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Contract Theory and the Limits of Reason

Efi Zemach

Omri Ben-Zvi

CONTRACT THEORY AND THE LIMITS OF REASON

Efi Zemach & Omri Ben-Zvi †

It is widely agreed that no theory of contract is fully adequate—all theories face formidable descriptive, normative and conceptual difficulties. Why has contract scholarship failed to produce an acceptable theory of contract law, even after several decades of nuanced and sophisticated theoretical efforts? This Article answers this puzzle by offering a novel meta-theory of contract scholarship that focuses on the aesthetics of various contract theories. An aesthetic commitment, under this understanding, is a pre-theoretical presupposition regarding the form (as opposed to the substance) of legal discourse. The article argues that jurists harbor several different aesthetics and often employ them interchangeably and without noticing. The continuing struggle between different contract theories is isomorphous to the battle of aesthetics that rages in the legal community as a whole. Since there is no meta-aesthetic way to determine which aesthetic construction is correct, contract theories, which are based on different aesthetics, are destined to continue struggling indefinitely. The article explores four leading contract theories—promissory, reliance, economic and pluralistic conceptions of contract—and illustrates the manner each theory's substantive insights are interwoven with aesthetics commitments, animating and giving the theories their unique character. In so doing, the article shows how the aesthetic point-of-view can better explain these theories' specific strengths, weaknesses and disagreements, and it grounds its prediction that contract scholarship is not likely to produce a widely accepted theory any time soon.

INTRODUCTION

Contract theory is experiencing a long period of unrest. Decades of theoretical work, though highly sophisticated, have failed to establish the supremacy of one specific approach to contract law. Moreover, the intensity of criticism against any given theory has weakened the intellectual appeal of all to the point that many believe it impossible to find one coherent theory of contract law (whether unitary or pluralist).

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This Article offers a novel way of dealing with this predicament. Instead of arguing for the supremacy of any existing contract theory, or advancing a new theory of contract law that supposedly meets all current objections, we take the current state of affairs in contract scholarship *itself* as the phenomenon that requires explanation. More specifically, we argue that a mode of inquiry, which explains the inability to rationally understand contract law, exists, but has gone unnoticed—until now. The article thus develops a novel *descriptive theory of contract theories* that aims to explain the troubling nature of the discourse on contract law and to shed light on attributes of the debate that have received little intellectual attention.

Our methodology is philosophical. We employ a phenomenological perspective which focuses on the first-person experience of rational deliberation that is characteristic to debates on the nature of contract. Instead of looking at the subject from an analytic, third-person viewpoint that tries to figure out which theory is objectively most justified, we highlight the fact that each of the prominent theories of contract situates jurists in different fields of discourse altogether—each theory of contract assumes a different way to construct its legal object of inquiry. We use the term "legal aesthetics" to capture this distinct experience of being situated in a specific legal space. The term "aesthetic" denotes pre-theoretical commitments to the form or structure of legal thought. These structural commitments animate legal discourse by dictating what is considered rational and plausible and which questions should be answered to better understand law. The first major claim of the article, then, is that the continuing debate about contract is fueled in large part by disagreements on an aesthetic level and is therefore rationally undecidable.

To demonstrate our claim and explain the role of aesthetic thinking in law, we first provide two examples that are designed to trigger an immediate feeling of familiarity with this type of experience. Following this procedure, we elaborate on these aesthetics and explain how they influence rational discourse. Consider, then, two common structures of experiencing the legal world: the *grid* and *energy* aesthetics. Both are discussed extensively by Pierre Schlag in his study of the aesthetics of American law.[1] Here is what it is like to engage with law through the grid aesthetic (as aesthetics are phenomenological structures, we use the second person throughout our examples):

> Example I: The Troubled Friend
>
> A friend asks for your legal advice concerning a problem she has with her landlord. She tells you her story, which is long and full of particulars. In order to make sense of the situation, you immediately ask yourself, *what kind of problem is this?* And once this question is asked, the answer seems clear. Your friend's claims are contractual; they do not involve torts or criminal law, for example. You continue this line of thinking and realize that, within contract law, the dispute centers on the doctrine of consideration, as nothing in the story brings up problems of offer and acceptance, breach of contract,

1. *See* Pierre Schlag, *The Aesthetics of American Law,* 115 HARV. L. REV. 1047 (2002) [hereinafter Schlag, *Aesthetics of American Law*].

> etc. You recall the necessary and sufficient conditions for legally recognizing consideration and tell your friend that the law is on her side in this case.

This kind of reasoning should be extremely familiar to jurists, as we all apply grid-thinking in certain situations. The grid aesthetic frames law as a space that can be conclusively mapped. It divides law into clearly demarcated sections on a grid (i.e., contract/torts, or, within contract law, contract formation/breach of contract or offer/acceptance/consideration/ remedies, etc.). Under this aesthetic, law is a stable, logical space governed by clear concepts with identifiable boundaries. The grid aesthetic conjures stability, logical coherency, and uniformity; within the grid, legal concepts themselves (contract, right, remedy, etc.) are *operative*—they can reach "all the way down," as it were, and decide concrete cases independently of other factors.[2] While this may seem like an old-fashioned understanding of law, the grid aesthetic is still relevant today, as *The Troubled Friend* example shows.[3] For instance, consider any law school curriculum in common-law systems, which is still arranged in a grid-like fashion.

In contrast, consider the phenomenology of legal reasoning under the energy aesthetic:

> Example II: The Judge
> A case comes before you that involves two shareholders that have made a certain verbal agreement. The question is whether or not this agreement ought to be considered a valid contract. Some legal answers are possible, and you can think of several relevant legal precedents, but something about the case causes you to abstract from its specifics. The parties to the dispute are important, of course, but the question seems more fundamental—how do we want future parties to behave? You realize that any legal determination will necessarily interact with a host of incentives—ideological, financial, and legal—all of which direct shareholders' behaviors. Thinking about the issue in this way: you determine that it ought to be decided that no contract has been made—labeling the agreement as a contract would influence the incentives of future shareholders in similar situations in a negative way. After realizing this, the legal precedents arrange themselves in your mind, and you are able to comfortably rule on the case.

In the energy aesthetic, law is thought of as a force on the move, bringing change and transformation; "Law is on the march. It is progressing. Wealth is being maximized. Accidents are being deterred. Reform is on the way."[4] Note that this is a description of a general attitude or predisposition and not a theory about how law is or ought to be. Nor is it a metaphor for law, in the "law and literature" sense of the term. Committing to this aesthetic entails experiencing law *as* energy, not believing that it is *like* energy; the energy aesthetic is the name we give to a certain way of experiencing law as already given to us. For another example of energy-thinking, think of the manner law and economics scholars perceive the legal world, or consider

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2. DUNCAN KENNEDY, THE RISE & FALL OF CLASSICAL LEGAL THOUGHT 5 (2006) [hereinafter KENNEDY, THE RISE & FALL].

3. *See also* Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 903-06 (1996) [hereinafter Schlag, *Law and Phrenology*].

4. Schlag, *Aesthetics of American Law*, *supra* note 1, at 1071-72.

how a law professor may ask a student to discuss which policy law should enforce. In these cases, participants always find law in a pre-given structure—namely, on the move, competing with economic, cultural, and ideological forces that push and pull in different directions. It is this aesthetic that allows the practice of asking about law's influence on society to become intelligible and responsive to rational argument in the first place.

As these two examples show, we are all constantly engaged with different aesthetics. A given aesthetic is never fully adopted, nor is it truly abandoned; rather, jurists switch aesthetics regularly. For instance, we are all grid-thinkers when we teach law (i.e., we separate sharply between contract, torts and property classes), but we become energy-thinkers when we discuss legal doctrine as an instrument for furthering policy considerations.

The article uses the grid and energy aesthetics, along with a third aesthetic, which we discuss later, to argue that, in many contract theories, aesthetic dispositions intertwine with substantive insights. Hidden aesthetic commitments influence the way jurists think of law by giving legal inquiry a certain form, and subsequently, limiting the ways in which legal questions may be asked and answered. Ignoring the manner in which aesthetics direct the flow of inquiry can lead to an incomplete understanding of each theory's insights, strengths and weaknesses, as well as to misinformed efforts to establish the superiority of any particular theory.

To examine our claim, we focus on four major contract theories—promissory, reliance, economic, and pluralist conceptions of contract—determining the track of aesthetic disposition and substantive insights of each. We characterize the type of pre-theoretical commitments present in the various theories and chronicle the impact they make. For example, we argue that Charles Fried's *Contract as Promise* relies on the grid aesthetic, while several reliance theorists—including Fuller and Perdue, Gilmore and Atiyah—share the energy aesthetic. As these theories rely on different aesthetics, one should not think of them as presenting different viewpoints on the same object, but as making different kinds of claims about different objects.[5]

Our analysis serves two main functions. Our first and most important contribution to contract scholarship is supplying a plausible descriptive theory of contract theory. We maintain that a purely descriptive theory is valuable in and of itself, regardless of whether it serves a normative goal, because it reduces the realm of the unexplained and gives intelligible order to a complex institution which we do not fully understand otherwise. In contrast to many descriptive theories of contract law, our account does not focus on legal doctrine but rather on the theoretical discourse that seeks to interpret it. This (academic) type of inquiry is no better understood than the very object of its study, and indeed, some might even argue that contract theory is considerably less settled than contract law itself. Hence, contract theory also deserves

5. Our argument in this regard challenges the familiar idea that law is a single "cathedral" whose counters theorists describe, or justify, from different viewpoints. *See*, *e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077 (2014).

a descriptive account of its own. In this regard, we maintain that our thesis is helpful in addressing the following three issues:

(1) Our theory bears on the general, meta-level discourse on contract theory and explains why, despite many decades of valuable and insightful research, there still is no widely accepted theory of contract. Our explanation also predicts that this scholarship is not likely to produce a widely accepted theory any time soon. Law can be imaged through the prism of various, different aesthetic forms; all aesthetics are attractive to some extent, and there is no way to rationally decide between legal aesthetics. Consequently, any particular contract theory might, at best, enjoy temporary acceptance within the legal community.

Jeremy K. Kessler and David E. Pozen have recently hinted at a similar outcome (at least regarding a specific sub-set of public law theories),[6] but our underlying rationale differs considerably from theirs. In fact, the two claims are diametrically opposed—Kessler and Pozen believe that because legal theories are constantly debated, they internalize criticism until they "reflect the conflict-ridden political and theoretical field [they have] promised to transcend."[7] We argue, on the other hand, that the theories of contract we discuss do not come in contact and are destined to talk past one another.

(2) We also explain many concrete disagreements between contract theories. We argue that, in many instances, a supposedly rational (normative, descriptive, or conceptual) debate conceals an undecidable confrontation between different images of law. In debates between contract theories that endorse opposing pre-theoretical commitments, it is sometimes aesthetic commitments themselves, rather than substantive features of the theories, that prompt and sustain the dispute. Such disputes, which we refer to in this Article as "aesthetic-to-aesthetic debates," cannot be conclusively adjudicated, since, as mentioned, there is no meta-aesthetic way to determine which aesthetic construction is correct. Thus, the theoretical debate continues, fueled (in part) by irreconcilable differences in aesthetic commitment. In other words, there is a certain point after which rational debate about contract ends, and something else—a naked aesthetic confrontation—begins. This important insight often remains unrecognized in contract scholarship.

We identify some of these deadlocked points in which the dispute takes the form of an aesthetic-to-aesthetic confrontation. For instance, we argue that the famous debates over (a) whether grounding contract law in the binding force of promises entails, in and of itself, any normative guidelines or particular doctrinal results; and (b) whether a distinct moral category of "promise" or "will" is meaningful in any substantive sense—are aesthetically charged to such an extent that rational discussion simply cannot settle them.

(3) Our thesis also offers a comprehensive explanation (but not a justification) for several contract theories, and shows that many of their insights—and fallacies—

6. *See* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life-Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. (forthcoming 2016).

7. *Id.* at 4.

are in fact motivated by specific aesthetic dispositions. Over the years, the difficulties plaguing each individual theory of contract have been extensively detailed in contract scholarship. Our aesthetic analysis explains that some of these problems stem from certain aesthetic commitments. Thus, we do not obsess over any given theory's fallacies, but rather explain *why* these mistakes took place in the first place. The article addresses many such errors. For example, we explain how Fuller and Perdue's aesthetic commitments animate their puzzling (and powerfully criticized) assertion that the proof and quantification of expectation damages (which often demands hypothetical and speculative evaluations) is *easier* than proof and quantification of reliance damages (which is based upon actual losses already incurred). We also address Fuller and Perdue's perplexing claim that the reliance damages awarded should not exceed the value of the promised performance. Clearly, this view is inconsistent with Fuller and Perdue's own normative position, according to which the repair of reliance damages is a central—and independent—goal of contract law. As we show, these erroneous, or inconsistent, assertions are naturally understood, or at least best explained, as a consequence of Fuller and Perdue's aesthetic commitments to energy thinking. We also touch on their threefold classification of "interests" protected by remedies for breach of contract (expectation, reliance and restitution), which famously includes many conceptual and analytical fallacies. These difficulties too stem from Fuller and Perdue's aesthetic dispositions. We argue that, contrary to what most of their critiques believe, Fuller and Perdue did not take their own classification too seriously.

In the same vein, we clarify *Contract as Promise*'s many descriptive and conceptual flaws. For instance, we explain Fried's preference for expectation damages, which seems inconsistent with his view that breaking a promise is, intrinsically, morally wrong. As Fried believes that contract doctrine is derived from an organizing moral principle of promise-keeping, adopting his view entails, arguably, preferring remedies that more strongly express the intrinsic moral significance of keeping a promise and the disapprobation of breaching it (such as specific performance, punitive damages, reliance damages that exceed the expectation interest, and disgorgement). Fried's strong defense of expectation damages therefore seems out of place. We explain this anomaly by arguing that Fried's endorsement of expectations damages is best explained by his pre-theoretical commitment to grid thinking.[8] Our theory also explains, more generally, Fried's insistence that contract doctrine is built on—and deductively derived from—the moral institution of promising, despite the considerable discrepancies between contract and promise. We further discuss other difficulties of different theories, such as the common critique that pluralistic approaches are "anti-theoretical."

The article thus explains these, and other, difficulties by arguing that they are not a result of analytical, logical, or conceptual stumbles. Rather, they stem from subscribing to an aesthetic which partly guides the course of investigation. The result is that many criticisms against contract theories become intellectually uninteresting, as

8. *See infra* part II.B.

they fail to recognize that the difficulties being attacked are not surprising—indeed, they are even predictable in a sense—when inspected through an aesthetic viewpoint. This explanation does not deny that each theory adds to the understanding of contract. Nor do we suggest that any specific objection to any specific theory is false. We argue, instead, that all of these valuable truths need to be framed differently—namely, as stemming from the complicated dynamic of aesthetic commitments and substantive insights.

The second major contribution the article makes is to legal philosophy. The study of aesthetics and law has seen a slow but steady rise in the number of participants and level of sophistication. With that, until now, discussions have usually been carried out on a much more abstract level. Pierre Schlag, on whose work we partly rely, discussed the aesthetics of American law as a whole, and while he did offer some sporadic examples, it is difficult to understand from his work how to use the new language he introduced. Ours is one of the first attempts to employ aesthetics to explain a current legal predicament by applying aesthetic insights to contract theory.[9]

Our discussion ensues as follows: Part I sets the stage for the investigation by discussing the article's subject-matter and methodology. In Parts III through VI, we analyze specific contract theories: contract as promise (Part II), reliance (Part III), economic efficiency (Part IV), and pluralism (Part V), explicating our contention that aesthetic commitments influence contract theory. A short conclusion ends our discussion.

I. SETTING THE STAGE

A. The Subject-Matter: Contract Theory

This subsection surveys various classifications of contract theory for the purpose of identifying more precisely which theories of contract we discuss in Parts III through VI.[10] We do not analyze all aspects of the classifications; rather, we only emphasize certain attributes of each theory. Yet, for the purposes of establishing a common point of departure, our limited focus is sufficient. However, as the need arises, additional insights are highlighted and discussed in more detail in subsequent chapters.

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9. For other attempts, *see* Heather Hughes, *Aesthetics of Commercial Law: Domestic and International Implications*, 67 LA. L. REV. 689, 697 n. 25 (2007); Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973 (2005-2006).

10. For a comprehensive overview of contract theories, *see* ERIC POSNER, CONTRACT LAW AND THEORY (2011); STEPHEN A. SMITH, CONTRACT THEORY (Peter Birks ed. 2004) [hereinafter SMITH, CONTRACT THEORY]; THE THEORY OF CONTRACT LAW: NEW ESSAYS (Peter Benson ed. 2001) [hereinafter THE THEORY OF CONTRACT LAW]; *see also* DOUGLAS G. BAIRD, RECONSTRUCTING CONTRACTS (2013); BRIAN H. BIX, CONTRACT LAW: RULES, THEORY AND CONTEXT 132-36 (2012); PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW (Gregory Klass, George Letsas & Prince Saprai eds. 2014). For a useful typology of contemporary contract theories, based on several distinctions, *see*, Martijn W. Hesselink, *Contract Theory and EU Contract Law*, *in* RESEARCH HANDBOOK ON EU CONSUMER & CONTRACT LAW 508, 509-18 (Christian W. Twigg-Flesner ed., 2016) [hereinafter, Hesselink, *Contract Theory*].

Generally speaking, contract theories can be divided into three categories: normative/evaluative, descriptive/analytic, and interpretive.[11] This Article primarily examines interpretative theories, which merge normative and descriptive theses by purporting to justify contract law as well as describe current doctrinal rules.[12] An interpretive theory, as indicated by its name, seeks to produce a coherent interpretation of contract law; it aims to explain, to fit existing law, and to reconstruct contract doctrine in a manner that makes law appear as a harmonic, normative whole.[13]

Another relevant classification separates monistic from pluralistic contract theories. This Article discusses three unitary theories (promise, reliance and economic efficiency) as well as one variant of pluralism. Unitary theories aim to explain contract law based upon a single justificatory principle, while pluralistic theories assert that diverse principles "share the spotlight" in various possible ways.[14]

A different categorization, which focuses on types of justificatory principles, divides theories into rights-based or utilitarian varieties.[15] Rights-based theories support individual rights and duties and impose justice in a narrow sense (i.e., between

11. *See, e.g.,* Hesselink, *Contract Theory, supra* note 10, at 509-510, 516; Richard Craswell, *In That Case, What Is the Question? Economics and the Demands of Contract Theory,* 112 YALE L.J. 903, 903 (2003) [hereinafter Craswell, *In That Case*]. Descriptive theories aim to describe existing law without expressing a normative argument, though they may sometimes be used as a means to advance a normative argument. *See*, *e.g.,* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 374-75 (1990) (arguing that a positive economic theory also serves as a guide for normative decisions); Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 104 (2000) (maintaining that Fuller and Perdue's descriptive analysis is an attempt to "reinforce[]" their normative argument). Normative theories offer a desirable goal that is external to law. *See, e.g.*, Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages* 64 WASH. & LEE L. REV. 829, 835-36 (2007) [hereinafter Oman, *Failure of Economic Interpretations*]; Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 133 YALE L.J. 541, 543 (2003). Normative theories might be further subdivided in various ways, such as into "comprehensive-normative-theories" and "value-contingent-theories." Comprehensive normative theories pay more attention to explicit normative arguments; they aim to establish and justify the basic value upon which they are built. Value-contingent-theories make no special attempt to justify the value upon which they were built but rather to specify the normative consequences that are derived from this value.. *See, e.g.,* Craswell, *In That Case*, *supra,* at 906-07; Eric Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 834 (2003) [hereinafter Posner, *After Three Decades*] (discussing normative economic analyses).

12. *See* SMITH, CONTRACT THEORY, *supra* note 10, at 4-5. The normative aspect of an interpretive theory, in contrast to a pure normative theory, does not evaluate law from an external normative premise but rather from a normative premise that is already employed in the cases studied. Additionally, the descriptive aspect of interpretive theories does not simply describe what courts do but is rather molded by the normative premise of the theory. *See* Craswell, *In That Case,* s*upra* note 11, at 918-19. For a critique of the interpretative project. *See*, Richard Craswell, *Contract Law, Default Rules and the Philosophy of Promising,* 88 MICH. L. REV. 489, 511-18 (1989) (discussing the problematic nature of an attempt to justify a certain rule while basing the very justification upon existing law).

13. *See* BIX, *supra* note 10, at 132 (arguing that interpretative theories engage in "rational reconstruction."). *See also* Melvin A. EISENBERG, FOUNDATIONAL PRINCIPLES OF CONTRACT LAW (forthcoming Sept. 2017); Peter A. Alces, *The Moral Impossibility of Contract*, 48 WM. & MARY L. REV. 1647, 1647-52, 1650 n.4 (2007); Melvin A. Eisenberg, *The Theory of Contracts, in* THE THEORY OF CONTRACT LAW, *supra* note 10, at 206, 213-22; PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, *supra* note 10, at 1.

14. ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW 3 (1997). For the general distinction between monist and pluralist theories, *see, e.g.*, Hesselink, *Contract Theory, supra* note 10, at 513-515.

15. *See* SMITH, CONTRACT THEORY, *supra* note 10, at 46-48 (using these terms); *see also* STEPHEN A. SMITH, ATIYAH'S INTRODUCTION TO THE LAW OF CONTRACT 3-5 (6th ed. 2005). For information on additional, overlapping classifications include Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 271 (1986) (discussing "party-based" versus "standards-based" theories); Jody Kraus, *Philosophy of Contract Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 689 (2002) (discussing "economic contract" versus "autonomy" theories); Posner, *After Three Decades, supra* note 11, at 870-72 (discussing economic and philosophical

contracting parties themselves), irrespective of the contract's broader social outcome. Utilitarian theories justify contract law by appealing to the contract's effects on society's overall well-being.

We discuss three leading theories of contract that present a single justificatory principle: promise, reliance, or efficiency. A promise-based theory views contract as a promise enforced by law—the legal obligation to perform a contract arises from the moral obligation to keep a promise. Normative arguments concerning the morality of promising rest upon deeper, more abstract ideas of free will and autonomy; the moral obligation to keep a promise stems from the promisor's exercise of her free will and autonomy.[16]

Reliance theories, in contrast, emphasize protection of the promisee and place normative weight on the promisee's legitimate expectations and interests in not being harmed by reliance on a promise. Hence, a promise's legally binding force is explained by additional elements, over and above the promise itself. These are commonly labeled as detrimental reliance and receipt of a benefit. This view challenges the distinctiveness of contract law, both with regard to its discrete place within private law and to its separate normative foundation. Properly understood, a contractual remedy is meant to cure wrongful infliction of harm and ultimately stems from normative notions of corrective justice.[17] As such, contract is seen as an instantiation of the general category of tort.[18]

While promissory and reliance theories are usually described as rights-based theories, economic efficiency, the third major theory we discuss, is a utilitarian theory. It is widely regarded as a promising contender among unitary contract theories.[19] Generally speaking, economic theorists believe that contract law promotes efficiency and enhances welfare (usually perceived as satisfaction of individual preferences). Although economic theories spend a great deal of time constructing normative suggestions[20] (e.g., policy recommendations), they also descriptively explain contract law as bearing the "stamp of economic reasoning."[21]

Finally, a pluralist outlook insists that no unitary theory can capture or justify the entire sphere of contract law. Instead, conflicting theories and principles govern contract law simultaneously. Pluralist theories appear in many variants.[22] Some are wholly pragmatic; they accept the disorder and contradictions in contract law and do

approaches); EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS AND MORALITY (2010) (discussing deontological versus consequentialist theories). For a discussion on instrumental versus noninstrumental/conceptual theories of contract law, *see* David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1818 (1991); Roy Kreitner, *Fear of Contract*, 2004 WIS. L. REV. 429, 432-38 (2004).

16. *See infra* Section II.A, for a more comprehensive discussion on promissory theories.

17. By "[p]roperly understood," we mean in one, strict, sense of this principle. *See also infra* note 101 for further discussion.

18. For further discussion, *see also infra* Part III.

19. *See, e.g.,* Oman, *Failure of Economic Interpretations*, *supra* note 11, at 831; Kraus, *supra* note 15, at 687-88. For further discussion, *see infra,* Part IV.

20. *But see supra* note 11, for a discussion on "value-contingent-theories."

21. RICHARD POSNER, THE ECONOMIC ANALYSIS OF LAW 25 (6th ed. 2003).

22. *See infra* notes 184-187 and the accompanying text for further discussion.

not strive to establish any internal theoretical order between disparate theories. Others are more principled in nature. For example, they may assign different tasks or qualities to various theories (e.g., one theory is lexically prior to the other; each theory has different meta-theoretical objectives; one theory is "foundational" and the other is "derivative"). Some pluralist theorists seek to highlight a range of applications in which particular theories do not conflict, but rather converge. Consequently, they do not prioritize justifications.

We now turn to briefly explore our study's methodology.

B. The Methodology: Aesthetics and Law

This Article follows Pierre Schlag's work[23] by understanding aesthetics as pre-theoretical forms through which jurists experience legal discourse.[24] While this definition is distinct from the common understanding of aesthetics as the branch of philosophy that supplies a theory of art or beauty, it is not altogether foreign to legal theory.[25] Our use of the term "aesthetic" draws on phenomenology to capture a particular form of legal experience that is best described from the first-person perspective.[26] More specifically, an aesthetic inquiry recognizes that when we think about and engage with law—as law students, lawyers, judges, and legal academics—we operate within a framework that facilitates our experience. Though usually hidden, this framework surrounds and guides legal practitioners in understanding how to come in contact with and operate law. "[A]esthetic operates through us—choosing us, enacting us, directing us,"[27] by placing us within a certain structure while focusing our attention on certain tasks rather than others. In short, aesthetic determines the way we are *situated* vis-à-vis law.[28]

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23. *See* Schlag, *Aesthetics of American Law*, *supra* note 1.

24. For major contributions to this field of study, *see* ADAM GEARY, LAW AND AESTHETICS (John Gardner ed., 2001); PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING SCHOLARSHIP (1999) [hereinafter KAHN, THE CULTURAL STUDY OF LAW]; DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) (1997) [hereinafter KENNEDY, A CRITIQUE OF ADJUDICATION]; KENNEDY, THE RISE & FALL, *supra* note 2; DESMOND MANDERSON, SONGS WITHOUT MUSIC: AESTHETIC DIMENSIONS OF LAW AND JUSTICE (Andrew Arato et al. eds. 2000); PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998) [hereinafter SCHLAG, ENCHANTMENT]; Patrick O. Gudridge, *Mit Schlag (Repetitions)*, 57 U. MIAMI L. REV. 607 (2003); Hughes, *supra* note 8, at 697, n.25; Tamara Piety, *Smoking in Bed*, 57 U. MIAMI L. REV. 827 (2003); Riles, *supra* note 9; Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (1989) [hereinafter Schlag, *Missing Pieces*]; David A. Westbrook, *Pierre Schlag and the Temple of Boredom*, 57 U. MIAMI L. REV. 649 (2003).

25. *See, e.g.,* KAHN, THE CULTURAL STUDY OF LAW, *supra* note 24; Jack M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990); Paul W. Kahn, *Philosophy and the Politics of Unreason*, 97 CAL. L. REV. 393 (2009); Riles, *supra* note 9; Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929 (1988).

26. *See* SCHLAG, ENCHANTMENT, *supra* note 24, at 98; *cf.* FRANK ANKERSMIT, SUBLIME HISTORICAL EXPERIENCE (2005).

27. Schlag, *Aesthetics of American Law*, *supra* note 1, at 1053.

28. *See*, *e.g.,* MAURICE MERLEAU-PONTY, THE PHENOMENOLOGY OF PERCEPTION 529 (Colin Smith trans. 1962) ("I am a psychological and historical structure, and have received, with existence, a manner of existing, a style. All my actions and thoughts stand in a relationship to this structure."); Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1789 (1987); Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990).

The underlying idea is that law always arrives steeped in some aesthetics or combination thereof. We cannot come in contact with formless law—for us, it is always an ensuing combination of words, people, institutions, history, mindsets, methodologies, and so on, all already presented, or thought about, in some form. In order to interact with law and to make it intelligible, practitioners must structure the object with which they are engaging, and this can be done in more than one way.[29] Students of legal aesthetics thus develop phenomenological accounts of the variety of forms the legal community uses in order to advance substantive arguments.[30] For example, recall again how common it is to engage with law in the manner that was exemplified in *The Troubled Friend* and *The Judge*, and note that these two cases signify altogether different manners of constructing the legal object.

The relationship between the aesthetic and substantive sides of a theory is subtle and complex, but generally speaking, one might say that an aesthetic influences, but does not determine the course of analysis. The aesthetic side of a thesis entails commitment to certain *types* of explanations and justifications (it suggests that they are desirable/plausible/attractive, etc.), and disregard for others. With that, an aesthetic does not determine which specific insight one arrives at. For example, a grid-thinker approaching a legal question naturally applies grid-techniques (classifications, categories, conceptual analysis, deductions, etc.). There is a sense in which this type of investigation is unconstrained, for the grid itself does not determine the actual results of the inquiry. But in another sense, a grid-thinker is led to search for specific types of answers and to only believe that specific phenomena require explanation. One might say that to subscribe to an aesthetic is analogous to committing in advance to only painting with a certain color. When one is only given a blue brush, one can still paint whatever one wants, and in this sense, the creative process is unconstrained. However, whatever the drawing will be, we know in advance that it will be blue. Hence, some questions about the drawing cannot be answered by an aesthetic inquiry (e.g., why did she paint a house?), others are explained rather naturally (e.g., why did she paint the house blue?), and still others are capable of partial explanation (e.g., why does she tend to only paint things that are blue in real life?).

Because of this integration between substance and aesthetics, one cannot simply import a substantive insight into a different aesthetic without changing the nature of what one is saying; the "same" insight will be dramatically different under other aesthetics, because it will be *positioned* differently (i.e. it will be a tool for performing a different task). However, since aesthetic commitments are pre-theoretical,[31] there are

29. *See* KENNEDY, THE RISE & FALL, *supra* note 2, at 5; STEVEN D. SMITH, LAW'S QUANDARY (2004).

30. *See* Gudridge, *supra* note 24; Hughes, *supra* note 24; Schlag, *Aesthetics of American Law*, *supra* note 1; Schlag, *Law and Phrenology*, *supra* note 3; Schlag, *Missing Pieces, supra* note 24.

31. For example, consider Kennedy's discussion of two law school experiences (working on a law review note and on a legal brief) that triggered his "loss of faith" in law. KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 24, at 313 ("One must *go through something* more than a [rational] critique."). *See also* KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 24, at 313 (emphasis added).

no theoretical grounds for leaving an aesthetic or subscribing to another. Additionally, there is no meta-aesthetic *a-priori* calculation that determines which aesthetic is appropriate or correct.[32] These kinds of rational standards come *after* one has committed to an aesthetic. Thus, the very act of deciding which questions are relevant in a given legal situation depends on the operative aesthetic already employed.[33] For example, *The Judge* was designed to show that we commit to an aesthetic very quickly and without direct rational deliberation, and in this sense, the aesthetic "chooses" us and not the other way around.

In addition, legal practitioners do not rely on one single aesthetic; on the contrary, jurists harbor different, conflicting aesthetics routinely.[34] In fact, we tend to switch between aesthetics without noticing.[35] For instance, note how easy it is to switch between the two mindsets that were presented in *The Judge* and *The Troubled Friend*:

> Example III: The Law Professor
> You are a realist law professor who teaches contract law. On Monday, you write a paper arguing that a given contract law doctrine is best understood as a reaction to certain social pressures (suggesting energy aesthetics). Preparing for your class on Tuesday, however, you outline the lecture distinguishing between tort/property/contract and contract formation/consideration/mistake/ remedies, etc. (supporting grid aesthetics). Although these two projects demand different conceptualizations of law, switching between them generates no feeling of contradiction or cognitive dissonance.[36]

Finally, we briefly address the claim that our discussion of aesthetics is problematic, since our explanation of aesthetics is also dictated by a certain aesthetic itself. For example, it may very well be that our own classifications reflect a commitment to grid-thinking. We concede this point but argue that it is of little importance. Of course, everything said here can be understood differently according to various aesthetics. One can, for example, focus on the sharp demarcation between the grid and energy aesthetics (grid-thinking), or consider the real-world implications of aesthetic theory for practicing lawyers (energy-thinking). Aesthetics are a way of being in the world and cannot, by themselves, make anything correct or incorrect (although they can make things sound more or less convincing). The fact that our analysis is open to different aesthetic readings does not pose a problem for the project.[37]Surely, this

32. *See* KENNEDY, THE RISE & FALL, *supra* note 2, at xviii.

33. *See* Schlag, *Aesthetics of American Law*, *supra* note 1, at 1105 ("[O]nce a dispute becomes explicitly aesthetic, rational argument has reached a kind of terminus."); *see also* MANDERSON, *supra* note 24, at 10-11; KAHN, THE CULTURAL STUDY OF LAW, *supra* note 24, at 102.

34. This makes the concept of a legal aesthetic very different from Fish's "interpretive community." *See* Fish, *supra* note 28; *see also* Winter, *supra* note 28.

35. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1776 (1976); Schlag, *Aesthetics of American Law*, *supra* note 1, at 1100.

36. *See* JACQUES DERRIDA, WRITING AND DIFFERENCE 278-93 (Alan Bass trans., 2001) (arguing that human history is fraught with changes in "centers of structure.").

37. *See* Schlag, *Aesthetics of American Law*, *supra* note 1, at 1101-04; *cf.* Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 921-27 (1988) (applying an argument about rhetoric in law to his own article).

short discussion of aesthetics leaves many questions unanswered, but instead of developing a more nuanced philosophical account, we move to our chosen field of inquiry—contract theory—and show how legal aesthetics dramatically influence our experience of legal rules, norms, and doctrines.

II. CONTRACT AS PROMISE

A. Introduction

We begin our discussion by examining Charles Fried's autonomy-based theory,[38] which he introduced in his seminal *Contract as Promise*.[39] Very briefly stated, Fried believes that contracts are binding because promises hold intrinsic moral value: "[S]ince a contract is first of all a promise," Fried states, "the contract must be kept because a promise must be kept."[40] Contract law thus rests on a "convention . . . of promising," a general cultural understanding that allows one party to be bound to another in the manner that creates expectations and trust between both sides.[41] By facilitating private agreements of the will, this convention increases one's options in the long run[42] and enhances freedom and autonomy. The convention of promising is, therefore, a necessary device by which individuals meet goals and purposes by enlisting the collaboration of other free persons.[43] Fried further maintains that breaking a promise is a breach of the trust we invoke when we promise, and as such it amounts to an unjustified act, per the Kantian injunction against using another as means for promoting one's goals.[44] At the same time, by forcing a promisor to keep her promise, we respect her capacity as a free, rational, and autonomous moral agent.[45]

Fried's account of contract as promise is not a "pure" normative theory, though some scholars have suggested that it could be best understood as such.[46] It is actually

38. For other autonomy-based theories, *see*, *e.g.*, Barnett, *A Consent Theory of Contract*, *supra* note 15 (placing the element of "consent," instead of promise, at the center of contract law). Consider also "transfer-theories", which view the contractual obligation as akin to the transfer of property-like entitlements. *See, e.g.,* Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673 (2007); Andrew S. Gold, *Contract as Property*, 103 NW. U. L. REV. 1 (2009). *See also* Kraus, *supra* note 15.

39. *See* CHARLES FRIED, CONTRACT AS PROMISE (1981). Fried further discussed and honed his argument in Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. FORUM. 1 (2007) (responding to Seana Valentine Shiffrin, *The Divergence of Contract and Promise,* 120 HARV. L. REV. 708 (2007)) [hereinafter Fried, *Convergence*]; Charles Fried, *"Contract as Promise" Thirty Years On,* 45 SUFFOLK L. REV. 961 (2012) [hereinafter Fried, *Thirty Years On*]; Charles Fried, *The Ambitions of Contract as Promise*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT L., *supra* note 10, at 17 [hereinafter Fried, *Ambitions*]; CHARLES FRIED, CONTRACT AS PROMISE (2nd ed., 2015) [hereinafter FRIED, CONTRACT AS PROMISE, 2ND].

40. *Id.* at 17.

41. *Id.*

42. *See* Dori Kimel, *Personal Autonomy and Change of Mind in Promise and in Contract,* in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, *supra* note 10, at 100-02, on the issue of regret and promoting autonomy in the long run in promissory theories of contract.

43. Fried, *Thirty Years On*, *supra* note 38, at 962.

44. FRIED, CONTRACT AS PROMISE, *supra* note 39, at 16-17.

45. *Id.* at 20-21.

46. For example, *see* Kraus, *supra* note 15, at 703-32.

an interpretive theory; Fried specifically points to the main themes of contract doctrine and strives to demonstrate that existing (American) contract law can be largely justified on the basis of a promissory obligation.[47]

We do not pursue the merits of Fried's substantive arguments; nor do we focus on the plausibility of his normative, or conceptual, assumptions.[48] Instead, we use Fried's theory to demonstrate how aesthetic choices *make a difference*. While these choices remain unstated throughout his discussion, they influence his claims dramatically. Above all, Fried succeeds in persuading his readers to accept his aesthetics without question. When this works, Fried wins a substantial intellectual victory: we are with him for the ride, so to speak, by tacitly agreeing that we are, in fact, situated in the space he envisions. There is a moment in the analysis—call it the "aesthetic moment"—when we accept the structure through which a notion is conveyed to us. This usually happens very quickly, and often unconsciously. Yet, it has a tremendous impact on the phenomenology of accepting an intellectual argument (in our case, a theory about contract law). Subsection III.B demonstrates that Fried uses the grid aesthetic in his treatise on contract, and subsection III.C discusses several consequences that flow from our aesthetic analysis.

B. Aesthetics

In this subsection, we advance an exegetical claim, according to which *Contract as Promise* invokes the grid aesthetic. The aesthetic side of Fried's work is uncovered when attention is paid to the kinds of tasks that Fried is interested in performing. Above all, Fried wants to situate contract within a broader framework that encompasses both law and morality. Consequently, the principle question that Fried asks repeatedly, and regarding any object of inquiry (promise, contract, offer and acceptance, consideration, expectation damages, etc.), is where this object figures in the overall normative structure. This question is then answered by identifying the object's borders vis-à-vis other conceptual notions (e.g., contract is a manifestation of the

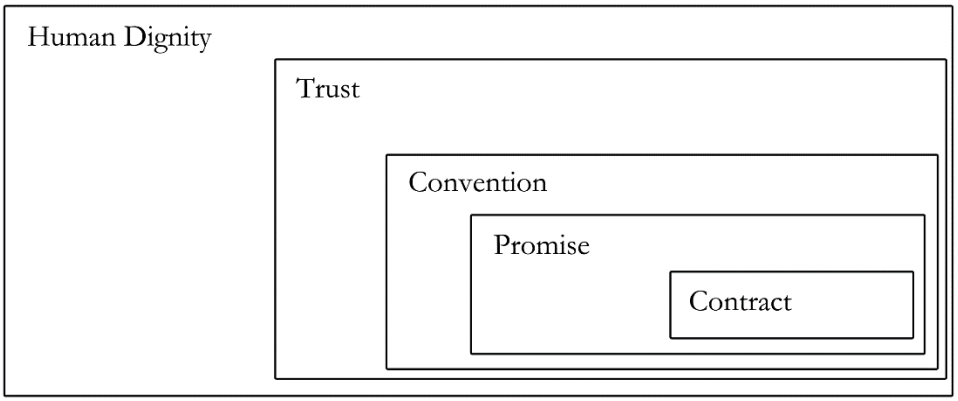
47. For further discussion, *see infra* note 61 and accompanying text. Elsewhere, Fried tries to maintain the coherence of American contract doctrine with regard to the promise principle in varied strategies. *See, e.g.*, *infra* note 85-87.

48. For criticism on Fried's derivation of legal duty to perform promises from a moral duty, *see* ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 25 (3d ed. 2003); SMITH, CONTRACT THEORY, *supra* note 10, at 69-78*;* Brian H. Bix, *Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried,* 45 SUFFOLK L. REV. 719, 724-726 (2012); Joseph Raz, Book Review, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 937 (1982). *But see* Fried, *Thirty Years On*, *supra* note 39, at 974-75 (responding to this line of critiques). For critical discussion on the connection between enforcing promises and respect for autonomy, *see* PATRICK ATIYAH, PROMISES, MORALS AND LAW 128-29 (1981); SCOTT & KRAUS, *supra* note 48, at 25; Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory,* 10 CARDOZO. L. REV. 1077, 1115 (1989); Curtis Bridgeman, *Liberalism and Freedom from the Promise Theory of Contract*, 67 MOD. L. REV. 684, 687 (2004); Kimel, *supra* note 42; *see also infra* note 79; *but see* FRIED, CONTRACT AS PROMISE, *supra* note 39, at 14.

inherent moral value of promising).[49] This technique reveals that Fried's analysis is steeped in an aesthetic form that only allows this type of question to be asked.[50]

The overall structure of *Contract as Promise* can be illustrated as thus:

FIGURE I



Within the world that Fried builds in *Contract as Promise*, to explain the nature of contract, or specific contract doctrines, *just is* to locate them on the grid. The grid thus provides the overall aesthetic of investigation. In what follows, we chronicle Fried's deductive, grid-thinking process in more detail.

Fried's argument starts by positing the Kantian ethics of trust and respect as a "sure foundation" from which to continue.[51] Relying on this "fact of the matter," Fried continues to identify the "device that gives trust its sharpest, most palpable form."[52] Promise, according to Fried, is a distinct moral category. It is a subset derived from the broader Kantian intuition and is distinguished from other moral principles, such as harm or reliance.[53] The intentional acceptance of obligation, and the consequential default of that obligation, is what separates this act from other harmful

49. FRIED, CONTRACT AS PROMISE, *supra* note 39, at 17 ("The moralist of duty… sees promising as a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise. The moralist of duty thus posits a general obligation to keep promises, of which the obligation of contract will be only a special case").

50. *Contract as Promise*'s grid structure of thought is readily recognizable in Fried's summarization of his theory. *See* Fried, *Ambitions*, *supra* note 39, at 21 ("We start with respect, which allows trust, which allows language, which finally allows the institution of promising").See also Fried, *Thirty Years On*, *supra* note 39, at 978 ("…promise is the human institution that expresses a morality of human freedom, of the expansion of the human will in relations of respect and trust, and… contract is the legal institution that is built on the moral institution of promising: hence contract as promise").

51. FRIED, CONTRACT AS PROMISE, *supra* note 39, at 7.

52. *Id.*

53. *Id.* at 14.

acts.[54] Thus, promise alone supplies the ground for other normative categories, such as reliance. [55]

After locating promise, Fried's next move is to explore the larger category of convention, which is located above promise on the grid.[56] The "logical structure of conventions in general" is for him, the reason promises create normative duties:[57] promise just *is* a convention which "make[s] nonoptional a course of conduct that would otherwise be optional."[58] Promises signify society's decision that intentions make a normative difference.

In response, some might wonder whether something else (e.g. reliance) could do the mandatory normative work here.[59] We suggest, however, that even to ask this question is to accept Fried's aesthetic and to establish an argument from within its structure. Fried takes up these types of objections himself by extensively discussing reliance, harm, etc., and in doing so, he remains within the grid aesthetic. This type of investigation is framed in a very specific manner—we are looking for an element that would figure neatly in our conceptual map. And since the guidelines for the search specifically call for distinct, enunciated data; therefore, "*One can only find what the search allows in the sense that the search fails to recognize anything else*."[60]

Fried then continues to rely on the grid when he elucidates the notion of contract and comments on the details of contract law itself (recall that his theory is interpretative and, as such, strives to account for existing law). Contract is thus "rooted in," and underwritten by, "the morality of promising," and "the legal institution of contract is grounded in the moral institution of promise."[61] As for the contract doctrine, Fried proceeds by identifying clear intellectual categories and deducing from the general to the concrete.

The doctrine of offer and acceptance, for example, is an adaptation of a "feature of promising"[62] What gives offer and acceptance this characteristic is that its explanatory force is the actual concept of a promise—which is operative here: it can reach down into law and settle how legal rules can and should look. In this case, this is because "a promise, to be complete, to count as a promise, must in some sense be

54. Charles Fried, *The Rise and Fall of Freedom of Contract By P.S. Atiyah,* 93 HARV. L. REV. 1858, 1863 (1980) (book review) [hereinafter Fried, *Book Review*]; *see also* Curtis Bridgeman & John C.P. Goldberg, *Do Promises Distinguish Contract from Tort?,* 45 SUFFOLK U. L. REV. 873, 874 (2012).

55. *See* Fried, *Book Review, supra* note 54, at 1863.

56. *See, e.g.,* Fried, *Ambitions*, *supra* note 39, at 21; *contra* Thomas Scanlon, *Promises and Contracts, in* THE THEORY OF CONTRACT LAW, *supra* note 10, at 98-99; Thomas Scanlon, *Promises and Practices,* 19. PHIL. & PUB. AFF. 199 (1990).

57. FRIED, CONTRACT AS PROMISE, *supra* note 39, at 12.

58. *Id.* at 13.

59. We discuss reliance-based arguments in Part III.

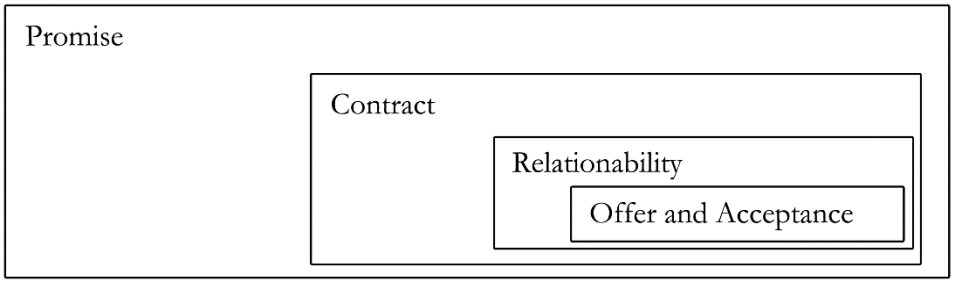
60. SCHLAG, ENCHANTMENT, *supra* note 26, at 4 (emphasis in original).

61. Fried, *Convergence*, *supra* note 39, at 3; *see also* Fried, *Thirty Years On*, *supra* note 39, at 17 ("*Contract as Promise* had its overriding ambition *connecting* a number of salient doctrines of contract law to—indeed deriving them from—a central organizing moral and doctrinal principle: the promise principle."). (emphasis added).

62. FRIED, CONTRACT AS PROMISE, *supra* note 39, at 40.

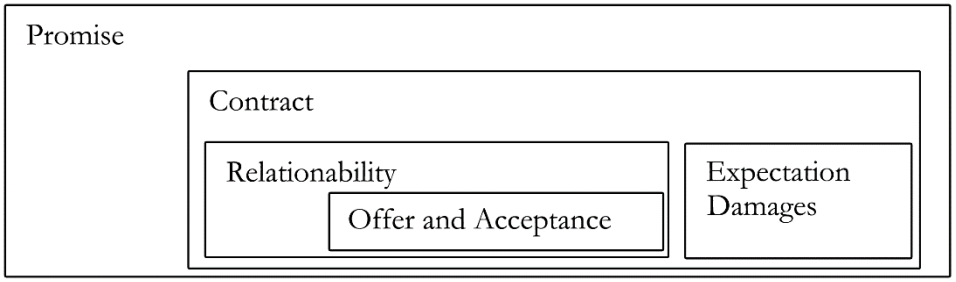
taken up by its beneficiary."[63] This means that Fried's entire discussion of offer and acceptance is plausible only if the grid aesthetic is already in place, facilitating the discussion. If we "zoom-in" on the notion of contract from *Figure I*, we see that offer and acceptance is simply a logical component of contract itself:

FIGURE II



A second example is expectation damages. For Fried, this doctrine represents a natural corollary to the promise principle. Expectation damages have a "palpable" connection with the "nature" of contract,[64] deriving directly from the fact that a contract is essentially a promise enforced by law.[65] Herein, Fried again moves from the general to the concrete. His justification in this case takes the following form (again, "zooming-in" on contract for the sake of simplicity, but now including the doctrine of offer and acceptance):[66]

FIGURE III



63. *Id.* at 41. Notice that many other conceptual approaches to contract law share this tendency to find direct conceptual relations between the basis of liability and the specific doctrine of offer and acceptance. *See, e.g.,* Benson, *Contract as a Transfer of Ownership*, *supra* note 38, at 1710; Peter Benson, *The Unity of Contract, in* THE THEORY OF CONTRACT LAW, *supra* note 10, at 138-49.

64. FRIED, CONTRACT AS PROMISE, *supra* note 39, at 17-21.

65. *Id.* at 4 ("To enforce a promise as such is to make a defendant render a performance . . . just because he has promised that very thing.").

66. *Id.* at 17 ("If I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that *I should be made to hand over the equivalent of the promised performance*. In contract doctrine this proposition appears as the expectation measure of damages for breach."). (emphasis added).

A conceptual grid is thus literally beginning to materialize. Recall for a moment the *Troubled friend* example and note how easy it is, when the grid is fully formed, to think of law through this structure of consciousness: a legal question quickly becomes an exercise in superimposing the facts of the case on top of the grid in order to ascertain where we are.

As a third and final example, consider Fried's similar discussion of the idea that an offeree is free to accept any contractual offer until it is withdrawn. Fried writes: "I think there are no reasons in principle [for not allowing this], nothing *entailed by the concepts themselves*."[67] This comment reveals what Fried thinks of reasons and reason-giving, and how he conceptualizes the space within which his theory is offered.

While Fried has many contesters, his argument seems plausible to many jurists. When one listens to Fried's rhetoric for some time, it is hard to remember that the grid is entirely optional, as we experienced in the "aesthetic moment" that converted us to grid-thinking long ago.

C. The Upshot

What flows from the fact that Fried's theory of contract is dependent on grid-thinking? This subsection discusses two major consequences.

1. Explaining *Contract as Promise*'s Weaknesses

Our aesthetic discussion provides an important framework for discussing the weaker points of Fried's theory. As we claim above, our thesis is that many of these problems are best explained as by-products of grid-thinking. To reiterate the point, the connection between aesthetic commitments and substantive insights is not one of logical necessity, but a more subtle (but stubborn) influence on the course of inquiry. We provide two examples.

First, many have objected to the sharp distinction that Fried makes between reliance, promise, and harm. For example, it has been noted that a promissory theory has indeterminate doctrinal results and that a legally binding promise might, or

67. FRIED, CONTRACT AS PROMISE, *supra* note 39, at 49 (emphasis added).

should, in fact, protect reliance.[68] Clearly, in such cases, the distinct label of "promise" ceases to do any meaningful work.[69] Furthermore, a promise-based obligation, even one based on autonomy, might equally qualify as an instantiation of a more basic category of the corrective justice principle,[70] or as an implication of the Millian harm principle.[71] Indeed, Fried's own explicit notions of "trust" and "respect" appear to be almost synonymous with some of their rivals, seemingly bringing Fried closer to the idea of reliance.[72]

The curious fact is that Fried insisted on the distinction between promise and other normative notions despite being aware of all this criticism.[73] Why is this so? We suggest that analyzing this point using an aesthetic perspective provides an explanation for Fried's pre-theoretical motivation. The grid aesthetic is not a rational construct, but a commitment to a certain form of legal consciousness, so it can remain operative even in the face of criticism. Thus, Fried remains committed to the task of policing the grid. As he says himself: "A major concern of this book is *the articulation of the boundaries and connection*" between promise and other conceptions.[74] In other words, Fried is aesthetically predisposed to stick to conceptual distinction even when they begin to fail.

The same explanation applies to our second example, which concerns Fried's insistence on placing the notion of contract (and contract law) under promise on the grid. Many theorists have criticized Fried by arguing that his thesis, the promissory notion, fits poorly into existing contract law. Some critics have pointed to the fact

68. *See* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1,* 46 YALE L.J. 52, 58-59 (1936) (explaining that a promise-based theory does not logically entail any conclusive guidelines with regard to the remedy, and that in many circumstances, a promissory obligation does not, by itself, produce a "ready-made solution for the problem of damages.") [hereinafter Fuller & Perdue, *Reliance Interest*]; *see also* Craswell*, Contract Law, Contract Law, Default Rules and the Philosophy of Promising, supra* note 12*,* at 519 (arguing that reliance measure of damages can be also supported by a non-reliance-based justification for the binding force of promises, such as the will theory); *accord* Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105, 106-08 (1989); *accord*, *infra* text accompanying notes 88-89 and note 144; *see also* Scanlon, *Promises and Practices, supra* note 56, at 216 (1990) (It follows that a promise-based regime of contract damages may still be equally compatible with a rule awarding reliance damages); *but cf.* Eyal Zamir, *The Missing Interest: Restoration of The Contractual Equivalence*, 93 VA. L. REV. 59, 105 (2007) [hereinafter Zamir, *The Missing Interest*].

69. *See* Richard Craswell, *Expectation Damages and Contract Theory Revisited* (Stanford Law School, John M. Olin Program in Law and Economics, Working Paper No. 325, 2006), http://ssrn.com/abstract=925980. [hereinafter Craswell, *Expectation Damages*]. *See infra* text accompanying notes 119-20.

70. If a promise is a source of entitlements, its breach is a disturbance of a status quo which justifies a correction by virtue of corrective justice. *See* Bridgeman & Goldberg, *supra* note 54, at 874.

71. The harm principle is usually perceived as an objection to promissory theories. *See, e.g.,* Nathan B. Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1487 (2005) [hereinafter Oman, *Unity and Pluralism in Contract Law*]. However, giving force to bare promises might be derived from perceiving a mere frustration of expectations as a "harm" for the purposes of the harm principle. *See, e.g.,* Raz, *supra* note 48, at 937-38; *cf.* Patrick S. Atiyah*, Contracts, Promises, and the Law of Obligations*, *in* ESSAYS ON CONTRACT 10, 45 (1986) (discussing and criticizing parts of Raz's view) [hereinafter Atiyah*, Contracts, Promises, and the Law of Obligations*].

72. *See, e.g.,* Patrick Atiyah, *The Liberal Theory of Contract*, *in* ESSAYS ON CONTRACT 121, 148 (1986) [hereinafter Atiyah, *The Liberal Theory of Contract*]; Anthony T. Kronman, *A New Champion for the Will Theory*, 91 YALE L.J. 404, 411-12 (1981) (reviewing CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

73. Fried, *Thirty Years On*, *supra* note 39, at 961, 978; *see* Jeffery Lipshaw, *Contract as Meaning: An Introduction to "*Contract as Promise" at 30*,* 45 SUFFOLK U. L. REV. 601, 623 (2012), for a response to Fried.

74. FRIED, CONTRACT AS PROMISE, *supra* note 39, at 25 (emphasis added).

that courts do not enforce all promises and also enforce non-promissory arrangements.[75] In addition, many rules of contract law equitable doctrines such as:[76] the doctrine of consideration,[77] the rule of mitigation,[78] objective theory of contract formation,[79] the remedy of expectation damages,[80] the *Hadley* case rule,[81] the relative inattention to moral culpability in breach,[82] the unavailability of punitive sanctions even on an intentional breach or through liquidated damages,[83] and other default rules or "gap-filling" rules[84]—are at odds with the promissory principle.

75. *See* FRIED, CONTRACT AS PROMISE, *supra* note 39, at 3; *see also,* Atiyah*, Contracts, Promises, and the Law of Obligations*, *supra* note 71, at 19-28; *cf.* Atiyah, *The Liberal Theory of Contract*, *supra* note 72, at 121-49; *see* SCOTT & KRAUS, *supra* note 48, at 25; BIX, *supra* note 10, at 133; SMITH, CONTRACT THEORY, *supra* note 10, at 151-56; *see* Dori Kimel, *The Morality of Contract and Moral Culpability in Breach,* 21 KING L.J. 213, 215-16 (2010) (grouping the many discrepancies around two main elements: *voluntariness* and *fault*) [hereinafter Kimel, *The Morality of Contract*].

76. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981), for example such as promissory estoppel. *See also* Hoffman vs. Red Owl Stores, Inc. 133 N.W.2d 267 (Wis. 1965); *see* Eric A. Posner, *The Decline of Formality in Contract Law*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 61 (F. H. Buckley ed., 1999), for explanation that promissory estoppel could also be interpreted as actually promoting promises and private arrangements by declining formalities. Furthermore, it seems that courts deny *in fact* recovery for pre-contractual reliance, in the absence of a clear "promissory" ground (namely, statements of intention to be bound). *See* Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 673 (2007).

77. Atiyah, *The Liberal Theory of Contract, supra* note 72, at 127; BRIDGEMAN, *supra* note 48, at 687; *see, e.g.,* J.E. Penner*, Voluntary Obligations and the Scope of the Law of Contract,* 2 LEGAL THEORY 325*,* 328-30 (1996); *but see* SMITH, CONTRACT THEORY, *supra* note 10, at 151 (arguing that the doctrine of consideration is consistent with rights-based theories).

78. Atiyah, *The Liberal Theory of Contract, supra* note 72, at 124; Seanna Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 724-26 (2007). *See* FRIED, CONTRACT AS PROMISE, *supra* note 39, at 131; Fried, *Ambitions*, *supra* note 39, at 7-9, 28-29.

79. *See* Barnett, *A Consent Theory of Contract*, *supra* note 15, at 269, 272-74; *accord* Randy E. Barnett, *Contract is Not Promise; Contract is Consent*, 45 SUFFOLK. L. REV 647, 650-652 (2012); ATIYAH*, Contracts, Promises, and the Law of Obligations*, *supra* note 71, at 21-22; Eisenberg, *The Theory of Contracts, supra* note 13, at 233; *but see* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 808 (1941) (claiming that the objective theory of contract does not contradict the will theory or the principle of autonomy). *See also* Fried, 2012, *supra* note 39, at 974 (clarifying that the objective doctrine should not be seen as a normative contradiction with his view of contract as promise); Wayne Barnes, *The Objective Theory of Contracts,* 76 U. CIN. L. REV. 1119, 1129 (2008) (demonstrating that the objective theory furthers the ideal of personal autonomy rather than restricts it); LAURENCE P. SIMPSON, CONTRACTS: HORNBOOK SERIES 9 (2d ed. 1965) (arguing that the external manifestation is inherent in the very idea of promise).

80. *See, e.g.,* Shiffrin, *supra* note 78, at 722-23; *see also* Atiyah, *The Liberal Theory of Contract , supra* note 72, at 124; SMITH, CONTRACT THEORY, *supra* note 10, at 154. Many have asserted that if contract law was grounded in the will theory, or the morality of promising, then the appropriate remedy should more express the moral duty to keep one's promise. For a survey of many arguments of this sort (with regard to varied remedies, such as specific performance, reliance damages exceeding the expectation interest, disgorgement and punitive damages); *see* Zamir, *The Missing Interest*, *supra* note 68, at 105; *see also* Louis Kaplow &. Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, n. 334 (2001) ("[I]t is well understood that expectation damages *encourage breach* . . . whereas specific performance or punitive damages would tend to deter–and, in the case of specific performance, undo–precisely these sorts of breaches.") (emphasis added); *accord* Nathan B. Oman, *Promise and Private Law,* 45 Suffolk L. Rev. 935, 942-48 (2012) (suggests four possible direct connections between expectation damages and the promise principle and further explains why neither of these suggestions is truly successful in establishing such a connection); *but see* Fried, *Thirty Years On*, *supra* note 39, at 971 (endorsing the view that expectation damages are provided only as a majoritarian default remedy, and not as a necessary implication of the promissory obligation).

81. *See* Hadley v. Baxendale, 156 ENG. REP. 145 (1854); *see also* Shiffrin, *supra* note 78, at 724.

82. *See* Kimel, *The Morality of Contract, supra* note 75, at 215-16, 225-27 (arguing that the negligible role that faults plays in contract law raises a "startling discrepancy" between contract and promise).

83. SMITH, CONTRACT THEORY, *supra* note 10, at 155; Shiffrin, *supra* note 78, at 726-27.

84. Craswell, *Contract Law, Default Rules, supra* note 12, at 521-23 (discussing impracticability, frustration, mistake and good faith); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 822-23 (1992) (discussing gap-filling rules); *see also* Barnett, *Contract is Not Promise*, *Contract is Consent, supra* note 79, at 652-53 (describing the problem of gap-filling as a "strike" for contract as promise).

Expectedly, the many divergences of contract and promise did not prevent Fried from holding fast to the grid aesthetic. The best that Fried can do is state the connection between promise is a bit "overstated," [85] and address some of the worries mentioned above.[86] However, Fried cannot fully retreat from the basic idea that contract is rooted in promise, because the aesthetic dimensions of his project push him in the direction of finding answers of this very type. As he states: "at the end of the day . . . I still believe that *Contract as Promise* is correct to locate as the generating genius of this body of law the promise principle."[87] This quote reveals more about the nature of the inquiry (finding a "generating genius of this body") than about the specific answer that the inquiry provides. Fried's aesthetic sympathies condition him into trying to find *some* well-defined normative rubric to explain contract doctrine, and the idea that no such rubric can fit the bill is simply beyond the scope of what his aesthetic allows.

2. Aesthetic-to-Aesthetic Battles

In the Introduction, we argued that some prominent disagreements in contract theory are undergirded by different aesthetic commitments. We locate the first such instance in the debate between Fried and Richard Craswell on the connection between the category of [promise] and [contract remedies]. Craswell is known for his economic perspective on law, which relies on a different aesthetic—the energy aesthetic, which we discuss in the Introduction. We return to economic theories of contract in Part IV, but for now, it is enough if we realize that Craswell is determined to ask what contracts *do* instead of what they *are*. From this perspective, Craswell begins to unravel the tight connection between promises and actual results in the world.

85. Fried, *Thirty Years On*, *supra* note 39, at 974 ("Thus my claim in Contract as Promise about the relation of the legal regime of contract to the moral institution of promising was not so much wrong as overstated.").

86. *See, e.g.,* Fried, *Thirty Years On*, *supra* note 39; Fried, *Convergence*, *supra* note 39; FRIED, CONTRACT AS PROMISE, 2ND, *supra* note 39 (discussing, among many other issues, contract law's preference for expectation damages over specific performance, the objective approach to contract, and the rule of mitigation). *See also* Kimel, *The Morality of Contract*, *supra* note 75, at 216-17; Seana V. Shiffrin, *Are Contracts Promises?*, in ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW (Andrei Marmor ed., 2012).

Following Shiffrin's classification of responses to the claim of divergence between *contract* and *promise*, Fried deals with divergent doctrines through varied strategies. Among these are: (I) to regard these doctrines as targets of reform and criticism (e.g., Fried's discussion about the doctrine of consideration and litigation costs, *see,* respectively, FRIED, CONTRACT AS PROMISE, *supra* note 39, at 28-39; Fried, *Convergence*, supra note 39, at 6) (II) to recharacterize the divergent rules or the connection between them and the promise principle (e.g. labeling expectation damages not as a necessary implication of the promise principle but as a "default majoritarian rule") (III) to explain divergent doctrines by appeal to reasons that distinctive to features of legal enforcement or regulation; these render it sensible for the legal treatment of such promises to differ from their moral treatment (*e.g.* explaining the objective theory of contract formation and interpretation, the regime of default rules and the rule of mitigation as "practical necessities"; or explaining law's treatment of gratuitous promises and unconscionable bargains as stemming from "law's resources and preferences").

87. FRIED, CONTRACT AS PROMISE, 2ND, *supra* note 39, at 133 (summarizing his comments to the many critiques of his thesis); *see also*, Fried, *Ambitions*, *supra* note 39, at 18.

As he notes, the substance of any given promise is contingent, and therefore, no *a-priori* connection can be drawn between promises and specific remedies. Craswell states, "Fried's conclusion about what remedy should actually be awarded seems to require a prior decision as to what remedy was expressly or implicitly promised."[88] Thus, according to Craswell, a promise-based theory does not entail, in and of itself, conclusive consequences with regard to the remedy, and almost every remedy might be consistent with a promissory regime.[89] We argue that this seemingly intellectual disagreement is animated by dissimilar aesthetic commitments. Craswell is not objecting to a particular claim; instead, he challenges the very image upon which Fried's argument is designed by denying the importance of the distinct rubric of "promise." In his view, this category eventually dissolves in its own contingencies, and is therefore, not an operative concept in a rigid grid, which entails conclusions in and of itself. According to Craswell, then, nothing is entailed by the "promise" concept itself. Craswell is, in effect, emptying promise of its conceptual essence and thinking of it and subsequently, of law itself, *as a force on the move*. Conversely, when Fried insists that promise is a morally important category with an intrinsic value, or that expectation damages (and other doctrines) are directly derivable from the essential nature of the rubric "promise," he is using a quite different picture, *a grid picture*, of law. Put sharply, Fried and Craswell make different kinds of claims about different objects. To a large extent, they are talking past each other. The whole point of Fried's study of contract is to place certain categories of thought promises, contracts, etc., on a stable map that shows contract's connections to both morality and legal doctrine. This is not a "decision," but an aesthetic fact about the scope of Fried's project.

The question of the connection between promise and legal remedies thus cannot be answered in the abstract, before one has an operative aesthetic in place—as the aesthetic provides the motivating force for choosing a *type* of answer to this question (e.g. should the answer provide us with a location on a map, or a description of an action in the world). Realizing this, Craswell and Fried have two options: either one of them adopts, *arguendo*, the aesthetic of the other, or they may try to argue directly against the grid or energy aesthetic as such. However, as we explain earlier, and stress again below, each aesthetic comes with its own criteria of judgment, and therefore, we can never vindicate or rule out an aesthetic construction out of hand. The only way to argue against Fried's grid-thinking is to *seduce* us to switch to another aesthetic. We explore such attempts shortly.

A second aesthetic-to-aesthetic battle becomes visible when Fried is forced to explain why contract doctrine is so tightly connected to Kantian morality. In light of vast criticism, Fried admits that such a connection seems implausible,[90] but does not

88. Craswell, *Expectation Damages, supra* note 69, at 13; *see also* Craswell, *Contract Law, Default Rules, supra* note 12, at 523 (arguing that Fried's "preoccupation with his theory of promising seems to prevent him from developing a coherent theory of the values that should play a role in selecting default rules.").

89. *See, e.g.,* Craswell, *Contract Law, Default Rules*, *supra* note 12, at 517-20.

90. Fried, *Ambitions*, *supra* note 39, at 17, Fried, *Thirty Years On*, *supra* note 39, at 968; *see also,* Fried, *Convergence*, *supra* note 39.

retreat from the assertion that the promise principle is the "generating genius" of contract law,[91] and continues to argue that, nevertheless, this is the type of answer that he wishes to pursue:

> The picture I have, then, is of philosophy proposing an elaborate structure of arguments and considerations which descend from on high but stop some twenty feet above the ground. It is the peculiar task of law to complete this structure . . . so that it is seated firmly and concretely and shelters real human beings against the storms of passion and conflict . . . . The lofty philosophical edifice does not determine what the last twenty feet are, yet if the legal foundation is to support the whole, then ideals and values must constrain, limit, inform, and inspire the foundation but no more.[92]

This is a remarkable passage, for it succeeds in momentarily, shifting the focus of the debate to "pictures" of law. This quote shows that Fried remains a grid-thinker even when he cannot support his conclusions with proper conceptual arguments. Even then, what is important is a picture of law within which the structure "is seated firmly and concretely," in order to protect human beings against "the storms of passion and conflict." In other words, the structure protects us from *life itself*: the ever-changing, messy life that we found outside of the grid. As we noted above, one accepts an aesthetic not as a result of rational calculation, but because of an act of seduction; and here, we might find Fried's most overt attempt to do just that.

We can now begin to understand why an aesthetic point of view is a worthwhile pursuit. As a methodology, an aesthetic point of view explains a given theory's advantages and weaknesses, in contrast to most categorizations that only partially explain some motivating forces behind the theories' important insights. We see that Fried's aesthetic construction performs a lot of the work for him, both when the theory seems natural and when it appears misguided. Realizing this, helps us to better understand Fried and makes it easier to explain his theory in a consistent manner. Neglecting his aesthetic perspective, on the other hand, may distort his point.

III. RELIANCE

A. Introduction

Reliance-based theories deny the juridical significance of promise and hold that contractual obligation is based on a party's reasonable reliance caused by the other party's promise. According to this view, the purpose of giving legal force to a contract (or of awarding damages) is to undo the harm caused through reliance on a broken promise and not to give legal effect to people's voluntary promises or expressions of will.

91. Fried, *Ambitions, supra* note 39, at 18, Fried, Thirty Years On, supra note 39, at 978.

92. Fried, *Thirty Years On*, *supra* note 39, at 978 (emphasis in original).

Reliance-based arguments were first introduced into modern theoretical thinking by Lon Fuller and William Perdue.[93] Fuller and Perdue identified three principal justifications to awarding contract remedies: restitution, reliance, and expectation interests.[94] They ranked the interests in descending order, according to their strength, and asserted that the restitution and reliance interests are more worthy of protection than the expectation interest.[95] Awarding the promisee the expected value means giving her an advantage not previously held. This, according to Fuller and Perdue, "seems on the face of things a queer kind of 'compensation.'"[96]

Though many others also contributed to reliance theory, Patrick Atiyah and Grant Gilmore are especially recognized as two theorists who further developed the idea of injurious reliance by devising a theory of contractual liability based solely on the idea of reliance.[97] In so doing, they shifted attention from the purposes of remedies to characteristic situations that are appropriate to be remedied.[98] They further generalized Fuller and Perdue's thesis and, in the process, dissolved contractual liability into tort.[99]

As for the theory's normative source, reliance arguments rely partially on notions of corrective justice,[100] which seek to maintain an equilibrium between members of society by demanding that injustices inflicted by one person on another be amended.[101] The reliance principle is also associated with John Stuart Mill's "harm principle," according to which, the state can only legitimately exercise power over an

93. Fuller & Perdue, *Reliance Interest, supra* note 68, at 52; *see* Patrick Atiyah, *Fuller and the Theory of Contract, in* ESSAYS ON CONTRACT 73 (1986). On this article's influence on further scholarship, *see* Robert Birmingham, *Notes on the Reliance Interest*, 60 WASH. L. REV. 217 (1985); Daniel Friedmann, *The Performance Interest in Contract Damages*, 111 L. Q. REV. 628 (1995); Craswell, *Against Fuller and Perdue*, *supra* note 11. There are, of course, others who contributed to the reliance theory in its formative years, such as Arthur L. Corbin. *See, e.g.,* Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 679-80 (1984); *cf.* BAIRD, *supra* note 10, at 25-45.

94. Fuller & Perdue, *Reliance Interest, supra* note 68, at 53-54. In brief: the restitution interest focuses on the benefits obtained by the breaching party at the expense of the injured party, i.e., the breaching party's unjust enrichment; the reliance interest focuses on the harm caused to the injured party in relying on the breaching party's promise; and the expectation interest focuses on the injured party, but puts an emphasis on the party's expected benefit from the bargain.

95. *Id.* at 56.

96. *Id.* at 53.

97. *See* GRANT GILMORE, THE DEATH OF CONTRACT (1974); *see also* ATIYAH, *PROMISES, MORALS AND LAW, supra* note 48.

98. *See* PATRICK ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 1-39 (1979), for Atiyah's classification of benefit, reliance and promise as three grounds of liabilities. [hereinafter ATIYAH, THE RISE AND FALL].

99. GILMORE, *supra* note 97, at 87-88; Atiyah, *Contracts, Promises, and the Law of Obligations*, *supra* note 71, at 20-23.

100. *See, e.g.,* Fuller & Perdue, *Reliance Interest, supra* note 68, at 56.

101. *See* ARISTOTLE, NICOMACHEAN ETHICS, book V. ch. 7 (J. E. C. Welldon, 1987). *See also* Ernest Weinrib, *Corrective Justice in a Nutshell,* 52 TORONTO L.J. 349 (2014), for a general discussion. However, there are many objections to this strict view of corrective justice. In particular, it is argued that the idea of corrective justice is a structural concept which does not define, in and of itself, the baseline rights for its exercise. Thus, various theories, including autonomy-based theories, might equally justify their argument on the ground of corrective justice. *See, e.g.,* SMITH, CONTRACT THEORY, *supra* note 10, at 147; Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 62-70 (2003); Craswell, *Against Fuller and Perdue, supra* note 11, at 99, 121-22, 125, 127; Zamir, *The Missing Interest*, *supra* note 68*,* at 109; Peter Benson, *The Unity of Contract, in* THE THEORY OF CONTRACT LAW, at 127-38; Posner, *After Three Decades*, *supra* note 11, at 871; Friedmann, *The Performance Interest in Contract Damages, supra* note 93, at 639; *and see, generally* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1046-47 (2001).

individual to prevent harm to others.[102] The connection between harm and reliance, though debatable,[103] is *prima facie* clear: Reliance theorists heavily emphasize the element of undoing harm (according to a strict understanding of harm), rather than enforcing promises or increasing autonomy..

It should be noted that reliance-based theories are also usually considered interpretive; they stress that contract law itself might be explained, or at least better understood, as a set of rules based upon the normative importance of reliance.[104]

B. Aesthetics

In this subsection, we defend the claim that in the writings of most reliance theorists, and specifically those discussed above, one can identify a dominant, shared aesthetic, which we earlier termed the energy aesthetic. Because we focus on several theorists instead of a single author (as we do in Part II), our interpretation relies on identifying several broad themes that are common to reliance scholarship.

The first indication of an aesthetic shift in reliance theory is the fact that many such accounts deny the type of investigation that Fried and other theorists (e.g.,. will theorists) engage in. Thus, instead of arguing, e.g. that Fried is mistaken in identifying the operative component of contract in promise instead of in reliance, thinkers such as Fuller & Perdue reject the very idea of a sharply defined, stable object of inquiry. In their words, "[i]t is, as a matter of fact, clear that the things which the law of damages purport to "measure" and "determine". . . are in considerable part its own creations, and that the process of "measuring" and "determining" them is really a part of the process of creating them."[105] Atiyah, too, discusses the fallacy of thinking that "a contract is a thing,"[106] and objects to the view that a contract is "like a railway or a ship."[107]

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102. JOHN STUART MILL, ON LIBERTY 23 (2nd ed. Ticknor & Fields, Boston, 1863). *See also* SMITH, CONTRACT THEORY, *supra* note 10, at 69; Bix, *supra* note *48, at* 724-725; Atiyah*, Contracts, Promises, and the Law of Obligations*, *supra* note 71, at 43-46 (discussing the close relationship between the harm principle and reliance theory).

103. Due to the flexibility of the definition of "harm," *see*, *e.g.,* Bix, *supra* note *48,* at 727; *see also* ATIYAH, *Contracts, Promises, and the Law of Obligations*, *supra* note 71, at 45 (discussing Raz's harm-based theory).

104. Thus, Fuller and Perdue argued that descriptively speaking, the reliance principle better explains contract remedies. *See* L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373, 418 (1937) [hereinafter Fuller & Perdue, *Reliance Interest (Part* 2)]. Craswell explored some of these claims in *Against Fuller and Perdue, supra* note 11, at 103-05. In the same vein, Atiyah and Gilmore have argued that the reliance principle provides a better framework through which contract law's rules and practices can be described. *See generally* GILMORE, *supra* note 97, at 87-103; Patrick Atiyah, *The Modern Role of Contract Law, in* ATIYAH, ESSAYS*, supra* note 72, at 7-9 [hereinafter ATIYAH, *The Modern Role of Contract Law*]; ATIYAH, *The Liberal Theory of Contract*, *in* ATIYAH, ESSAYS, *supra* note 72, at 123-24; Atiyah, *Contracts, Promises, and the Law of Obligations*, *supra* note 71, at 19-28.

105. Fuller & Perdue, *Reliance Interest, supra* note 68, at 52.

106. ATIYAH*, Contracts, Promises, and the Law of Obligations*, *supra* note 71, at 14.

107. ATIYAH, *The Modern Role of Contract Law, supra* note 104, at 1. Fried, on the other hand, highlights the static, universal, and quite palpable and unchanging, quality of the morality of promising, comparing it to a logical "mathematical truth." *See* Fried, 2007, *supra* note 39, at 2 ("Morality does not . . . describe attitudes, beliefs, or demands . . . , any more than mathematics . . . is about what people think, teach, or ordain about the domain of numbers and abstract relations. In both cases, there is *a fact of the matter*: the gratuitous infliction of pain is wrong; 2+2=4."). Additionally, Fried often puts emphasis on the "timeless nature" of his theory. *See* FRIED, CONTRACT AS PROMISE, 2ND, *supra* note 39, at 2; Fried, *Book Review, supra* note 54, at 1864-65.

We submit that this tendency to reject contract as a stable object of inquiry is explained by the fact that under the energy aesthetic, which these theorists employ, the mind encounters law as a moving force—"an arrow pointed to the future"[108]—and not as a static conceptual structure (recall *The Judge* example from the Introduction). When law is thought of this way, the focus of investigation turns to law's interaction with other social forces. The analysis presupposes an object of inquiry that is on the move—and the main purpose of intellectual investigation is to describe that movement. For instance, Fuller and Perdue argue that when we switch from corrective to distributive justice, "[t]he law no longer seeks merely to heal a disturbed status quo, but to bring into being a new situation. It ceases to act defensively or restoratively, and assumes a more active role."[109] Notice how in order to even make sense of this claim, not to mention to consider it plausible, it is crucial to posit the energy aesthetic as background. Law is dynamic; as such, it is characterized by its actions. In a nutshell, contract doctrine is shaped as it is because "law and society have interacted."[110] The crucial move that is motivating such assertions is the framing of law as something that *can* interact with the actual world, and the energy aesthetic supplies this presupposition. Thus, law is constantly characterized in active form as "seeking an end."[111]

A rigid conceptual analysis is thus ill-suited for reliance theory. The next logical step for energy thinkers—again, not a logical necessity, but an understandable tactic given their aesthetic commitments—is to introduce *history* to make sense of the theory's object of inquiry. After all, the history of an institution chronicles the different social forces that shaped it and were affected by it. And indeed, we find that reliance scholars usually argue along historical lines. In fact, they believe that not only does contract law react to other social forces; additionally, the manner we view the *justification* for contract doctrine is also in constant motion.

The standard historical meta-narrative advanced by reliance theorists is well-known. It is commonly exemplified by notions, such as the rise and fall of freedom of contract, or the self-imposed, promissory paradigm of contractual obligation. There is no need, therefore, to repeat it at length here. Generally speaking, Atiyah describes the emergence of a contract theory that is organized around the idea of private autonomy in the nineteenth century, and its decline during the twentieth century. Gilmore suggests an American version of the same tale, while famously announcing the death of contract (as a form of self-imposed, distinct, obligation).[112] We do not intend to make any substantive claims regarding the historical accuracy of

108. Schlag, *The Aesthetics of American Law*, *supra* note 1, at 1070.

109. Fuller & Perdue, *Reliance Interest, supra* note 68, at 56.

110. *Id.* at 63; *see also* GILMORE, *supra* note 97, at 9, 95.

111. Fuller & Perdue, *Reliance Interest, supra* note 68, at 53.

112. ATIYAH, THE RISE AND FALL, *supra* note 98, at 95; GILMORE, *supra* note 97. For a brief summary of Atiyah's thesis, *see* SMITH, ATIYAH'S INTRODUCTION TO THE LAW OF CONTRACT, *supra* note 15, at 11-21; Fried, *Book Review, supra* note 54, at 1858-59. For a brief summary of Gilmore's view, *see* Nathan Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L. J. 77, 81-82 (2009).

these stories.[113] Instead, we highlight two specific points with regard to these narratives:

(1) The historical account indicates a constant flux of movement vis-à-vis the theoretical justification of contract; contract law and theory are often described using dynamic terms: "transformation,"[114] "rise" and "fall,"[115] a moving "wheel" which ultimately "comes full circle,"[116] an object that rose and then fell "from the high point which it had reached,"[117] and even through personification of contract law's development: "birth," "growth," "life," and "death."[118]

(2) This history places heavy emphasis on contract law's relationship with external social and intellectual forces,[119] as well as on the effects of law.[120] In other words, rather than being concerned with the "nature" of contractual obligation, and the structure of legal concepts, the historical narrative of contract theory tells a story that is focused on factual contingencies and empirical generalizations, both with regard to contract law's external influences, and its effects in the world. The historical framework taken by reliance theorists in order to establish their normative point is not incidental; rather, it reflects the aesthetic commitment upon which these theories are designed. In reliance theory, we are no longer looking for an ideal type, but rather for the movement of a force.

C. The Upshot

Understanding the underlying aesthetic sympathies of reliance theory helps explain several puzzling attributes of these theories. Additionally, it uncovers more aesthetic-to-aesthetic battles.

1. A Better Understanding of Reliance Theory

In this subsection, we highlight three elements of reliance theory that are better understood when viewed aesthetically.

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113. *But see, e.g.,* Simpson's discussion of Gilmore's historical description ("a writing of historical twaddle, uninhibited by more or less total ignorance of his subject!" A. W. Brian Simpson*: Calculating Promises: The Emergence of Modern American Contract Doctrine: By Roy Kreitner,* 26 L. & HIST. REV. 221, 222 (2008)).

114. MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977).

115. ATIYAH, THE RISE AND FALL, *supra* note 98.

116. *Id.* at 716-79.

117. *Id.* 716.

118. GILMORE, *supra* note 97.

119. *See generally* ATIYAH, THE RISE AND FALL, *supra* note 98 (The rise and decline of the promissory concept is often associated with broader social developments, such as economic trends of free market and individualistic and liberal ideas of autonomy associated with the nineteenth century; the rise of the welfare state during the twentieth century, etc.). *See, e.g.,* ROY KREITNER, CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE (2006), for other cultural developments which influenced the transformation of contract law,

120. Reliance theorists often claim that liberal values conceal social coercion and resulted in a perpetuation of class inequality. *See* ATIYAH, THE RISE AND FALL, *supra* note 98, at 6-7. Thus, reliance theorists sought to establish a more communitarian, socialized, regime of contracts, which accords with the changing social and legal reality. *See, e.g.,* ATIYAH, THE RISE AND FALL, *supra* note 98, at 713-15, 778-79).

a. Conceptual Distinctions:

The first point that might seem puzzling, if viewed outside of the aesthetic perspective, is that conceptual distinctions are not as important for reliance scholars as they are for promise theorists, working within the grid aesthetic. A scholar embracing the energy aesthetic ultimately sees only action. Nothing is stable in such a world. As Gilmore notes: "[t]he materials which, as lawyers, we deal with are, as we are all unhappily aware, forever changing—they dissolve and recombine and metamorphose into their own opposites, all, it seems, without a moment's notice."[121] Distinctions between various conceptual components in law are temporary and *are always in a process of decay* (they have a history and a future). Consequently, their merits are only pragmatic: A distinction can be helpful as a rule of thumb, but in the end, it is not much more than a ladder that one discards once one has climbed over.[122]

This point is seldom acknowledged in the literature, and indeed, the exact opposite is emphasized: Fuller and Perdue, for example, are considered the fathers of the threefold classification of the purposes of awarding contract damages, which "clarified the complex picture of contract remedies."[123] But a close reading of their article reveals that many of their distinctions were never meant to last. Some distinctions eventually overlap, or subsume one another, and contrary to what most scholars think—this dissolution does not occur because of unfortunate analytical fallacies,[124] but *by design*, because of the aesthetic within which their discussion is situated. Put differently, rather than attempting to forcefully preserve a strict distinction between interests, Fuller and Perdue's analysis does not take its own classification of interests too seriously.

Interestingly, Fuller and Perdue themselves are happy to admit this. They do not feel that their analytical argument is threatened by the fact that restitution in many instances is actually a special case of reliance,[125] or reliance on a promise is, in turn, typically included in restitution.[126] Indeed—"Fuller and Perdue were willing to assume that the restitution interest is identical to the reliance interest in most cases."[127]

121. GILMORE, *supra* note 97, at 3-4.

122. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS, § 6.54 (D. F. Pears & B. F. McGuinness trans., 1961).) (1974).

123. Eyal Zamir, *The Missing Interest*, *supra* note 68, at 61.

124. *See, e.g.,* Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755, 1767-68 (1992) (discussing the multiple meanings attached to "the reliance interest."); David W. Barnes, *The Net Expectation Interest in Contract Damages*, 48 EMORY L. J. 1137, 1146-157 (1999) (discussing and demonstrating the many overlaps between the different interests); Fuller & Perdue, *Reliance Interest, supra* note 68; Fuller & Perdue, *Reliance Interest (Part 2)*, *supra* note 104; Craswell, *Against Fuller & Perdue, supra* note 11, at 102, 136-54 (discusses the overlaps and similarities between the different interests).

125. In typical cases where the gain involved in the restitution results from the injured-party's loss through reliance, *see* Fuller & Perdue, *Reliance Interest, supra* note 68, at 55. *See also id.* at 78 (defining "essential reliance" as including acts necessary to the perfection rights, such as a payments made by the promisee to the other party).

126. *Id.* at 54. Except from special cases where the breaching party is left with an unjust gain, which was not taken from the injured-party nor was not the result on reliance by the promisee.

127. Barnes, *The Net Expectation Interest in Contract Damages*, *supra* note 124, at 1155.

One may also notice that the distinctions between expectation and reliance—according to Fuller and Perdue's deliberate assumptions—are not entirely hermetic.[128] Moreover, Fuller and Perdue blurred the boundaries between the reliance principle and promissory notions in at least two important ways:

(1) Fuller and Perdue actually promoted protection of bare expectations arising from a promise, though they re-casted them as an integral part of the reliance principle. In their view, the reliance principle must cover not only "losses caused" but also "gains prevented" due to lost opportunities inflicted by relying on a promise.[129] Absent an aesthetic understanding of their theory, this concrete move—this broad definition of reliance and the inclusion of recovery of gains from a lost (potential) contract not entered—might be seen as an unexplained logical fallacy of the reliance theory,[130] since it employs a promissory notion that removes partitions between reliance and promise.[131]

(2) Another promissory notion evident in the reliance theory can be found in the "promissory constraints" that limit the extent of damages suffered by an injured party that will be repaired. Generally speaking, compensation for harms caused by a broken promise might, in some cases, exceed the value of the promise itself (e.g., in losing contracts). However, Fuller and Perdue argue that reliance damages awarded should not exceed the value of the promised performance.[132] It follows that not every benefit received, nor all detriment reliance incurred, must be compensated for, rather only those that do not surpass the value of the promised performance. This means that an injured party does not have an independent right to be returned to her pre-promised position without any regard to the particular contingencies and risk allocations included in the promise itself. But had the repair of damages been a central and independent goal of contract law, as argued by Fuller and Perdue, there would be no convincing reason to cap the reliance damages at the value of the promised performance.[133]

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128. According to Fuller and Perdue's view, the reliance interest also covers inherently "forgone opportunities"—the profits that the injured party would have made had she entered into an alternative contract. If so, then the reliance interest also covers the injured party's lost expectations according to Fuller and Perdue's own definitions. *See* Fuller & Perdue, *Reliance Interest, supra* note 68, at 55-56, 60-61. *See also id.* at 78 (defining "essential reliance" as including within it acts of forgo in the opportunity to enter other profitable contracts). Secondly, in principle, at least in a typical case in which the contract produces a positive profit, the expectation measure inherently includes not only profits that the injured-party could have made, but also lost expenses and payments he made in reliance on the contract. *See, e.g.,* Craswell, *Against Fuller & Perdue*, *supra* note 11, at 102.

129. Fuller & Perdue, *Reliance Interest, supra* note 68, at 55.

130. *See* Friedmann, *The Performance Interest in Contract Damages, supra* note 93, at 638 (arguing that Fuller and Perdue's theory of the recovery of lost opportunity of a *potential* contract is, in fact, the recovery of the *very expectation interest* arising from the *actual* contract though under the "guise of reliance." If so, Friedmann argues correctly, this theory is flawed and based upon a circular reasoning).

131. *See* Kelly, *The Phantom Reliance Interest in Contract Damages, supra* note 124, at 1761-762 (arguing that Fuller and Perdue's reliance ideal has actually transformed into a type of *promissory model* that in fact protects expectations). For a similar point regarding the case of opportunity costs, *see* FRIED, CONTRACT AS PROMISE, *supra* note 39, at 5.

132. *See* Fuller & Perdue, *Reliance Interest, supra* note 68, at 79.

133. *See* Zamir, *Contract Law & Theory: Three Views of the Cathedral*, *supra* note 5, at 2084; *see also* Kelly, *The Phantom Reliance Interest in Contract Damages*, *supra* note 124, at 1762-63.

Clearly, these two insights almost entirely blur the lines between reliance and a promise.[134] Though these points, which are routinely described in the literature as conceptual fallacies, can be easily explained if one thinks of Fuller and Perdue's aesthetic commitment. The energy aesthetic conditions reliance thinkers to give precedence to the constant flux of shifting relations in the world, over rigid conceptual distinctions. It should be noted, that Fuller and Perdue are not the only reliance theorists to treat conceptual distinctions as rules of thumb. Gilmore, too, devotes much of his scholarship to proving that "the general theory of contract was never as neat and tidy and all-of-a-piece in the real world as it was to appear in casebook and treatise and Restatement."[135] Atiyah, as well, breaks down the "artificial" connection between contract and promise,[136] as well as between contract as agreement,[137] and blurs the boundaries between contractual and tortious liability:[138] "I do not find the divisions between the branches of the law to rest neatly upon fundamental theoretical . . . distinctions. The distinctions drawn between the branches of the law seem to me to be drawn for purposes of pedagogy and exposition, but precisely where the lines will be drawn often depends on historical accidents and traditions."[139] This approach—according to which distinctions may be important for pragmatic reasons, but are ultimately prone to change by the perpetual movement of law—is offered by all reliance theorists we discuss in this Article, and best descriptively explained by the energy aesthetic.

Understanding the reliance approach's tendency to blur distinctions in law is important because it implies that many criticisms aimed at these theorists—particularly, for making distinctions that are not tenable or conceptually stable—are based on an erroneous assumption that the reliance approach is fundamentally committed to its conceptual categories and divisions. Similarly, and for the same reasons, it is incorrect to ascertain that the reliance approach cannot overcome the collapse of these distinctions. On the contrary, if these distinctions were universally correct (that is, that they were embedded into the structure of law), the reliance approach would have a problem, since it would mean that contract *is* "like a railway or a ship," and that contrary to Gilmore's claim, contracts are alive and well (how can something eternal die?).

134. Kelly, *The Phantom Reliance Interest in Contract Damages*, at 1764.

135. GILMORE, *supra* note 97, at 55.

136. ATIYAH, *The Modern Role of Contract Law, supra* note 104, at 4.

137. *Id.*

138. It should be noted that reliance theorists also reject the independent status of *the law of restitution*, see ATIYAH, *Contracts, Promises, and the Law of Obligations, supra* note 71, at 47-48.

139. *Id.* at 48. *See also* Fuller & Perdue, *Reliance Interest (Part* 2), *supra* note 104, at 419 (arguing that breaking line of division between contract and other fields will be "a distinct service to legal thinking"). *Cf.* GILMORE, *supra* note 97, at 88 ("[t]here is really no longer any viable distinction between liability in contract and liability in tort.").

b. Reliance and Expectation Damages in Fuller and Perdue

The second seemingly false claim that aesthetics help put in context is Fuller and Perdue's famous discussion on why the reliance interest is actually protected by expectation damages. Fuller and Perdue state, puzzlingly, that it is easier to measure the expectation interest than it is to measure the reliance interest. Therefore, and since the expectation value usually exceeds the value of reliance, the expectation interest serves as a yardstick for the reliance interest.[140] Clearly, this assertion seems incorrect; contrary to the reliance measure of damages which is retrospective and based upon actual losses incurred, the expectation measure is prospective and, therefore, often demands hypothetical and speculative evaluations of the injured-party's position had the promise been kept. Fuller and Perdue seem, therefore, committed to a false claim; indeed, this is how their claim is usually understood.[141]

This, however, is a misunderstanding of the aesthetic ramifications of their theory. One cannot explain Fuller and Perdue's discussion of the proof and quantification of reliance and expectation damages without mentioning that they dissolved the very distinction between these two interests (by including "gains prevented" due to lost opportunities in reliance).[142] Therefore, when they argue that the reliance interest is harder to quantify than the expectation interest, they are not relying on a clear distinction between the two interests; instead, they claim that measuring *one kind* of expectation interest (stemming from the actual contract) is easier than measuring *a different kind of the same interest* (stemming from lost, potential, contracts not entered). While assuming that reliance damages are harder to measure than expectation damages, reliance (as a rigid category which is strictly separated from expectation) just drops out of the picture. Although this analysis does not make Fuller and Perdue's general argumentative move any more correct, it nevertheless explains why they endorsed this particular claim.

c. Contract and Torts

The final implication we explore concerns Atiyah and Gilmore's claim that contract law is slowly being absorbed into tort law.[143] We do not wish to engage with this claim directly; arguments both for and against have been thoroughly discussed, rearticulated to account for objections, and contemplated *ad nauseam*. Instead, we stress that this is a paradigmatic claim for an energy-thinker. First, the claim is about movement; contract law is pictured as moving. Atiyah and Gilmore claim that the

140. Fuller & Perdue, *Reliance Interest, supra* note 68, at 62.

141. *See, e.g.,* Friedmann, *The Performance Interest in Contract Damages, supra* note 93, at 635-36; And indeed, according to a prevailing convention, it is actually the reliance measure of damages that is used as an approximation of the expectation interest. *See, e.g.,* Zamir, *Contract Law & Theory: Three Views of the Cathedral*, *supra* note 5, at 2084.

142. As discussed above, according to Fuller and Perdue, real *reliance* entails far more than out of pocket expenses, and includes all the opportunities foregone when the contract was entered—including *lost profits* from other contracts not entered. This broad definition of reliance, as mentioned, in fact blurs the boundaries between the *reliance* and *expectation* interests. *See* our discussion at notes 178-9 and accompanying text.

143. *See* Part III.A. Gilmore, for instance, argued that contract law's rules have experienced an ongoing "dissolving". The growth of ideas such as quasi-contract, unjust enrichment and promissory estoppel as well as other developments, "illustrate the coming together of contract and tort." *See* GILMORE, *supra* note 97, at 87-88.

destination of movement is tort law, but this view is outside of our examination (though we do take note of this issue shortly). We are far more interested in the notion that *law moves*, and that, consequentially, a proper account of contract law must involve a description of a vector, a starting point; an interim destination, and the history of the slow journey. It is not surprising, considering this, that both Atiyah and Gilmore's principal method of analysis is historical, since history is the study of change in human affairs. In this regard, the force of their analysis rests on the assumption that what we should look for is movement.

Moreover, as to the specific destination of contract, an energy-thinker, when given the chance, would always look for (conceptually) destructive movement. Law operates to break down conceptual barriers since its flow cannot tolerate constant, unchanging differences. It is little wonder then, that according to Atiyah and Gilmore, contract is not only moving, but is *being absorbed* into another field, thus, eliminating two separate conceptual categories (Law & Economics literature takes this yet another step further, as we demonstrate in section V Both of these claims regarding the disintegration of contract into tort are owed, in last part, to the energy aesthetic. But if we do not buy into this aesthetic, surely any account of contract law as moving would seem implausible. If, on the other hand, we accept the energy aesthetic (as we often do), then, as was the case with Fried, the most important intellectual step in the argument has already been accepted. The direction of contract law is of less importance once we accept that it must be headed somewhere.

2. More Aesthetic-to-Aesthetic Battles

Not just reliance theory itself, but its relation to other schools of thought can be explained better via an aesthetic perspective. Take, for example, the following debate. Fuller and Perdue famously argued that the will theory of contract—Fried's predecessor —fails to logically entail any guideline with regard to remedies for breach. They state, for example, that "'there is no necessary contradiction' between the will theory and a rule which limits damages to the reliance interest," and hold that a promissory theory does not logically entail any conclusive guideline with regard to the remedy.[144] Eyal Zamir rejects this view. While Zamir does not claim that the will theory necessarily entails, in and of itself, expectation damages as the standard remedy for breach, he nonetheless points at Fuller and Perdue's misconception when they assert that the will theory does not logically entail any guideline with regard to the remedy. Contrary to Fuller and Perdue, Zamir states that "there is a *significant linkage* between [the will] theory and remedies for breach of contract," and that the will theory entails "remedies that more clearly express the *inherent moral virtue* of keeping one's

144. *See* Fuller & Perdue, *Reliance Interest, supra* note 68, at 58-59. *See also* Craswell*, Contract Law, Default Rules and the Philosophy of Promising*, supra note 12, at 517-20 (argues that a promise based theory does not entail conclusive consequences with regard to the remedy, and that almost every remedy might be consistent with a promissory regime).

promise."[145] We want to point out, that some pre-rational aesthetic sympathies, underlie this seemingly rational debate between Fuller and Perdue and Zamir.

Arguably, for Zamir, at least in this text, the legal space is constructed in a way that makes the will theory a separate, fundamental category of thought, which is intrinsically linked to other rigid sets of categories and (at least certain types of) remedies. Fuller and Perdue, on the other hand, construct the legal space quite differently. Fuller and Perdue describe law—more specifically, the will theory—in energy-thinking terms, as a *force* which flows toward infinite directions (in our case: towards protecting reliance). While Fuller and Perdue presuppose an aesthetic under which law (and, consequently, contract) is chiefly described by movement, Zamir's view (in this case) reflects grid-thinking. He imagines the realm in which his argument takes place, divides law into intellectual categories ("will theory," "remedies," etc.), and then deduces from the "inherent moral virtue" of the rubric "will" to achieve certain deviations from it. In so doing, Zamir is engaging in the type of activity that an energy-thinker is simply conditioned to ignore. And the opposite is true as well, of course. When Zamir argues that contrary to Fuller and Perdue, it is necessary to logically deduce other particular remedies from the will theory, both sides of the argument are using aesthetically-charged arguments to such a degree that the disagreement between them can no longer be solved by rational means. Fuller and Perdue's view on law leaves no room for the sort of activity that their opponents are interested in.

Why is this so? Fuller and Perdue's strongest objection to the rigid connection between the will theory and remedies is aesthetic, not substantive. Their aim is to stop us from thinking about the object of inquiry (i.e. contract) as something that is imbued with inherent essence, and instead, concentrate solely on the manner in which we utilize contracts to attain certain ends. This can only be because in their eyes, to describe the law is to describe action. Therefore, if we accept the energy aesthetic, we can agree that contracts are connected to expressions of will without inferring to what contracts *do* while they are on the move. For Zamir, on the other hand, there is value in the type of project that tries to map legal remedies vis-à-vis conceptual entities. Thus, we get an aesthetic-to-aesthetic battle: the conflicting arguments are, in fact, different claims about different kinds of objects, and they obey different norms of plausibility and persuasion. The important step in the argument is that neither one of the parties discusses explicitly the framing of the intellectual project in a manner that guarantees that only certain *kinds of results* could be legitimately generated. Once this step is over, it is much easier to discredit the other side's type of response.

145. See Zamir, *The Missing Interest*, supra note 68, at 105. In a similar vein, *see* Friedmann, *The Performance Interest in Contract Damages, supra* note 93, at 637 (asserting that the basis of the right entails necessary conclusions with regard to the remedy which should be, if accepting the will theory, specific performance).

IV. ECONOMIC EFFICIENCY

A. Introduction

The economic literature on contract is extensive, and we only intend to discuss some of the basic premises and features underlying economic theories of contract law.[146] Economic efficiency is a utilitarian theory; it views law in general,[147] and contract law in particular, as an instrument for increasing aggregate human welfare[148] (usually measured by the satisfaction of individual preferences).[149] Economic theorizing about contract might be normative, descriptive, or interpretative.[150] Normative economic analysis strives to identify and recommend the most efficient doctrinal rule,[151] while descriptive economic theories hold that existing contract doctrine is best seen as serving the goal of maximizing welfare.[152] An interpretive economic theory, such as the ones we discuss below, combines normative and descriptive elements.

Most economic theories believe that while, in principle, efficiency goals could have been promoted through a direct enforcing of actions or rules which are efficient in and of themselves,[153] contract law contains a set of incentives for future contracting parties.[154]

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146. For an extensive discussion on economic theories, *see* Louis Kaplow & Steven Shavell, *Principles of Fairness Versus Welfare*, 114 HARV. L. REV. 961, 977-99 (2001); EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS AND MORALITY 11-40 (2010). For discussions on economic theories of contract law, *see, e.g.*, RICHARD CRASWELL, *Contract Law: General Theories, in* ENCYCLOPEDIA OF LAW AND ECONOMICS VOLUME III (Boudewijn Bouckaert & Gerrit De Geest eds., 2000)*;* Benjamin E. Hermalin, Avery W. Katz & Richard Craswell, *Contract Law*, *in* HANDBOOK OF LAW AND ECONOMICS VOLUME I 3-128 (A. Mitchell Polinsky & Steven Shavell eds., 2007); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW Ch. 4 (8th ed. 2011); ERIC POSNER, *Contract Theory, in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY ch.Ch. 9 (Martin P. Golding & William A. Edmundson eds., 2005); Posner, *After Three Decades, supra* note 11; ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW (1979).

147. Economic theory of contract law is actually a particular instantiation of a more general economic theory of law which applies to many other legal areas. *See, e.g.,* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2004); ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS (6th ed. 2012), A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (3d ed. 2003).

148. While efficiency is perceived as a proxy for human welfare. *See, e.g.,* Kaplow & Shavell, *Principles of Fairness Versus Welfare, supra* note 146, at 961.

149. *See, e.g.,* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8. J. LEGAL. STUD. 103, 119 (1979), for a discussion in contrast to the utilitarian concept of subjective happiness**.**

150. *See* Oman, *Failure of Economic Interpretations*, *supra* note 11, at 837-38.

151. S*ee, e.g.,* Posner, *After Three Decades*, *supra* note 11*,* at 834.

152. KRONMAN & POSNER, THE ECONOMICS OF CONTRACT LAW, *supra* note 146, at 5; *see* POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 146. For a brief discussion on descriptive economic theories, *see* Craswell, *In that Case*, *supra* note 11, at 904-07. For a philosophical defense on explanatory economic theories, *see* Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis,* 93 VA. L. REV. 287 (2007).

153. Some examples might be found in SMITH, *supra* note 10, at 114; and in Kaplow & Shavell, *Principles of Fairness Versus Welfare, supra* note 146, at 1103.

154. *See* SMITH, *supra* note 10, at 115; BIX, *supra* note 10, at 135; Richard Craswell, *Two Economic Theories of Enforcing Promises*, *in* THE THEORY OF CONTRACT LAW, *supra* note 10, at 26; Craswell, *Against Fuller and Perdue, supra* note 11, at 1071; Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 3-29 (1985); Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 692-725

B. Aesthetics

We argue that an aesthetic inquiry into economic theories of contract reveals four major insights: (a) economic efficiency is based on energy aesthetics; (b) in this respect, economic efficiency is aesthetically related to reliance theories of contract. More specifically, the economic approach is an *aesthetic radicalization* of reliance theory; (c) because of this, some of the attributes of reliance theory come to be radicalized as well. Our main example is that economic theories tend to dissolve all, or almost all conceptual distinctions in law, to the point that the object of inquiry disappears; (d) the economic approach also demonstrates that taking an aesthetic to its endpoint leads to its collapse. We discuss assertions (a)-(b) in this subsection and devote subsection V.C to demonstrate claims (c)-(d).

The first point we stress is that most economic theories represent energy thinking.[155] In fact, our general contention that aesthetic commitments underlie many substantive insights is most evident here, since law and economics scholarship is very explicit about the way it constructs its object of analysis. Economic analysis explains legal objects—contracts, torts, international treaties etc.—in terms of their influence on maximizing efficiency, and more specifically, by the incentives they create for individuals. Applied to contract law, this means that contract is a vehicle for maximizing individual and social gains. The energy aesthetic is capable of making the economic theory of contract seem plausible, even natural or organic. Here, too, as in reliance or promise theories, once we accept the dominant aesthetic notion, the rest of theory just seems to follow naturally.

Thus, Richard Posner informs us that "economics is the deep structure of the common law."[156] And how can it not be? If law itself is but a force, the amalgamation of many individual's choices about how society should be regulated, how can it not be best described by the scientific method that captures all "rational choice in the world?"[157] In a sense, it is understandable why economic theories (however by now dominated by pure normative inclinations) have first emerged through a *descriptive* viewpoint.[158] Just as reliance theorists attempted to descriptively show that contract law is actually moving toward reliance and fairness, Posner pointed to the fact that existing law actually moves as an efficiency maximization force.[159] It was only later,

(1986); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). Many examples may be found in Posner, *After Three Decades, supra* note 11.

155. Perhaps some theories related to economic efficiency (though not the ones we discuss here) could be best described as supported by the grid aesthetic. Arguably, such an approach is reflected in the "new formalism" or "instrumental formalism" economic approaches to contract interpretation. *See, e.g.,* Schwartz & Scott, *supra* note 11; Kreitner, *supra* note 15, at 436-38 ("Local Instrumental Formalism"). In these cases, the general normative theory is confined by a narrow formalist set of rules which govern the question of how contract law can support economic efficiency. Law then ceases to be pictured as a *force* on the move and starts to appear as a kind of rigid grid which includes within it strict distinctions and categories by which (and only by which) its substantive goal is to be reached.

156. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 249 (7th ed. 2007).

157. *Id.* at 3.

158. *See, e.g.,* Craswell, *In that Case*, *supra* note 11, at 904 (describing the early days of law and economics as ones in which much attention was given to descriptive analysis of law).

159. *See* RICHARD POSNER, *supra* note 21. *See also* Oman, *Failure of Economic Interpretations, supra* note 11, *at* 837.

after this aesthetic was already deeply rooted within legal thinking that the descriptive economic analysis fell out of favor and was replaced by fully normative analysis—which presupposed the same structure of thought.[160]

Recall that the reliance theorists we discuss above also rely on a similar aesthetic understanding; contract law was defined in terms of how it actually affects the parties to the contract. In this respect, economic scholarship simply takes this type of reasoning one step further: if law—and, derivatively, contract—is only defined in terms of what it does, why not define law in terms of *every* quantitative change it brings about? Why settle only for the welfare of the concrete parties to the contract themselves and not, for instance, on overall human welfare? Thus, thinking the reliance theory's presuppositions through leads to something like the economic approach.

This point is crucial; most current analyses describe reliance and promissory theories as belonging to the same camp.[161] However, our analysis reorganizes the standard divisions of camps, placing *reliance and efficiency* in the same (aesthetic) group. Of course, one might also find some substantive similarities between these theories; arguably, Fuller and Perdue may be seen as predicting some economic insights of their own.[162] Our aesthetic examination reveals that these insights are not a negligible postscript to their central reliance thesis, but rather a possible echo of their deepest aesthetic commitment—one that is also shared by efficiency theories.

In particular, the economic theory of contract is the result of taking the energy aesthetic to its logical endpoint.[163] As Duncan Kennedy notes, something similar happened with the American Realist movement and CLS: Once the idea that clear-cut rules do not constrain adjudication established itself in the minds of legal academics, it was an easy next step to question whether policy considerations, to which early Realists alluded to next, are any different.[164] Thus, when we accept that law is not inert, but is rather better described as a force in motion, we are forced to wonder why *any* static constraining apparatus—whether a rule set forth by the legislator, or a policy determination made by the public—could hold it in check. The same phenomenon, we argue, affects contract theory: once the energy aesthetic became prominent via reliance theories (originally, we argue, with regard to a substantive conception of corrective justice), the floodgates opened, and energy-thinking spread, thus, resulting

160. *See* Craswell, *In that Case*, *supra* note 11, at 904, 906-07.

161. Both reliance and promissory theories are, for example, "rights-based" theories. *See supra* Introduction. *See also* Oman, *Unity and Pluralism in Contract Law*, *supra* note 71, at 1488. As to promissory and efficiency theories, despite the fundamental divergences between them, they overlap in many ways; specifically, they converge in many central points—both in some of their basic premises, and in their recommendations for the substantive content of contract law. *See, e.g.,* Kraus, *Philosophy of Contract Law, supra* note 15, at 687; Fried, *Thirty Years On*, *supra* note 39, at 964-65, Fried, *Ambitions*, *supra* note 39, at 22-24.

162. They recognized the instrumental importance of enforcing promises, and asserted that the remedy of expectation damages might be explained both on the ground it influences the parties' incentives (in their words: "encouragements"), and because it facilitates business agreements which in turn support economic activity. *See* Fuller & Perdue, *Reliance Interest, supra* note 68, at 61-62.

163. Though there are different ways of doing this. Other possible results include cultural theories of contract, feminist jurisprudence and other theories, which limitations of space prevent us from discussing seriously here.

164. *See* KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 24, at 113, 148.

in one of the most paradigmatic energy theories—economics. If this is correct, it means that the economic theory of contract is not just a third theory, but an aesthetically radical version of one of the first two.

C. The Upshot

Turning to our next point—the implications of energy-thinking on conceptual distinctions—we examine some paradigmatic characteristics of economic literature on contract. First, consider this highly illuminating comment by Shavell:

> Is it not of interest to every legal analyst to determine how legal rules affect behavior and then to evaluate the rules with reference to some criterion of the social good? The answer would seem to be "yes," and thus in this general sense, one cannot distinguish economic analysis from other analysis of law.[165]

Here we see that not only is law economic in nature (recall Richard Posner's assertion that economic logic is "the deep structure of the common law,") but in fact, *any* intellectual legal inquiry is, in the end, reducible to economics.[166] Indeed, if we condition ourselves to only seek movement and force, we naturally find a lot of what we are looking for.

Surely, some distinctions remain cherished in the literature on law and economics (more on that below). Nevertheless, we can see that the conceptual borders that seem to underlie the very coherence of speaking about law as an individualized unit start to dissolve. We have already witnessed that there is no specific, differentiated economic point of view on the law; any inquiry into law is, in the end, economic in nature. And, additionally, economists claim that law itself represents economic logic. Taking these two suggestions together implies a certain redundancy—even a double redundancy—in the term "law and economics." On the one hand, when we study law, we are always actually studying economics; on the other hand, there is nothing unique in applying an economic point of view to law, since any inquiry is in the end economic. From this point of view, law and economics is, actually, just general intellectual inquiry—it is neither uniquely economic nor legal. Schlag calls this the "de-differentiation problem."[167] It occurs when certain fields of study cannot analytically explain the difference between their methodology and the object they are studying.[168] He also suggested that it applies to economic analysis of law.[169] Our analysis confirms this suspicion,[170] but more importantly, explains that its origins lie in aesthetic presuppositions.

An important implication of this type of energy-thinking is that it too finds that contract law is merging into a different area of law. This time, though, it is not just

165. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS, *supra* note 147, at 4.
166. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 147, at 249.
167. Pierre Schlag, *The De-Differentiation Problem*, 41 CONT. PHIL. REV. 35 (2009).
168. *Id.*
169. *Id.*
170. *Id.*

tort law; instead, contract law is woven into a single, unified tissue called "law." One can, therefore, understand contract doctrine in any number of ways: for example, as tort problems, or as problems concerning property rights.[171] The reason that this counterintuitive idea seems plausible to economic scholars is, perhaps, related to substantive methodological commitments, though we believe it is primarily connected to the energy aesthetic.[172] These theorists view law, as a whole, as a moving force that influences human behavior through incentives. "Contract" is just another intellectual construct through which the law accomplishes this, but economic theories have no reason to be particularly faithful to *this* construct as opposed to another, since tort, or property rights for that matter, are all just symbols for doing the same thing. Through contracts, torts, and property rights law creates incentives and seeks to shape individual behavior. Hence, the movement of law—toward efficiency, maximizing social welfare, or any other economic goal—is the focal point of the theory; the specific vehicle through which it moves is nothing more than a casual instrument.

A contract is, therefore, exactly like a tort, or a property right, or any other legal term for that matter. They are fictions through which social benefit is maximized (successful or not, only economists know). The dissolvent that reliance thinkers have concocted works to maximum effect here. Contract law is not absorbed into torts; it is just absorbed. To be sure, economic-thinkers deeply care about some conceptual distinctions, but these are mostly economic in nature (supply/demand, rational/irrational players, *ex post*/*ex ante*, etc.) instead of legal (contract/tort, etc.). The reason is, again, that only economics is real when energy aesthetic is employed in this way. Only objects that can be measured in the way efficiency theories measure the world are deemed substantial; law is just another quantified material.

This leads us, finally, to touch on an interesting phenomenon that has not yet been addressed in our discussion. Commonly put, aesthetics are only useful when not closely examined—that is, when the logical implications of the picture they imply are not meticulously pursued. Figuratively speaking, we may say that just like with one's heroes, it is best to keep an appropriate distance from one's aesthetic; too far, and the excitement eventually wears off; too close, and the illusion becomes clear for what it is. The reason for this is that aesthetic activity involves giving form to (and in the process, constructing) an intellectual object for purposes of inquiry. This type of action has something artificial about it: as we noted earlier, law is not really a rigid grid, nor is it a moving social force; we choose to see it as such since it allows us to come in contact with it.[173] We encounter many processes, people, institutions, and ideas that comprise law, and to make sense of them, we situate ourselves somewhere and "[decree] from our corner that perspectives are permitted only from this corner," as Nietzsche put it.[174] And this process of aesthetic construction involves some degree

171. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 147,, at 250.

172. Jody Kraus discusses the tendency of economic theories to unify diverse areas of law under the same principle of efficiency, defining this tendency as a "methodological commitment." *See* Kraus, *Philosophy of Contract Law, supra* note 15, at 699-701.

173. Schlag, *Law and Phrenology*, *supra* note 30, at 907.

174. FRIEDRICH NIETZSCHE, THE GAY SCIENCE 336 (Walter Kaufmann trans., 1974).

of falsification, in the sense that we necessarily have to focus on *something* and in the process treat other phenomena which we encounter as unimportant. But when we insist on seeing the world solely through the eyes of our aesthetic, the world eventually resists; some of the data we ignored comes back to haunt us, and we are constantly reminded that we have chosen to forget some things that perhaps should not have been forgotten.

This is what happened to Langdellian formalism and to Fried's theory of contract. In both cases, critics claimed that when we take the theory most seriously, we find out that it is not truly operative.[175] For instance, we cannot really make the logical, deductive transition from one point in Fried's grid to the next, since that involves "forgetting" a lot of information, which, if included, would overwhelm the aesthetic.[176] We believe that the economic approach to contract is experiencing just this sort of crisis, and for the same reasons.

The problem, in a nutshell, is that energy is everywhere; the world is ever-changing in countless ways. Consequently, we cannot really make the idea of energy operative. The energy aesthetic demands that we identify *every* meaningful (that is, social-welfare altering) way in which law influences society, and vice-versa, through contract. Otherwise, we cannot fully capture what contract is (it would be similar to offering a conceptual understanding of contract with several necessary conditions missing). But for this project, the project of articulating exactly how different contractual regimes affect people in the world, economics is just not suited, since economic models cannot actually measure many important factors that influence our lives (the way we are structured by ideology and society comes to mind).[177] And it is interesting that this challenge to economic theory comes from *within* the practice itself.

For example, consider Eric Posner's assertion that the economic approach provides indeterminate policy recommendations about contract doctrine, since "[the determinate] models omit important variables, but including these variables makes them indeterminate, or, in some cases, unrealistic."[178] This comment, and others like it,[179] can only be the result of taking economic theory too seriously, and trying hard to actually make it work. When these attempts fail—when, for instance, the doctrine fails to align all sorts of incentives perfectly—they reveal not a methodological problem with the economic analysis, but an aesthetic problem. We cannot ensure that we have measured everything, and, more alarmingly, we do not know what constitutes

175. Baird describes this point neatly with regard to Langdell, by stating that: "There were principles in the great beyond that were fixed and immutable. A court sitting on Mars would apply the same principles. *We should not be surprised that such fantasies created trouble.*" *See*, BAIRD, *supra* note 10, at 150.

176. *See e.g, supra* Part II, notes 67, 90, 106; Part III. note 151.

177. Pierre Schlag, *Four Conceptualizations of the Relations of Law to Economics (Tribulations of a Positivist Social Science)*, 33 CARDOZO L. REV. 2357, at 2357 (2012). This is not to imply that other methods are more suited for this task.

178. Posner, *After Three Decades, supra* note 11, at 834. *See also* POSNER, *supra* note 10, at 223-32.

179. *See, e.g.,* Richard Craswell, *Instrumental Theories of Compensation: A Survey,* 40 SAN. D. L. REV. 1135 (2003) (opining that different economic models are based upon different variables, therefore often establish different conclusions. An attempt to combine all economic considerations is impossible); *see also,* with regard to contract remedies, POLINSKY, *supra* note 147, at 69; COOTER & ULEN, *supra* note 147, at 331; Steven Shavell, *Damage Measures for Breach of Contract*, 11 Bell J. Econ. 466 (1980).

an object worth measuring until we impose order—but that order will always keep certain things out. And yet, when we measure only some things, and not others, we do not have an adequate understanding of the world even by our own standards. A solution is not easily forthcoming; as we note earlier, the wise scholar avoids trouble in the first place by never pursuing her aesthetic to the fullest degree.[180]

V. PLURALISM

A. Introduction

We end our discussion with a brief tour of one of the field's most intriguing notions —the pluralist approach to contract. Pluralist conceptions are based on the idea that a single principle cannot justify or describe the entire realm of contract law.[181] Drawing on the notion that each theory contains genuine and valuable insights, but none is capable of explaining or justifying the complete normative sphere,[182] pluralists have argued against the exclusiveness of a single approach, suggesting instead a synthesis of many principles.[183]

In this Article, we focus on unprincipled pluralism, which holds that there is no meta-principle or overarching theory that determines *a-priori* which of the principles is superior when justifications collide.[184] This version of pluralism certainly does not exhaust the pluralist discussion. For instance, some argue for a more conclusive way of reconciling or balancing multiple values.[185] Others have sought to construct an

180. Which creates other problems, of course.

181. This position is fueled in part by the absence of a compelling, internally-consistent theory which entails clear doctrinal results. *See, e.g.*, Eisenberg, *The Theory of Contracts*, *supra* note 13, at 223-40; SCOTT & KRAUS, *supra* note 48, at 28; BIX, *supra* note 10, at 132-36; HILLMAN, THE RICHNESS OF CONTRACT LAW, *supra* note 14; Oman, *Unity and Pluralism in Contract Law*, *supra* note 71, at 1498-499. Another reason for endorsing pluralism is that contract law is perceived as too complex to be captured by any specific theory. *See, e.g.,* Peter A. Alces, *Unintelligent Design in Contract*, 2008 U. ILL. L. REV. 505 (2008); Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, at 123 (1988); HILLMAN, THE RICHNESS OF CONTRACT LAW *supra* note 14, at 273; Peter A. Alces, *The Moral Impossibility of Contract*, *supra* note 13, at 1661; SMITH, *supra* note 10, at 159. *See also* BIX, *supra* note 10, at 119, 126, 147, 152-53, 155, 161-62.

182. Hillman, *The Crisis in Modern Contract Theory, supra* note 181, at 103-04, 133; *see also* HILLMAN, THE RICHNESS OF CONTRACT LAW*, supra* note 14, at 2, 4, 6; BIX, *supra* note 10, at 160.

183. Both from a descriptive and a normative standpoint. Thus pluralism, at least in some variants of it, is also an interpretive theory—it seeks both to justify and explain contract law (or certain parts of it). *See* SMITH, *supra* note 10, at 158-60; *See also* SCOTT & KRAUS, *supra* note 48, at 28; Eisenberg, *The Theory of Contracts*, *supra* note 13, at 240-44; Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710 (1997); BIX, *supra* note 10, at 147-62; HILLMAN, THE RICHNESS OF CONTRACT LAW, *supra* note 14, at 267-73.

184. Such theories are commonly labeled as 'ad hoc' mixture of normative theories. *See, e.g.,* SMITH, *supra* note 10, at 158–59. For examples of such theories, *see* Hillman, *The Crisis in Modern Contract Theory, supra* note 181, at 104 (argues that the very question of the relative weight of conflicting principles is "unanswerable" as well as "unimportant."); HILLMAN, THE RICHNESS OF CONTRACT LAW*, supra* note 14, at 2, 4, 268 (argues against a rigid theoretical ordering and excessive abstraction), Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915 (2012) (offers a pluralist conception that lacks a core or an overarching principle for deciding cases). For further discussion *see infra* notes 191-200 and the accompanied text.

185. *See, e.g.,* Eisenberg, *The Theory of Contracts*, *supra* note 13, at 240-44 (discussing his "multi-valued" theory). For criticism on this approach, *see e.g.* Schwartz & Scott, *supra* note 11, *at* 543, n.2. For another attempt to balance, in some way, multiple values, *see* BIX, *supra* note 10, at 136, 148.

even clearer principled form of pluralism.[186] Disregarding the question whether such models are in the end, pluralistic at all, our primary concern here is with the unprincipled variant of pluralism.[187] We choose to only focus on this type of pluralism because, like Charles Fried's or Fuller and Perdue's theories, it is a "classic" in the sense that it is the standard for other approaches. In addition, it serves as a good example for a theory that relies on a specific aesthetic structure. We do not deny, of course, that an aesthetic analysis of other, more principled, pluralistic theories can be highly illuminating and may reach different results than those we defend here.[188]

B. Aesthetics

Pluralism itself (as opposed to any specific pluralist mixture of justifications) is usually presented as an alternative to, or a critique of, theoretical unification in general, and not as a response to any specific unitary contract theory. For example, both Hillman and Bix introduce pluralism to suggest that all unitary theories are partially correct. However, our analysis reveals that pluralism too rests on a single (one is tempted to say unitary) aesthetic. In other words, the pluralist project is informed by a particular aesthetic vision, which in this case, differs from the ones we have already addressed. This aesthetic—the *dissociative aesthetic*—is responsible for pluralism's unique characteristics; it animates the approach's strengths, which are hard to deny, but also its weaknesses. In this respect, pluralism is on equal terms with other first-order contract theories in the sense it is presented in a manner that presupposes a single aesthetic.[189]

Here, then, is an example of dissociative thinking:

> Example IV: The Vexed Law Student
> During your first year contracts class, your professor asks you to describe the holding in a particular case. You read the case beforehand and found that it was extremely well

186. Either by integrating or reconciling theories, or by dividing contract (or contract law) into types. *See, e.g.*, Kreitner, *On the New Pluralism in Contract Theory*, *supra* note 184, at 919-21 (demonstrating divisions by contracting parties; situations; contract law's categorizations). For attempts to integrate, balance or reconcile principles in varied ways, *see* Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420, 422 (2001) (suggesting two models of "vertical integration"); Oman, *Unity and Pluralism in Contract Law*, *supra* note 71, at 1499-506 (using lexical ordering); Daniel Farber, *Economic Efficiency and The Ex Ante Perspective*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 54 (Jody S. Kraus & Steven D. Walt eds., 2000) (offering a foundational and derivative model); Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229 (1998) (reconciling efficiency and paternalism); Hanoch Dagan *Autonomy, Pluralism and Contract Law Theory*, 76 L. & CONTEMPORARY PROBLEMS 19 (2013) (arguing that autonomy-based approach to contract should be attentive to diverse ideals and principles); Jody S. Kraus *Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency,* 1 SOC. POL. & L. PHIL. 385 (2002) (offering a model of "horizontal independence" for reconciling theories). *See generally* ZAMIR & MEDINA LAW, ECONOMICS AND MORALITY, *supra* note 15 at Ch. 4 (integrating economic analysis with deontological commitments).

187. Arguably, some of the suggested models of reconciling theories are not purely pluralistic either because they dim, if not wholly nullify, conflicts between theories (*see* Kreitner, *On the New Pluralism in Contract Theory*, *supra* note 184, at 918-19, n.12), or because theories that divide contract into types or situations are, in a sense, unitary, because they provide a singular justificatory principle to each contingency.

188. This topic deserves a separate inquiry. We only note, tentatively, that some pluralist theories contain a rigid internal ordering within fixed categorizations, and therefore might reflect grid tendencies (*see, e.g.*, Ethan J. Leib, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 QUINNIPIAC L. REV. 1 (2005)).

189. Although we again want to stress that this is not *necessary*—any theory could, potentially, be presented using different aesthetics. Some aesthetics combine more naturally with specific theories.

> justified, given past decision in similar situations, and you explain why. Your law professor then asks you to explain why the holding is incorrect and should be reversed. The question catches you off-guard, and you freeze—you intuitively thought that the case was rightly decided and can't find any rationales to support a reverse decision. Nevertheless you give it your best shot. In order to find something to say you try to broaden your point of view and think of more than the precedents. In the quick moment you take for reflection, any remotely plausible response is possible. You quickly reorganize and tell your professor that legal precedent notwithstanding, the ruling ignores some legal principles that are deeply embedded into contract law. In addition, you recall a remotely analogous case from another field that featured a different logic. You mention the case and argue that is relevant to this one because it features similar policy considerations.

As Pierre Schlag notes, lawyers sometimes experience a moment in which their intellect suspends belief in all conceptualizations of law. This is usually the moment just before drafting a court brief or prior to writing a judicial decision. At that moment, many different options appear, and we refuse to give law a particular structure in any way whatsoever. The result is that *law has no predisposed form*. Law may be a series of clear-cut authoritative rules, if that suits the client's interests, but it may also be a social force that responds to ideological and economic pressures. And it might, of course, be something else entirely.

At this point, the jurist has yet to determine how to engage with—how to construct —law. Making a final decision and advancing a legal argument means leaving the dissociative aesthetic, which allows the presentation of multiple options and making a choice. The dissociative moment is highly creative, and it facilitates an important process that many who practice law go through (often very quickly) before they choose how to advance a substantive legal claim. As Schlag notes, "[t]here is no sum to be added up here: each aspect of law (law as conceptual system, law as behavior, law as coercive apparatus) is already conjoined with the others."[190] However, we cannot examine law through the dissociative aesthetic for long periods of time—it is mostly a destructive force that has to be first discarded in order to actually build something (a legal holding, a chapter in a book, etc.). Thinking of law in a dissociative manner allows us to begin with a "clean slate" on which we proceed to construct our desired projects.

The dissociative aesthetic is an intellectual frontier, and like other frontiers, it is full of potential and danger. The remainder of this subsection focuses on the manner this aesthetic actually connects to and supports pluralism in contract theory. Part V.C then discusses how aesthetic dissociation triggers some of the more common attacks on pluralism.

Our main example of the relationship between pluralism and aesthetic dissociation is the pluralists' main thesis regarding contract doctrine. While pluralists offer different accounts of the mix of justifications for contract, many rely on the same

190. Schlag, *The Aesthetics of American Law*, *supra* note 1, at 1096.

basic normative technique: they explain how different justifications combine to clarify and justify contract doctrine on a case-by-case basis. For example, Hillman argues that "theorists should address how to utilize each principle in particular contexts,"[191] and Kreitner offers a pluralist conception that has no core.[192.] According to Kreitner, "there is no one idea that encapsulates the *sine qua non* of contract, no nodal point from which all the instantiations of the institution of contract flow: not autonomy; not consent; not promise; not a community of mutual respectful recognition; not efficiency; not the transfer of proprietary right; not reliance (tired yet? I could go on)".[193] In his view, contract "serves as an infrastructure that provides a means to carry out a range of collaborative projects"[194.], and pluralistic theory of contract should not necessarily provide a general metric for deciding concrete cases but rather to provide a "language for mediating between normative commitments and the settings in which we try to realize those commitments" [195.] Zamir maintains (regarding specific legislation) that,

> No normative theory, in and of itself, can provide full explanation or justification for the entire Law, or even to any of its provisions . . . Indeed, there are tensions and even contradictions among the various theories, their premises, and their implications . . . However . . . one should take all theories into account when interpreting the Law.[196]

Finally, even Melvin Eisenberg, who sought a more ordered view, conceded that "when social propositions conflict the Legislator must exercise good judgment concerning the weight and role to be given to each proposition in the issue at hand . . . ."[197]

Pluralists believe, then, that pluralism provides many possible justifications and that to "understand" any specific contract doctrine is to explain how the different rationales actually support the doctrine. For instance, one rule may be justified by the reliance principles, and another by both economic efficiency and morality of promise-keeping. Pluralists' basic tenet is that contract law is complex and should not, and cannot, be explained by only one justification.

To demonstrate this view, consider a pluralist approach to §90 of the Restatement (Second) of Contracts, which states that reliance upon a promise should be reasonable "as justice requires."[198] As Leon Trakman states, a pluralist should seek

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191. HILLMAN, THE RICHNESS OF CONTRACT LAW, *supra* note 14, at 269. As mentioned, Hillman explicitly argues against the attempt to establish some pre-determined balance of conflicting principles. *See supra* note 184.

192. Kreitner, *On the New Pluralism in Contract Theory*, *supra* note 184, at 923, 926.

193. *Id.* at 923.

194. *Id.* at 924.

195. *Id.* at 923.

196. *See* Eyal Zamir, *Theoretical Foundations of the Sale Law (Housing),* 30 MISHPATIM 495, 512 (2000) [Hebrew]. In other place, Zamir explicitly declines the need for a balancing overarching theory; see Zamir, *Contract Law and Theory: Three Views of the Cathedral, supra* note 5, at 2087, n.23.

197. Eisenberg, *The Theory of Contracts*, *supra* note 13, at 244; *see infra* Part V.A (discussing Eisenberg's multi-valued theory).

198. RESTATEMENT (SECOND) OF CONTRACTS, §90.

to examine the different moral dimension of this provision before making any determination in a specific case.[199] In particular, a pluralist is burdened with identifying, weighing, ranking and comparing different moral values in order to determine whether enforcing a promises is reasonable, "as justice requires."[200] We are not interested in asking what decisions such a procedure would generate, but rather what sort of image of law one must subscribe to for this procedure to be even entertained. A jurist making a determination regarding doctrine should refrain from conceptualizing law in a specific manner—contract is a force maximizing efficiency in one moment, and a Kantian manifestation of the will in the next. As Trakman notes above, one has to go through "infinite" such iterations before reaching a decision.

And so we can see that the most important intellectual move that pluralists advocate —the endless combination of justifications—necessitates the dissociative aesthetic. Which conceptual net should we lay on top of law in order to be able to make theoretical claims about it? Pluralists answer that no singular conceptualization of the law should be accepted, at least not fully, and never initially. More precisely, they argue that we should be ready to embrace them all. In order to *use* pluralism and to make it an operational contract theory, we have to enter the dissociative aesthetic—even if only for a moment—and to suspend judgment regarding the very form of law.[201]

Dissociation is needed in order to consider different contract theories because, as we note throughout our discussion on aesthetics, each rationale for contract was developed using a specific aesthetic as a starting point. Pluralists thus must support entering the dissociative aesthetic (at least before making any claim regarding contract doctrine).[202] Aesthetic dissociation also explains why pluralism seems so constructive and helpful at times, and why it inspires optimism—in at least some contract theorists. Pluralism is unique in that it allows engagement with contract doctrine without the hindrance of a fixed perspective: contract is not a rigid conceptual grid, or a force on the move, or anything else—at least *not yet*. All options are available, and jurists can choose the mixture they prefer in any specific case to match the particulars of the contemplated doctrine. Aesthetically speaking, pluralism in contract theory allows jurists to disassociate from the form of contract itself.

199. Leon Trakman, *Pluralism in Contract Law*, 58 BUFF. L. REV. 1031, 1056 (2010).

200. *Id.*

201. But perhaps pluralists combine different aesthetics to form a single aesthetic point of view that guides them in *all* encounters with contract doctrine? This interpretation is implausible as a description of what pluralists actually do—and recall that we are interested in a descriptive account of contract theories. To make this reading work, we need some description of the alleged alternate aesthetic that pluralists use. But how can we even begin to think about this aesthetic? It must include rigid conceptual distinctions (for the grid-moments), as well as constant movement, history, and an emphasis on the potential future. While perhaps not impossible, this combination does seem implausible: it is difficult to conceptualize all these contrasting characteristics *at the same time*.

202. One may object and argue that pluralists do not combine *aesthetics* but only normative ideas (promise, reliance, efficiency). However, this seems implausible. Remember that in any given theory, substance is interwoven with — steeped in — aesthetic commitments. This means that when a pluralist chooses between reliance, promise and efficiency, she is also choosing between the energy and the grid aesthetics. Of course, a pluralist can create new theories of reliance, promise, etc., based on different aesthetics. But, we must assume that these *new* theories will be quite different than the ones we know and to which we constantly refer.

C. The Upshot

Accepting dissociative thinking brings about some unfortunate consequences. We specifically refer to the claim that pluralism is anti-theoretical, about which there has been much discussion.[203] Of course, pluralists have responded to this charge,[204] but in our opinion, both sides to the debate have been talking past each other. Our aesthetic point of view helps explain why this is so (and why it could not have been otherwise).

"With the advent of this dissociative aesthetic," Schlag reminds us, "we experience the dissipation of form and the dissolution of identity."[205] What type of being can take the form of reliance this day and promise the next? What is it, *really*? Kreitner seems content with the answer that contract has no core, but the problem seems to be different, namely that contract has no *form*. Which begs the question: is contract really an object of inquiry? Is it really *there*? Can we actually point to something (i.e., an idea or a group of ideas)—anything—and say that this is contract law?[206] Dissociative thinkers cannot answer that question in the affirmative, and pluralists insist that we should inhabit that point of view often. The upshot is that "we experience a kind of ontological crash—we have lost the identity of the thing we were supposedly talking about."[207] And contract scholars of the monist variety are justifiably concerned about such ontological crashes—they are aesthetically conditioned to worry, since their inability to objectify contract, with no real substitute, is a threat on a much larger scale than the never-ending quarrel over which justification is more worthy of our attention could ever present. Here, too, the aesthetic-to-aesthetic discussion takes place side by side (or behind) the standard debate. Many involved believe that more data, or a more nuanced normative analysis, could solve the puzzle, but our aesthetic analysis shows what kind of commitments are tacitly at work, and why rational arguments could never vindicate or rebuke them.

We hope that these comments show that here too, aesthetics play a major role in the theoretical discourse on contracts. The dissociative aesthetic preconditions us into accepting pluralism as a plausible conception for thinking about contract. If we buy into it—if, that is, dissociative thinking comes naturally to us—pluralism will seem like the natural next step. But if we resist dissociative thinking (or at least the thought that we should be dissociative much of the time), pluralist contract theory will seem like a borderline nihilistic strategy that denies the project of intellectually

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203. *See, e.g.,* Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1283-84 (1989) (describing Hillman's pluralism as an "anti-theory counter attack"); Kreitner, *On the New Pluralism in Contract Theory*, *supra* note 184, at 922; SMITH, *supra* note 10, at 158-59; SCOTT & KRAUS, *supra* note 48, at 28 (arguing that the lack of a decisive meta-principle is one of most basic difficulties of pluralist theories); Schwartz & Scott, *supra* note 11, at 543, n.2 (pluralistic approaches are "least helpful when they are most needed"). *See also* HILLMAN, THE RICHNESS OF CONTRACT LAW, *supra* note 14, at 269 (mentioning that a pluralistic conception, which basically lacks a clear theoretical hierarchy, might be seen as "atheoretical" or "unrigorous," and does not offer any certainty).

204. *See* Kreitner, *On the New Pluralism in Contract Theory*, *supra* note 184, at 922-23.

205. Schlag, *The Aesthetics of American Law*, *supra* note 1, at 1093.

206. *See* SMITH, LAW'S QUANDARY, *supra* note 29.

207. Schlag, *The Aesthetics of American Law*, *supra* note 1, at 1095.

constructing our object of inquiry in a way that makes talking about it and explaining it coherent.

VI. CONCLUSION

This Article examined prominent contract theories using a philosophical methodology that highlights how each theory is informed by pre-theoretical, aesthetic commitments. Our general contention is that contract theory's current state of disagreement is isomorphous to the battle of aesthetics that rages in and between individual lawyers and in the legal community as a whole. This aesthetic struggle, we suggest, cannot be conclusively decided.

Our analysis has limits, as well as advantages. For example, the investigation focuses on form rather than substance, which means that it does not include specific recommendations for contract doctrine. But on the other hand, shifting attention to the way a theory is aesthetically structured sheds light on many theoretical points that are usually hidden from sight. As noted throughout the article, we do not intend to undermine the general project of constructing a theory of contract law. In fact, this Article assumes that exploring the underpinnings of contract theories would make them more understandable, and, therefore, more intellectually attractive (and this is true even when we discover that certain foundations cannot be rationally defended). It is exactly when we *cannot* explain to ourselves what we are doing that our project is undermined.

If our inquiry shows anything, it is that even though reason is not solely in charge in theoretical discussions about contract law, this does not mean that we cannot have engaging discussions about the theoretical underpinnings of law. On the contrary, it is this very fact that is responsible for creating the immense wealth and diversification of opinion in the debates about contract. We argue, then, that the battlefield of conflicting contract theories is better celebrated as a continuing discourse in which there is no ultimate victory—perhaps a kind of highly stylized, intellectualized art-form—than a field of absolute rational inquiry, a science of sorts, in which some theory must reign supreme for the entire field to have worth.