off than otherwise. The first two requirements are simply expressions of the container and time-as-linear-path metaphors that structure preference doctrine. The third is largely useless as an instrument for judging whether a preference exists or not in the context of future nonadvance obligations. It is instead a condition that will be proclaimed or denied depending completely upon the decisions reached concerning the first two requirements.

Deciding whether a preference results under the circumstances outlined in the illustration is all a matter of the way the nonadvance obligation—the *debt*—and the leeching of equity—the *transfer*—are understood. The conceptual choices are not infinite, as might be supposed. The container metaphors that define preference doctrine, and the subsidiary metaphors that define debt and transfer, closely circumscribe the available conceptual alternatives. Specifically, the concept of the future nonadvance obligation must come to be understood as the “antecedent debt,” and the erosion of equity must come to be understood as the “transfer of an interest in property” of § 547. Conceiving of the nonadvance obligation as debt presents no special difficulty, although deciding when future nonadvance debt arises is highly problematic. This difficulty, coupled with the problems of conceptualizing the loss of equity to nonadvance obligations as a transfer of property and deciding when such a transfer occurs, make further analysis in terms of these metaphors nearly impossible.

For example, it is possible to conceive of nonadvance debt as arising spontaneously and in perfect correspondence with expenditures for attorney’s fees and the regular addition of commitment fees and interest. If the consequent relocation of equity to meet that nonadvance debt with security is taken as occurring on the liquidation of those obligations, the debt and transfer spring into existence at once, and the debt is not antecedent to the transfer. Every dollar of debt is instantaneously met with a dollar of transfer.

On the other hand, it seems equally plausible to think of the nonadvance

debt as arising in the security agreement²⁰⁴ with the debtor's promises, the time the debtor becomes contractually bound to pay nonadvance obligations in the future. That the obligation was then contingent on the passage of time, in the case of interest and commitment fees, and on the secured creditor's actually incurring attorney's fees would seem to present no obstacle to this view.²⁰⁵ On this conceptualization, so long as we sustain the assumption that equity in the collateral was conveyed as each dollar of debt was identified, the nonadvance debt is antecedent thereto, and the transfer preferential.

The analysis is confounded, however. On the same principle that commissions the view of the nonadvance debt as originating in the security agreement, it might as easily be said that subsequent withdrawal of equity to meet nonadvance debt simply completes a conveyance already made in the security agreement, albeit a conveyance then contingent on actual expenditures. On this reasoning, the contingent transfer and the contingent debt are once more synchronous and the transfer beyond the reach of § 547.

As to security transfers of personalty, bankruptcy law offers incomplete guidance in deciding either when a debt, nonadvance obligation or otherwise, arises or when a transfer of equity to meet a nonadvance obligation is made. The Bankruptcy Code does state that a security transfer

204. This very issue has been raised in cases where a trustee or debtor in possession has sought to avoid as preferential cash payments within the preference period on account of interest to unsecured or undersecured creditors. The discussion focuses on whether the debt represented by interest arises with the signing of the note and was therefore antecedent to cash payments, or whether the debt arises only as interest comes due.

One line of cases reasons that interest is simply rent for the use of principal, and that like rental payments for the use of property or debt for utility services, no obligation to pay arises until the debtor has had use of the funds advanced for the interest period. Accordingly, either debt for interest is not antecedent to interest payments and so not preferential, the payments on account of interest are substantially contemporaneous with the debt and within the § 547(c)(1) exception, or payments on account of interest are made in the ordinary course of business and so within the exception of § 547(c)(2). See, e.g., *In re Smith-Douglass, Inc.*, 842 F.2d 729, 730 (4th Cir. 1988); *In re Jeffrey Bigelow Design Group, Inc.*, 127 B.R. 580, 585 (D. Md. 1991), *aff'd*, 956 F.2d 479 (4th Cir. 1992); *In re Iowa Svcs. Co., Inc.*, 695 F.2d 1109, 1111 (8th Cir. 1982).

A contrary line of authority holds that the obligation to pay interest arises when the loan is made. See, e.g., *In re Western World Funding, Inc.*, 54 B.R. 470, 480 (Bankr. D. Nev. 1985); *In re Winn*, 127 B.R. 697, 701 (Bankr. N.D. Fla. 1991). Cf. *In re CHG Int'l, Inc.*, 897 F.2d 1479, 1482 (9th Cir. 1990).

If nothing else, the disagreement over the question is testimony to the difficulty associated with the journey metaphor in deciding when a preference has occurred.

205. In the Bankruptcy Code "debt" is defined in terms of a "claim," 11 U.S.C. § 101(12) (1988), and a claim is a right to payment whether matured or contingent, liquidated or not, 11 U.S.C. § 101(5)(A) (1988).

is deemed made when it is effective between the transferor and transferee, provided it is perfected within ten days after that time.²⁰⁶ Otherwise, the transfer is deemed made at the time of perfection.²⁰⁷

But when a security transfer is perfected is a question left to state law to answer. Section 547(e)(1)(B) provides that a transfer is perfected from the point a creditor cannot acquire a lien superior to the transferee's interest, a point that must be determined by reference to U.C.C. section 9-301(4). Analysis is thereby driven once more to flounder in the quagmire of the Coogan-Gilmore debate.

Consider now a second kind of nonadvance preference case, Type 2, represented in the following illustration. Bank lends \$50,000 to Debtor on a secured basis. The agreement provides that the collateral, valued at \$100,000, will secure all obligations of Debtor to Bank, not just the primary indebtedness which animated the transaction, but including such indebtedness of Debtor as Bank might thereafter acquire by assignment or otherwise. Trade Creditor has a \$30,000 unsecured claim against Debtor and, having little faith in its prospects for successful collection, sells its claim to Bank at a substantial discount for, say, \$10,000.²⁰⁸ Within ninety days of the assignment Debtor petitions for bankruptcy relief, whereupon Bank files a proof of claim maintaining that the assigned claim, unsecured in the hands of Trade Creditor, has become secured by dint of the all-indebtedness clause in the security agreement. Bank accordingly insists that it receive the first \$75,000 of proceeds from the sale of the collateral. The trustee argues that the inflation of the secured obligation from the assignment, naturally accompanied by a transfer of Debtor's equity, is a

206. 11 U.S.C. § 547(e)(2)(A) (1988).

207. 11 U.S.C. § 547(e)(2)(B) (1988). The Bankruptcy Code also instructs us that, for preference purposes, no transfer can occur until a debtor has rights in the property conveyed. Thus, where a debtor conveys in a security agreement an interest in personalty it has yet to acquire, the conveyance does not take place as of the security agreement, but on the debtor's acquisition of the collateral. 11 U.S.C. § 547(e)(3) (1988).

208. In the alternative, consider that Debtor has reduced its primary obligation to Bank to a trifling balance. The security agreement contains an all-indebtedness clause providing that the collateral secures all debts owed by Debtor to Bank, together with debts owed any assignee of Bank. Trade Creditor, with a huge, unsecured claim against Debtor, buys out Bank's secured claim by satisfying the negligible balance and takes the security interest by assignment. Debtor defaults on its debt to Trade Creditor, which claims secured status both as to the balance originally owed Bank and the theretofore unsecured debt.

In a thorough and excellent treatment of assignments that convert unsecured to secured debt, one commentator describes the first kind of assignment as creating an inflatable lien, and the second type as creating a negotiable lien. *See generally* Flechtner, *supra* note 18. For an earlier treatment of assignments that convert unsecured obligations to secured debt, *see* Shanor, *supra* note 51.

preferential transfer and avoidable.

The secured status of the principle debt owed Bank, the \$50,000 loan, is not open to doubt. As to the \$25,000 claim Bank acquired by assignment, two questions present themselves for necessary resolution, necessary since without answering them the ontological element of the transfer cannot be crammed within or safely excluded from the container of the preference period.

One is whether the security transfer took place at the time Debtor created the security interest in favor of Bank and therefore occurred outside the preference period, or whether the transfer took place at the time the claim was assigned and therefore transpired within the preference period. The other question is whether the debt secured arose out of the assignment clause in the security agreement with Bank, or whether it arose when Debtor became obligated to Trade Creditor. If the former, the time of transfer of equity to secure the assigned claim and the time of the debt are one. In that case, the debt is not antecedent to the transfer and no preference results. If the latter, the debt antedates the transfer, which is therefore preferential and avoided by Debtor's trustee.

The conceptual difficulties in the case of assignments are, in other words, nearly identical to those raised by the Type 1 case. This similarity is hardly remarkable given what does or does not fit within the preference period depends once more on section 9-301(4), in the presence of which the analysis is saluted with the Coogan-Gilmore debate. Such it is that future nonadvance obligations push the controlling metaphors of the journey and the race to their expository limits.

What is somewhat remarkable is that while Type 2 cases (assignments) have been the subject of both cases and commentary, the possibility that Type 1 cases might be avoidable as preferences seems to have escaped attention entirely. Considering that Type 1 cases have the same erosive effect on the bankruptcy estate, how can it be that they have eluded the preference challenge?

The obvious answer may be that § 506(b) precludes any such argument. It provides that where the value of the collateral exceeds the amount of the allowed claim (i.e., the creditor is oversecured), interest, fees, costs, and charges provided for in the security agreement are annexed to the secured claim, and they are added until the debtor's equity is exhausted.²⁰⁹ But this answer presumes the nonadvance obligations are unavoidably secured to

209. 11 U.S.C. § 506(b) (1988).

begin with. Moreover, the fees, costs, and the like of which § 506(b) speaks seem to be the very same future nonadvance obligations under discussion. If that section precludes § 547(b), then Congress has created an unstated exception to the preference rule outside those enumerated in § 547(c).²¹⁰

If nothing else, some interesting questions about the relationship of the two provisions present themselves. For instance, does § 506(b) apply first to preempt § 547(b) as to all such charges, fees, and costs, or are they secured under § 506(b) but open to scrutiny as possible preferences? If those charges are reviewable under § 547, would preference doctrine eviscerate § 506(b)?

In partial answer to the last question raised, application of preference law to § 506(b) fees and the like would certainly circumscribe that provision, but the provision might otherwise operate in a number of possible ways. First, § 506(b) has in mind postpetition interest, fees, costs, and charges. Immunity from preference doctrine might therefore begin and end with the filing of the petition.²¹¹ Nonadvance obligations provided for in the security agreement liquidated to certainty within ninety days before the bankruptcy case would be open to challenge as preferential. Some would fall before the challenge where the elements of § 547(b) are met and no exception in § 547(c) is found to apply.²¹²

The object here, however, is not necessarily to advocate avoidance of nonadvance obligations nor to urge any particular interpretation of § 506(b), although a normative case can be made for both. It is to call attention to what appears to be an asymmetry in the treatment of

210. The exceptions are contained in 11 U.S.C. § 547(6)(1)-(5) (1988).

211. There is some policy justification for this position, namely, that postpetition nonadvance obligations have a special claim to certain payment because of the effects of the bankruptcy petition and stay. Such costs might therefore be thought of as occasioned by the bankruptcy and particularly deserving. Cf. 11 U.S.C. § 362(d) (1988) (requiring termination, annulment, or modification of the stay for lack of adequate protection where impairment of the secured claim is attributable to the stay itself). See *In re Alyucan Interstate Corp.*, 12 B.R. 803 (Bankr. D. Utah 1981).

212. Others would not. Consider interest accruing within the preference period. Interest might be thought of as rent for funds advanced with no obligation to pay it until the debtor has actually had use of the funds for the interest period. Each dollar of equity might thus be regarded as transferred as each dollar of interest accrues, that is, as the debtor enjoys a dollar's worth of use of the funds advanced. If so, the debt for interest is not antecedent to the transfer, and no preference occurs.

Of course, this line of analysis simply directs attention back to the journey metaphor and requires renewed consideration of the questions: when does the interest obligation arise, and when is the equity in the collateral conveyed? Whether the debtor received something of value for the equity transferred would seem the more fruitful inquiry. Cf. Flechtner, *supra* note 18, 731-32.

nonadvance obligations: when they take the form of an assignment, nonadvance obligations have been attacked as preferential; when they take the form of costs, fees, or interest, they have not. The arguments raised here concerning possible interpretive limitations on § 506(b) may or may not be convincing, but they are not untenable and, above all, they are by no means so subtle as to be generally illusive. Doubtless, there are many other arguments that might be raised besides. In short, § 506(b) does not in itself readily explain away the asymmetrical treatment given Type 1 and Type 2 cases.

The analytic themes of the present treatment suggest one explanation. In working out the relative priority of future nonadvance obligations under state law, the conceptual treatment given future advances, proceeding from the race metaphor as implemented mainly through the unitary view, spread to future nonadvances. The conflation of the concepts of the future advance and nonadvance in the literature and cases create a conceptual monopoly in favor of the unitary view.²¹³ When future nonadvances are understood according to the unitary view, avoidance under § 547(b) is conceptually unavailable.

Conflating the concepts, thus allowing them to be ruled collectively by the metaphor of the unitary security interest, has two drawbacks. First, it is evident that the same doctrinal impasse that plagues analysis under state law complicates preference doctrine as it relates to nonadvance obligations, even in Type 2 cases where the possibility of avoidance has at least been raised. Against the background of the race metaphor under state law, discourse necessarily deteriorates into a set of metaphysical conundrums that force analysis of the nature of the security interest as either unitary or multiple.²¹⁴ The unitary view, wrenched from its uncertain moorings in state law future advance priorities, provides inconclusive responses to these questions about nonadvance priorities. It does no better in the context of preference doctrine.

Second, conflation of future advances and nonadvances eclipses differences between them, differences we might wish to take account of according to the set of conditions with which we are confronted. The application of the unitary view to future nonadvances is not arbitrary. Future advances and future nonadvance obligations share in common the

213. At a minimum, the treatment to date creates a conceptual monopoly in favor of treating the whole issue as about the nature of the security interest as motivated by the race metaphor.

214. For example, when does a transfer occur, when does a debt arise, and so on.

dimension of futurity and might for some purposes be usefully compared.²¹⁵ Nevertheless, in highlighting shared dimensions, distinctions are lost in the bargain, distinctions we otherwise might wish to preserve for emphasis under other conditions.

The most significant distinction for preference law may be that, in the case of future advances, while a debtor's equity is drained from the estate as advances are made, advance value is substituted in its place. Nonadvance obligations drain equity (i.e., take property), but substitute nothing therefore. Reconceptualizing the nonadvance obligation, that is, disentangling it from the concept of the future advance to highlight the exchange dimension which the two do not share, both suggests and enables different treatment of the two under § 547. None of this is to assert a single explanation of the apparent asymmetry in preference law as conclusive. The disagreement and indeterminacy surrounding nonadvance obligations and the susceptibility of § 506(b) to varying constructions are, however, provocative.

Preference law is animated by a policy of preventing last minute improvements of position at the expense of the bankruptcy estate, at the expense, that is, of unsecured creditors. With the probable exception of interest, in the case of nonadvances, of course, there is no substitution of property for that transferred by the debtor. The estate is simply depleted. When analysis is reduced to a debate over the true nature of the security interest as unitary or multiple, the substitution principle is for the most part lost from view, or at least not underscored. The conceptual monopoly can be dissolved only on recognizing that any statement about the nature of the security interest is a metaphor.

V. CONCLUDING REMARKS

I would like the reader to leave this essay with the following points in mind. Experientialism teaches that our concepts and what we "know" are relative to our purposes and our conceptual system, a system that is mainly metaphoric. These insights invite doctrinal critique uninhibited by reverence for legal doctrine as propositional, and free of discredited notions about transcendent concepts and knowledge. To say that legal rules and doctrine are metaphorical constructs, however, is by no means to imply they are somehow less legitimate than we might otherwise have supposed them to

215. Future nonadvances and future advances both may be understood as events antedating execution of a security agreement and the initial extension of credit to the debtor.

be. It is to say only that their measure is not an objectively verifiable set of formal propositions, but the degree to which they advance our purposes.

At the same time it suggests legal doctrine is relative to human purpose and imaginative rationality. Experientialism does not entail that we resign ourselves to a view of the law as wildly, inevitably indeterminate. Our conceptual system is grounded in common experience and constrained by its own systematicity. In this way, the Experientialist program enables critical attention to a specific aspect of legal doctrine within the context of a metaphoric system of concepts established by a consensus,²¹⁶ for example, the experiential consensus of the commercial community on the metaphoric framework memorialized in Article 9.

It is possible, in other words, to critique individual rules within an existing doctrinal context understood as a system of metaphoric concepts, and to offer transformative solutions without calling for deconstruction of the system itself. This is an important contribution of the Experientialist program to legal discourse—it is the prospect of acknowledging legal doctrine to be imaginative, relative, and purposeful, without being driven inescapably to the skeptical stance that legal doctrine is hopelessly relative to individual values. In short, we can be skeptical without becoming skeptics.

216. Tushnet has argued that judges can do no more than interpret community values. MARK V. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 144 (1988). It would seem that, under the Experientialist program, we might readily concede this point without concluding that the decisionmaking process is wholly value-laden and illegitimate. The cognitive activities of judges are constrained (again, in the somewhat weaker Experientialist sense of the term) by experience (i.e., in a broad sense—physiologically and culturally). It seems that while it is not possible for the judiciary to disentangle itself from its human conceptual systems, neither would it be desirable for it to do so. See generally Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. L. REV. 919, 969-70 (1991) (arguing that the judiciary is an appropriate repository of community decisionmaking power).