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CRITICAL INTERVENTIONS: TOWARD AN EXPANSIVE EQUALITY APPROACH TO THE DOCTRINE OF GOOD FAITH IN CONTRACT LAW

Emily M.S. Houh†

This Article argues that courts should use the doctrine of good faith in contract law to prohibit improper considerations of race in contract formation and performance, and should recognize good faith as a device for eliminating racial subordination that can function beyond the scope of conventional civil rights discourse. Although civil rights laws provide important remedies to victims of discrimination, the elimination of racial subordination cannot remain the exclusive domain of civil rights law. Rather, other substantive areas of law can and should incorporate expansive equality principles to achieve that end. For example, this Article demonstrates how the implied obligation of good faith in contract law, applied in the at-will employment context, can employ expansive equality principles to provide alternate remedies to at-will employees who may not be able to obtain civil rights remedies because of the onerous burdens they must satisfy in order to prevail on their civil rights claims. Although courts have used the good faith doctrine largely to achieve economically efficient outcomes, this Article further argues that courts need not limit the doctrine's use in that way. By screening the doctrine of good faith through the lenses of critical race and law and market economy theories, this Article argues that using the doctrine of good faith to prohibit improper considerations of race in contracting is consistent not only with the equitable principles embodied by the doctrine, but also with the contractual goals of protecting parties' bargains, wealth formation, and the facilitation of exchange transactions.

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This Article interrogates a controversial issue: should contractual claims for breach of the implied obligation of good faith and fair dealing in at-will employment contracts be available to plaintiffs if the breach is based on allegedly improper racial prejudice? The varied

1 Although the scope of this Article is limited to theorizing a definition of good faith that would preclude the improper consideration of race in the context of the contractual employment relationship, its thesis may be applied more widely to improper consideration
and inconsistent judicial responses to this question have spawned several articles. This Article’s response focuses on how the contractual doctrine of good faith is used in at-will employment cases. Specifically, the Article incorporates a critical race critique of the ways in which the availability of conventional, statutory civil rights remedies have, in many jurisdictions, precluded at-will employees from asserting contractual good faith claims against their former employers whose conduct was racially motivated. The Article concludes that the use of racial prejudice in the contracting process should provide a good faith cause of action for at-will employees. This conclusion is reached by synthesizing law and market economy theory and critical race theory, and applying the product of that synthesis to several such at-will and good faith cases.

The first problem addressed in this Article is the way in which the current interpretation of the doctrine of good faith is used to preclude suit in many valid contexts. For example, an employer might terminate a competent, Black, female, at-will employee based on racist assumptions or evaluations of her performance, because the employer has failed to provide her with adequate mentoring and access to institutional information relative to her White and/or male co-workers. This action clearly violates the plain meaning of the term “good faith.” Courts nevertheless are split over whether an employer’s discrimination provides the at-will employee with a common law cause of action for breach of the implied covenant of good faith if the employee may pursue civil rights remedies by suing under state or federal antidiscrimination statutes.

The refusal to allow such a contractual claim is justified by the law and economics approach to good faith, which this Article argues has subsumed the broader good faith approach known as the “excluder analysis.” The excluder analysis approach, conceptualized by Robert

in the contracting process of, for example, national origin, ethnicity, gender, sexual orientation, age, and disability.

2 See, e.g., Steven J. Burton, Racial Discrimination in Contract Performance: Patterson and a State Law Alternative, 25 HARV. C.R.-C.L. L. REV. 431 (1990) (arguing that Patterson v. McLean Credit Union, 491 U.S. 164 (1989), which held that 42 U.S.C. § 1981 (which then prohibited the consideration of race in the making and enforcement of contracts) did not reach the performance of contracts, was wrongly decided, and advocating the use of state contract law to address racial discrimination in contract performance); Neil G. Williams, Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process, 62 GEO. WASH. L. REV. 183, 184 (1994) (arguing that “contract law’s prohibition of racial discrimination in the formation, performance, enforcement, or termination of a contract would be perfectly consistent with its natural, orderly evolution in [the twentieth century]”).

3 See infra Parts IV.B-V.

4 See infra Part I.
Summers and adopted by the *Restatement (Second) of Contracts,* defines good faith conduct as the opposite of bad faith conduct in the process of contract formation. Thus, for example, because courts define the withholding of relevant information in the contracting process as bad faith, a contracting party must disclose all such information in order to satisfy the implied obligation of good faith. Refusing to act in good faith because of racism, however, is not defined as bad faith per se. Rather, the bad act itself must be purely contractual in nature (e.g., a party withholds necessary information because of his or her racism). Racism in contracting is thus viewed as a mere bad motive, rather than as a form of contractual bad faith itself.

The Article addresses this problem by suggesting an alteration of the doctrine of good faith based on a law and market economy approach, rather than a law and economics or excluder approach. The law and market economy approach challenges the law and economics assumption that individuals can weigh the costs and benefits of actions in an objective manner, unimpacted by cultural influences. Under law and market economy theory, individuals' cultural biases (such as racism or sexism) affect how they define, interpret, and weigh the costs and benefits of their actions. This theory reveals that the excluder approach to good faith, as it has been appropriated by the law and economics movement, makes an untenable distinction between general cultural biases on the one hand, and acts specifically related to contract formation with the attendant benefits and obligations that derive therefrom on the other.

The second and related problem addressed in this Article is that the excluder analysis approach leads courts to abandon victims of ra-

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6 See *Restatement (Second) of Contracts* § 205 cmt. a (1981); see also infra Part I.A.2 (discussing the excluder analysis approach to good faith and its subsequent adoption by the *Restatement (Second) of Contracts*).

7 See Summers, Good Faith, supra note 5, at 196 ("[G]ood faith . . . is best understood as an 'excluder'—it is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith." (footnote omitted)).

8 See id. at 203.

9 See infra Parts 1, IV.

10 For a discussion of law and market economy theory, see infra Part II. Robin Paul Malloy developed the conceptual framework of law and market economy theory. See ROBIN PAUL MALLOY, LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS (2000).

cist contracting to conventional civil rights laws. The procedural difficulties inherent in civil rights law, however, often leave the at-will employee who has been subjected to racism in the contractual process without a remedy. Hence, the excluder analysis approach to good faith combines with the procedural barriers in civil rights law to preclude many valid claims. The Article addresses this second problem by way of a critical race critique that demonstrates the inappropriateness of abandoning at-will employees to the remedies of civil rights law. This critique in essence states that conventional civil rights law, which may provide redress for the most egregious racist offenses in the workplace, not only does not provide such redress for, but also has legitimized, less onerous but more pervasive forms of racism in the workplace.

On the basis of the forgoing critiques, this Article proposes the addition of another formulation of the doctrine of good faith, one that explicitly comports with substantive and expansive notions of equality. The application of this formulation would provide wrongly terminated at-will employees a contractual basis for relief based on the implied obligation of good faith in cases in which civil rights remedies are out of reach.

In order to demonstrate the need for a reformulation of the doctrine of good faith, Part I.A of this Article provides a basic primer on

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12 See infra note 211 and accompanying text; see also infra Part III.A (discussing critical legal and critical race studies challenges to the notion that the law is or can be applied objectively).

13 See infra Part III.B.


My conception of “equality,” a term used throughout this Article, might be analogized to Iris Marion Young’s conception of justice. Iris Marion Young, Justice and the Politics of Difference (1990). In this influential work, Young critiques modern, liberal, distributive theories of justice as reductionist in their “tendency to reduce political subjects to a unity and to value commonness or sameness over specificity and difference,” id. at 3, and argues instead that “[o]ppression and domination ... should be the primary terms for conceptualizing injustice,” id. at 9. Young further asserts:

[The distributive paradigm] tends to focus thinking about social justice on the allocation of material goods such as things, resources, income, and wealth, or on the distribution of social positions, especially jobs. This focus tends to ignore the social structure and institutional context that often help determine distributive patterns. Of particular importance ... are issues of decision-making power and procedures, division of labor, and culture.

Id. at 15. Responding to those identified problems, Young defines injustice as being comprised of the systemic, social conditions of “oppression, the institutional constraint on self-development, and domination, the institutional constraint on self-determination.” Id. at 37 (emphasis added).

15 See infra Part V.
the contractually based implied covenant of good faith and fair dealing and the scholarly controversy surrounding the articulation and formulation of a workable good faith standard. Using case law, Part I.B demonstrates that, despite the controversy and the concededly amorphous state of the law surrounding the good faith standard, the courts’ formulations are by and large based on an economic analysis of the doctrine of good faith and contract law. This case law analysis begins to critique the current economic formulations of the good faith standard and, in particular, the way in which those economic formulations leave no room for consideration of how the ideology of racial subordination may corrupt the contracting process and cause subsequent harm to non-breaching parties.

Part II of this Article extends the critique of the economic formulation of the doctrine of good faith by explaining and applying Professor Robin Paul Malloy’s law and market economy theory, in particular because Malloy’s “reinterpretation” of law and economics is effected on economic terms. Focusing further on the semiotic nature of Malloy’s law and market economy theory, this Article becomes a necessary screen, in addition to the screen of law and economics, through which to analyze contractual good faith claims and cases.

Part III adds another theoretical screen to the critique and analysis by setting forth the foundational concepts of critical race theory that guide the descriptive and normative aspects of this project. Part III.A focuses on two key concepts. First, it examines the perpetrator-victim critique of conventional antidiscrimination discourse, as articulated by critical legal scholar Alan David Freeman and critical race scholar Charles R. Lawrence III. This critique states that civil rights law legitimatized everyday forms of unconscious and subconscious racism through its procedural mechanisms, which are wrongly and almost singularly concerned with the intent and perspective of the alleged perpetrators of discrimination. Part III.A also discusses Kimberlé Crenshaw’s critique of traditional civil rights discourse as

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16 See Malloy, supra note 10, at 1–22 (describing the methodology of law and market economy theory and contrasting it with traditional law and economics scholarship).

17 With respect to the word “discrimination,” which this Article tries to avoid in setting out the normative aspects of this project, Catharine MacKinnon has stated in the context of her critique of formal equality:

Fundamentally, the law has often failed to call the problem of discrimination by a real name—say, white supremacy or male dominance. It has instead used more neutral terms like “racism” or “racial classifications” or “race,” or “sexism” or “sex classifications” or “sex,” terms that fail to specify who is doing what to whom. As a result, while many conditions of actual disadvantage are obscured, situations in which the affected and agentic groups appear reversed can easily be made to look like discrimination. Abstractions (are you treated the same or differently?) may be inverted far more readily than substance (are you victimized by white supremacy or male dominance or both?).
embodying a restrictive view of the goal of antidiscrimination law that seeks to prevent discrete and egregious acts of race-based wrongdoing, rather than eliminate the pervasive ideological and material conditions of racial subordination. Crenshaw further proposes that legal decision makers recognize and apply a more expansive view of antidiscriminatory goals, a view which would be concerned primarily with the elimination of the ideological and material components of racial subordination and White supremacy.

By presenting a general critical race critique of law and economics, Part III.B sets the stage for this Article's critique of the economic approach to the doctrine of good faith and, using Crenshaw's phraseology, its proposal of an "expansive equality" approach to good faith. Part III.B also argues that Malloy's law and market economy theory plays a crucial role in developing that critique, because it directly confronts law and economics theory in a manner that also recognizes the complex and multiplistic realities of market actors, whose actions are dictated by their individual identities as well as by their membership in broader communities.

Part IV further synthesizes critical race theory and law and market economy theory to formulate the "expansive equality" approach to the doctrine of good faith. It does so by analyzing a specific body of good faith cases in the at-will employment context, because that limited body of law best demonstrates the inadequacy of civil rights remedies for victims of racial discrimination in the workplace. Part IV's analysis of that body of law illustrates how the contractual obligation of good faith may be used to provide redress in cases in which antidiscrimination law precludes civil rights redress. More theoretically and importantly, the case law analysis demonstrates why the doctrine of good faith and contract law should provide redress for victims of racial subordination. In analyzing the cases from a fused critical race and law and market economy perspective, Part IV also argues that expansive and substantive equality and Malloy's market theory justify a reconceptualization of good faith, one that recognizes that a benefit flowing from every contractual relationship is freedom from racial subordination through the contracting process.

In arriving at this reconception, Part IV.A reviews the erosion of the at-will employment doctrine, which permits an employer or employee to terminate his or her employment relationship at any time

MacKinnon, Sex Equality, supra note 14, at 21. Although this Article continues to use terms such as "racism" and "sexism," MacKinnon's concerns with the use of those "neutral" terms are well noted. This Article's use of those terms suggests that "racism" connotes continuing practices of white supremacy and racial subordination and that "sexism" connotes continuing practices of male dominance and sexual subordination in almost all aspects of American life and culture.
for no reason, after proper notice. This erosion, initiated primarily to protect employees from unjust termination, has emerged through the judicial and legislative creation of several exceptions to the at-will doctrine, one of which is the good faith exception.

Part IV.B discusses how, notwithstanding the exceptions to the doctrine of at-will employment, courts have failed to render a considered and consistent treatment of cases in which at-will employees have attempted to bring both contractual and tortious good faith claims based on facts that also allegedly give rise to statutory discrimination claims. Part IV.B critiques the courts' conclusions from a critical race perspective, arguing that they are the result of an unwarranted over-reliance on conventional civil rights law to remedy currently cognizable forms of racial discrimination.

A review of the case law begins in Part IV.B.1, which discusses the majority and minority positions on the "alternate remedies doctrine," under which state common law claims for breach of good faith based on allegedly discriminatory conduct are precluded by statutory antidiscrimination schemes. This section argues that the minority position, which rejects the alternate remedies doctrine, is the better position. Part IV.B.2 focuses further on cases in which courts have taken the minority position. In those cases, at-will plaintiffs successfully brought discrimination claims and tort claims for breach of good faith or wrongful discharge. Part IV.B.2 argues that those cases should be analogized to cases in which plaintiffs attempt to bring state common law claims for breach of the contractual implied obligation of good faith, and that such contractual claims should be permitted, despite existing case law to the contrary. Part IV.B.3 examines cases in which the courts have rejected contractual good faith claims in the at-will context because of the availability of statutory antidiscrimination remedies. This section offers a critical race and law and market economy critique of the courts' holdings in those cases, and argues for a fusion of the public policy and good faith exceptions to the at-will employment doctrine.

Part V puts this expansive-equality good-faith exception into play. It argues that an expansive equality approach to the doctrine of contractual good faith should enable contractual good faith claims notwithstanding the availability of civil rights remedies based on the same factual allegations. Part V describes how such good faith claims might be brought and analyzed in real life cases by discussing and analogizing Schuster v. Derocili, a recent case in which the Delaware Supreme Court sustained the plaintiff's contractual good faith claim, which was based on sexually harassing conduct in the workplace, despite and be-

18 See 775 A.2d 1029 (Del. 2001).
cause of the limited availability of statutory civil rights remedies for such sexual subordination. Part V argues that the court's analysis in the Schuster decision is grounded in a profound understanding of the mechanisms and conditions of male domination, and that it should be analogized to race cases. Because the Schuster court's analysis actualizes this Article's proposed expansive equality approach to the doctrine of contractual good faith, Part V argues that it is the model by which courts should analyze and adjudicate contractual good faith claims rooted in allegations that might also give rise to antidiscrimination claims.

I

THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. A Primer: The Standards

The implied obligation of good faith and fair dealing has been adopted by the Restatement (Second) of Contracts is implied into every contract governed by the Uniform Commercial Code, and in most jurisdictions is implied into every contract at common law. Therefore, it is the ideal vehicle through which to introduce and incorporate the goals of "expansive equality" into contract law. This is so because, although the concept of good faith is relatively easy to grasp, the actual standard by which good faith or its absence is discerned can be frustratingly elusive. A sophisticated and lively discussion of what constitutes good faith, whether among students or scholars, reflects not only how the meaning of good faith might fluctuate with the times and the context of the transaction, but also how the meaning of the common law invariably shifts as the courts reconstitute and reinter-

19 Although the implied obligation of good faith is often referred to as the obligation of good faith and fair dealing, this Article will subsequently refer to the implied obligation simply as that of good faith. Regarding the term "good faith and fair dealing," the distinguished Professor E. Allan Farnsworth, currently the Reporter for the Restatement (Second) of Contracts, has stated: "'Good faith' has also been used in other connections. It has traditionally been used to set the standard of honesty for good faith purchase, rather than for performance. Coupling it with the term fair dealing may help to make it more descriptive of performance." E. ALLAN FARNSWORTH, CONTRACTS § 7.17, at 504 n.3 (3d ed. 1999).

20 RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").


pret the law.\textsuperscript{23} Even classroom discussions about good faith during the first year of law school highlight the general tension in the law between equity and justice on the one hand, and some amount of pragmatic certainty delineated by legal rules on the other.

Many scholars, with different goals in mind, have attempted to formulate a workable good faith standard. For example, various scholars have proposed a standard that gives contracting parties a measure of predictability that enables them to behave accordingly, and which permits courts and juries to make principled rather than intuitive judgments about good faith conduct.\textsuperscript{24} However, two approaches continue to guide ongoing efforts toward formulating a workable standard for the doctrine of good faith: Robert Summers's "excluder analysis" and Steven Burton's "forgone opportunities" approach.\textsuperscript{25}

1. The "Forgone Opportunities" Approach

The "forgone opportunities" approach, first theorized by Burton, is essentially an economic analysis of the doctrine of good faith. The analysis begins with an economic inquiry into the cost perspective on contractual breach. Burton suggests that, from an economic perspective, bad faith breach is analytically similar to simple breach by failure to perform an express promise, in that both involve a party's attempt to recapture opportunities forgone in the contracting process (in the form of resources committed at the time of contracting to particular uses in the future).\textsuperscript{26} Further, one of Burton's basic premises is that, because contracts often involve some "discretion in performance" on the part of the contracting parties, a "weaker" party at the mercy of this discretion in performance might require some protection against a "stronger" party.\textsuperscript{27} The duty of good faith performance supplies this

\textsuperscript{23} As Justice Holmes wrote, the law "will become entirely consistent only when it ceases to grow." O.W. Holmes, Jr., The Common Law 36 (Boston, Little, Brown, & Co. 1881).

\textsuperscript{24} See, e.g., Burton, supra note 22, at 378–94 (proposing the "forgone opportunities" approach to good faith); Diamond & Foss, supra note 22, at 600–24 (proposing two categorical standards for assessing good faith claims: commercial unreasonableness and dishonesty).

\textsuperscript{25} Legal scholars and commentators continue to theorize about the most desirable and useable articulation of the good faith standard. Indeed, more than one hundred law review and bar journal articles have been written about the implied duty of good faith in the past twenty years alone. Many of those articles, however, focus on good faith in particularized contexts, such as insurance, contracting, and labor. For purposes of this Article, I focus on Burton's and Summers's approaches, because other formulations of the duty of good faith may be subsumed within them.

\textsuperscript{26} See Burton, supra note 22, at 375–78.

\textsuperscript{27} See id. at 380–84. This discretion arises, for example, if the decision regarding certain terms of performance is delayed and decisionmaking authority is assigned to one of
protection, and therefore its application in a given set of circumstances depends on the legitimacy of the exercise of that discretion.\textsuperscript{28}

Burton's analysis also criticizes the "reasonable contemplation" method of distinguishing legitimate from illegitimate uses of discretion.\textsuperscript{29} According to the reasonable contemplation approach, the duty of good faith performance permits parties to exercise their discretion "for any purpose . . . reasonably within the contemplation of the parties."\textsuperscript{30} Therefore, bad faith conduct includes any exercise of discretion beyond the range of the parties' reasonable contemplation. Burton criticizes this approach as too reliant on "an amorphous totality of the circumstances at the time of formation,"\textsuperscript{31} and disapproves of the open-ended and far-reaching factual inquiry it potentially requires to discern the parties' intentions and reasonable expectations.\textsuperscript{32}

Burton thus formulates his forgone opportunities approach in order to "make[ ] it possible to identify with greater particularity the relevant expectations and motives that have been held to constitute bad faith."\textsuperscript{33} The forgone opportunities approach assumes that during the contract formation process, contracting parties forgo opportunities to enter into other agreements.\textsuperscript{34} Burton describes bad faith conduct as the exercise of contractual discretion on the part of one party in an attempt to "recapture" those opportunities forgone during contract formation, because parties to the resulting contract should have known that the contract precluded the subsequent recapture of those opportunities.\textsuperscript{35} Burton argues that the application of this forgone opportunities approach is desirable because it enables courts to employ a less amorphous and more factually particularized inquiry in their assessment of whether a party has breached the implied obligation of good faith in a given case.\textsuperscript{36}

2. The "Excluder Analysis" Approach

Summers rendered one of the most important critiques of Burton's forgone opportunities approach in 1982, and in so doing, built

\footnotesize{the parties, or if terms in the contract are unclear, ambiguous, or simply omitted. \textit{Id.} at 380.}
\footnotesize{\textsuperscript{28} See id. at 382-83.}
\footnotesize{\textsuperscript{29} Id. at 387.}
\footnotesize{\textsuperscript{30} Id. at 385-86 (footnotes omitted).}
\footnotesize{\textsuperscript{31} Id. at 387.}
\footnotesize{\textsuperscript{32} Id.}
\footnotesize{\textsuperscript{33} See id.}
\footnotesize{\textsuperscript{34} See id. at 388 ("[E]ach party must forgo some future opportunity upon formation and thus restrain its future freedom in some way.").}
\footnotesize{\textsuperscript{35} See id. at 388-89.}
\footnotesize{\textsuperscript{36} Id. at 390-92; see supra text accompanying note 32.}
upon his earlier influential work on the doctrine of good faith. Central to Summers’s theory of good faith, first articulated in 1968, is the notion that good faith is defined as the negative corollary of bad faith. Accordingly, good faith performance cannot be reduced to a certain and specific set of appropriate and acceptable behaviors; rather, good faith derives its meaning by “ruling out radically heterogeneous forms of bad faith.”

Based on this general normative principle, Summers critiques Burton’s forgone opportunities approach to good faith, arguing that good faith should not and cannot be defined in purely economic terms. Summers further posits that good faith can be described only through the exclusion of contextually recognizable forms of bad faith conduct in the performance of a given contract. He promotes, in deliberate and direct opposition to Burton, a more open-ended approach to good faith “in the nature of a principle or maxim,” as opposed to a “rule.” Nonetheless, in his 1968 article, Summers also acknowledges the need for some delimiting categorization of bad faith conduct, and formulates an inclusive but nonexhaustive list of eight such categories.

Summers’s excluder approach to the doctrine of good faith received explicit approval in the Restatement (Second) of Contracts.

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37 See Summers, General Duty, supra note 5, at 830–34. Summers’s 1982 critique of the forgone opportunities approach expanded upon his earlier work on good faith, in which he first developed the excluder analysis. See Summers, Good Faith, supra note 5.

38 See Summers, Good Faith, supra note 5, at 200–01.

39 Id. at 204.

40 See Summers, General Duty, supra note 5, at 826–27, 830–34. Summers’s critique of Burton’s economic approach to good faith succinctly summarizes certain aspects of a more general critique of law and economics. For example, Summers critiques the forgone opportunities approach as positively or descriptively “ahistoric,” amoral in the sense that it disregards the “moral” component of contractual obligations, and overly speculative in its purported economic reasoning. See id. at 827.

41 See id. at 818–21.

42 See id. at 821 (describing the excluder conceptualization of good faith as encapsulated in section 205 of the Restatement (Second) of Contracts; see also Restatement (Second) of Contracts § 205 cmt. a (1981) (“The phrase ‘good faith’ is used in a variety of contexts, and its meaning varies somewhat with the context. . . . [I]t excludes a variety of types of conduct characterized as involving ‘bad faith’ . . . .”)).

43 See Summers, Good Faith, supra note 5, at 203. The eight categories of bad faith (and their good faith opposites) are: concealment of defects in goods sold (full disclosure of material facts); willful failure to perform in full when there has been substantial performance (substantial performance without known material deviation from specifications); coercive abuse of bargaining power to raise contract price (refraining from such abuse); intentional frustration of another party’s ability to perform contractual obligations (cooperative action); conscious failure to mitigate damages (mitigation of damages); arbitrary and capricious exercise of power to terminate a contract (reasonable action); overreaching interpretation of contract terms (fair and reasonable interpretation); and harassment to obtain repeated assurances of performance (acceptance of adequate assurances). Id.

44 Although the Restatement adopted the excluder approach to good faith, the Uniform Commercial Code did not. See Summers, General Duty, supra note 5, at 824–25.
Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. 45

The comments to section 205 also appear to adopt Summers's articulation of the primary rationales for the doctrine of good faith: "justice and . . . justice according to law." 46 The Restatement (Second) states:

The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness. 47

Despite Summers's emphasis on justice, reflected in the Restatement's language concerning "community standards of decency, fairness or reasonableness," this Article argues that Summers's excluder analysis approach has been employed in practice primarily to bring about economic efficiency. 49 Although this Article does not argue

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46 Summers, General Duty, supra note 5, at 826 (quoting Summers, Good Faith, supra note 5, at 198). In fact, Summers notes that although the Restatement (Second) did not adopt his specific formulation, "the overlap between the [Restatement's] language . . . and my own formulation is great." Id.
47 Restatement (Second) of Contracts § 205 cmt. a (1981) (emphasis added).
48 Id.
49 Economic efficiency is not necessarily inconsistent with justice. For example, in a famous article, Guido Calabresi and A. Douglas Melamed refute the notion that justice concerns are merely residual in the economic analysis calculus, arguing that "many entitlements that properly are described as based on justice in our society can easily be explained in terms either of broad distributional preferences like equality or of efficiency or of both." Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1105 (1972); see also Richard A. Posner, Economic Analysis of Law § 4.13 (5th ed. Aspen Publishers 1998) (providing an economic justification of quasi-contractual restitutionary recovery for benefits conferred to preserve life, health, or property).
that efficiency of transactional exchange should not be a goal of contract law, it contends that, in some cases, Summers’s call for the primacy of justice should be meaningfully revived. This “call” is different from Summers’s simply in that it posits that good faith should encompass a specific conception of justice modeled on substantive equality and Iris Marion Young’s oppression/domination model of injustice. Before moving to a discussion of this Article’s proposed model of good faith in the at-will employment context, however, Part I.B discusses how the excluder analysis approach has been used to effect an economic model of the doctrine of good faith.

B. The Dominance of the Economic Model

Although the forgone opportunities and excluder analysis approaches are philosophically and methodologically distinct, the application of each in substance reflects an economic analysis of the doctrine of good faith. Because of the impact and importance of market analysis and economic analysis on the law generally, and because the conclusions and proposals set forth in subsequent sections of this Article critique the entrenchment of economic analysis of the law from a critical race and law and market economy perspective, it is necessary to set forth some basic principles of law and economics as a foundation for further arguments about the two oppositional approaches to the formulation of a good faith standard.

1. Law and Economics

Richard Posner’s Economic Analysis of Law has significantly influenced the development of law and economics scholarship. Building upon the foundational work of scholars such as Ronald Coase and Guido Calabresi, Posner’s seminal text laid the groundwork for the

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50 See supra note 14 and accompanying text.
52 See, e.g., R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960) (discussing what has come to be known as the “Coase theorem,” which states that if transaction costs are minimal, private bargaining will lead to an efficient allocation of resources, regardless of how the law assigns rights).
developing discourse\textsuperscript{54} of law and economics\textsuperscript{55} over the past thirty years. In Economic Analysis of Law, Posner demonstrates the primacy of efficiency, or the "allocation of resources in which value is maximized,"\textsuperscript{56} in the law.\textsuperscript{57} Significantly, in the book's introductory materials, Posner carefully defines and differentiates between two models of efficiency, one based on a concept of Pareto-superiority and the other on the Kaldor-Hicks construction of efficiency as wealth maximization.\textsuperscript{58} The Pareto-superior model describes an efficient transaction or reallocation of resources as "one that makes at least one person better off and no one worse off."\textsuperscript{59} In contrast, the more elastic Kaldor-Hicks model is not concerned with whether or not a reallocation of resources will make certain individuals worse off, but rather with whether or not society's aggregate utility has been maximized. [A] reallocation of resources is efficient if those who gain from it obtain enough to fully compensate those who lose from it.\textsuperscript{60} Posner adopts the Kaldor-Hicks conception of efficiency, which he also describes as "wealth maximization."\textsuperscript{61}

Using this notion of wealth maximization as a foundation for his theory of law and economics, Posner goes on to describe that theory as having both positive and normative aspects.\textsuperscript{62} In the positivist sense, Posner's analysis can be used to describe many of the legal results and rules underlying our common law. That is, the common law reaches efficient outcomes.\textsuperscript{63} In the normative sense, Posner asserts that legal decision makers should prefer legal rules that promote the

\textsuperscript{54} This Article uses the word "discourse" deliberately to imply that law and economics constitutes a specific system of representation by which legal meaning and knowledge are produced and reproduced. Moreover, this Article assumes that the reproduction of knowledge through the discursive practice of law and economics by legal scholars, teachers, lawyers, and judges is directly correlated to how power is configured, reconfigured, held, and circulated in society at large. See Stuart Hall, The Work of Representation, in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 13, 41–51 (Stuart Hall ed., 1997) (discussing discourse and its relationship to knowledge, truth, and power in society).

\textsuperscript{55} In this age of post-law and economics, Posnerian economic analysis continues to be regarded as foundational and is referred to as the Chicago School of Law and Economics.

\textsuperscript{56} Posner, supra note 49, § 1.2, at 13.

\textsuperscript{57} See, e.g., id. §§ 2.1–2.3.

\textsuperscript{58} See id. § 1.2, at 14–15.

\textsuperscript{59} Id. § 1.2, at 14. "In other words, the criterion of Pareto superiority is unanimity of all affected persons." Id.

\textsuperscript{60} ROBIN PAUL MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 40 (1990).

\textsuperscript{61} Posner, supra note 49, § 1.2, at 14.

\textsuperscript{62} Id. § 2.2.

\textsuperscript{63} See id. Posner asserts that many areas of the law . . . bear the stamp of economic reasoning . . . What we may call the efficiency theory of the common law is not that every common law doctrine and decision is efficient . . . The theory is that the com-
efficient allocation of resources. Efficiency as wealth maximization thus forms the bedrock of Posner's economic analysis of the law in both its positive and normative aspects.

In one sense, economic analysis of contract law guides lawyering and judicial decision making to produce conditions that approach a state of efficient bargaining and to correct many of the market failures that can occur in the contracting process. These goals are realized by minimizing transaction costs. In turn, if transaction costs are minimized, individual contracting parties can achieve their goals, because perfectly efficient contracts would permit and require the strict enforcement of all contractual obligations, without the need for judicial gap-filling and regulation. Although a perfect contracting environment is impossible to obtain in the real world, the efficient application of legal rules contributes to wealth formation and maximization.

Although the preceding explanation is overgeneralized, further theorizing of the economically ideal contracting environment is premised broadly on a few different conditions or assumptions. One condition assumes that only rational decision makers can enter into enforceable exchange transactions. The individual rationality of a given decision maker is determined by that party's ability to order his or her preferences and, consequently, to maintain stable preferences. Robin Paul Malloy notes that these rational actors "know

mon law is best (not perfectly) explained as a system for maximizing the wealth of society.

Id. § 2.2, at 27.

64 See id. § 2.2.

65 See Owen M. Fiss, The Death of the Law?, 72 CORNELL L. REV. 1, 5 (1986). Owen Fiss has stated:

The aim of th[e] . . . normative[ ] branch of law and economics is not to describe or explain how decisions were in fact made or predict how they will be made, but rather to guide them. . . . According to this branch of law and economics, the normative concepts of the law should be construed and applied in such a way as to make the judicial power an instrument for perfecting the market.

Id.; see also ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 205–12 (Addison Wesley Longman, Inc. 3d ed. 2000) (discussing the concepts of perfect contracts and market failure).

66 Transaction costs are "the costs of effecting a transfer of rights." POSNER, supra note 49, § 3.1, at 39. More specifically, transaction costs are "[c]onditions impeding the carrying out of mutually beneficial exchanges; such costs include information costs, costs of negotiating and contracting, and costs imposed by taxes and regulations." MALLOY, supra note 60, glossary at 163.


68 See COOTER & ULEN, supra note 65, at 206–07; MALLOY, supra note 60, at 31–32.

69 COOTER & ULEN, supra note 65, at 206.
what they want” and “can take clues from the market.”70 In pursuing their stable preferences, however, rational decision makers may be constrained by factors beyond their control, such as fraudulent or opportunistic manipulations by the other party to a contract.71 Thus, from an economic perspective, one aspect of contract law that helps to create a perfect contracting environment is its goal of deterring people from “behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and . . . obviate costly self-protective measures.”72

With respect to contract law in particular, Posner further argues that the typical contract case is

a setting of low transaction costs, and therefore a judicial failure to discover the efficient solution can be rectified for the future by a drafting change. This point suggests that contract law cannot readily be used to achieve goals other than efficiency. A ruling that fails to interpolate the efficient term will not affect future conduct; it will be reversed by the parties in their subsequent dealings. It will only impose additional—and avoidable—transaction costs.73

It is the suggestion that “contract law cannot readily be used to achieve goals other than efficiency” that this Article disputes.

2. The Obvious Case: Forgone Opportunities

The “amorphous” nature of the duty of good faith, as described by Burton,74 appears to exist in tension with basic principles of a conventional economic analysis of the law. It is this tension that Burton attempts to ease through the forgone opportunities approach to the doctrine of good faith.75 In doing so, Burton not only deftly deploys the positivist strategy of law and economics (through his description

70 Malloy, supra note 60, at 52. Actors who are presumed under the law to be incapable of ordering their preferences (such as minors and the insane) are deemed to be legally incompetent and therefore “cannot conclude an enforceable contract.” Cooter & Ulen, supra note 65, at 206. Although legal incompetence generally enables a party to avoid contractual obligations, there are exceptions. See, e.g., Hauer v. Union State Bank, 532 N.W.2d 456, 462-66 (Wis. Ct. App. 1995) (holding that, in the absence of special circumstances obviating restitution, a mental incompetent may disaffirm a contract but must make restitution of consideration received from the counterparty); Dodson v. Shrader, 824 S.W.2d 545, 549-50 (Tenn. 1992) (holding that, in the absence of overreaching, undue influence, or other unfairness to the minor party, the counterparty is entitled upon the minor’s disaffirmation of the contract to reasonable compensation for depreciation of or damage to the counterparty’s consideration).

71 See Cooter & Ulen, supra note 65, at 206-07.

72 Posner, supra note 49, § 4.1, at 103. Posner also states that “it is not always obvious when a party is behaving opportunistically.” Id.

73 Id. § 4.1, at 108.

74 See Burton, supra note 22, at 371-72.

75 See supra Part I.A.1 (describing Burton’s forgone opportunities theory of good faith).
of cases in which courts applied the then-unnamed forgone opportunities approach), but also successfully presents his normative argument. His advocacy of a particularized factual inquiry into the attempted recapture of forgone opportunities is one that is explicitly economic and sharply focused on the notion of costs, one of the foundational concepts of law and economics. Thus, the forgone opportunities approach is essentially an economic analysis of the doctrine of good faith.

3. The Less Obvious Case: Excluder Analysis

In contrast to Burton’s forgone opportunities approach, Summers’s excluder analysis of the doctrine of good faith appears to be grounded in fundamental notions of fairness, rather than in economic analysis. Practically speaking, however, this Article suggests that the scope of the duty of good faith under the excluder analysis approach—its ability to preclude various kinds of bad faith conduct—tends ultimately to foster conditions that contribute toward an economically perfect contracting environment, and not to foster conditions leading toward a level of equality consistent with expansive notions of justice.

In his 1968 article, Summers extracts from case law several distinct forms of bad faith conduct and their good faith counterparts. For example, a seller acts in bad faith by concealing a defect in his product; the good faith counterpart is the seller’s full disclosure of material facts. In economic terms, a crucial condition of the ideal contracting environment is that all contracting parties have access to “full information about the nature and consequences of [their] choice[s].” Another example of an act of bad faith is a contractor who openly abuses his bargaining power to coerce an increase in contract price; the good faith counterpart is to refrain from the abuse of

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76 See Burton, supra note 22, at 387–92.
77 Cf. id. at 375–76 (outlining a “wholly economic description of contracting costs”).
78 See supra Part I.A.2 (discussing Summers’s excluder analysis theory of good faith); see also Farnsworth, supra note 19, § 7.17, at 504 (“Th[e] implied duty [of good faith] is based on fundamental notions of fairness.”).
79 Cf. infra Part III.A.2 (discussing Kimberlé Crenshaw’s critique of antidiscrimination law as legitimatizing racial subordination, and her reconceptualization of the expansive goals of antidiscrimination law).
80 Summers, Good Faith, supra note 5, at 203.
81 Id. (citing Stewart v. Wyo. Cattle Ranch Co., 128 U.S. 383, 388 (1888)).
82 Cooter & Ulen, 1988 LAW AND ECONOMICS, supra note 67, at 235 (emphasis omitted); see also Robin Paul Malloy, Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics, 36 U. Kan. L. Rev. 209, 243 (1988) (stating that the neoclassical model of economics assumes that “people have access to perfect information”).
bargaining power.83 Similarly, a party who enters into an agreement and then prevents the other party from deriving the benefits of the agreement acts in bad faith; the good faith counterpart is to act cooperatively.84 These excluder-analysis good faith prohibitions against abusive or uncooperative conduct effectuate another economic goal, because they deter contracting parties from behaving opportunistically toward one another, which, Posner has stated, "obviates costly self-protective measures."85 Because a perfect contracting environment requires minimal transaction costs,86 these good faith prohibitions further economic goals by preventing both contracting parties from incurring extraneous transaction costs arising after contract formation.87

The application of conventional economic analysis to contract law suggests that, in a perfect contracting environment, judicial intervention would be necessary to invalidate contracts only in the most egregious of circumstances (e.g., if one party has induced the other contracting party, through fraud or duress, to enter into the agreement).88 Such judicial intervention would be inappropriate, however, if the agreement were merely unfair to one of the parties. As stated more succinctly by Malloy, "[t]he market does not care about . . . fairness or justice. . . . As long as there are no artificial barriers to success, no one should be offended by the functioning of the market."89 This particular assumption is inconsistent with Summers's stated conclusion about the role and purpose of the good faith obligation in contract law, which is to ensure fairness in the contracting process.90 Yet, the doctrine of good faith, even in its excluder analysis form, is frequently applied to achieve the conditions required to construct a perfect contracting environment.

Decisions in two recent cases exemplify the ways in which applications of the excluder analysis yield economically driven results. For example, in Kleiner v. First National Bank,91 the District Court for the Northern District of Georgia used a definition of good faith that adopts the excluder analysis approach in recognizing the validity of the plaintiffs' claim for breach of an implied covenant of good faith.

83 Summers, Good Faith, supra note 5, at 203 (citing Lingenfelder v. Wainwright Brewery Co., 15 S.W. 844, 848 (Mo. 1891)).
84 Id. (citing Carns v. Bassick, 175 N.Y.S. 670, 673 (App. Div. 1919)).
87 See Cooter & Ulen, 1988 LAW AND ECONOMICS, supra note 67, at 236; Malloy, supra note 60, at 34–38.
89 Malloy, supra note 60, at 32.
90 See Summers, General Duty, supra note 5, at 826.
and fair dealing. In that case, the plaintiffs alleged in pertinent part that the defendant bank breached its contractual obligation of good faith by charging interest on the plaintiffs' loans in a manner inconsistent with the terms of the promissory notes they had signed. The relevant term at issue concerned the rate of interest on the loans, which was denominated the "prime rate" in the notes. Although the prime rate was defined in the notes, the bank argued that its meaning should instead be interpreted in accordance with the trade meaning of the term prime rate. The court quoted language from the Restatement (Second) of Contracts section 205, which describes the excluder analysis approach, and noted that "arguably, where an agreement permits one party to unilaterally determine the extent of the other's required performance, an obligation of good faith in making such a determination is implied." The court then denied the plaintiffs' motion for summary judgment, but allowed the question of whether the prime rates were good faith estimates to go to the jury.

Although the Kleiner court employed the Restatement's excluder analysis approach to good faith, the facts appear more compatible with the purely economic forgone opportunities approach. The court's analysis of the facts in Kleiner seemed to depend on whether the bank legitimately exercised its discretion in setting the prime rate and, if not, on whether the bank was attempting to recapture an opportunity to reset those rates in a manner it knew it had forgone at the time of contract formation. This analysis is precisely what Burton's forgone opportunities approach contemplates. Thus, the Kleiner court would have reached the same conclusion under a forgone opportunities approach as it did under the Restatement's excluder analysis.

Kleiner illustrates that although the differences between the two approaches to good faith performance remain pure in theory, they are easily elided in practice in purely commercial cases. If those theoretically divergent meanings are conflated in practice, then the theoretical distinction between the approaches is rendered meaningless. Although this does not present a significant analytical problem in cases like Kleiner, the question remains whether the eliding of these

92 See id. at 960 n.5 (relying in part on the Restatement (Second) of Contracts § 205 (1981) approach to good faith, which adopts Summers's excluder analysis).
93 See id. at 957-58.
94 See id. at 958-59.
95 See id.
96 See id. at 960 n.5.
97 Id. at 960.
98 See id.
99 See id. at 959-60.
100 See Burton, supra note 22, at 387-92.
theoretical differences ever matters. Are there cases in which the theoretical distinction between the good faith approaches should be revived?

The case of Larson v. Larson\textsuperscript{101} suggests an affirmative answer to that question, although probably because it is a divorce case rather than a commercial case. Larson involved a settlement agreement between former spouses, and the term at issue concerned the payment of alimony.\textsuperscript{102} Pursuant to the settlement agreement, Mr. Larson agreed to pay alimony and child support to Mrs. Larson in a set monthly amount until the emancipation of their youngest child, and thirty percent of his gross earned income thereafter.\textsuperscript{103} The Larsons' settlement agreement also stated that both parties intended the agreement to govern their obligations independently, regardless of future events that might change either of their positions.\textsuperscript{104} After the emancipation of their youngest child, Mr. Larson—an apparently healthy fifty-five year old—retired and stopped making alimony payments, claiming that he had no earned income.\textsuperscript{105} Mrs. Larson subsequently filed a motion to modify the settlement agreement due to the changed circumstances of her ex-husband.\textsuperscript{106} The lower court granted the motion.\textsuperscript{107}

In affirming the lower court's decision, the Appeals Court of Massachusetts set forth some additional facts about the Larsons' relationship: When the couple divorced in 1983, Mr. Larson had an annual earned income of $90,000, an annual unearned income of approximately $10,000, and net assets worth almost $600,000.\textsuperscript{108} Mrs. Larson was a homemaker who had been financially dependent on her husband during their marriage and whose net worth was "modest."\textsuperscript{109} At the time Mrs. Larson filed her motion to modify the settlement agreement, Mr. Larson had retired and was living on $50,000 per year of unearned income, and had a net worth of approximately $1,000,000.\textsuperscript{110} Mrs. Larson had a weekly earned income of $97, a weekly unearned income of $104, and assets worth about $400,000.\textsuperscript{111}

\begin{footnotes}
\footnote{101}{636 N.E.2d 1365 (Mass. App. Ct. 1994).}
\footnote{102}{See id. at 1366–67.}
\footnote{103}{Id. at 1366.}
\footnote{104}{Id.}
\footnote{105}{See id. at 1366–67.}
\footnote{106}{Id. at 1366.}
\footnote{107}{Id. The trial court ordered Mr. Larson to pay approximately $1,000 per month in alimony. Id. at 1367.}
\footnote{108}{Id. at 1366.}
\footnote{109}{Id.}
\footnote{110}{Id.}
\footnote{111}{Id. Her principal asset was the marital home, which she had obtained in the divorce settlement. Id.}
\end{footnotes}
The appellate court also discussed at length Mr. Larson's breach of his duty of good faith and fair dealing in the performance of the settlement agreement.\textsuperscript{112} The court stated that Mr. Larson's decision to retire at the age of fifty-five, while in good health, without otherwise providing for his ex-wife's support, "deprived the wife of her reasonably anticipated fruits of the separation agreement and amounted to an 'evasion of the spirit of the bargain.'"\textsuperscript{113} What is striking about the appellate court's reasoning and its reliance on the excluder analysis approach is the absence of language that refers explicitly to the guiding principles of fairness, equality, and justice, even though the facts, which the appellate court restated in detail, easily warrant at least mention of those principles.\textsuperscript{114} Only the concurring judge recognized that Mr. Larson's early and abrupt retirement was "patently unfair,"\textsuperscript{115} and acknowledged the "emotional, and oftentimes irrational"\textsuperscript{116} nature of divorce cases. The absence of similar language in the majority opinion raises the following question: Why are legal analyses of noneconomic or only partially economic facts so often discussed exclusively in economic terms, even in cases in which the law cited to support these analyses theoretically dictates or at least permits consideration of noneconomic factors such as fairness and equality?\textsuperscript{117}

In arguing that the excluder analysis functions practically as an economic model, this Article does not suggest that the Kleiner and Larson courts reached the wrong results, or that their decisions are the result of a misunderstanding of the excluder analysis. Nor does this Article contend that courts should not use the duty of good faith per-
formance to optimize efficiency in the exchange process. It simply takes issue with the way in which courts have deployed the doctrine of good faith as an alternate means to effect an economic analysis of the law. Thus, this Article intends to critique the economic analysis of the doctrine of good faith and to revive the old debate between Burton and Summers, taking sides with Summers but from a more critical perspective.

C. Critique of the Economic Model of Good Faith

The Chicago School of Law and Economics, as Posner himself concedes, can fairly be categorized as both politically and economically conservative. Now, however, almost thirty years after the publication of the first edition of Economic Analysis of Law, law and economics scholarship embodies the spectrum of political ideologies. Legal scholars situated both to the right and to the

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118 See, e.g., Richard A. Posner, Law and Economics Is Moral, 24 Val. U. L. Rev. 163, 165–66 (1990). As Posner has stated: I consider myself to be a pragmatic economic libertarian... By libertarian, I mean someone who believes in minimum government—as little government as possible. I mean someone who is suspicious of public intervention, who thinks that people should look to themselves rather than to their government for their happiness, their future, their success in life. I mean a practitioner of laissez faire in a general sense, not in a literal sense. I mean a small government person.... The reason I affixed the adjective "economic" is not that I am protective only of economic liberty... but that I use economic theory to try to figure out what the appropriate boundaries of the minimum state are. Basically my view is that the role of government is to intervene and correct... serious market failures.... My third term, pragmatic, comes from my opening remark about not being enthusiastic about moral discourse.... My point is only that I do not intend to try to derive my free-market views from something more fundamental, more rigorously philosophical. And the consequence of this lack of foundations is that I am not dogmatically attached to any of my free-market views.

Id.

119 See Posner, supra note 51.

120 For an excellent primer on the various approaches to law and economics scholarship, see generally Malloy, supra note 60. Malloy argues that: The proper study of law and economics should... require us to evaluate alternative social arrangements while exploring the consequences that such alternatives have on the relationship between law and economics... [T]he primary goal of law and economics should be to investigate how certain values or principles will be affected by changing a community's current social, political, and economic arrangements.

Id. at 4. Thus, Malloy argues that the study of law and economics requires a comparative approach. Id. at 5. In his analysis, Malloy discusses and compares the conservative, liberal, left communitarian and neo-Marxist, libertarian, and classical liberal approaches to law and economics, see id. at 60–101, and applies those readings to various cases in contract, property, criminal, constitutional, employment, and tort law, see id. at 104–54.

121 For example, in mounting a controversial argument against employment discrimination laws, Richard Epstein has argued that discrimination based on irrational hatred of or distaste for people belonging to certain classifications (such as women or minorities)
left of Posner engage in law and economics scholarship, either by arguing to extend its conservative, free-market direction across various areas of substantive law, or by attacking, deconstructing, or rerouting its direction toward a more values-based theory of law and economics. Yet, it is the conservative model of law and economics that remains well entrenched within the legal academy.

Because of that will be extinguished by market forces because such distaste is inefficient, but that "voluntary sorting" based on "commonality of preferences"—which often tracks along racial, ethnic, or gender lines—will (and should) survive because it increases satisfaction in the workplace by allowing workers to avoid distasteful associations. See Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 66–69 (1992). But see Ian Ayres, Alternative Grounds: Epstein's Discrimination Analysis in Other Market Settings, 31 San Diego L. Rev. 67 (1994) (critiquing Epstein's libertarian analysis of discrimination law). Even Posner has criticized Epstein's libertarian views, stating that Epstein's Lockean view of natural rights, which informs his model of law and economics, "derive[s] a sense of minimum government smaller than even I think appropriate." Posner, supra note 118, at 171.

See, e.g., Bruce A. Ackerman, Social Justice in the Liberal State 181 n.5, 200 (1980) (indirectly engaging law and economics by constructing, in part, a liberal "ideal transactional structure" on economic terms that would "affirm . . . the right of every citizen to exchange goods, services, and meanings with his fellows on terms that do not require him to concede that his search for the good is any less important than his fellows' pursuit of happiness"); Bruce A. Ackerman, Law, Economics, and the Problem of Legal Culture, 1986 Duke L.J. 929, 940, 942 (arguing that "neoclassical economics takes an extremely reductionist view of culture in general and conversation in particular," and "categorically reject[ing] . . . the standard economist's condescending attitude toward other disciplines that do take seriously the deep problems that are generated every time social meanings are exchanged through symbolic processes"); Shubha Ghosh, Property Rules, Liability Rules, and Termination Rights: A Fresh Look at the Employment at Will Debate with Applications to Franchising and Family Law, 75 Or. L. Rev. 969, 979–1016 (1996) (arguing that economic models' presumptions in favor of at-will employment relationships erroneously assume the absence of positive and negative externalities in employment contracts, and observing public ramifications of such "private" employment agreements); Robin Paul Malloy, Is Law and Economics Moral—Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis, 24 Val. U. L. Rev. 147 (1990) (promoting a classical liberal approach to law and economics that disputes the underlying values of Posner's view of law and economics). Indeed, even scholars to the far left of Posner have at times engaged law and economic scholarship. See, e.g., Linz Audain, Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness, 70 Ind. L.J. 709 (1995) (incorporating cultural studies into a law and economics analysis); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1740–53, 1762–66, 1776 (1976) (arguing, in relevant part, that economic principles embedded in legal rules and standards are "instrumental to [and not independent of] the pursuit of substantive objectives"). Significantly, both legal and nonlegal feminist scholars also have critiqued the Chicago School and have proposed alternate models for economic analysis as well as law and economics analysis. See, e.g., Elizabeth Anderson, Value in Ethics and Economics (1993); Hadfield, supra note 11.

See supra notes 121–22.

discourse's descriptive and normative power, this Article attempts to reapply law and economics analysis to contract law through a discussion and critique of the implied obligation of good faith from a critical race as well as law and market economy perspective.

II
ROBIN PAUL MALLOY'S "LAW AND MARKET ECONOMY" THEORY

A particularly important critique of the conservative model of law and economics—Malloy's theory of law and market economy—warrants detailed discussion here. Malloy's critique and reinterpretation of law and economics, utilizing economic and market terms, enables critical scholars to better evaluate the economic analysis of the law. This is important because critical scholars must reckon with the reality and problems of the market, especially in the contractual context, as well as with the institutional entrenchment and depoliticization of the economic analysis of the law.

In developing his theory of law and market economy, Malloy argues that the existing, highly influential law and economics discourse is flawed because it unrealistically and inaccurately assumes the primacy of efficiency in its understanding of both the exchange process and market theory. By deploying a semiotic analysis and reinterpretation of law and economics, Malloy persuasively argues that creativity and discovery, not efficiency, drive wealth formation and maximization.

Malloy's innovation as a law and economics scholar is not only substantive, but also methodological. Malloy uses Peircean semiotics, derived from the philosophy of Charles Sanders Peirce, to reinter-

(1999) (contrasting the marginalization in the legal academy of critical and other "outsider" legal scholars with the preferential treatment of law and economics scholars).

125 MALLOY, supra note 10.
126 See id. at 2–4.
127 See id. passim.
128 Charles Sanders Peirce was an influential twentieth century American philosopher who "provided the theoretical foundation for Legal Realism," and who is "generally acknowledged ... as one of the greatest thinkers of the 20th century for whom the law served as prototype for a general theory of signs." Roberta Kevelson, Introduction to 1 LAW AND SEMIOTICS 1, 14 (Roberta Kevelson ed., 1987). Peirce was a contemporary of Oliver Wendell Holmes, and both were members of the Metaphysical Club, a discussion group that met regularly in Cambridge, Massachusetts in the early 1870s. ROBERTA KEVELSON, THE LAW AS A SYSTEM OF SIGNS 8 (1988); John T. Valauri, Peirce and Holmes, in 1 PEIRCE AND LAW: ISSUES IN PRAGMATISM, LEGAL REALISM, AND SEMIOTICS 187, 187 (Roberta Kevelson ed., 1991). Legal semioticians have argued that Holmes came to legal realism indirectly by way of Peirce's semiotic theory and philosophical pragmatism. See KEVELSON, supra, at 5–8. But see Valauri, supra, at 187–88 (asserting that the proof of influence between Peirce and Holmes is "ultimately contradictory and inconclusive").
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pret the values of law and economics. Semiotics is the science or study of signs, and can loosely be described as a type of linguistic theory that explains the formation and reproduction of linguistic structures. Its more philosophical derivations, of which Peircean semiotics is one, are concerned with the “process of ‘knowing,’ and the construction of meaning and value within a dialogic or relational system of exchange,” which are grounded in experience and history.

As Malloy’s semiotic reinterpretation demonstrates, the most significant interpretive concept that Peircean semiotics imparts is that the processes of legal analysis and interpretation are additive. In other words, one who engages in legal discourse generally filters her analysis through several different screens or lenses of interpretation, and no single screen is the only screen through which she should interpret the law. For example, this Article is filtered through the multiple lenses of critical race theory, law and market economy theory, and law and economics. Each of those discourses is only one screen through which an individual may interpret or understand the law, and each of those discourses may in turn be constituted of multiple other screens. The additive nature of legal analysis is certainly not a new discovery; it is something that all law students learn in the first year of law school, when they are introduced to common law and the casebook pedagogy that dominates the doctrinal classroom. This additive nature is particularly relevant from a critical perspective because of the potentially infinite ways, for example, one may interpret, reproduce, reinterpret, and reconstruct the meaning of good faith.

129 Malloy, supra note 10, at 23.
130 See id. at 29. See generally Winfried Nöth, Handbook of Semiotics (1990) (providing a comprehensive overview of the vast field of semiotic research).
131 Malloy, supra note 10, at 29; see id. at 32–33. Because semiotics examines the process of knowing, it enabled the development of much constructionist, postmodern, and deconstructionist thought. See Hall, supra note 54, at 36 (“The underlying argument behind the [Saussurian] semiotic approach is that, since all cultural objects convey meaning, and all cultural practices depend on meaning, they must make use of signs . . . .”); id. at 30–39. Hall further links semiotics to the formation and circulation of power through discursive formations and practices. See id. at 41–51. Moreover, some law and semiotics scholars have argued that the critical legal studies movement, see infra Part III.A, is linked directly to semiotics. See J.M. Balkin, The Promise of Legal Semiotics, 69 Tex. L. Rev. 1831 (1991); Jeremy Paul, The Politics of Legal Semiotics, 69 Tex. L. Rev. 1779 (1991). Analogously, one of the goals of this Article is to develop further connections between semiotics and critical race theory that may contribute to fields of scholarship.
132 See Malloy, supra note 10, at 61–69 (arguing that the study of “the relationship between law and market theory . . . should . . . focus on the implications and consequences of relational exchange,” and that the exchange process is “reciprocal,” “integrative,” “dynamic,” and “situational”).
Thus, Peircian semiotic interpretation of the legal term, or, semiotically speaking, “sign,”\textsuperscript{133} good faith illustrates that it lacks a single true meaning. Contractual good faith may mean one thing to a critical race scholar, another to a conventional law and economics scholar, and another to a law and market economy scholar. A practicing commercial lawyer, depending on his client’s problem, will argue for a judicial definition of good faith that is consistent with one, all, or none of those scholarly interpretations. The production of meaning, and of legal meaning in particular, is relational in nature, and the meaning of any given sign, such as good faith, is subject to constantly shifting interpretations. This indeterminacy is exemplified by the theoretical debate between Burton and Summers over the proper formulation of a standard of good faith.

Although extreme applications of this principle of indeterminacy\textsuperscript{134} may lead ultimately to the destabilization of various legal doctrines and concepts, those engaged in Peircian semiotics would not employ such extreme applications.\textsuperscript{135} In this respect, Peircian semioticians and critical race scholars perhaps share something in common: a refusal to forgo legal reform as a vehicle for progressive social change. Peircian semiotics recognizes certain limitations on interpretation, which exist because meaning is not only relational in nature, but also experiential\textsuperscript{136} and communal.\textsuperscript{137} That is, meaning references community.\textsuperscript{138} Thus, for example, good faith may have a particular descriptive or normative meaning to a community of critical race scholars, who would generally agree that good faith does and should prohibit racist conduct in the contracting process. Meaning also ref-

\textsuperscript{133} See Nöth, \textit{supra} note 130, at 42 (describing Peirce’s “sign model as consisting of a triple connection of sign, thing signified, cognition produced in the mind” (internal quotation omitted)); \textit{id.} at 79–91 (discussing generally the concept of sign); \textit{see also} Umberto Eco, \textit{Semiotics and the Philosophy of Language} 14–45 (1984) (discussing signs); Malloy, \textit{supra} note 10, at 29–36 (providing a brief overview of semiotics and discussing the concept of sign).

\textsuperscript{134} See \textit{infra} Part III.A (discussing critical legal scholarship’s focus on the indeterminacy of legal rules).

\textsuperscript{135} See, e.g., Malloy, \textit{supra} note 10, at 161 (“A second weakness in the critical approach [to law] is that it typically fails to recognize that all complex systems, including the market exchange process, are ... determinate in some respects (habit and convention based), and indeterminate in other respects (influenced by chance, surprise, and creative discovery.”); \textit{see also} Umberto Eco, \textit{The Limits of Interpretation} 37–41 (1990) (arguing that, although Peircian semiotics may welcome the notion of “unlimited semiosis” by the interpreter, “the process of semiosis produces in the long run a socially shared notion of the thing that the community is engaged to take as if it were in itself true”).

\textsuperscript{136} See Malloy, \textit{supra} note 10, at 67, 76.

\textsuperscript{137} See Eco, \textit{supra} note 135, at 40–41.

\textsuperscript{138} See Malloy, \textit{supra} note 10, at 46, 57–77.
erences experience and, by extension, history, which suggests, for example, that Black or female consumers who have negotiated contracts for the purchase of new cars may believe that the particular contracting process is infected with bad faith conduct, while their White and male counterparts may disagree. In short, Malloy's semiotic reinterpretation of law and economics takes account of politics, community, and culture.

Malloy's semiotic critique of the dominant role of efficiency in law and economics discourse takes issue primarily with the overly "determinate process" of an efficiency calculus situated firmly "within a static and closed environment" and based on "habit, convention, and continuity." That is, Malloy takes issue not with the role of efficiency as the principal motivator of wealth formation, but rather with the fact that it dominates economic legal analysis in a manner inconsistent with the shifting and dynamic nature of socioeconomic reality. From a semiotic perspective, the dominant, efficiency-driven interpretive model is an inadequate or at best imperfect lens through which to evaluate the market and market exchanges because it fails to give pri-

139 See Hall, supra note 54, at 41-44 (arguing that power circulates through the production of knowledge, which in turn depends on who is historically situated to engage in certain discursive practices).


141 "Culture" is difficult to define, because its meaning is dependent on context. Stuart Hall, a pioneer of cultural studies, provides a simplified definition of the term as it is used in this Article:

In recent years, and in a more 'social science' context, the word 'culture' is used to refer to whatever is distinctive about the 'way of life' of a people, community, nation or social group. This has come to be known as the 'anthropological' definition. Alternatively, the word can be used to describe the 'shared values' of a group or of society—which is like the anthropological definition, only with a more sociological emphasis. . . . What has come to be called the 'cultural turn' in the social and human sciences . . . has tended to emphasize the importance of meaning to the definition of culture. Culture . . . is not so much a set of things—novels and paintings or TV programmes and comics—as a process, a set of practices. Primarily, culture is concerned with the production and the exchange of meanings—the 'giving and taking of meaning'—between the members of a society or group. To say that two people belong to the same culture is to say that they interpret the world in roughly the same ways and can express themselves, their thoughts and feelings about the world, in ways which will be understood by each other. Thus culture depends on its participants interpreting meaningfully what is happening around them, and 'making sense' of the world, in broadly similar ways.

Stuart Hall, Introduction to Representation: Cultural Representations and Signifying Practices, supra note 54, at 1, 2.

142 Malloy, supra note 10, at 2-3 (citing Israel M. Kirzner, The Meaning of Market Process 1-54 (1992)).
macy to the dynamic nature of market choice, which is grounded in how decision makers interpret incentives and disincentives.\textsuperscript{143}

Taking the Peircean reinterpretive turn that emphasizes the indeterminacy of meaning, Malloy emphasizes creativity as the linchpin of wealth formation because it is "grounded in an environment of potentiality, of discontinuity, and indeterminacy"\textsuperscript{144}—i.e., because it recognizes the shifting nature of interpretive processes. Yet, because Peircean semiotics also teaches that the interpretation of meaning, though indeterminate, is limited by communal, experiential, and historical constructs of meaning, the semiotic creative process is informed by "an ethical environment of social responsibility" that is constantly evolving.\textsuperscript{145}

Malloy also challenges the way in which the discourse of law and economics creates a certain understanding of market choice.\textsuperscript{146} He exposes, in theoretical terms, a near-universal commonsense understanding: that market actors are not necessarily rational and objective, that they may not always make choices based on pseudo-scientific, cost-benefit analyses, and that they may not necessarily agree on what constitutes a cost or a benefit.\textsuperscript{147} Although market choice may be informed in part by a cold cost-benefit analysis, it is more significantly informed by "our experiences as participants in dynamic networks and patterns of social intercourse."\textsuperscript{148} Simply stated, if deals that are efficient in terms of the bottom line are not always fair to the individuals and communities they affect, why should the bottom line matter more than what is fair?

Malloy does not claim that efficiency analysis has no role to play in the interpretation of the market, or that other methods should replace efficiency analysis.\textsuperscript{149} After all, the concepts associated with traditional law and economics occupy significant space within legal discourse. Rather, Malloy claims that efficiency analysis should not have a dominant role in the study of market theory and the exchange process.\textsuperscript{150}

Malloy's semiotic model of law and market economy, together with critical race interpretations of what the law means for people of color, guides this Article's critique of the existing models of contractual good faith. It is not the Article's objective to propose a replace-

\textsuperscript{143} See id. at 2–4.
\textsuperscript{144} Id. at 3 (citations omitted).
\textsuperscript{145} Id.
\textsuperscript{146} See id. at 3–4.
\textsuperscript{147} See id. at 57–77; supra note 11 and accompanying text.
\textsuperscript{148} MALLOY, supra note 10, at 4.
\textsuperscript{149} See id. at 3.
\textsuperscript{150} See id.
ment for the current excluder analysis model of good faith, but rather to suggest a justifiable addition to its meaning.

III
CRITICAL RACE THEORY: FOUNDATIONAL CONCEPTS

A. History and Guiding Principles

Francisco Valdes, a notable critical race and LatCrit scholar, has aptly termed critical race theory "social justice scholarship." As such, critical race theory provides an important additional screen through which to filter the doctrine of good faith. Although critical race scholarship originated in and continues to grow primarily out of the legal academy, it is interdisciplinary insofar as the disciplines from which it draws are concerned with sociopolitical and socioeconomic racial inequality. Thus, there is no single, unifying methodology for engaging in critical race analysis. In fact, this lack of a single methodology is one of critical race theory's enduring features.

Critical race theory emerged in the 1980s as a response by progressive scholars of color to the critical legal studies (CLS) movement.

The CLS movement originated in the late 1970s as a

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151 Although it is difficult to define singularly LatCrit theory, Valdes has defined it generally as "the emerging field of legal scholarship that examines critically the social and legal positioning of Latinas/os, especially Latinas/os within the United States, to help rectify the shortcomings of existing social and legal conditions." Francisco Valdes, Foreword: Under Construction—LatCrit Consciousness, Community, and Theory, 85 CAL. L. REV. 1087, 1089 n.2 (1997), 10 LA RAZA L.J. 1, 3 n.2 (1998); see also Iglesias, supra note 124 (reconceptualizing the notion of "community" and its role in the LatCrit movement).


153 I suggest that the vast body of critical race scholarship incorporates and synthesizes aspects of political philosophy, science, sociology, critical legal studies, feminist theory, feminist legal theory, cultural and ethnic studies, semiotics, literary studies, postmodernism, poststructuralism, and postcolonialism. This list, I am certain, is nowhere near complete.


155 See Introduction to Critical Race Theory: The Cutting Edge, at xiii, xiv–xv (Richard Delgado ed., 1995) [hereinafter Cutting Edge]; Introduction to Critical Race Theory: The Key Writings that Formed the Movement, at xiii, xiii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter Key Writings].

156 An excellent discussion of the historical development of critical race theory is included in the introduction to Critical Race Theory: The Key Writings, one of two critical race theory readers published in 1995. See Cutting Edge, supra note 155; Key Writings, supra note 155, at xix–xxvii. These two readers are of particular importance because they were compiled and edited by some of the founders of and key contributors to critical race scholarship.
derivative of Legal Realism,\textsuperscript{157} whose followers in the 1920s and 1930s criticized the rule of law and its application as overly formalistic\textsuperscript{158} and as cloaking in the myths of neutrality and objectivity\textsuperscript{159} a legal system that in reality was driven by policy, economics, and politics.\textsuperscript{160} The Realists sometimes manifested this critique in the form of "rule skepticism," which recognized that legal rules are "not what they appear to be."\textsuperscript{161} In more concrete terms, the Realists argued that the formalistic notion of the rule of law created an illusion of certainty that masked the unspoken social and political assumptions guiding much judicial decision making.\textsuperscript{162} The exposure of this illusion of certainty

\textsuperscript{157} See Key Writings, supra note 155, at xvii–xxvii; Roberto Mangabeira Unger, The Critical Legal Studies Movement 1–2 (1983).

\textsuperscript{158} See Unger, supra note 157, at 1. In The Critical Legal Studies Movement, Unger was careful to define that which he critiqued. Of "formalism" he wrote:

Formalism . . . is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary. Such conflicts fall far short of the closely guarded canon of inference and argument that the formalist claims for legal analysis. This formalism holds impersonal purposes, policies, and principles to be indispensable components of legal reasoning.

\textsuperscript{159} See id. at 1–2. Of "objectivism," Unger wrote:

Objectivism is the belief that the authoritative legal materials—the system of statutes, cases, and accepted legal ideas—embody and sustain a defensible scheme of human association. They display, though always imperfectly, an intelligible moral order. Alternatively they show the results of practical constraints upon social life—constraints such as those of economic efficiency—that, taken together with constant human desires, have a normative force. The laws are not merely the outcome of contingent power struggles or of practical pressures lacking in rightful authority.

\textsuperscript{160} See id. at 1–4.

\textsuperscript{161} Mark Tebbit, Philosophy of Law: An Introduction 29–30 (2000); see also Brian Leiter, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, 76 Tex. L. Rev. 267, 275 (1997) (noting that "the Core Claim of Legal Realism is that judges reach decisions based on what they think would be fair on the facts of the case").

\textsuperscript{162} See Tebbit, supra note 161, at 26–29. As Justice Holmes famously observed:

What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

O.W. Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 460–61 (1897). Karl Llewellyn, among the most important and well known of the Realists, also argued that commercial law developed into its modern, stabilized state not because it embodied and formally enacted a set of legal rules, but because particularized social and economic circumstances compelled the judicial creation of a body of law that developed into a coherent doctrine.

See Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship,
led to Realist pronouncements of the indeterminate nature of the law.163

Critical legal scholars (crits) pushed the Realist critique of formalism and objectivity to its outer limits through their deconstruction of the law,164 whereby they described the law not only as political, but also as so indeterminate that no rational normative structure could be imposed upon it.165 Further, through their methodology of delegitimation, a process by which they destabilized the legitimacy of basic legal concepts and legal order,166 the crits argued generally that the law not only is not objective and not neutral, but that it is indeterminate, political, ideological,167 and hegemonic.168 For example, Ro-


163 See Tebbit, supra note 161, at 26–32.

164 The practice of deconstruction, itself an outgrowth of poststructuralism, "dismantle[s] the structures of meaning so as to expose the premises on which they are built and to reveal the concepts of objectivity and linguistic autonomy as constructs. . . . Deconstructive critical practices seek to identify power relations . . . ." Key Concepts in Cultural Theory 108, 109 (Andrew Edgar & Peter Sedgwick eds., 1999); see also supra note 54 (discussing this Article's use of the related term "discourse").

165 See, e.g., Fiss, supra note 65, at 9–10; see also Unger, supra note 157, at 118–19 (acknowledging that his view of CLS suggests a "formidable gap . . . between the reach of our intellectual and political commitments and the many severe constraints upon our situation").

166 For an example of such an analysis in a particular context, see the discussion of Alan David Freeman's critique of antidiscrimination law, infra Part III.A.I.

167 The common understanding of the term "ideology" is inadequate with respect to critical theory and this Article. Because ideology embodies the ideas of the dominant class, its definition suggests that our understanding and knowledge of the world . . . is determined by political interests. There are certain beliefs, and certain ways of seeing the world, that will be in the interests of the dominant class (but not in the interests of subordinate classes). For example, it was in the interests of the dominant class in feudalism to believe in the divine right of kings. . . . The dominant class is able to propagate its ideas throughout society due to its control of various forms of communication and education (such as the mass media, the church and schools).

Key Concepts in Cultural Theory, supra note 164, at 190 (emphasis omitted). Yet, ideology does not necessarily dictate that subordinate classes exist oblivious in a state of shared false consciousness. See id. This essentially Marxist, class-based view of ideology evolved through the efforts of those like sociologist Karl Mannheim, whose work postulated the simultaneous coexistence of multiple ideologies—multiple systems framing how different people within a society and different people from different societies understand the world and relate to one another. See id. at 190–91. Antonio Gramsci further developed the notion of ideology through his theory of hegemony. See id. at 164–65; infra note 168.

168 The term "hegemony" was developed primarily by the Italian neo-Marxist Antonio Gramsci in the early twentieth century "to explain the control of the dominant class in contemporary capitalism." Key Concepts in Cultural Theory, supra note 164, at 164 (emphasis omitted). Gramsci's theory of hegemony explains that, because the dominant class "cannot maintain control simply through the use of violence or force," it must implement other cultural and sociopolitical apparatuses based on consent. See id. at 164–65. The consent-based apparatuses and institutions used at various levels in society to disseminate the dominant ideology include civil rights jurisprudence, education, the church, the me-
berto Mangabeira Unger has rejected both the law and economics movement (which he characterizes as addressing the private domain and “serv[ing] the political right”) and the rights and principles movement (which he characterizes as addressing the public domain and serving “the liberal center”) as mere “restatements of objectivism and formalism.”

Although certain scholars of color in the late 1970s and early 1980s aligned themselves with the crits’ deconstructionist and delegitimizing agenda, they became dissatisfied with the crits’ failure to acknowledge, and to locate centrally, White supremacy and a meaningful critique of racial power and racial hegemony within critical legal discourse. Thus, critical race theory developed over time in order to effect a “race conscious intervention on the left,” that is, on the critical legal studies movement itself. These scholars, or “race crits,” sought to interrogate “how law was a constitutive element of race itself,” and to “uncover . . . how law constructed race.” Uncovering the legal construction of race meant writing not only about constitutional antidiscrimination and civil rights jurisprudence, but also about other areas of law such as immigration, the Japanese American, and family. See id. at 164. Although Gramsci’s theory of hegemony depends on consent, the transmission of the dominant ideology is not simply imposed on duped classes of nonelites; rather, the messages embedded in the dominant ideology are negotiated between the classes in their transmission. See id. at 164–65. In the field of cultural studies, Gramsci’s theory of hegemony has been especially significant because it has “facilitated analysis of the ways in which subordinate groups actively respond to and resist political and economic domination. The subordinate groups need not then be seen merely as the passive dupes of the dominant class and its ideology.”

― Unger, supra note 157, at 12. Unger also characterizes the rights and principles movement and the law and economics movement as “the most influential and symptomatic legal theories in America today,” whose advocates “stand[] at the margin of high power.”

Key Writings, supra note 155, at xxii–xxiii.

can internment,\textsuperscript{175} criminal justice,\textsuperscript{176} hate speech and hate crimes,\textsuperscript{177} affirmative action,\textsuperscript{178} and even the ways in which biographies of Supreme Court justices construct race and hegemonic racial ideology.\textsuperscript{179} Moreover, because the race crits, unlike their crit predecessors, did not view legal reform as a doomed and ineffective vehicle for progressive change, they set out to translate, proactively and pragmatically, their theoretical discoveries into a program for the elimination of racial subordination.\textsuperscript{180}

Although critical race scholarship employs no single methodology, some unifying themes and concepts have developed over the past twenty-five years. First, critical race theory seeks to expose the entrenchment of White supremacy and the reality of the continued subordination of people of color in the United States (and throughout the world\textsuperscript{181}), and to unravel its relationship with the rule of law.\textsuperscript{182} More specifically, race crits examine how racial power constitutes and reproduces itself through the apparatuses of law and culture. Second, race crits are not satisfied with merely naming and understanding their observations and discoveries; they also are committed to transforming the relationship between law and hegemonic racial power in order to destabilize that power.\textsuperscript{183} Third, like critical legal scholars, race crits continue to reject notions of objectivity and neutrality in the law, and the idea that legal scholarship can and should be so characterized.\textsuperscript{184} Thus, race crits frequently and self-consciously situate their work in a specific cultural, historical, institutional, and political con-


\textsuperscript{177} See, e.g., MARJ. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431.


\textsuperscript{180} See KEY WRITINGS, supra note 155, at xiii–xvi, xxxii.

\textsuperscript{181} See, e.g., GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien Katherine Wing ed., 2000) (anthologizing writings on women’s legal rights around the world).

\textsuperscript{182} See CUTTING EDGE, supra note 155, passim; KEY WRITINGS, supra note 155, at xiii.

\textsuperscript{183} See KEY WRITINGS, supra note 155, at xiii; Crenshaw, supra note 173, at 1349–69.

\textsuperscript{184} See KEY WRITINGS, supra note 155, at xiii; Crenshaw, supra note 173, at 1336–49.
In furtherance of their subversion of the notions of objectivity and neutrality, race crits sometimes deploy unorthodox rhetorical strategies in their scholarship, such as the use of narrative, to effect a contextual deconstruction of the notion of objectivity. Fourth, critical race theory simultaneously expresses both a profound appreciation for and a deep dissatisfaction with traditional civil rights jurisprudence. The central proposition underlying this aspect of critical race scholarship is that racism and racist acts are not extraordinary in nature, but rather are quite ordinary. Because conventional civil rights jurisprudence, in the form of antidiscrimination law, aims to prevent and remedy only extraordinary forms of racism, race crits have argued that antidiscrimination law is complicit in, and in fact necessary to, the endurance of racial hegemonic power, because it does little to reckon with the pervasiveness of racism. In effecting this particular critique of conventional civil rights and antidiscrimination law, race crits have adopted and extended critical legal scholar Alan David Freeman’s “perpetrator-victim” critique of antidiscrimination law, which is described in more detail below.

1. Overview: The Perpetrator-Victim Critique of Antidiscrimination Law

In 1978, Alan David Freeman introduced his perpetrator-victim critique of traditional antidiscrimination law, which asserted that the then-existing antidiscrimination jurisprudence effectively legitimized racial discrimination because it developed from a perpetrator, as opposed to a victim, perspective. Freeman identified a fundamental, positional difference between the perpetrator and victim perspectives on discrimination: the victim perspective views discrimination as a set of sociopolitical conditions imposed on the victim as a “member of a perpetual underclass,” while the perpetrator perspective sees discrimination “not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator.” Thus, argued Freeman, in

185 See, e.g., CUTTING EDGE, supra note 155, at 1-36; KEY WRITINGS, supra note 155, at xxi–xxii; Greshaw, supra note 173, at 1369–87.

186 See, e.g., CUTTING EDGE, supra note 155, at 37–96.

187 See, e.g., KEY WRITINGS, supra note 155, at xiv, 5–57.

188 See id. at xiv.


190 See, e.g., RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION passim (1994); Bell, supra note 173; Yamamoto, supra note 189, at 847–48, 867–70.

191 See Freeman, supra note 173, at 1052–57.

192 Id. at 1052–53.

193 Id. at 1053.
approaching the problem of racial discrimination, the victim perspective tends to focus more broadly on eliminating the conditions enabling the continued existence of racial subordination, whereas the perpetrator perspective focuses more narrowly on "neutraliz[ing] the inappropriate conduct of the perpetrator," and pays little attention to the "overall life situation of the victim class."

Freeman further argued that antidiscrimination law was "hopelessly embedded in the perpetrator perspective." Because antidiscrimination law required victims to identify a discrete set of acts or conduct constituting a violation on the perpetrator's part before it would provide any remedy, antidiscrimination law was "ultimately indifferent to the condition of the victim." Further, because the antidiscrimination remedy focused solely on specific violations, it left no room for consideration of the systemic conditions of racial subordination.

Charles Lawrence developed Freeman's perpetrator-victim critique further when he challenged the doctrine of discriminatory purpose set forth by the Supreme Court in Washington v. Davis, which requires plaintiffs to demonstrate discriminatory intent in their constitutional challenges to facially neutral laws. In critiquing Davis, Lawrence identified the problem of "unconscious racism," arguing that the dichotomy articulated by the Court between intentional, unconstitutional discrimination and unintentional, constitutional discrimination was a false one. Lawrence further predicted that, in light of

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194 Id.; see id. at 1053–57.
195 Id. at 1053.
196 Id.
197 See id. at 1053–57.
198 Id. at 1054 (emphasis added). More specifically, Freeman wrote: In its core concept of the “violation,” antidiscrimination law is hopelessly embedded in the perpetrator perspective. Its central tenet, the “antidiscrimination principle,” is the prohibition of race-dependent decisions that disadvantage members of minority groups, and its principal task has been to select from the maze of human behaviors those particular practices that violate the principle, outlaw the identified practices, and neutralize their specific effects. Antidiscrimination law has thus been ultimately indifferent to the condition of the victim; its demands are satisfied if it can be said that the “violation” has been remedied. The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors.
199 See id. at 1053–57.
202 Id. at 321–22.
the historically contextualized culture of racism within which we have all been socialized, both as victims and/or as perpetrators on some unconscious or conscious level—the Davis Court's disregard for unconscious racism would in fact develop into one of antidiscrimination law's greatest failings. Both Lawrence's and Freeman's cautionary arguments about the future of antidiscrimination law ultimately turned out to be prophetic.

2. Overview: The Expansive and Restrictive Visions of Equality

Kimberlé Crenshaw has also critiqued traditional civil rights discourse from a critical race perspective. Crenshaw articulates the difference between the expansive and restrictive views of the goals of antidiscrimination law by comparing her view with that of Thomas Sowell, a conservative, African American, law and economics scholar. The expansive view, which is associated with the critical race movement,

stresses equality as a result, and looks to real consequences for African-Americans. It interprets the objective of antidiscrimination law as the eradication of the substantive conditions of Black subordination and attempts to enlist the institutional power of the courts to further the national goal of eradicating the effects of racial oppression.

The restrictive view, on the other hand,

treats equality as a process, downplaying the significance of actual outcomes. The primary objective of antidiscrimination law, according to this vision, is to prevent future wrongdoing rather than to redress present manifestations of past injustice. "Wrongdoing," moreover, is seen primarily as isolated actions against individuals rather than as a societal policy against an entire group. Nor does the restrictive view contemplate the courts playing a role in redressing harms from America's racist past, as opposed to merely policing society to eliminate a narrow set of proscribed discriminatory practices. . . . In sum, the restrictive view seeks to proscribe only certain kinds of subordinating acts, and then only when other interests are not overly burdened.

Consequently, the adoption of the restrictive view (and similarly, the perpetrator perspective) in civil rights discourse is not historically, so-

203 See id. at 322, 344–55.
204 See Crenshaw, supra note 173.
205 See id. at 1339–49; see also Audain, supra note 122, at 764 n.295 (criticizing Sowell's views on the role of race and culture in determining the success of particular groups in society).
206 Crenshaw, supra note 173, at 1341 (emphasis added); see also Young, supra note 14, at 9 (arguing that injustice should be conceptualized primarily in terms of oppression and domination).
207 Crenshaw, supra note 173, at 1342 (footnote omitted) (citing Derrick A. Bell, Jr., Race, Racism and American Law § 1.12, at 41 (2d ed. 1980).
cially, politically, or culturally contextualized, and does not address adequately the day-to-day problems of subordinated classes. Crenshaw's argument for adoption of the expansive view is rooted fundamentally in her assertion that the neoconservative interpretation of sociopolitical power structures is ahistorical because it assumes the absence in society of hegemonic racial power and subordination. In her critique of the restrictive view of equality, Crenshaw does not suggest that the restrictive view should be eliminated altogether. Rather, she argues that, because equal process is inexorably and complexly linked with equal results, the expansive view must also inform the goals of antidiscrimination law.

Unfortunately, it appears that civil rights discourse has moved increasingly toward an exclusive adoption of the restrictive view of equality, and has become further embedded in the perpetrator perspective. This Article suggests that Crenshaw's expansive equality approach to antidiscrimination law should be applied to substantive areas of the law beyond the scope of civil rights and antidiscrimination law doctrine, and that such applications should seek to eliminate the conditions of racial subordination, rather than remedy singularly egregious acts of racism. Specifically, this Article's primary objective is to argue for the incorporation into contract law's doctrine of good faith the victim perspective of expansive equality.

208 See id. at 1342–46; see also JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE vi–v, 15-18 (1994) (rebutting the notion that discrimination no longer exists, and describing discrimination confronting middle-class African Americans).

209 See Crenshaw, supra note 173, at 1344–46. "[T]o believe . . . that color-blind policies represent the only legitimate and effective means of ensuring a racially equitable society, one would have to assume not only that there is only one 'proper role' for law, but also that such a racially equitable society already exists." Id. at 1344.

210 See id. at 1342–44.

211 See supra Part III.A.1 (criticizing the perpetrator perspective of racial discrimination, which views discrimination as a discrete set of acts inflicted on the victim by the perpetrator, and arguing that antidiscrimination law's focus on intentional discrimination is a manifestation of the perpetrator perspective). This proposition is supported by a cursory review of the familiar McDonnell Douglas burden-shifting framework imposed upon plaintiffs who bring claims of intentional discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000) (as amended). See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). A Title VII plaintiff must establish her prima facie case by showing that she belongs to a protected class traditionally discriminated against in the workplace, that she was adequately qualified, but despite her qualification, she received adverse treatment, and that similarly situated, non-protected employees did not receive similar treatment. See id. at 802. The employer-defendant in turn may rebut plaintiff's prima facie case simply by producing some legally sufficient evidence of a legitimate, nondiscriminatory reason for the adverse treatment. See Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-56 (1981). If the employer meets this burden of production, then the plaintiff must show by a preponderance of evidence that the legitimate reasons offered by the employer are mere pretext. Id. at 255-56; McDonnell Douglas, 411 U.S. at 804-05.
B. A Critical Race Critique of the Economic Model

A critical race assessment of the economic model of good faith assessment overlaps with many points of Malloy's general critique of law and economics. First and foremost, both critical race theory and law and market economy theory take issue with the primacy of efficiency in conventional economic analyses of the law.\textsuperscript{212} Malloy, of course, does so from a market perspective,\textsuperscript{213} while critical race scholars do so from an equality perspective.\textsuperscript{214} That is, critical race scholars critique law and economics scholars for excessively focusing on an atomistic conception of individual choice, and for fundamentally "misperceiving the essence of racism"\textsuperscript{215} as a perpetrator's "idiosyncratic 'taste'"\textsuperscript{216} that may impact efficiency positively or negatively, rather than as a systemic condition of subordination.\textsuperscript{217}

Critical race scholars also take issue with economists' criticisms of critical race theory as overtly political, as evidenced by Posner himself labeling some influential race crits as members of the "lunatic fringe."\textsuperscript{218} Although I object to Posner's characterization of critical race scholars, race crits do not dispute that their work is politically situated.\textsuperscript{219} Rather, they dispute claims that law and economics is neutral and objective, or that the discourse of law and economics is somehow less political than the discourse of critical race theory. Critical race theory and law and economics simply map two related political terrains through two distinct lenses of interpretation. Critical race theory interprets and maps the enabling structures of hegemonic racial power (one of which is the systemic denial to subordinated peoples of opportunities to engage in exchange processes), while law and economics interprets and maps the enabling structures of wealth formation in a free market. Race crits explicitly map their terrain from particularized political and cultural positions, while law and econom-

\textsuperscript{212} See supra notes 126, 142–50 and accompanying text.
\textsuperscript{213} See supra notes 142–50 and accompanying text.
\textsuperscript{214} See, e.g., Richard Delgado, Rodrigo's Second Chronicle: The Economics and Politics of Race, 91 Mich. L. Rev. 1183 (1993) (reviewing Epstein, supra note 121); see also Audain, supra note 122 (arguing that law and economics scholars have disregarded the analytical importance of culture).
\textsuperscript{215} Delgado, supra note 214, at 1195.
\textsuperscript{216} Id. at 1188.
\textsuperscript{217} See supra Part III.A. Malloy similarly critiques the conventional economic focus on the atomistic individual, as demonstrated by his argument that wealth formation is informed by both cost-benefit analysis and individuals' membership in a community. See supra notes 142–50 and accompanying text.
\textsuperscript{218} Richard A. Posner, The Skin Trade, New Republic, Oct. 13, 1997, at 40, 40 (book review) ("Every intellectual movement has a lunatic fringe. Radical legal egalitarianism is distinguished by having a rational fringe and a lunatic core. The latter is constituted by the critical race theorists and the other legal academics who have swallowed postmodernism hook, line, and sinker . . . .")
\textsuperscript{219} See, e.g., Crenshaw, supra note 173, at 1342–44, 1384–87.
ics scholars map theirs using the powerful and predictive “science” of economics. But, as Malloy has argued from a market theory perspective, by locating the discourse in the science of economics and objectivity, law and economics scholars misunderstand not only the impact of racial subordination on the market and the exchange process, but more fundamentally, the reinterpretable and indeterminate qualities of the market and the exchange process in general.  

In spite of those critiques, it appears that law and economics, as a general discourse, may inaccurately be perceived as more objective and less political than critical race theory. The relative proliferation of law and economics programs, centers, and concentrations at the “top twenty” law schools in the United States, as compared with the presence of only one concentration in critical race theory at a major law school, suggests that this perception is widespread. But despite the fact that race crits and law and economics scholars are extremely critical of one another, members of both movements have acknowledged that the actualization of different notions of justice may require the application of different legal theories to various kinds of real-life problems. For example, Posner notes that

there is more to notions of justice than a concern with efficiency. It is not obviously inefficient to allow suicide pacts; to allow private discrimination on racial, religious, or sexual grounds; to permit killing and eating the weakest passenger in the lifeboat in circumstances of genuine desperation; to force people to give self-incriminating testimony; to flog prisoners; to allow babies to be sold

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220 See supra notes 142–50 and accompanying text.

221 The “top twenty” refer to those schools ranked as such by the most recent edition of the U.S. News & World Report’s annual “Best Colleges and Graduate Programs” issue. See America’s Best Graduate Schools 2003: Law Schools, http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php. Of the law schools ranked in the top twenty, thirteen of them have law and economics programs or centers: Yale, Stanford, Harvard, Columbia, Cornell, Vanderbilt, University of Pennsylvania, University of Chicago, University of Michigan, University of Virginia, University of California at Berkeley (Boalt Hall), Georgetown, and University of Southern California. This research was compiled by searching the websites of the top twenty law schools.

As Elizabeth Iglesias has noted:

Those who master the dominant language reap the rewards of assimilation. . . . Law and economics aficionados get hired by elite law schools, appointed to the federal bench, recruited for high-level policy-making positions and published in prestigious law journals at higher rates than exponents of any of the major strains of critical legal discourse. By contrast, legal scholars working to articulate critical perspectives . . . are channeled into the “interesting visitor” circuit, cast as “too political” for judicial appointment and “too abstract and theoretical” for the nitty-gritty of policy-making.

Iglesias, supra note 124, at 655–56 (footnote omitted).

222 The University of California at Los Angeles is the only top twenty law school with a critical race theory program. See CRS@UCLAW, at http://www1.law.ucla.edu/~crs/index.html (last updated Sept. 9, 2002).
for adoption; to allow the use of deadly force in defense of a pure
property interest; to legalize blackmail; or to give convicted felons a
choice between imprisonment and participation in dangerous med-
ical experiments. Yet all these things offend the sense of justice of
modern Americans, and all are to a greater or lesser (usually
greater) extent illegal. An effort will be made . . . to explain some
of these prohibitions in economic terms, but most cannot be; there is
more to justice than economics, a point the reader should keep in mind
in evaluating normative statements in this book.223

Similarly, other scholars of race and law have acknowledged the signif-
icance of the (post-)law and economics movement, as well as the need
for continued work in that area.224

As critical race scholars substantively engage economic analysis of
the law, it becomes crucial to examine carefully the interaction of
these distinct interpretive lenses in modern legal discourse. Accord-
ingly, the remaining sections of this Article focus on a synthesis of
critical race theory and Malloy’s law and market economy scholarship
in the context of the doctrine of contractual good faith. The theoreti-
cal debate surrounding the doctrine of good faith provides an appro-
priate doctrinal context for examining the interaction of critical and
economic analysis, because that debate has historically pitted eco-
nomic analysis (e.g., Burton’s forgone opportunities approach)
against independent conceptions of justice (e.g., Summers’s excluder
analysis). Moreover, the theoretical distinction between economy and
justice is often elided in contract law because contract disputes are
particularly susceptible to economic analyses. But is this susceptibility
merely a function of convenience, or do economic analyses in con-
tract disputes yield the fairest results? Is it true, as Malloy has asserted,
that “[t]he market does not care about fairness”?225

Because I am not an economist, I will not answer for the econo-
mists. However, the remaining sections of this Article argue that con-
siderations of fairness should be accounted for explicitly in the
analysis of contract cases, despite the apparent amenability of such
cases to purely economic analysis. This is especially true in cases that
do not involve purely commercial contracts,226 and particularly in
cases involving employment contracts. In giving due consideration to
fairness concerns, it is not necessary to forgo entirely the law and eco-

224 See, e.g., William Bratton, Law and Economics of English Only, 53 U. MIAMI L. REV. 973
(1999) (arguing that economic analysis reveals the inefficiency of English-only language
laws).
225 MALLOY, supra note 60, at 32.
226 This is not to say that it is always appropriate to apply an economic analysis to
commercial cases; in such cases, distinct applications of economic and justice-centered ap-
proaches to good faith will not always yield equally equitable results.
nomic goals of efficiency and wealth maximization. But it is possible to give primacy in contract disputes to expansive notions of equality because doing so will lead ultimately to more productive, creative, and dynamic interactions between contracting parties. More dynamic interactions will create an expanding network of exchange that, in turn, will drive and reallocate the formation of wealth and economic opportunity and effect a more equitable allocation of access to these exchange processes. The remaining sections of this Article also argue that conventional antidiscrimination law has not done enough to combat racial subordination.

IV

CASES INVOLVING GOOD FAITH AND RACIAL DISCRIMINATION IN THE AT-WILL EMPLOYMENT CONTEXT: CRITIQUE OF THE CASE LAW

This Part develops an expansive equality perspective on the doctrine of good faith by analyzing cases arising in the context of at-will employment agreements. Specifically, the analysis focuses on cases in which at-will employees attempt to bring claims against their employers for breach of the implied covenant of good faith under factual circumstances that also give rise to statutory discrimination claims under state or federal civil rights legislation. Most courts have held that the availability of statutory civil rights remedies precludes plaintiffs from bringing common law claims for breach of the duty of good faith based on the same conduct. This Part analyzes the reasoning behind these decisions from a critical race perspective. It then argues that the courts have relied too heavily on civil rights law to remedy cognizable forms of discrimination, and that they have employed the doctrine of good faith primarily to protect the economic interests of parties rather than to ensure fairness in the contracting process.

A. The Basics of At-Will Employment

Plaintiffs who bring interconnected discrimination claims and contractual claims for breach of good faith generally do so in the employment context, after they have received adverse treatment at the hands of their employers. These good faith claims are premised on the contractual nature of the employer-employee relationship, while

227 See supra notes 142–50 and accompanying text; see also Ian R. MacNeil, Relational Contract: What We Do and Do Not Know, 1985 Wis. L. Rev. 483, 525 (surveying the behavioral, legal, and scholarly dimensions of relational contract law and arguing that acquisition of a “greater knowledge of essential human social patterns” is required to fully understand discrete contractual exchanges).

228 Plaintiffs have, however, brought breach of good faith and discrimination claims together in other contexts. See, e.g., Ruiz v. A.B. Chance Co., 234 F.3d 654 (Fed. Cir. 2000) (termination of distributor agreement); Reid v. Key Bank of S. Me., Inc., 821 F.2d 9 (1st
the discrimination claims are brought as alleged violations of federal or state civil rights statutes. Moreover, because these cases involve at-will employment relationships, courts frequently refuse to recognize good faith and other common law claims, whether based in contract or tort, reasoning that both the employer and the employee are free to terminate the at-will relationship at any time upon proper notice, for any reason or for no reason.

However, some courts have established narrow, categorical exceptions to the at-will employment doctrine. In *Wagenseller v. Scottsdale Memorial Hospital*, the Supreme Court of Arizona delineated three general categories of exceptions to the rule that an employer may terminate an at-will employee for any reason or no reason: the public policy exception, the implied-in-fact employment contract exception, and the good faith and fair dealing exception. The public policy exception dictates that an employer may not terminate an employee for any reason that would violate "public policy articulated by constitutional, statutory, or decisional law." The implied-in-fact employment contract exception operates to restrict at-will termination in

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231 See infra Part IV.B.

232 Many courts acknowledge the general rule that at-will employment is terminable upon notice for any or no reason, but recognize exceptions to that rule, including an implied obligation of good faith and fair dealing. See, e.g., E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 437-38 (Del. 1996); Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1030-33, 1036-40 (Ariz. 1985), superseded by ARIZ. REV. STAT. ANN. § 23-1501 (West 2002). But see, e.g., Dandridge v. Chromcraft Corp., 914 F. Supp. 1396, 1406-07 (N.D. Miss. 1996) (noting that Mississippi law does not recognize an implied obligation of good faith and fair dealing in at-will employment agreements); Rios v. Tex. Commerce Bancshares, Inc., 930 S.W.2d 809, 814-16 (Tex. App. 1996) (noting that "neither the [Texas] legislature nor the supreme court [of Texas] has recognized an implied covenant of good faith and fair dealing in employment relationships").

233 See, e.g., Wagenseller, 710 P.2d at 1030-40. Although Wagenseller was subsequently superseded by statute, the Supreme Court of Arizona's discussion of the good faith and fair dealing exception to an at-will employment contract is useful for this Article's analysis. Moreover, Wagenseller has been cited favorably in several jurisdictions. See, e.g., Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 105-06 (Colo. 1992); Wholey v. Sears Roebuck, 802 A.2d 482, 488 (Md. 2002).

234 Wagenseller, 710 P.2d at 1031.

cases in which the parties' conduct or supplemental statements indicate that the parties have agreed to limit their rights to terminate the employment relationship.\textsuperscript{236} Finally, the good faith and fair dealing exception establishes "a [contractual] duty imposed by law where the contract itself is silent,"\textsuperscript{237} which "requires that neither party do anything that will injure the right of the other to receive the benefits of their agreement."\textsuperscript{238} As one might expect from its use of this language, the \textit{Wagenseller} court cited section 205 of the \textit{Restatement (Second) of Contracts}\textsuperscript{239} at the outset of its discussion of the good faith exception, and also noted that the good faith duty acts in some jurisdictions as the basis for a tort claim.\textsuperscript{240} The court then summarized the conflict between jurisdictions that have recognized the good faith exception to the at-will doctrine and those that have not.\textsuperscript{241}

The \textit{Wagenseller} court stated, in terms echoing Burton's forgone opportunities analysis,\textsuperscript{242} that the courts that rejected the good faith exception were motivated primarily by "the concern that to [recognize the exception] would place undue restrictions on management and would infringe the employer's 'legitimate exercise of management discretion.'"\textsuperscript{243} Although the \textit{Wagenseller} court did not sustain the plaintiff's good faith claim in the case before it, the court did not categorically refuse to recognize good faith claims in the at-will employment context.\textsuperscript{244} Instead, the court crafted a good faith exception modeled on the economic approach to good faith, stating:

\begin{quote}
We do . . . recognize an implied covenant of good faith and fair dealing in the employment-at-will contract, although that covenant does not create a duty for the employer to terminate the employee only for good cause. The covenant does not protect the employee from a "no cause" termination because tenure was never a benefit inherent in the at-will agreement. The covenant does protect an employee from a discharge based on an employer's desire to avoid the payment of benefits already earned by the employee, such as the
\end{quote}

\begin{flushright}
\textsuperscript{236} See \textit{Wagenseller}, 710 P.2d at 1036–38. In many cases, the most significant sources of extrinsic evidence are the employment policy manuals distributed to employees; indeed, the \textit{Wagenseller} court referred to the implied-in-fact contract exception as the "personnel policy manual exception." See \textit{id}. at 1036.
\textsuperscript{237} \textit{Id}. at 1036.
\textsuperscript{238} \textit{Id}. at 1038 (citing \textit{Comunale v. Traders & Gen. Ins. Co.}, 328 P.2d 198, 200 (Cal. 1958) and \textit{Fortune v. Nat'l Cash Register Co.}, 364 N.E.2d 1251, 1257 (Mass. 1977)).
\textsuperscript{239} The \textit{Restatement (Second) of Contracts} adopted the excluder analysis model of good faith. See \textit{supra} notes 44–47 and accompanying text.
\textsuperscript{240} \textit{Wagenseller}, 710 P.2d at 1038; see \textit{infra} Part IV.B.2.
\textsuperscript{241} See \textit{Wagenseller}, 710 P.2d at 1039–40.
\textsuperscript{242} See \textit{supra} Part I.A.1.
\textsuperscript{243} \textit{Wagenseller}, 710 P.2d at 1039 (quoting \textit{Pugh v. See's Candies, Inc.}, 171 Cal. Rptr. 917, 928 (Ct. App. 1981), overruled on other grounds by \textit{Guz v. Bechtel Nat'l, Inc.} 8 P.3d 1089 (Cal. 2000)).
\textsuperscript{244} See \textit{id}. at 1040–41.
\end{flushright}
sales commissions in *Fortune* [v. *National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1971)], but not the tenure required to earn the pension and retirement benefits in *Cleary* [v. *American Airlines, Inc.*, 168 Cal. Rptr. 722 (Ct. App. 1980)]. Thus, plaintiff here has a right to receive the benefits that were a part of her employment agreement with defendant Hospital. To the extent, however, that the benefits represent a claim for prospective employment, her claim must fail. The terminable-at-will contract between her and the Hospital made no promise of continued employment. To the contrary, it was, by its nature, subject to termination by either party at any time, subject only to the legal prohibition that she could not be fired for reasons which contravene public policy.\textsuperscript{245}

Although the reasoning set forth in the *Wagenseller* opinion is both thorough and sensible, and has guided many courts in their analyses of the exceptions to the at-will doctrine,\textsuperscript{246} this Article takes issue with the *Wagenseller* court's analysis of the public policy exception as theoretically distinct from the good faith exception. This separation of the two exceptions is a result of the dominance of the economic analysis of the doctrine of good faith.\textsuperscript{247} Contrary to the *Wagenseller* court's position, the public policy and good faith exceptions are often impossible to separate from an analytic perspective. Moreover, in some circumstances, an expansive equality approach to good faith consistent with the spirit of the *Restatement (Second) of Contracts* may actually necessitate an analysis of the two exceptions as interrelated phenomena. In order to explicate this point, it is necessary to examine briefly the law controlling preclusion of common law contract and tort claims by statutory antidiscrimination remedies.

**B. Preclusion of Common Law Contract and Tort Claims by Antidiscrimination Statutes: The Alternate Remedies Doctrine**

1. **Opposing Positions**

Although cases in which courts have employed the public policy exception to limit the at-will employment doctrine usually involve conduct that is either "statutorily sanctioned" or "in furtherance of public policy,"\textsuperscript{248} it cannot seriously be questioned that federal and state statutory and constitutional prohibitions against discrimination embody the sort of clearly mandated public policy contemplated by this exception to the at-will doctrine.\textsuperscript{249} However, in cases in which plaintiffs

\textsuperscript{245} *Id.*

\textsuperscript{246} See supra note 233.

\textsuperscript{247} See supra Part I.B.

\textsuperscript{248} See Pennington, supra note 235, at 1596–1622.

\textsuperscript{249} See, e.g., Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1225 (Okla. 1992) (holding that racially motivated discharge or retaliation offends a clear mandate of public policy and
have brought state common law claims, which may include claims of contractual or tortious breach of good faith, in conjunction with discrimination claims, courts have divided on the issue of whether the availability of a statutory civil rights remedy precludes common law claims and remedies based on the same factual allegations.

Although some commentators and courts have used the language of "preemption" to describe this controversy,\(^{250}\) the use of this term requires some clarification. Many of the relevant cases involve the "preemption" of state common law claims by statutory schemes, rather than the more common issue of preemption of state law claims by federal law under the Supremacy Clause.\(^{251}\) As the Supreme Court of Kansas explained in *Flenker v. Willamette Industries, Inc.*, this controversy is more accurately described as one involving the "alternate remedies doctrine," or as it is sometimes called, "preclusion."\(^{252}\) In *Flenker*, the employee-plaintiff brought a common law tort action for wrongful discharge, alleging that he had been terminated in retaliation for filing complaints under the Federal Occupational Safety and Health Act (OSHA), and that the termination violated the public policy exception to the at-will employment doctrine.\(^{253}\) After reviewing and comparing the remedies available under the relevant section of OSHA and the state common law tort claim, the *Flenker* court held that, because the discretion to bring a retaliatory discharge claim under OSHA lay solely with the Department and Secretary of Labor, OSHA did not provide an adequate alternate remedy.\(^{254}\) Thus, the court refused to bar the plaintiff's state tort claim for retaliatory wrongful discharge, on the ground that OSHA provided an inadequate alternate remedy.\(^{255}\)

The *Flenker* court did assert in dicta, however, that Title VII was distinguishable from OSHA in that Title VII would preclude a state common law claim because, unlike OSHA, Title VII gives an aggrieved person permission to bring a private action in the event that the Equal Employment Opportunity Commission (EEOC) refuses to pursue the

\(^{250}\) See, e.g., Gottling v. P.R. Inc., 61 P.3d 989 (Utah 2002).

\(^{251}\) See, e.g., Peatros v. Bank of Am. NT & SA, 990 P.2d 539, 552–53 (Cal. 2000) (holding that plaintiff's California Fair Employment and Housing Act claim was preempted by federal statute to the extent that the state and federal statutory schemes conflicted); see also Kimberly C. Simmons, Annotation, *Pre-emption of Wrongful Discharge Cause of Action by Civil Rights Laws*, 21 A.L.R.5th 1 (1994) (surveying case law on preemption of common law wrongful discharge claims by statutory antidiscrimination statutes).


\(^{253}\) See *id.* at 298.

\(^{254}\) See *id.* at 302–03.

\(^{255}\) See *id.* at 301–03.
complaint. In support of this conclusion, the Flenker court cited Polson v. Davis, which held that the Kansas Acts Against Discrimination (KAAD) provided an "adequate and exclusive state remedy for violations of the public policy enunciated therein," thereby precluding the plaintiff's state law retaliatory wrongful discharge claim. This Article takes issue, from a critical race perspective, with the general proposition that the availability of federal or state statutory antidiscrimination remedies precludes plaintiffs from bringing state common law claims based on the same allegedly discriminatory conduct.

The Polson court, in precluding the plaintiff's common law claim, expressly refused to adopt the reasoning of Wynn v. Boeing Military Airplane Co., a case that had originated in the same federal district as Polson. In Wynn, the plaintiff sued the Boeing Military Airplane Co. for employment discrimination on the basis of race, in violation of 42 U.S.C. § 1981, which prohibits racial discrimination in the contracting process. In his complaint, Wynn also asserted that Boeing had breached the implied covenant of good faith and fair dealing by treating him in a discriminatory manner. Because Kansas recognizes public policy limitations on the at-will employment doctrine, and in light of clear public policy against racial discrimination, the district judge allowed plaintiff to proceed with his breach of good faith claim, stating that "[i]n absence of a specific contractual provision, an employer may terminate an employee at will for any reason or for no reason, but not for a discriminatory reason.

Moreover, the court rejected Boeing's argument that the availability of remedies under federal civil rights statutes precluded Wynn's assertion of a common law good faith claim, and declined to extend the holding of Murphy, Tarr v. Riberglass, that the Age Discrimination in Employment Act provides the exclusive remedy for complaints of age discrimination, into the context of race discrimination law. Rather, the court stated that "[t]his Court is unwilling to engraft [an

256 See id. at 303.
257 895 F.2d 705 (10th Cir. 1990).
258 Id. at 709-10.
261 See Wynn, 595 F. Supp. at 728.
263 See Wynn, 595 F. Supp. at 728-29.
264 Id. at 729 (citing Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs., 630 F.2d 186, 192 (Kan. Ct. App. 1981)).
265 Id. at 728-29.
266 Id. at 729 (citing Murphy, Tarr v. Riberglass, Civil Action No. 83-4234 (D. Kan. Feb. 8, 1984)).
exclusive remedy provision] onto the law of race discrimination."267 Addressing more squarely the issue of whether the federal civil rights statutes provided plaintiff an adequate alternate remedy, the court asserted that Wynn's good faith claim was not coterminous with his federal statutory remedies, noting that even the Kansas statutory scheme differed from federal antidiscrimination law.268 Thus, the court refused "to make § 1981 and Title VII plaintiff's exclusive avenues of relief."269

The Wynn court's recognition of two important but ostensibly obvious points reveals a critical understanding of the nature of racial subordination. First, the court acknowledged explicitly that Wynn's good faith claim was directly related to a public policy against discrimination because Boeing's alleged failure to act in good faith arose out of the same set of facts that gave rise to his potential discrimination claims.270 As the court implied, however, this is not to say that the two claims are equivalent; each may require a distinct legal analysis of the facts and provide remedies of a different nature.271 Second, in refusing to engraft an exclusive remedy provision into the federal law of race discrimination, the Wynn court recognized implicitly the limitations of federal civil rights remedies, as well as the onerous burden plaintiffs must carry in such cases, when it refused to recognize federal claims as the exclusive remedies for unlawful racial discrimination.272 The problem with making federal civil rights statutes a plaintiff's exclusive remedy is that such relief is difficult to obtain.273 Under statutory antidiscrimination law, the defendant's mere articulation of a legitimate business reason for the plaintiff's termination requires the plaintiff to demonstrate that the defendant's reasons are a mere pretext for discrimination,274 a rather difficult task.

Thus, a critical reading of the Wynn court's opinion transforms theoretical critiques of conventional civil rights jurisprudence into practice. The opinion addresses the need for broader remedies outside of traditional civil rights jurisprudence in order to deal more

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267 See id.
268 Id.
269 Id.
270 See id. at 729–30 ("Wynn's case fits squarely within the ambit of Murphy [v. City of Topeka-Shawnee County Department of Labor Services, 630 P.2d 186 (Kan. Ct. App. 1981)]: a discharge based on the impermissible consideration of race is prohibited by the public policy of Kansas.").
271 See id. at 729; supra notes 268–69 and accompanying text.
272 See Wynn, 595 F. Supp. at 729 ("The Kansas common law action may provide remedies not available under federal law and does not have requisites that the federal law possesses.").
273 See, e.g., supra note 211 (discussing the McDonnell Douglas burden-shifting framework in Title VII cases).
274 See supra note 211.
effectively with the material conditions of racial subordination by expanding the scope of the implied duty of good faith in the at-will employment relationship. A critical reading of the opinion also reveals an implicit recognition of the perpetrator-victim critique of civil rights jurisprudence, and begins to address the broader social problem of racial subordination through the expansion of the efficiency-modeled "perfect contracting world." The Wynn decision thus opens the door to an expansive equality approach to the doctrine of good faith.

Although the Wynn court's holding was rejected by the Tenth Circuit in Polson, and has not been widely followed, its significant intervention in the development of both good faith and at-will employment jurisprudence has support in other jurisdictions. Yet, even in cases in which courts follow the Wynn approach, the implied duty of good faith is still used primarily as an instrument to effect efficiency. In order to develop the expansive equality perspective, the next section examines two analogous cases consistent with Wynn.

2. Analogous Positive Cases: Rojo and Tate

a. California: Rojo v. Kliger

In Rojo v. Kliger, the Supreme Court of California held that the California Fair Employment and Housing Act (FEHA), California's antidiscrimination statute, did not preclude state common law claims relating to employment discrimination. The Rojo plaintiffs, Emma Rojo and Teresa Maloney, who were former medical assistants to the defendant Dr. Erwin Kliger, alleged that they were compelled to leave their employment due to Dr. Kliger's "sexually harassing remarks and demands for sexual favors." Subsequently, Rojo and Maloney sued Dr. Kliger and his medical corporation, asserting statutory claims for sexual harassment in violation of FEHA, as well as common law tort claims for intentional infliction of emotional distress and wrongful discharge in contravention of public policy. Although Rojo involved allegations of discrimination based on sex as opposed to race, and the plaintiffs did not allege a breach of the duty of good faith, the court's reasoning is instructive for purposes of this Article, because it can be

275 See Polson v. Davis, 895 F.2d 705, 709-10 (10th Cir. 1990).
277 See supra Part I.B.
278 801 P.2d 373 (Cal. 1990).
280 See Rojo, 801 P.2d at 376-83. The court also addressed the related issue of whether the employees were required to exhaust the administrative process under the FEHA before bringing common law causes of action. The court answered this question negatively. See id. at 383-88. However, the court's analysis of that issue is beyond the scope of this Article.
281 Id. at 375.
282 See id.
used to address more broadly the elimination of other forms of identity-group based subordination.\textsuperscript{283}

The inconsistency of California’s lower courts on the particular issue of whether the FEHA precluded common law claims, such as those of the \textit{Rojo} plaintiffs, was reflected in the procedural history of the case itself. The trial court granted Dr. Kliger summary judgment based in part on the exclusive alternate remedy doctrine and the FEHA’s preclusion of state common law claims,\textsuperscript{284} but the Court of Appeals reversed, holding that the FEHA did not preempt or preclude the common law claims that were related to the employment discrimination facts.\textsuperscript{285} Affirming the Court of Appeals, the California Supreme Court in \textit{Rojo} relied primarily on the language of the FEHA itself:

“The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of \textit{any other law of this state relating to discrimination} because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.”

\ldots

As we explained in \textit{State Personnel Bd. v. Fair Employment \\& Housing Comm’n}, \ldots: “The FEHA was meant to supplement, not supplant or be supplanted by, existing antidiscrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights against discrimination . . . .”

By expressly disclaiming a purpose to repeal other applicable state laws . . . , we believe the Legislature has manifested an intent to amplify, not abrogate, an employee’s common law remedies for injuries relating to employment discrimination. Had the Legislature intended otherwise, it plainly knew how to do so.\textsuperscript{286}

Thus, the court concluded that “[t]he meaning of the FEHA is clear . . . . [T]he FEHA . . . expressly disclaims any intent to repeal other applicable state laws.”\textsuperscript{287} Moreover, the common law of California “provides any number of remedial theories to compensate for injuries ‘relating to discrimination,’”\textsuperscript{288} and a failure to bring such


\textsuperscript{284} See \textit{Rojo}, 801 P.2d at 375.

\textsuperscript{285} See \textit{id.} at 375–76.

\textsuperscript{286} \textit{Id.} at 377–78 (quoting \textit{CAL. GOV’T CODE} § 12993(a) (West 1992) (emphasis added) and \textit{State Pers. Bd. v. Fair Employment \\& Hous. Comm’n}, 703 P.2d 354, 359 (Cal. 1985)).

\textsuperscript{287} \textit{Id.} at 377, 383.

\textsuperscript{288} \textit{Id.} at 377 (quoting \textit{CAL. GOV’T CODE} § 12993(a) (emphasis added)).
related claims, such as Rojo's and Maloney's emotional distress and tortious discharge claims, would reflect the irresponsibility and ineptness of the attorney handling such a case.\textsuperscript{289}

One of the defendant's particular arguments deserves a more detailed discussion, because the court's response to that argument is relevant to the analysis of the exclusive alternate remedies doctrine discussed earlier in this Article.\textsuperscript{290} Kliger argued that the "new right-exclusive remedy" rule of statutory construction and the "preexisting right-cumulative remedies" doctrine supported the inference that the California legislature intended in enacting the FEHA to cover the entire field of employment discrimination.\textsuperscript{291} The new right-exclusive remedy rule requires that "where a statute creates a right that did not exist at common law and provides a comprehensive and detailed remedial scheme for its enforcement, the statutory remedy is exclusive."\textsuperscript{292} In contrast, the preexisting right-cumulative remedies doctrine dictates that "where a statutory remedy is provided for a preexisting common law right, the newer remedy is generally considered to be cumulative, and the older remedy may be pursued at the plaintiff's election."\textsuperscript{293}

In its first line of reasoning, the court summarily dismissed the applicability of these constructive doctrines, because "the pertinent language of the FEHA is plain and its meaning unmistakable: the act expressly disclaims any intent to repeal other state laws relating to discrimination, legislative or otherwise."\textsuperscript{294} The court then went on to attack the defendant's argument on its merits, criticizing the defendant's misapplication of the doctrines. The court held that the correct application of the doctrines simply established that the scope of the FEHA was limited to the categories expressly enumerated in its provisions, thus barring discrimination only on those specified

\footnotesize{289} Id. Kliger advanced additional interpretive challenges to the continued validity of common law claims in light of the provisions of the FEHA, but the Rojo court remained unpersuaded. See id. at 378 (rejecting defendant's argument that use of the term "repeal" in section 12993(a) of the FEHA revealed legislative intent to preserve only statutory, not common law, remedial theories); id. at 378–81 (rejecting defendant's argument that the statement in section 12993(c) of the California Legislature's intent to "occupy the field of regulation of discrimination in employment" expressed an intent to supersede all preexisting state law except for a particular civil code section referenced in section 12993(c)).

\footnotesize{290} See supra Part IV.B.1.

\footnotesize{291} Rojo, 801 P.2d at 381.

\footnotesize{292} Id.

\footnotesize{293} Id.

\footnotesize{294} Id. The court further criticized Strauss v. A.L. Randall Co., 194 Cal. Rptr. 520 (Ct. App. 1983), and its progeny for "needlessly" applying the new right-exclusive remedy rule of interpretation to the FEHA to preclude common law wrongful discharge claims in violation of public policy, in light of the FEHA's express disclaimer of any intent to preclude other state law claims. Rojo, 801 P.2d at 383.
In support of this holding, the court noted that "we have long recognized that the common law provides a variety of means independent of the FEHA . . . to redress injuries arising from discrimination in employment."\(^{296}\)

Although the Rojo court's opinion bolsters this Article's position that federal and state antidiscrimination statutes do not and should not preclude common law claims based on related facts, the Rojo opinion's almost singular reliance on statutory interpretation of the FEHA reveals a reluctance, either conscious or unconscious, to confront a harder question: Why do plaintiffs need access to multiple theories of redress if civil rights statutes provide specific remedies for discrimination? As suggested above, plaintiffs need this access because of the way legal and nonlegal actors have come to conceptualize discrimination as singularly egregious acts of racism perpetrated by bad actors who intend to inflict the subordinating consequences of their actions, rather than as a set of systemic conditions of subordination.\(^{297}\)

The Rojo court's 1990 decision that the FEHA does not bar related common law claims has since been extended to discrimination based on race\(^{298}\) and age.\(^{299}\) Moreover, other states, such as Oklahoma, have followed California's lead in this regard.

b. Oklahoma: Tate v. Browning-Ferris, Inc.

In Tate v. Browning-Ferris, Inc.,\(^{300}\) the Supreme Court of Oklahoma addressed the following question certified by the U.S. District Court for the Western District of Oklahoma:

"Where an at-will employee terminated by a private employer files suit alleging facts that, if true, violate state and federal statutes providing remedies for employment discrimination, can the employee-plaintiff state a tort cause of action based on the same facts, pursuant to the public policy exception to the at-will termination rule, recently recognized by the Oklahoma Supreme Court in Burk v. K-Mart, 770 P.2d 24 (Okla. 1989)?"\(^{301}\)

The Tate court answered this question in the affirmative, "noting that the federal statute violated does not preempt state law and holding

\(^{295}\) See Rojo, 801 P.2d at 381.

\(^{296}\) Id.

\(^{297}\) See supra Part III.A.


\(^{299}\) See, e.g., Stevenson v. Superior Court, 941 P.2d 1157 (Cal. 1997).

\(^{300}\) 833 P.2d 1218 (Okla. 1992).

\(^{301}\) Id. at 1220. In Burk, the Supreme Court of Oklahoma adopted the public policy tort exception to the at-will-employment termination rule, 770 P.2d 24, 28 (Okla. 1989). The Burk court noted that although it refused to impose an implied covenant of good faith on an employer's decision to terminate, id. at 27, recognition of the public policy tort exception served "to accommodate the competing interests of society, the employee and the employer," id. at 28.
that the applicable state statute neither explicitly nor implicitly provides an exclusive remedy for employment-related discrimination."302

The plaintiff in Tate, a Black male, had been employed at Browning-Ferris, Inc. as a driver, but was demoted to “driver’s helper,” allegedly so that a less qualified and less senior White employee could be promoted to Tate’s driver position.303 Tate also alleged that he had been subjected to harassment and intimidation while employed at Browning-Ferris, and he filed a discrimination claim with the EEOC, charging Browning-Ferris with discrimination against Black males.304 Tate was later terminated, and he subsequently filed another EEOC complaint charging Browning-Ferris with racially motivated wrongful discharge in retaliation for the filing of the first EEOC complaint.305 When the EEOC issued Tate a right-to-sue letter, he brought an action in federal court against Browning-Ferris, asserting violations of Title VII in addition to state tort claims for wrongful discharge in contravention of public policy.306

The Tate court first addressed the preliminary question of whether Oklahoma’s antidiscrimination statute is preempted by Title VII, which provides that “state laws will be preempted only if they actually conflict with federal law.”307 Concluding that Title VII does not preempt Oklahoma’s employment discrimination laws, the court noted two well-settled principles established by the U.S. Supreme Court in California Federal Savings & Loan Ass’n v. Guerra.308 First, the Tate court referenced the Supreme Court’s interpretation in Guerra of Title VII’s limited preemption provisions as “explicit disclaimers of any federal intent categorically to preempt state law or to ‘occupy the field’ of employment discrimination.”309 Second, the Tate court noted that, under Guerra, Title VII acts as a floor, rather than as a ceiling, with respect to the scope of protection that may be provided by federal or state antidiscrimination law.310 Moreover, the court noted Tate’s own assertions about the inadequacy of both Title VII and Oklahoma’s statutes as remedies for racial discrimination: these statutory schemes, Tate claimed, not only failed to make him whole, they also failed to deter discriminatory practices.311

302 Tate, 833 P.2d at 1220 (emphasis omitted).
303 Id. at 1221 n.9.
304 Id. at 1221 & n.9.
305 Id.
306 Id.
309 Id. at 1222 & n.13 (quoting Guerra, 479 U.S. at 281).
310 Id. at 1222–23 & 1223 n.14 (citing Guerra, 479 U.S. at 285).
311 See id. at 1223.
Returning to the more relevant question of whether the state antidiscrimination statutes precluded plaintiffs from bringing tortious wrongful discharge claims based on racially motivated discrimination, the Tate court acknowledged that the courts of various states were divided on this issue.\textsuperscript{312} Some states simply precluded state common law claims based on statutory exclusive remedy theories.\textsuperscript{313} Others refused to preclude all state claims, but, employing narrow applications of the public policy exception to the at-will employment doctrine, limited the availability of common law tort actions to those circumstances in which wrongful discharges in contravention of public policy "would otherwise go unavenged by a civil remedy."\textsuperscript{314} Still other courts held that state common law claims supplemented rather than supplanted the goals of antidiscrimination statutes, reasoning that "the common-law tort action's availability may deter future discrimination and combat entrenched existing illegal employment practices."\textsuperscript{315}

The Tate court ultimately followed the approach of this third category of cases, holding that the Oklahoma antidiscrimination statute did not preclude Tate from asserting a claim for tortious wrongful discharge in violation of the public policy against racial discrimination, or for unlawful retaliation in response to a racial discrimination complaint.\textsuperscript{316} As the California Supreme Court did in Rojo, the Tate court applied conventional canons of statutory interpretation to support its conclusion, noting in particular that the Oklahoma statute was "to be construed liberally to further its general purposes."\textsuperscript{317} Further, the court expressly rejected the argument that, by enacting the Oklahoma statute, the legislature had intended the statute to occupy the entire field of not only employment discrimination, but also all employer/employee regulations:

That conclusion would be far from sound. Regulation of discrimination lies in many legal domains. Since the Act's purpose places it \textit{in pari materia} with Title VII, which was not meant to be \textit{the sole source of redress} for employment discrimination, a reasonable construction would be that the remedies provided by our Act are not exclusive. There is nothing in the Act to indicate a legislative intent to even enter, much less completely occupy, the entire arena of legally regulated employer/employee relationship.\textsuperscript{318}

\textsuperscript{312} See \textit{id.} at 1223 n.21.
\textsuperscript{313} \textit{Id.}; see \textit{supra} notes 291–92 and accompanying text.
\textsuperscript{314} Tate, 833 P.2d at 1223 n.21.
\textsuperscript{315} \textit{Id.} Notably, among the cases the Tate court cited for this proposition is Wagenseller \textit{v. Scottsdale Memorial Hospital}, 710 P.2d 1025 (Ariz. 1985), superseded by \textit{AZ. REV. STAT. ANN.} \textsection 23-1501 (West 2002). See \textit{supra} notes 233–46 and accompanying text (discussing Wagenseller).
\textsuperscript{316} Tate, 833 P.2d at 1230–31.
\textsuperscript{317} \textit{Id.} at 1228 & n.54.
\textsuperscript{318} \textit{Id.} at 1229 (footnote omitted).
Finally, the Tate court invoked the Oklahoma Constitution's mandate against "dichotomous division of discrimination remedies."\textsuperscript{319}

c. Tying Up Rojo and Tate

The Rojo and Tate courts reached a desirable conclusion by refusing to construe state or federal antidiscrimination claims as precluding or preempting state common law claims of wrongful discharge in contravention of a public policy against discrimination. Moreover, although both Rojo and Tate presented a solid first line of reasoning guided by the language of the statutes themselves and rooted in the application of well-established canons of statutory interpretation, the Tate court's reasoning is more consistent with the theoretical approach advocated in this Article.

First, in a turn consistent with the critical race critique of antidiscrimination statutes, the Tate court (like the Wynn court before it\textsuperscript{320}) explicitly recognized Tate's assertions that the remedies provided by antidiscrimination statutes were inadequate to provide the relief sought, assertions that can be read to express a dissatisfaction with the traditional perpetrator perspective of conventional civil rights jurisprudence.\textsuperscript{321} Although the Tate court did not explicitly adopt or extrapolate broader principles from Tate's assertions, the court's early reference to them arguably implies that Tate's assertions—those of the "victim" in the language of Freeman\textsuperscript{322}—had some impact on the court's analysis and decision.

The Tate court also expressly stated that the regulation of discrimination lay in "many legal domains."\textsuperscript{323} This statement is significant not only because it potentially broadens the conventional legal understanding of discrimination as a function of particular egregious acts or conduct, but also because it recognizes the complex ways in which systemic conditions of subordination manifest themselves in the workplace. An employee may not be able to point to a single actionable incident of blatant discrimination, such as the pervasive use of humiliating racial epithets in his presence or the expressed refusal to promote him because of his race, but that will not diminish the inequality of his situation. He understands, for example, that he will be held to an implicitly higher standard in the review process relative to other, similarly situated White employees; that his work will be scrutinized much more carefully and critically than that of his White counter-

\textsuperscript{319} Id. at 1229–30 & 1230 n.65 (emphasis omitted) (citing Okla. Const. art. V, § 46).
\textsuperscript{321} See supra notes 191–99 and accompanying text.
\textsuperscript{322} See supra notes 191–98 and accompanying text.
\textsuperscript{323} Tate, 833 P.2d at 1229.
parts; and that he will have to calculate more scrupulously the risk of his work-related decisions because of this enhanced scrutiny, while his White colleagues will have given similar decisions little or no thought.\textsuperscript{324} The psychic, emotional, intellectual, and professional tolls that attach to these kinds of precautionary practices in the workplace are severely burdensome, yet they are generally ignored by antidiscrimination law.\textsuperscript{325} The significance of the Tate court’s reasoning is that, although it makes no explicit reference to these issues, it seems to recognize implicitly that discrimination, from a victim’s perspective, involves much more than conventional civil rights law contemplates. Thus, other remedies must remain available to plaintiffs.

The contours of those other remedies, however, were limited in both Rojo and Tate to tortious wrongful discharge claims, and did not extend to contractual claims for breach of the duty of good faith. In Bakken v. North American Coal Corp.\textsuperscript{326} and Bennett v. Beiersdorf, Inc., however,\textsuperscript{327} federal courts in the districts of North Dakota and Connecticut, each applying the law of its respective state, expressly stated that public policies against discrimination based on gender or race cannot support an at-will employee’s claim for breach of the implied covenant of good faith and fair dealing. Similarly, the Supreme Court of California in Guz v. Bechtel National, Inc. has expressly limited the use of good faith claims to combat age discrimination in the at-will employment context.\textsuperscript{328}

3. **Analogous Negative Cases: Contractual Good Faith Claims**


The Bakken case, although not involving racial discrimination, is an analogous sex discrimination case. The plaintiff brought an action against her former employer alleging sex discrimination in violation of Title VII, breach of an implied covenant of good faith and fair dealing, and bad faith sufficient to justify an award of punitive damages.\textsuperscript{329} Bakken began working as a secretary for North American Coal in February 1977.\textsuperscript{330} Over the next two years she received salary increases, and was promoted to the position of technical assistant in October 1979.\textsuperscript{331} A few months later, her title was changed to research technician, and she continued to receive steady and substantial raises over

\textsuperscript{324} See Carbado & Gulati, Working Identity, supra note 283, at 1263–66, 1279–98.
\textsuperscript{325} See id. at 1276–98.
\textsuperscript{326} See 641 F. Supp. 1015, 1023 (D.N.D. 1986).
\textsuperscript{327} See 889 F. Supp. 46, 49 (D. Conn. 1995).
\textsuperscript{328} See 8 P.3d 1089, 1109–12 (Cal. 2000).
\textsuperscript{329} Bakken, 641 F. Supp. at 1017.
\textsuperscript{330} Id. at 1016.
\textsuperscript{331} Id.
the next few years. Bakken filed a sex discrimination suit against North American Coal alleging that her salary was less than that of a male employee in her department, even though their job responsibilities were essentially the same. In addition, she alleged that, although she submitted a request for a transfer to Cleveland when her department was relocated, she was denied the opportunity to transfer because North American Coal’s president disliked women and had instructed Bakken’s supervisors to discourage her from transferring. Bakken sought another position with North American Coal in Cleveland, but another woman was hired for that position. Bakken then filed a complaint with the North Dakota Department of Labor alleging sex discrimination. Shortly thereafter, Bakken’s supervisors informed her that her position as research technician was to be eliminated when her department moved to Cleveland. She was subsequently offered another, apparently lesser position at North American Coal as a secretary and keypunch operator; however, she declined the offer. At the time she was offered this position, one of her supervisors told her that she would not receive her promised severance pay unless she agreed to abandon her claim with the Department of Labor.

The court sustained Bakken’s Title VII sex discrimination claim and her contractual good faith claim, but dismissed the claim for punitive damages under both the Title VII and the contractual good faith theories. Because North Dakota had not yet recognized an action for breach of the implied covenant of good faith in the context of at-will employment, the court first determined that the Supreme Court of North Dakota would recognize such an action only if the covenant is implied in fact in an employment arrangement. The court then held that Bakken had presented genuine issues of material

332 Id.
333 Id.
334 See id. at 1016–17.
335 Id. at 1017.
336 Id.
337 Id.
338 Id.
339 Id.
340 See id. at 1018–19, 1022–23. The court asserted that North Dakota would recognize the implied covenant of good faith only as an implied-in-fact contract term, not as a term implied in law. Id. at 1022. Thus, although the court refused to grant summary judgment against Bakken on this claim, it noted that she would ultimately need to support this claim with proof of representations by North American Coal sufficient to establish an implied-in-fact duty of good faith. See id. at 1022–23.
341 Id. at 1020, 1022. However, the Supreme Court of North Dakota later rejected the Bakken court’s analysis and held that at-will employment contracts do not contain an implied covenant of good faith and fair dealing. See Hillesland v. Fed. Land Bank Ass’n, 407 N.W.2d 206, 211–15 (N.D. 1987).
fact regarding whether North American Coal had, through its conduct, objectively manifested to Bakken that “she had job security and would be treated fairly.”

Significantly, however, the court also suggested that a contractual good faith claim, as opposed to a tort claim alleging violation of public policy, “cannot rest solely on an alleged violation of a public policy against discrimination.” The court discussed the exclusive alternate remedy doctrine, stating that

[most courts that have considered the question have held that the presence of a statutory remedy for violation of an anti-discrimination statute precludes a common law action based on violation of a public policy against discrimination. Those courts have generally held that the remedy scheme provided in an anti-discrimination statute is intended to define the exclusive remedy against discrimination. Other considerations include use of a public policy exception to circumvent an anti-discrimination statute's procedural and remedial limitations.]

Thus, the Bakken court refused to permit contractual good faith claims to rest solely on alleged violations of public policy, and seems to have condemned implicitly such claims as attempts to circumvent conventional civil rights law.

b. Bennett v. Beiersdorf, Inc.

The plaintiff in Bennett, an African American woman, sued her former employer and supervisor, asserting state law claims for breach of the covenant of good faith and fair dealing, negligent infliction of emotional distress, and tortious interference with a contract, as well as a Title VII claim alleging discrimination on the basis of race. Because her good faith claim was factually related to the Title VII claim, Bennett argued that, under Connecticut law, the defendants had breached the covenant of good faith in violation of a clearly mandated public policy prohibiting employment discrimination on the basis of race. Despite the public policy against discrimination, the court dismissed Bennett's good faith claim.

[It is not sufficient simply to point to an important public policy—a plaintiff bringing a claim for violation of the covenant of good faith and fair dealing must also establish that she does not otherwise have an adequate means of vindicating that public policy. For example, the public policy against age discrimination in employment cannot justify a claim based on the covenant of good faith and fair dealing, because there

343 See id. at 1023.
344 Id. (citation omitted).
346 See id. at 49.
are already sufficient statutory remedies. As with age discrimination, the statutory remedies for race discrimination in employment are sufficiently well developed to preclude an independent cause of action. Indeed, plaintiff's complaint alleges violations of both state and federal statutes dealing with race discrimination in employment. Defendants' motion to dismiss is granted as to the [good faith claim], with prejudice.\textsuperscript{347}

Aside from providing, in essence, a restatement of the exclusive alternate remedy doctrine, the Bennett court offered no reasoning in support of its dismissal of Bennett's good faith claim.


The reasoning of the Supreme Court of California in Guz v. Bechtel National, Inc.\textsuperscript{348} is only tenuously related to that used by the Bakken and Bennett courts to bar contractual good faith claims. Yet it warrants discussion because the Supreme Court of California's decision in Guz began to limit the erosion of the at-will employment doctrine by expressly barring independent recovery for breach of the implied covenant of good faith and fair dealing arising out of the alleged violation of a clear public policy against age discrimination.\textsuperscript{349}

Guz, a twenty-two year employee of Bechtel National, Inc., was terminated at the age of forty-nine, when his work unit was eliminated and its responsibilities reassigned to another Bechtel office.\textsuperscript{350} Guz was originally hired as an administrative assistant in 1971 and he received numerous raises and promotions over the next two decades.\textsuperscript{351} At the time of his discharge, he was the financial reports supervisor for Bechtel's in-house management information unit.\textsuperscript{352} In 1992, a new president of Bechtel became dissatisfied with the inefficient performance of Guz's work unit.\textsuperscript{353} After considering different proposed business and budget plans, the new president decided to transfer the unit's work responsibilities to a similar work group in one of Bechtel's regional offices.\textsuperscript{354} Bechtel retained and transferred only the two youngest employees of Guz's unit to the regional office, while Guz and the other older employees were laid off, and their responsibilities

\textsuperscript{347} Id. (emphasis added) (citations omitted).
\textsuperscript{348} 8 P.3d 1089 (Cal. 2000).
\textsuperscript{349} The Guz case abrogated, in part, the California appellate court's decision in Walker v. Blue Cross, 6 Cal. Rptr. 2d 184 (Ct. App. 1992), a case in which the court permitted plaintiff to bring an action alleging a claim for breach of the implied covenant of good faith and fair dealing that was related to the plaintiff's FEHA claims for race, sex, and physical handicap discrimination. See Guz, 8 P.3d at 1111-12.
\textsuperscript{350} Guz, 8 P.3d at 1095-96.
\textsuperscript{351} Id. at 1095.
\textsuperscript{352} Id.
\textsuperscript{353} See id. at 1096.
\textsuperscript{354} See id. at 1096-97.
assumed by current employees at the regional office.\textsuperscript{355} Guz was laid off and placed on temporary holding status for six months, pending possible reassignment to another position at Bechtel.\textsuperscript{356} During that time, three other positions became available in the group that assumed Guz’s duties, but they were filled by other employees aged forty-two, fifty-two, and thirty-eight.\textsuperscript{357} Guz obtained no other position with Bechtel during those six months, and Bechtel subsequently terminated his employment.\textsuperscript{358}

Following his termination, Guz sued Bechtel, asserting claims of age discrimination in violation of the FEHA, breach of an implied contract to be terminated only for good cause, and breach of the implied covenant of good faith and fair dealing.\textsuperscript{359} Guz’s good faith claim was based solely on his allegations that, assuming the employment relationship had been at-will, Bechtel violated its own personnel policies when it terminated him without giving him an opportunity to improve his performance, failed to use objective criteria when selecting him for layoff, and failed to consider him for other open positions for which he was qualified.\textsuperscript{360} In essence, Guz argued implicitly that Bechtel violated the implied covenant of good faith and fair dealing by refusing to use objective criteria—other than age—in evaluating him as a candidate for layoffs and for other positions with Bechtel.

The Supreme Court of California flatly rejected the availability of a good faith claim under these circumstances, not on preemption grounds, but because Guz had attempted to use the duty of good faith to “impose substantive terms and conditions beyond those to which the contract parties actually agreed.”\textsuperscript{361} The court further explained that:

The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party’s right to receive the benefits of the agreement actually made. The covenant thus cannot “be endowed with an existence independent of its contractual underpinnings.” It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.

\textsuperscript{355} Id. at 1097.
\textsuperscript{356} Id.
\textsuperscript{357} Id. Apparently, Guz conceded in the course of the litigation that he never specifically applied for these positions, but he insisted that he had made it known that he wanted to stay at Bechtel. Id.
\textsuperscript{358} Id.
\textsuperscript{359} Id. at 1094, 1112.
\textsuperscript{360} Id. at 1109-10.
\textsuperscript{361} Id. at 1110.
Precisely because employment at will allows the employer freedom to terminate the relationship as it chooses, the employer does not frustrate the employee's contractual rights merely by doing so.\footnote{Id. (citations omitted).}

Thus, the court retreated to a more rigid application of the at-will employment doctrine and rejected categorically the good faith exception to the at-will termination rule.

The Guz court's reasoning, however, is more persuasive than that of the Bakken and Bennett courts in reaching similar results, because Guz's good faith allegations pointed to certain termination procedures to which he and Bechtel had \textit{not} agreed.\footnote{See id. at 1109--10 (describing Guz's allegations that Bechtel failed to follow its own personnel policies); supra notes 361--62 and accompanying text.} If Guz had explicitly alleged that Bechtel had inappropriately considered his age in refusing to reassign him to other positions and in selecting him for layoff, would the result have been different? Perhaps so, in light of Rojo.\footnote{See supra Part IV.B.2.a.}

d. \textit{Critique of the Negative Cases}

It is unclear whether Guz could have saved his good faith claim by alleging explicitly that Bechtel's negative employment actions were motivated by improper consideration of Guz's age. Such allegations, however, were at least implicit in his charge that Bechtel failed to use objective criteria in its decision making. Nonetheless, the discussion of good faith in Guz focused narrowly on the conditions to which the parties agreed,\footnote{See Guz, 8 P.3d at 1109--10.} despite, or perhaps because of, California's adoption of the \textit{Restatement (Second) of Contracts} approach to good faith.\footnote{See, e.g., Foley v. Interactive Data Corp., 765 P.2d 373, 389--90 (Cal. 1988) (citing \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 205 (1981)).} Such a narrow approach may be attributable to the California courts' concerns that the doctrine of good faith leads to the theoretical conflation of contract and tort.\footnote{See, e.g., id. at 393--94.} Indeed, the doctrine of good faith raises concerns that implicate Grant Gilmore's infamous prediction regarding the "death of contract" by its absorption into tort law.\footnote{See \textit{GRANT GILMORE, THE DEATH OF CONTRACT} 95--112 (Ronald K.L. Collins ed., 1974) (arguing that the law of contracts is collapsing into the law of torts). The broader theoretical question raised by Gilmore's book is beyond the scope of this Article.}

This Article, however, takes issue with contractual conceptions of good faith, because traditional economic analysis is pervasive in contract theory. Thus, the dominant conception of good faith in contract law derives almost exclusively from economic analysis.\footnote{See supra Part I.B.} However, because a system of effective private agreements is critical to the pro-
cess of wealth formation, Malloy's law and market economy theory plays a crucial role in this Article's analysis. Malloy's theory asserts that wealth formation depends at least as much upon creativity, discovery, and social responsibility as it does upon efficiency.

The narrow economic approach to the good faith exception makes sense in the context of a categorical analysis of exceptions to the at-will employment doctrine. This compartmentalization of the exceptions directs courts to separate completely the questions of what constitutes good faith and what constitutes public policy. Yet, if the duty of good faith reflects "community standards of decency, fairness or reasonableness," and public policy also reflects social conceptions of fairness and equity, why should these two aspects of the contractual employment relationship be separated in theory or doctrine? The separation of good faith and public policy derives from the dominance of economic analysis of contract law and the courts' use of the doctrine of good faith to advance purely economic analyses. That is, in cases in which courts use the excluder analysis of good faith to bring about efficiency and define the duty of good faith as one that "exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made," they dilute the duty's primary equitable purpose: to serve the ends of justice in a way that reflects "community standards of decency, fairness or reasonableness." This Article challenges that practice and advocates an expansive equality approach to the doctrine of good faith, an approach that takes into account independent notions of justice and fairness.

The reasoning of courts holding that good faith claims are precluded by state or federal antidiscrimination statutes is problematic because it ignores the difference in remedy available under different theories of recovery simply because the respective claims are based on

\[\text{See supra Part II.}\]

\[\text{This categorical analysis can be seen, for example, in Wagenseller v. Scottsdale Memorial Hospital, 710 P.2d 1025 (Ariz. 1985), superseded by Ariz. Rev. Stat. Ann. \$ 23-1501 (West 2002). See supra notes 233-46 (discussing Wagenseller).}\]

\[\text{This Article addresses the good faith exception (rather than the public policy exception) because of its broad applicability to other aspects of contract law. Moreover, the at-will employment context seems to be the most obvious starting point for advocating an expansive equality approach to the duty of good faith because good faith claims in this context are inextricably related to discrimination claims. Thus, the at-will employment context enables both a critique of antidiscrimination law and an integrative proposal for confronting racial subordination.}\]

\[\text{See supra Part I.B.3.}\]

\[\text{Restatement (Second) of Contracts \$ 205 cmt. a (1981); see supra Part I.A.}\]

\[\text{See supra text accompanying notes 46-48.}\]

\[\text{Restatement (Second) of Contracts \$ 205 cmt. a (1981).}\]

\[\text{See, e.g., supra Part IV.B.3.a-b (discussing the Bakken and Barrett cases).}\]
the same set of facts. In many cases, however, it is the lawyer’s obligation to present multiple theories of recovery. Moreover, the remedies provided by breach of good faith claims and discrimination claims are, as the Wynn court recognized implicitly,379 often dramatically different, as are the respective burdens a plaintiff must carry in order to prevail.380 The substantive and procedural limitations on civil rights remedies drive the need for an expansive equality approach to good faith.

As discussed above, the plaintiff’s burden in proving a civil rights claim can be quite onerous.381 For instance, the defendant in a Title VII case can rebut the plaintiff’s prima facie case merely by articulating a legitimate business reason for the challenged employment action, and the plaintiff faces significant difficulties in demonstrating that the articulated justification is purely pretextual.382 The Title VII burden-shifting framework exemplifies Freeman’s perpetrator-victim critique383 of antidiscrimination law. By forcing the plaintiff to carry such a heavy burden, the framework presumes that conditions of racial subordination no longer exist. In short, the framework privileges the alleged perpetrators’ construct of reality over that of the victims. Perpetrators and victims perceive reality very differently, and this difference in perception is the red flag of continued racial inequality.384

This Article does not suggest that antidiscrimination statutes are unnecessary or should be repealed, or that we as a society are not indebted to past and current civil rights struggles. Our civil rights must, of course, receive continued protection, and civil rights laws have at the very least attempted to eliminate direct and overt forms of discrimination in the workplace.385 However, this Article identifies ways in which the law should strengthen its assault against racial subordination, in light of the inherent limitations of current civil rights laws. That body of law does not reckon with the pervasiveness of unconscious racism, which is essential to the reproduction of conditions of subordination.

The solution to this problem is not to import the Title VII standard into an analysis of contractual good faith claims. Such a proposal would simply embed the existing perpetrator perspective into the doctrine of good faith. It is beyond the scope of this Article to formu-

379 See supra notes 272–74 and accompanying text.
380 See, e.g., supra note 211 (discussing the McDonnell Douglas burden-shifting framework in Title VII cases).
381 See supra note 211.
382 See supra note 211.
383 See supra notes 191–99 and accompanying text.
384 Feagin and Sikes have also observed conditions of racial inequality in the modern sociocultural landscape. See Feagin & Sikes, supra note 208, at vi–x, 15–18.
385 See supra Part III.A.1.
late legal standards or bright-line rules establishing what conduct constitutes good faith or bad faith. However, in analyzing the meaning of good faith and fair dealing, courts should be permitted to take into account plaintiffs' perceptions of racial prejudice and the conditions of racial subordination. Such a shift in focus is necessary not only because society should be committed to the elimination of racial subordination, but also because the ways in which we "do business" will be affected positively by social equality and responsibility.\textsuperscript{386} If the doctrine of good faith functions to produce the conditions of a perfect contracting environment,\textsuperscript{387} why should it be concerned solely with ensuring the most efficient conditions, when exchange transactions and wealth formation are driven more by creativity and discovery than by efficiency?\textsuperscript{388}

The current models of the doctrine of good faith\textsuperscript{389} require reconstruction. These models exist in part because of the legal compartmentalization of remedies for racial subordination into the realm of antidiscrimination jurisprudence, which constructs civil rights law, inaccurately, as the exclusive and adequate solution to problems of subordination. Accordingly, courts are generally unwilling to consider race in other substantive areas of law, such as contract. Permitting considerations of race in contract law will not eliminate the pervasiveness of the perpetrator perspective in antidiscrimination law,\textsuperscript{390} restricted notions of equality,\textsuperscript{391} or conditions of unconscious racism.\textsuperscript{392} An expansive equality approach to the doctrine of good faith, however, uses good faith in an attempt to construct a contracting environment that reflects a societal commitment to ending subordination.

\textsuperscript{386} This is so because, as Malloy has noted, "[l]egal and market institutions . . . vary with reference to the cultural-interpretive framework in which they operate." Robin Paul Malloy, Law in a Market Context: An Introduction to Using Market Concepts in Legal Reasoning (forthcoming Dec. 2003) (manuscript at 14, on file with author). In turn, those cultural-interpretive frameworks, themselves informed by factors such as race, gender, and class, are "used to shape markets, to segment markets, and to discriminate within and between markets." Id. (manuscript at 14–15). By understanding and applying Malloy's interpretive law and market economy approach, see supra Part II, "successful market economies can be understood as being facilitated by legal institutions that promote a concern for others—for third parties and for a public interest that is not always advanced by the fragmented pursuit of self-interest," Malloy, supra (manuscript at 15).

\textsuperscript{387} See supra Part I.B.3.

\textsuperscript{388} See supra note 127 and accompanying text.

\textsuperscript{389} See, e.g., supra Part IV.B.3.a–c (discussing Bakken, Barrett, and Gus).

\textsuperscript{390} See supra notes 191–99 and accompanying text.

\textsuperscript{391} See supra notes 204–10 and accompanying text.

\textsuperscript{392} See supra notes 200–03 and accompanying text.
The Supreme Court of Delaware recently decided a case that illustrates how an expansive equality approach might function in practice. In *Schuster v. Derocili*, the plaintiff alleged that her employer breached its implied duty of good faith by discriminating against her on the basis of gender.\(^{393}\) *Schuster* serves as a solid model for an expansive equality approach because the court’s reasoning demonstrates a commitment to the eradication of discrimination against cognizable identity groups.

The plaintiff, Linda Schuster, was hired by defendant Compliance Environmental Inc. as a temporary administrative assistant in September 1997.\(^{394}\) About a month later, she became a full-time employee of Compliance under a written employment contract specifying that the employment relationship was at-will.\(^{395}\) Schuster worked primarily for defendant Derocili, “the president and controlling shareholder of Compliance.”\(^{396}\) Shortly thereafter, Derocili allegedly began to engage in inappropriate sexual conduct directed at Schuster, including both sexual comments and physical advances.\(^{397}\) Schuster contended that she repeatedly rejected Derocili’s advances.\(^{398}\) She complained of this sexual conduct to two coworkers, and, upon counsel of a religious advisor, began recording Derocili’s conduct in a journal and rejecting his advances more vigorously.\(^{399}\)

In December 1998, Derocili terminated Schuster, citing substandard job performance, even though she had received several pay raises and performance-based bonuses from Compliance, including one performance-based bonus only a week prior to her termination.\(^{400}\) Believing that she was actually terminated for refusing Derocili’s advances, Schuster filed a complaint with the Delaware Department of Labor.\(^{401}\) She also filed a lawsuit in state court alleging breach of contract based on violation of the implied covenant of good faith and fair dealing.\(^{402}\) The trial court granted summary judgment to Derocili on the breach of contract claim, holding that, because Delaware’s employment discrimination statute provided an “elaborate

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393 775 A.2d 1029, 1031–32 (Del. 2001).
394 *Id.* at 1031.
395 *Id.*
396 *Id.*
397 *Id.*
398 *Id.*
399 *Id.*
400 *Id.*
401 *Id.* at 1031–32.
402 See *id.*
statutory remedy” for sexual harassment, Delaware did not recognize a common law claim for sex discrimination.\textsuperscript{403} However, the Department of Labor had already dismissed Schuster’s complaint under the Delaware antidiscrimination statute.\textsuperscript{404}

On appeal, the Supreme Court of Delaware addressed two important questions relevant to this Article’s discussion. The court first examined whether “there exists a common law cause of action for sexual harassment based upon a breach of the implied covenant of good faith and fair dealing exception to the at-will employment doctrine in cases in which the termination is alleged to have violated a recognized, legally cognizable public policy exception to at-will employment.”\textsuperscript{405} It then turned to whether the Delaware legislature “intended . . . Delaware’s Discrimination in Employment Statute[ ] to be the sole remedy for a claim of sexual harassment by a terminated employee.”\textsuperscript{406}

The \textit{Schuster} court held that a common law good faith claim is valid under such circumstances and that Delaware’s employment discrimination statute does not provide an exclusive remedy, distinguishing the many cases upon which the lower court had relied.\textsuperscript{407} The lower court had relied on \textit{Ayres v. Jacobs & Crumplar, P.A.}\textsuperscript{408} and \textit{Drainer v. O’Donnell},\textsuperscript{409} which, read together, arguably supported the position that Delaware’s antidiscrimination statute precluded Schuster’s common law claim.\textsuperscript{410} \textit{Ayres}, a case in which the plaintiff brought a breach of good faith claim in state court after his federal statutory discrimination claims were dismissed, in turn relied on another Delaware case, \textit{Finch v. Hercules Inc.}\textsuperscript{411}

In \textit{Finch}, the U.S. District Court for the District of Delaware predicted that the Delaware Supreme Court would not recognize a common law public policy exception to the at-will employment doctrine because the legislature had enacted “an elaborate statutory scheme addressing the same public policy concerns.”\textsuperscript{412} The \textit{Schuster} court noted, however, that it had decided \textit{Merrill v. Crothall-American}, in which it recognized for the first time the good faith exception to the at-will employment doctrine, in the same year that \textit{Finch} was de-

\textsuperscript{403} Id. at 1032–33 (internal quotation marks omitted).
\textsuperscript{404} Id. at 1032.
\textsuperscript{405} Id.
\textsuperscript{406} Id.
\textsuperscript{407} See id. at 1032–40.
\textsuperscript{410} See Schuster, 775 A.2d at 1034.
\textsuperscript{411} 809, F. Supp. 309 (D. Del. 1992); see Ayres, 1996 WL 769331, at *12.
\textsuperscript{412} Finch, 809 F. Supp. at 312.
Moreover, in 1996 the court set forth in *E.I. DuPont de Nemours & Co. v. Pressman* Delaware’s categorical approach to the doctrine of good faith, which included a category for violations of public policy.\(^{414}\)

In *Drainer*, the court similarly dismissed the plaintiff’s common law sexual harassment claim because Delaware had not recognized a common law cause of action for employment discrimination, and suggested that the Delaware statute provided an exclusive remedy.\(^{415}\) The *Drainer* court, however, had relied on *Wright v. ICI Americas Inc.*\(^{416}\) which involved an alleged violation of a specific provision of the Delaware statute and a common law claim based only on that violation.\(^{417}\) The *Schuster* court distinguished *Drainer* and *Wright*, noting that Schuster had not asserted a claim arising directly from any specific provision of the Delaware statute:

Schuster . . . asserts a common law claim for a breach of an implied covenant of good faith and fair dealing derived from her contract of employment. Therefore we do not decide that a plaintiff may assert a private cause of action for employment discrimination based on sexual harassment on the theory that the Delaware legislature “intended [such] remedies” under [a particular statutory provision]. We do today, for the first time, decide that a person may assert a cause of action for breach of an implied covenant of good faith based upon a termination alleged to have resulted from a refusal to condone sexual advances. This private cause of action flows directly from Delaware’s clear and firmly rooted public policy to deter, prevent and punish sexual harassment in the workplace.\(^{418}\)

Thus, the *Schuster* court synthesized the public policy and good faith exceptions to the employment-at-will doctrine.

Next, addressing the preclusion issue, the court noted that the Delaware statute did not by its language proscribe related common law claims:

While this Court will not “engraft upon a statute language which has been clearly excluded therefrom by the Legislature,” because of the insidious nature of sexual harassment in the workplace, we conclude that the General Assembly intended to combat sexual harassment in an expansive rather than restrictive scheme. The statute in question does not

\(^{413}\) Schuster, 775 A.2d at 1035 (citing Merrill v. Crothall-Am., Inc., 606 A.2d 96 (Del. 1992)).

\(^{414}\) Id. (citing E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 441-44 (Del. 1996)).


\(^{416}\) See id. (citing Wright v. ICI Americas Inc., 813 F. Supp. 1083, 1091 (D. Del. 1993)).

\(^{417}\) See Wright, 813 F. Supp. at 1090-94.

\(^{418}\) Schuster, 775 A.2d at 1036 (first alteration in original) (emphasis added) (footnote omitted).
explicitly state that the remedies contained within it are exclusive to all others, therefore, it is entirely consistent with the General Assembly's intention to promote civilized conduct in the workplace to allow private causes of action for breach of contract based upon termination solely caused by a failure to respond to unwanted sexual advances by an employer.\footnote{419}{Id. at 1037–38 (emphasis added) (footnote omitted).}

Although the court employed a conventional interpretive approach in its analysis, it made clear that its reasoning and decision were consistent with the legislative intent and with community standards.\footnote{420}{See id.}

Derocili and Compliance also argued that Schuster had failed to satisfy the two-prong test for breach of the covenant of good faith and fair dealing under the public policy category.\footnote{421}{See id. at 1038.} This two-pronged test required, first, that Schuster "assert a public interest recognized by some legislative, administrative or judicial authority" and, second, that she "occupy a position with responsibility for advancing or sustaining that particular interest."\footnote{422}{Id.} The first prong was not at issue in the case.\footnote{423}{Id.} Schuster's argument regarding the second prong, however, was particularly noteworthy. The court stated:

Schuster contends that because she was as [sic] an employee to whom Derocili allegedly made sexual advances, she necessarily occupied a position with responsibility for advancing public policy condemning that conduct. She argues that if in fact the statutory remedy is not exclusive, and there exists a private cause of action in contract, then if she cannot assert the public policy designed to protect her by asserting that common law cause of action, it would be legally impossible for any person similarly situated to enforce the public policy exception asserted here. The common law private cause of action would be meaningless.\footnote{424}{Id. at 1038–39 (emphasis added).}

The court agreed with Schuster's reasoning and reemphasized the significance of its holding as an effort to combat sexual harassment in the workplace.

Schuster [sic] is an alleged victim directly injured by the alleged public policy breach. Accordingly, she has standing.

... Combating sexual harassment in the workplace ... has nothing to do with deterring or thwarting a company from pursuing its legitimate business goals.

Sexual harassment in the workplace is a systemic social problem that involves a personal assault on the recipient. Preventing it is of immense social value, and combating it promotes the public policy of this State. As
such, the unfortunate recipient of unwelcomed sexual advances holds a position of responsibility contemplated by the public policy exception.425

Schuster is remarkable because it demonstrates a nuanced understanding of the entrenchment of sexual subordination in the workplace. Moreover, this understanding applies by analogy to cases involving other forms of subordination based on cognizable identity groups. Three of the Schuster court's conclusions are particularly helpful in illustrating the mechanics of an expansive equality approach to good faith.

First, as discussed above, the Schuster court acknowledged explicitly the interconnection between the public policy and good faith exceptions to the at-will employment doctrine. Although Delaware has recognized this interconnection for some time,426 courts in other jurisdictions have often ignored or rejected it.427 Moreover, the court refused to reason around the contractual nature of Schuster's claim by recasting it as a tortious breach claim, noting that "Schuster . . . asserts a common law claim for a breach of an implied covenant of good faith and fair dealing derived from her contract of employment."428 The court expressed no need to further justify Schuster's good faith claim on economic terms, as other courts have, presumably because the court understood that parties to a contract are entitled to receive the benefits flowing from the terms of the contract in a manner that conforms with "community standards of fairness, decency or reasonableness."429 After all, if courts used the duty of good faith exclusively as a device to ensure adherence to contract terms, the doctrine of good faith would merely duplicate the standard breach of contract claim. In other words, by infusing its application of the doctrine of good faith with notions of equality, the Schuster court breathed life back into the doctrine of good faith.

Second, in holding that the Delaware antidiscrimination statute did not preclude Schuster's contractual good faith claims, the court demonstrated both its ability to deconstruct the lower court's analysis and statutory interpretation, and a profound understanding of the pervasive, systemic nature of sexual subordination. Although the court recognized that conditions of sexual subordination may be alle-
viated in part by antidiscrimination laws, it ultimately refused to limit the struggle against inequality to that corner of the law.

Third, the court's approach is particularly valuable because it provided Schuster a meaningful legal tool to combat sexual subordination in the workplace, beyond the perpetrator-centered antidiscrimination framework that had already failed her. Moreover, because courts have used this tool—the implied obligation of good faith—as a device for approximating the conditions of a perfect contracting environment, the Schuster court effectively incorporated a commitment to equality into its conception of the perfect contracting environment.

Few courts since Schuster have addressed squarely the viability of good faith claims under Delaware's construction of the at-will employment doctrine.430 In Schatzman v. Martin Newark Dealership, Inc., the plaintiff, a White male, sued his former employer, alleging retaliatory termination after he reported a coworker for using racially derogatory language.431 In addition to his federal civil rights claims, the plaintiff claimed that his employer had breached the covenant of good faith and fair dealing under Delaware law.432 The defendant dealership argued that the state antidiscrimination statute was an exclusive remedy that barred the plaintiff’s common law good faith claim.433 Although the court acknowledged the support in the lower courts for defendant’s argument,434 it then turned to Schuster, stating that:

[T]he Delaware Supreme Court recently held as a matter of first impression that a plaintiff can maintain a common law claim for breach of the Covenant due to discriminatory conduct, such as sexual harassment, despite the fact that said conduct is prohibited by both state and federal law. The Court finds this reasoning to be equally applicable to the instant circumstances, which involves [sic] retaliatory conduct against an employee who reported racially discriminatory conduct to his superiors. Therefore, the Court con-

430 In Holland v. Zarif, 794 A.2d 1254, 1258 & nn.6 & 7 (Del. Ch. 2002), the Delaware Chancery Court discussed briefly whether the Delaware antidiscrimination statute created a private right of action. The court noted that:

[C]ourts interpreting the Act have held that it creates no private right of action independent of the administrative procedures set forth in the Act itself. Other decisions have rejected common law claims premised on discrimination prohibited by the Act, reasoning that the Act created a statutory remedy in derogation of the common law employment-at-will doctrine, and that complainants are stuck with the relief provided for them expressly by the Act.

Id. at 1258 (footnotes omitted). Curiously, the Chancery Court cited decisions of the Delaware lower courts and federal district court in support of its observation, despite its explicit recognition of the Supreme Court of Delaware’s contrary decision in Schuster. See id.


432 Id.

433 See id. at 399.

434 Id.
cludes that Plaintiff’s breach of Covenant claim falls within the public policy exception to the at-will employment doctrine.\textsuperscript{435}

Thus, \textit{Schatzman} used the \textit{Schuster} decision to sustain a claim based on a White plaintiff’s refusal to tolerate racially pejorative remarks in the workplace.

The court in \textit{Reed v. Agilent Technologies, Inc.}, on the other hand, failed to acknowledge \textit{Schuster}, and accordingly refused to recognize the plaintiff’s breach of good faith claim.\textsuperscript{436} In \textit{Reed}, the plaintiff brought Title VII claims for “reverse” discrimination and common law breach of good faith claims against his former employer.\textsuperscript{437} Although \textit{Reed} may have reached the correct outcome, the court incorrectly analyzed Reed’s good faith claim. \textit{Reed} misstated the Delaware’s Supreme Court’s holding in \textit{Lord v. Souder}.\textsuperscript{438} Specifically, the \textit{Reed} court stated that one of the good faith exceptions to the at-will doctrine is “where the termination violates public policy and no other remedial scheme exists.”\textsuperscript{439} However, neither \textit{Lord} nor \textit{E.I. DuPont de Nemours & Co. v. Pressman} incorporated the alternate remedies doctrine into the categorical good faith exceptions.\textsuperscript{440} The \textit{Reed} court thus bypassed an opportunity to discuss the nature of racial subordination and Reed’s attempt to misappropriate the rhetoric of civil rights jurisprudence. Certainly the court could have reached the same conclusion in a more nuanced manner had it directly addressed Reed’s good faith claim.

\textbf{Conclusion}

This Article has argued that courts should use the doctrine of good faith in contract law to prohibit the improper use of racial prejudice in contract formation and performance and, moreover, should recognize good faith as a device for eliminating racial subordination that can function beyond the scope of conventional civil rights discourse. Although civil rights laws provide important remedies to victims of discrimination, this Article has argued that the elimination of racial subordination cannot remain the exclusive domain of civil rights law, and that other substantive areas of law should and can incorporate expansive equality principles to achieve that end. For example, this Article has demonstrated how the implied obligation of good faith in contract law, applied in the at-will employment context, can employ expansive equality principles to provide alternate reme-
dies to at-will employees who may not be able to obtain civil rights remedies because of the onerous burdens they must satisfy in order to prevail on their civil rights claims.

Although the courts have used the doctrine of good faith largely to achieve economically efficient outcomes, courts need not limit the doctrine's use in that way. Rather, courts can use the doctrine of good faith to provide just outcomes to victims of racial subordination on those occasions in which, from the victim's perspective, civil rights laws fail to do so. By screening the doctrine of good faith through the lenses of critical race and law and market economy theories, this Article has further argued that using the doctrine of good faith in this way is consistent not only with the equitable principles embodied by the doctrine, but also with the contract goals of protecting the parties' bargain, wealth formation, and the facilitation of exchange transactions.