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The Aesthetics of American Law

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COMMENTARY

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"No, no," he would say, "You are not thinking; you are just being logical."[1]

Law is an aesthetic enterprise. Before the ethical dreams and political ambitions of law can even be articulated, let alone realized, the aesthetics of law have already shaped the medium within which those projects will have to do their work.[2]

This insistence on the aesthetic character of law can easily seem disturbing. Aesthetics is usually understood as delimited to the appreciation of art and beauty.[3] Hegel defined aesthetics as "the entire realm of the beautiful; more specifically, . . . Fine Art."[4] Kant viewed

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[1] OTTO R. FRISCH, WHAT LITTLE I REMEMBER 95 (1979), *quoted in* HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT 1 (1987).

[2] I am not suggesting a temporal priority for the aesthetic over the ethical/political. *See infra* section VII.A, pp. 1110–12.

[3] The view that aesthetics pertains to the realms of art and beauty is the prevailing understanding among academic philosophers and, no doubt, legal professionals as well. This quotation from a small encyclopedia of philosophy makes the point:

> The experiences that we have when we listen to music, read poetry and look at paintings or scenes in nature, have a distinctive immediate, emotional and contemplative character, and lead us to describe what we experience in a special vocabulary, and to use terms such as beautiful, exquisite, inspiring, moving and so on. Philosophy employs the term 'aesthetic' to circumscribe this kind of experience.

Sebastian Gardner, *Aesthetics*, *in* THE BLACKWELL COMPANION TO PHILOSOPHY 229, 229 (Nicholas Bunnin & E.P. Tsui-James eds., 1996). This confinement of aesthetics to such delimited precincts is itself the product of a particular philosophical orientation, one that is well entrenched in Anglo-American academic analytical philosophy but by no means universally shared.

A number of philosophers have expressed far broader conceptions of the aesthetic and its significance. Benedetto Croce, for instance, describes aesthetics as crucially implicated in a variety of human competencies (including concept formation and intellectual activity). BENEDETTO CROCE, THE AESTHETIC AS THE SCIENCE OF EXPRESSION AND OF THE LINGUISTIC IN GENERAL 24 (Colin Lyas trans., 1992). John Dewey described the aesthetic as extending beyond both the beautiful and the arts to everyday experience. JOHN DEWEY, ART AS EXPERIENCE (1934). More recently (and perhaps more relevant to the study of law), it has been argued that the fashionable primacy of ethics as a source of political thought eclipses a prior moment in which aesthetics gives shape to politics and political thought. *See, e.g.*, F.R. ANKERSMIT, AESTHETIC POLITICS 21–23 (1996).

[4] G.W.F. HEGEL, THE PHILOSOPHY OF FINE ART 1 (photo. reprint 1979) (F.P.B. Osmaston trans., 1920).

the aesthetic judgment as detached — "disinterested."[5] Many thinkers view aesthetic judgments as subjective and ungrounded, impervious to rational argument. Meanwhile, law is written "in a field of pain and death."[6] To suggest then that law is an aesthetic enterprise can easily seem cavalier, ethically obtuse, even cruel. We are confronted with the disturbing possibility that law paints its order of pain and death on human beings with no more ethical warrant or rational grounding than an artist who applies paint to canvas.[7]

I do not dispute — in fact, I would affirm — these ethical concerns and moral judgments here. But the notion of aesthetics I wish to invoke is neither confined to the realm of art nor preoccupied with questions of beauty. Mine is a broader and more permissive, though also less conventional, conception of aesthetics. My use of the term draws on its Greek etymology (*aisthetikos*), meaning perception or sensation. In this conception, the aesthetic pertains to the forms, images, tropes, perceptions, and sensibilities that help shape the creation, apprehension, and even identity of human endeavors, including, most topically, law.

The project here builds upon prior scholarly encounters between law and aesthetics.[8] Virtually all of these earlier discussions, however, rely upon a conventional understanding of aesthetics as the province of beauty and fine art. These explorations have thus been limited by the attempt to find something of beauty in art or in law.[9] More often than

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[5] IMMANUEL KANT, CRITIQUE OF JUDGMENT 39 (J.H. Bernard trans., 1951).

[6] Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

[7] The aesthete has a response available here: namely, that a judicial opinion, however beautifully crafted its prose may be, is nonetheless ugly if it does violence to those it regulates. This seems rather tendentious, an attempt to avoid an ethical difficulty by using beauty as a covert vehicle for moral or political judgments.

[8] Helpful discussions of law and aesthetics include DESMOND MANDERSON, SONGS WITHOUT MUSIC: AESTHETIC DIMENSIONS OF LAW AND JUSTICE 4–24 (2001); ADAM GEAREY, LAW AND AESTHETICS (Legal Theory Today, 2001); LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW (Costas Douzinas & Lynda Nead eds., 1999) [hereinafter LAW AND THE IMAGE]; and LAW AND AESTHETICS (Roberta Kevelson ed., New Studies in Aesthetics vol. 11, 1992).

[9] Thus, legal thinkers sometimes invoke notions of beauty when they speak of the "well-crafted opinion" or the "well-drawn statute" or when they make romantic references to the art of law and its "virtuosity." *See, e.g.*, Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990). But these claims about the beauty of law are few, far between, and appropriately local. *See* Karl Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 227 (1942) (noting pointedly that beauty has been slighted in law). Others looking for an aesthetic of law have tended to focus on those moments in law that seem most akin to the fine arts — for instance, the image of Justitia. *See, e.g.*, Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727 (1987) (describing the historical variations in the pictorial representations of Justitia); Martin Jay, *Must Justice Be Blind? The Challenge of Images to the Law*, *in* LAW AND THE IMAGE, *supra* note 8, at 19 (same). Some thinkers use fine art — for instance, music — as an analogy to shed light on the organization of law, its interpretations, and performances. *See, e.g.*, Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing*

not, the result has been a moral idealization of aesthetics or a romanticization of law (or both).[10] Almost always, the attempt to acquaint law with aesthetics has forced the latter into a subordinate or subsidiary role.[11]

There will be none of that here. There will be no idealization of aesthetics and no romanticization of law. Moreover, the presumption that the aesthetics of law is to be explored with an eye to finding moments of beauty or fine art will simply be dropped.[12]

What I am after is the description of those recurrent forms that shape the creation, apprehension, and identity of law. What is at stake is an attempt to reveal the aesthetics within which American law is cast. Here, I describe four such aesthetics:

In the *grid aesthetic*, law is pictured as a two-dimensional area divided into contiguous, well-bounded legal spaces. These spaces are divided into doctrines, rules, and the like. Those doctrines, rules, and the like are further divided into elements, and so on and so forth. The subjects, doctrines, elements, and the like are cast as "object-forms." They exhibit the characteristic features of objects: boundedness, fixity, and substantiality. They have insides and outsides that are separated by well-marked boundaries. The resulting structure — the grid — feels solid, sound, determinate. Law is etched in stone. The grid aesthetic is the aesthetic of bright-line rules, absolutist approaches, and categorical definitions.

In the *energy aesthetic*, law is cast in the image of energy. Conflicting forces of principle, policy, values, and politics collide and combine in sundry ways. Precedents expand or contract in accordance with the push and pull of policy and principle. Legal rules, principles, policies,

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Arts, 139 U. PA. L. REV 1597 (1991) (book review). Or the graphic arts — for instance, the works of Mondrian — are used to illuminate the aspirations of law. *See* Laura S. Fitzgerald, Note, *Towards a Modern Art of Law*, 96 YALE L.J. 2051 (1987).

[10] For instance, legal thinkers envelop the aesthetics of law within the classic consoling narratives of reason, morality, or political redemption. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE *passim* (1986). Or they selectively ascribe a pleasing aesthetic to a highly romanticized vision of law. *See, e.g.*, JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985).

Not all discussions of the aesthetics of law are given over to the moral idealization of aesthetics or the romanticization of law, however. Duncan Kennedy's works, for instance, eschew both tendencies. *See, e.g.*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (*FIN DE SIÈCLE*) (1997).

[11] To the extent that the considerable scholarship in law and literature deals with aesthetics, it is generally in an incidental and tangential manner. For a recent survey of the various approaches to law and literature, see GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW (2000).

[12] My account of aesthetics is perhaps closest to the conceptions developed by Adam Gearey, Duncan Kennedy, and Desmond Manderson. *See generally* GEARY, *supra* note 8; KENNEDY, *supra* note 10; MANDERSON, *supra* note 8.

and values have magnitudes that must be quantified, measured, and compared. Movement and flux are the orders of the day.

In the *perspectivist aesthetic*, the identities of law and laws mutate in relation to point of view. As the frame, context, perspective, or position of the actor or observer shifts, both fact and law come to have different identities. Accordingly, the social or political identity of the legal actor or observer becomes the crucial situs of law and legal inquiry.

In the *dissociative aesthetic*, identities collapse into each other. Nothing is what it is, but is always already something else. Any attempt to refer to X is frustrated, as even the most minimal inquiry reveals that X is an unstable glomming-on of many other things that cannot be subsumed or stabilized within any one thing. The crucial contributions of the prior aesthetics — the grid (and its fixed identities), energy (and its quantifiable magnitudes), and perspective (and its identifiable relations) — have all collapsed. No determinable identities, relations, or perspectives survive.

These aesthetics are "legal," not in the sense that they are exclusive to law (they are not).[13] Rather, they are legal in the sense that they are instanced in the traditional legal materials, the usual canonical texts, sites, and scenes of law: appellate opinions, rules, doctrines, and the like. They are integrated aesthetics[14] in the weak sense that each is a prototypical coalescence of

> Images and schemas,[15]
> Rhetorical forms,[16]
> Metaphors and other tropes,[17]
> Perceptual modes and sensibilities,[18]

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[13] Nor are they exhaustive of the aesthetics that can be discerned in American law. They do, however, strike me as the most important.

[14] A caution: to the extent one comes to see American law in terms of the later aesthetics, it will become more difficult to identify distinct aesthetics.

[15] *See generally, e.g.*, LAW AND THE IMAGE, *supra* note 8 (exploring the role of images and icons throughout the law).

[16] *See generally, e.g.*, PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS 85–124 (1987) (describing the ways in which law is a rhetorical enterprise).

[17] *See generally, e.g.*, ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 189–92 (2000) (explaining and demonstrating the ways in which metaphor organizes the construction of law); STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001) (describing the cognitive and metaphorical patterns animating American law and jurisprudence).

[18] *See generally, e.g.*, Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569 (1990) (using Wallace Stevens's poetry to describe how it feels to be a pragmatist).

Dramatic tensions,[19]
Sensory impressions,[20] and
Emotions and feelings.[21]

Each aesthetic combines aspects of these different phenomena. An aesthetic thus cuts across some of our familiar academic divisions: linguistics, psychology, literary criticism, and the like. An aesthetic is identifiable as such insofar as it exhibits a certain characteristic coherence that recurs throughout law's empire.

But there is nothing absolute about this. Indeed, the various aesthetics combine in all sorts of ways; they merge, envelop, and subsume each other, yielding all sorts of hybrids. No legal text or thinker is a "pure" example of any of the four aesthetics.

A legal aesthetic is something that a legal professional both undergoes and enacts, most often automatically, without thinking. We can "choose" to deploy an aesthetic in this or that moment. But by and large, the aesthetic operates through us — choosing us, enacting us, directing us. Meanwhile, as the aesthetics do their work, law happens.

In shaping our apprehension, experience, and creation of law, the aesthetics leave their marks. In doing so, they bring what we call law into being. Indeed, the aesthetics have an important ontological effect: they fashion law as a presence, an identity, something that is there, that we have, that we can reflect upon, and over which we can argue.

The legal aesthetics also call forth and enact different kinds of professional selves, oriented in different ways to the thinking and doing of law. A legal aesthetic is thus constitutive of the tasks at hand and the already launched projects of an already engaged legal self. As I try to show, the aesthetics help shape the cognitive, emotive, ethical, and political preoccupations, goals, values, and anxieties of legal professionals.

All of these aesthetics are instanced in contemporary law, but each can also be seen as having reached an advanced condition at a particular period in American legal history. For instance, the most obvious expression of the grid aesthetic is the "scientific" jurisprudence of the turn of the twentieth century (roughly 1870–1920). The energy aes-

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[19] *See generally, e.g.*, Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985) (using Northrop Frye's archetypes of literary form to analyze various jurisprudential approaches).

[20] Sight and sound are the most important sensory markers in law. Touch, taste, and smell lag far behind — unless, of course, law extends all the way to the crack of the police baton on the suspect's head or the smell of sweat in lockup. The law in this Commentary will, as it does for most legal professionals, stop somewhat arbitrarily short of the suspect's head and lockup's empire. *See infra* section IV.B, pp. 1095–98.

[21] *See generally, e.g.*, THE PASSIONS OF LAW (Susan A. Bandes ed., 1999) (collecting essays on the descriptive and normative role of emotion and emotionalism in law and lawmaking).

thetic is most visible in early twentieth-century legal realism and in the explicitly normative and economic approaches to law of the mid-twentieth century (1920–1990). Perspectivism achieves its most prominent expression in critical legal thought, identity politics, and postmodern jurisprudence (1980–?). As for the dissociative aesthetic, it is a specter of dissolution that haunts all these aesthetics. Although it emerges from time to time, the dissociative aesthetic does not and cannot last. At any rate, for purposes of exposition, I rely principally on these historical examples to evoke and describe the aesthetics. It would be a mistake, however, to equate an aesthetic with a jurisprudence.[22]

These preliminary statements about the aesthetics of law are bound to seem elliptical and sketchy. In part, that is to be expected of an inquiry into any aspect of life so close to us, so pervasively implicated in the ways in which we perceive, think, and ultimately are. Many difficulties attend the enterprise pursued here.[23] Some of them can be resolved through the elaboration of the various aesthetics. Others reemerge much later, not as difficulties, but as interesting complexities within which we think and do law. But some difficulties cannot be eliminated: these are traceable to the recognition that law and self are shaped by different nonfungible, incommensurable aesthetics. There is a dissonance that results from this realization: the more profound the realization, the greater the dissonance.

Mine is itself an aesthetic project: an attempt to awaken in the reader a sensitivity for and a recognition of the different aesthetics of law. I cannot "define" these aesthetics or "prove" their existence, but I can show how it feels to enact or inhabit a particular aesthetic. And I can try to show how these aesthetics matter.

What is called for from the reader is a certain imaginative empathy, a certain letting go. One must try to imagine what it is like to operate within or through a world of law constructed in these aesthetics. This project will be successful to the extent it enables the reader to recognize the various aesthetics of law and their influence on law and legal professionals — including most especially herself or himself.

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[22] It would also be a mistake to forget that these aesthetics are, in a variety of guises, far more ancient than their relatively recent manifestations in the parochial precinct of American law.

[23] Here are a number of such difficulties:

The problem of reflexivity: What is the aesthetic used in this Commentary, and what enables/justifies the use of this aesthetic to describe and explore the others? *See infra* Part V, pp. 1101–04.

The problem of rightness: Which aesthetic is the right one, and does the aesthetic take on law preclude the possibility of being right in the first place? *See infra* section VI.C, pp. 1107–09.

The problem of essentialism: Does the attempt to describe distinct aesthetics effectively deny the multiplicity and mutability of different forms in law? *See infra* p. 1087.

I. THE AESTHETIC OF THE GRID

In the grid aesthetic, law is framed as a field, a territory, a two-dimensional space that can be mapped and charted. This jurisprudential mapping occurs through the subdivision of the territorial space of law into various parts: contracts/torts. Each part is subdivided into subparts: negligence/intentional torts. These are then subdivided into even smaller subparts. This process continues until a mysterious point is reached where law gives out and all that remains are questions of fact.

A. Grids

One effect of this relentless partitioning is that law is stabilized and objectified into an orderly field of clearly delineated, neatly bounded, perfectly contiguous legal conceptions and propositions.

By way of example, consider the first page of Christopher Columbus Langdell's seriatim six-part article, ironically entitled *A Brief Survey of Equity Jurisdiction.* Langdell writes: "Rights are either absolute or relative. Absolute rights are such as do not imply any correlative duties. Relative rights are such as do imply correlative duties. . . . Relative rights, as well as their correlative duties, are called obligations."[24] In Langdell's vision, the categories are neatly delineated such that no category overlaps with another.

The appeal of the grid is its stability, predictability, and uniformity. There is an aesthetic here that promises an enduring and definitive charting of the legal world. Every legal concept has its own distinct and bounded place, and every place is occupied by a distinct and bounded legal concept.

B. Drawing the Line

In this aesthetic, one preeminent task of the appellate judge, and even more so the legal academic, is to locate the addresses of legal concepts by determining precisely where they belong within the juridical subdivisions.[25] If this oversight is properly performed, there will be no confusion of legal concepts.[26] Clarity, consistency, and coher-

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[24] C.C. Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55, 55 (1887).

[25] Duncan Kennedy describes this as a key feature of classical legal thought. Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3, 6–8 (1980).

[26] As one commentator put it:

> The creation of a system properly designated as scientific requires: (a) the expression of *all the component elements or constituents* of the whole subject; (b) *a classification* of these in accordance with an appreciable principle which constitutes *a guide to the arrangement.* The result is necessarily a formal and visible picture displaying the whole as an articulate or coordinate body in which each part is seen in relation to the

ence will be satisfied. Everything, as Langdell promised, "should be found in its proper place, and nowhere else."[27]

Often, this requires multiple classifications, as the grid aesthetic replicates itself internally, subdividing into ever smaller, more precise, more exact determinations.[28] One can imagine how Langdell might have reorganized this very Commentary:

I. THE AESTHETIC OF THE GRID
  A. Grids
  B. Drawing the Line
    1. Classification
    2. Squaring One Thing With Another
      (a) On being correct
      (b) On being incorrect
        (i) Etc. etc. etc.
        (ii) Etc. etc. etc.
          (A) Prong a
          (B) Prong b

Langdell, of course, was there long before us. And he doesn't need to do anything to this Commentary to have his way: We (you and I) are doing it for him. Many others before us have as well. Here, for example, is a table drawn by a New York judge bent on providing a rather elaborate classification of the parts, subparts, and sub-subparts of law.[29]

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whole and the parts appear in reciprocal relation to each other — this is a system. There is no isolation; there is organization.

In a system of law subjected to such treatment there can be no real conflicts as to identical matter . . . .

James D. Andrews, *Jurisprudence: Development and Practical Vocation*, 25 YALE L.J. 306, 307 (1916) (emphasis added).

[27] C.C. LANGDELL, 1 A SELECTION OF CASES ON THE LAW OF CONTRACTS, at ix (Boston, Little, Brown & Co., 2d ed. 1879).

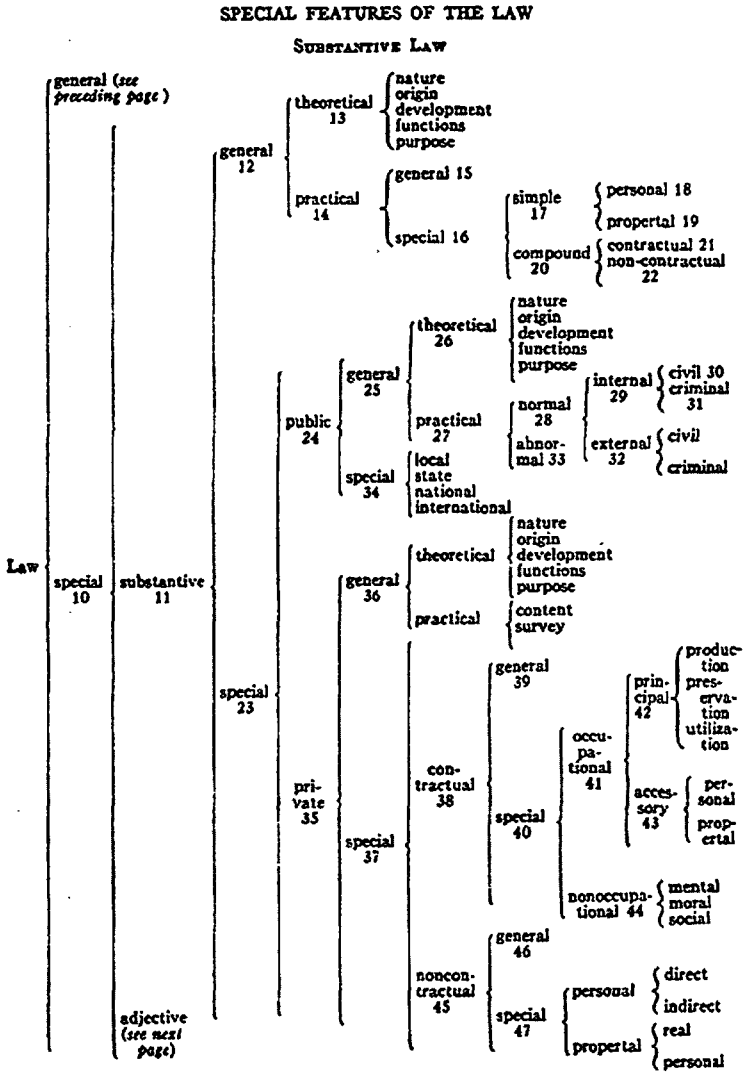
[28] James B. Thayer, for instance, was quite convinced of the need for more precise, more specific definitions:

> Let us now try to find some definition of "fact," and a just discrimination between fact and law. To define fact is, indeed a "*perylous chose*," as they say in the Year Books; and some persons think it unnecessary. It is certainly true that the term is widely used in the courts, much as it is used in popular speech; that is to say, in a tentative, literary, inexact way; and there are those who would let all such words alone and not bother about precision. But as our law develops it becomes more and more important to give definiteness to its phraseology; discriminations multiply, new situations and complications of fact arise, and the old outfit of ideas and phrases has to be carefully revised.

James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147, 150–51 (1890) (footnote omitted).

[29] Rodenbeck used these kinds of charts throughout the book as the structure of exposition. ADOLPH J. RODENBECK, THE ANATOMY OF THE LAW *passim* (1925).

FIGURE 1: RODENBECK'S SPECIAL FEATURES OF THE LAW[30]



NOTE: Numbers refer to chapters

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30 *Id.* at 274. As Rodenbeck put it in his preface: "My only hope is that in its present form [the book] may stimulate an interest in the subject of *the scientific arrangement of the law* and may lead to a *classification* that can be accepted as a basis for a scientific statement of the law." *Id.* at vii (emphasis added).

All of this, of course, requires work. (Rodenbeck's chart[31] goes on like this for several pages.)

While the grid does take a prodigious effort to create, one of its great virtues for both judges and academics is that it enables microthought. The bounded space, the defined concept (torts, common carriers, whatever) is isolated and can be treated as discrete subject matter. This creation of discrete areas enables a division of labor ("I teach torts") and specialization ("I am an expert on the law of common carriers"). It allows the segmentation of discrete parts from what might otherwise look like a seamless web.

Not only does the image of the grid spatialize law, but it also enables the legal thinker to treat legal concepts as material objects. The concepts become the material objects contained within the particular subdivisions, the parts and subparts that make up the law.[32] What is important to appreciate here is that this grid vision is not simply a conscious conceptual strategy. It is an aesthetic: law is apprehended, is experienced as already divisible in this way. Once the grid has been established, the characteristic role of the judge and the academic is to "apply the law to the facts" and to "police the boundaries of the grid."[33]

C. Applying the Law

In the grid aesthetic, "applying the law" is the crucial operation through which the judge (or other decisionmaker) reaches a legal conclusion. This act of applying the law casts both "the law" and "the facts" as distinct, already known objects. The only thing that remains in reaching a legal conclusion is for the judge (or other decisionmaker) simply to place the one (the grid) upon the other (the facts) and to take note of the results.

Indeed, Justice Roberts described the judicial role in just this way:

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has *only one* duty, — to *lay* the article of the Constitution which

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[31] For Rodenbeck's perfected pictorial outline of the law, see *id.* at 273–75. For a description of the encyclopedic work required to establish and fill such classifications, see John Henry Schlegel, *Langdell's Legacy or, the Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1519 (1984) (book review).

[32] As late as 1927, Kocourek, for instance, thought it a "novelty" to recognize that a legal relation is "entirely a matter of concepts and not of material objects." ALBERT KOCOUREK, JURAL RELATIONS 234 (2d ed. 1927).

[33] For a sophisticated defense of border-patrol jurisprudence, see Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1044–46 (1987).

> is invoked beside the statute which is challenged and to decide whether the latter *squares* with the former.[34]

Academics also engage in "applying the law." But academics are in a poor position to apply the law to the facts. (They have no facts.) Still, the aesthetic gesture endures. It is transposed onto other artifacts. Hence, legal academics often apply the theory to the doctrine or they apply a foreign discipline to the law.[35] The names of the artifacts may have changed, but the verb remains the same.

D. Policing the Law

Another principal role of the judge in the grid aesthetic is to police the grid. He is supposed to monitor the various borders to ensure that the grid remains gapless, determinate, and nonoverlapping. To the existing grid, new cases must be added. In the legal academy, the traditional legal academic patiently awaits new judicial opinions to insert into his particular grid (contracts or secured transactions). He hopes that the new cases will work only incremental change, so as not to disrupt the structure of his grid (and trigger a massive architectural renovation in his notes). Or to the contrary, he hopes that the new case law will ruin the existing grid — so that a new grid will be required, namely his own.

This border-control jurisprudence is attended by certain characteristic aesthetic concerns. The grid thinker is preoccupied with the proper location and maintenance of boundaries: "Where do we draw the line?" "Will the line hold?" "How do we avoid the slippery slope?" "Are the distinctions sufficiently clear and precise?" Furthermore, certain aesthetic requirements (not unlike those of normative legal theory or analytical jurisprudence today) must be observed. Many of these virtues can be seen as related to this policing function and to the aspirational image of the perfect grid. Precision, exactitude, and clarity describe the attributes of perfectly formed boundaries. Consistency, coherence, and comprehensiveness can be seen as virtues of a perfect arrangement of contiguous sectors of law clearly marked on a plane.[36]

E. Seduction

There is a certain pleasure that many of us experience in working within the grids. It is the pleasure of making arguments that are ei-

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[34] United States v. Butler, 297 U.S. 1, 62 (1936) (emphasis added).

[35] *See generally* Seidman, *supra* note 33.

[36] *Compare* Albert Kocourek, *Classification of Law*, 11 N.Y.U. L.Q. REV. 319, 336 (1934) (stating that criteria of economy, clarity, convenience, and completeness should govern classification), *with* John Stick, *Formalism as the Method of Maximally Coherent Classification*, 77 IOWA L. REV. 773, 793–94 (1992) (arguing that theories should be evaluated in terms of intelligibility, clarity, comprehensiveness, elegance, coherence, and predictive value).

ther right or wrong, and if right, unassailable. It is the enjoyment that some thinkers get in having "proved" that something is indubitable, not subject to revision.

Besides, the grid thinker is working on the monument of law. It may be that his contribution is just a humble bit of chisel work on one small section, but still he carves it in stone, and in knowing the law (all within his subject matter jurisdiction), he is the master of his corner of the grid.[37] A vision of law as cast in stone allows the grid thinker to believe that in his thinking and writing, he is producing something that will endure.

Then, too, there is the magisterial detachment afforded by the grid. The legal self is left off the grid. As will be shown later, this omission leads to aesthetic and jurisprudential problems, but it also yields positive values for the grid thinker. Being off the grid, the judge or academic can behold law from a figuratively detached and disinterested position: His tasks are merely to "apply" the law and "police" its boundaries. His detachment allows him to be ostensibly "neutral." He is removed from responsibility for the worldly consequences of his actions.

In law, this "detachment" has a certain appeal. Law deals with a lot of dirt.[38] The French legal intellectual Pierre Legendre, for instance, claims that lawyers are "refuse collectors" and that "the law is a dumping ground."[39] Charles Fried, for instance, endorses "the picture of lawyers, not as the architects of society, but as its janitors."[40] Fittingly enough, Dworkin's jurisprudential hero, the superhuman Hercules, turns out to be a stable boy charged with cleaning the Augean stables.[41] These colorful images, while less than flattering to the legal profession, are nonetheless apt. Lawyers get the messes that no one else — not the parties, not the social workers, not the legislatures — has been able to resolve. Lawyers clean up the dirt. Washed in cynical acid, law's empire is society's mess.

Understandably, the recurrent contact with societal untidiness elicits in legal professionals a desire for an antiseptic law. The grid can be

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[37] The gendered aspect of the grid aesthetic is hard to miss. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE (1993).

[38] Lawyers know this. For a bracing and refreshingly candid, if bleak, account of the lawyer's world, see LAWRENCE JOSEPH, LAWYERLAND (1997). *See also* Pierre Schlag, *Jurisprudence Noire*, 101 COLUM. L. REV. 1733 (2001) (exploring the dissonance between the noirish character of law practice and the idealized law of the academy).

[39] PIERRE LEGENDRE, L'EMPIRE DE LA VÉRITÉ: INTRODUCTION AUX ESPACES DOGMATIQUES INDUSTRIELS 49 (1983), *quoted and translated in* PETER GOODRICH, LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS 275–76 (1990).

[40] Charles Fried, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 331, 333 (1988).

[41] For a description of some of Hercules's other talents, see DWORKIN, *supra* note 10, at 239–40, 313, 379–80.

seen as an attempt to shield the lawyer, the judge, and the law itself from contamination. In this light, the grid can be seen as an attempt to ward off contamination.[42] The most prestigious precincts of law are the most antiseptic, the most clearly marked off from the mess. The prototype is the fancy corporate law office on the thirty-eighth floor, where the ethereal, perfectly typed words of impeccably dressed attorneys produce highly mediated, largely unseen effects on the messy flesh of humanity below. At the extreme, client objectives are reached simply by rearranging highly abstracted and technical words on a page: the lawyer need not and often cannot see the material implications of the work he is doing.

Both the appellate judge and the academic can become entranced with maintaining or perfecting the grid at the expense of attending to its worldly implications. This is the allure of law cast as geometry.[43] This is the formalist orientation par excellence: the dominance of concern with maintaining the proper form and order of law in terms of its own criteria.[44]

F. Alienation

Many thinkers, however, are put off by the grid. For them, the grid aesthetic is rigid, intransigent, and inflexible.[45] And in a reversal of the grid thinker's image of the grid as solid, its critics view it as insubstantial, ethereal, ungrounded, disconnected from any significant reality.[46]

Meanwhile, the detached, disinterested, and neutral grid thinker is seen as cold, aloof, uncaring, lacking in compassion — even misanthropic or vaguely sadistic. The great indictment of the grid thinkers (whether warranted or not) is that they are obsessed with maintaining

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[42] In this context, policing the grid involves not only attending to its axes, but also cleansing it of impurities ("law works itself pure") and protecting law from external contamination ("the autonomy of law"). Indeed, keeping law's empire "clean" is an enduring, even if subterranean, trope in law.

[43] *See* GOODRICH, *supra* note 39, at 275–76.

[44] The extreme here is law as a formal end in itself. For one sophisticated defense of such formalism, see Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988). *See also infra* note 47.

[45] Those familiar with the rules versus standards dialectic will recognize the vices and virtues of the grid as characteristics also present there. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 383–96 (1985); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 56–94 (1992).

[46] This is one of the most common aesthetic reactions of legal realists to the aesthetics of legal formalism. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935).

the aesthetic of the grid regardless of its effects on "real world" transactions.[47] The grid thinkers are said to care more about their "law" than about what this law does to human beings.[48]

Nonetheless, the grid itself does not inspire any strong negative emotional reaction.[49] In part, this is because the aesthetic vulnerability of the grid lies in its pretensions: the grid is offputting mostly because it is seen as puff taking itself for stonework. In that sense, the grid produces puzzlement or invites ridicule rather than any strong reaction such as contempt or hatred. There is, however, another reason that the grid does not induce a strong negative reaction. The grid, in its detachment and disinterestedness, represents itself as emotionally barren. Its negative affect is alienation.

As aesthetics go, the grid is simple. It has the appearance of being enduring. It can and does, however, break down. In American law, the aesthetic vulnerability of the grid characteristically appears (and reappears) in connection with three related problems: the proliferation of classification schemes, the problem of legal change, and the anxiety of judicial restraint.

G. Classification Mania

One of the ironic byproducts of the effort to police and maintain the grid is that this activity ends up producing a plurality of grids — a multitude of different classification schemes. The proliferation of sundry classification schemes in the early twentieth century was intense.

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[47] This accusation forms the ethical-emotional gist of a main objection to what is pejoratively called "formalism." What is considered repellent is the desire to maintain law's order at the expense of the living human beings compelled to bear its marks. Formalists, of course, can always respond that it is precisely their concern for human beings that leads them to insist on the maintenance of proper legal form. From the sidelines, one might add that the insistence on "proper" form is a general feature of any approach to law, including contextualism, narrative, and postmodern jurisprudence. Everyone insists on "proper" form (notably, their own).

The unflattering diagnosis of legal formalism above parallels claims that the aestheticization of politics is at the core of fascism. WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, *in* ILLUMINATIONS 217, 241–42 (Harry Zohn trans., Schocken Books 1986) (1968) (describing fascism as the aestheticization of politics, the creation of politics as public spectacle).

[48] This is one of the main themes of the legal realists. *See, e.g.*, Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 18–24 (1937); Karl N. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236–37 (1931).

[49] There are, of course, strong emotions (such as hatred and anger) that attach to a forceful imposition of the grid. "Applying the law" and "policing the law" are not gentle activities by any means. Felix Cohen, an early critic of legal formalism (and perforce of the grid), was one angry young man. *See* Cohen, *supra* note 46. But such a strong reaction does not seem to be a reaction so much to the grid aesthetic per se as to its coercive imposition or hegemony.

In fact, "classification" itself became a subject of inquiry, controversy, and of course, ultimately classification itself.[50]

One problem posed by the multiplication of classification schemes is simple: What happens when some lines of division in one scheme *sometimes* register in some other set and *sometimes not*? Which classification scheme enjoys priority over the other — or are they coequals?

In an otherwise completely forgettable 1934 article on legal classification, Albert Kocourek confronted precisely this problem.[51] He developed one classification scheme for juridical concepts such as intention, negligence, malice, fraud, accident, and mistake. He also developed another classification scheme for legal subject matters such as chattels, intangibles, performances, and relations. Obviously, there was some relation between the two. As he explained: "[W]hen we come to the task of assigning legal rules to these various linear divisions, *we will find that certain ideas occur for all divisions*; and that certain other ideas less fundamental occur in two or more divisions *but in less than all*."[52] This meant that Kocourek could not draw a neat grid. Instead, he offers a rather inelegant picture, which lays out horizontal divisions *next to* vertical divisions. This picture is the visual confession that the axes of the law do not always intersect, not on the plane nor anywhere else. Kocourek's drawing is a graphic admission that some spaces in the grid are empty, that coherence is a sometimes thing. The comprehensive order of a gapless subdivision of legal space is gone.[53]

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[50] *See* ROSCOE POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 163–90 (5th ed. 1943). Despite his evident prowess at classification, Pound expressed doubts about the "extravagant expectations as to what may be accomplished through classification of law." Roscoe Pound, *Classification of Law*, 37 HARV. L. REV. 933, 938 (1924). Pound believed that classification schemes were not entirely useless, but could serve a few modest jurisprudential goals. These, he dutifully classified:

> Classification is a shaping and developing of traditional systematic conceptions and traditional systematic categories in order to organize the body of legal precepts so that they may be: (1) Stated effectively with a minimum of repetition, overlapping, and potential conflict, (2) administered effectively, (3) taught effectively, and (4) developed effectively for new situations.

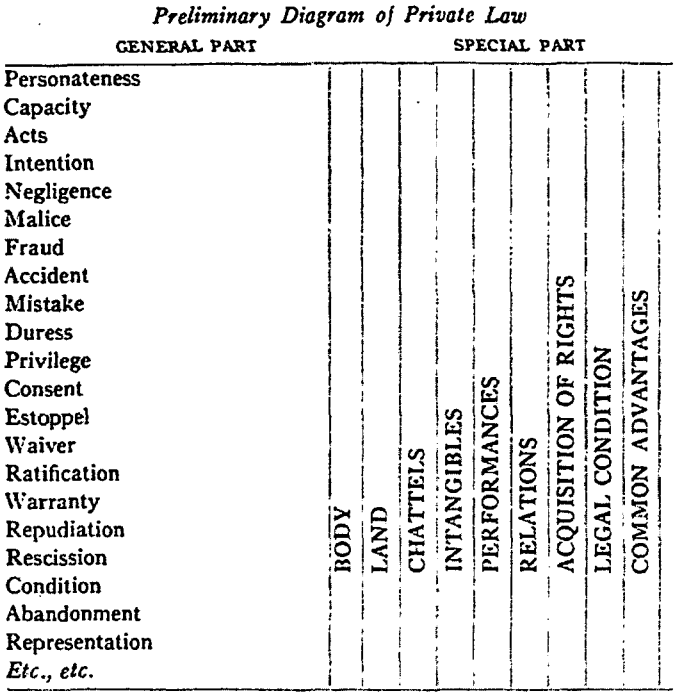
Id. at 944 (emphasis omitted).

[51] Kocourek, *supra* note 36.

[52] *Id.* at 342 (emphasis added).

[53] Kocourek's visualization of the problem and his solution are also less than consonant, but elaboration here would require a considerable digression.

FIGURE 2: KOCOUREK'S PLANE[54]



Many of Kocourek's contemporaries experienced related difficulties. As they encountered multiple discordant classification schemes in sundry fields, many lost faith in the grid.[55] As the number of different classification schemes multiplied, it became apparent that each of the schemes stemmed from different concerns, interests, and values.[56] Ultimately, this is the kind of aesthetic breakdown/insight that leads to the energy aesthetic and perspectivism.[57]

Because distinction and classification are among the few operations permitted within the grid aesthetic, grid thinkers tend to do these a lot.

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[54] Kocourek, *supra* note 36, at 344.

[55] Gone as well was the nineteenth-century hope of universal classification based on the idea of "free will." *See* Pound, *supra* note 50, at 942–44 (arguing that purportedly universal classification schemes in which law is deduced from the idea of "free will" or "a fundamental datum of liberty or personality" are all determined by the history of classification and are nothing but attempts to give theoretical justifications for practical necessities).

[56] For example, in jurisprudence, there are those hoary disputes about how, whether, and if it is possible to define "law." *See* Glanville L. Williams, *International Law and the Controversy Concerning the Word "Law"*, 22 BRIT. Y.B. INT'L L. 146 (1945).

[57] *See infra* Parts II–III, pp. 1070–92.

Grid thinkers sometimes have a tendency to subdivide and distinguish endlessly. Grid thinking can thus spin out of control. In the name of greater precision, clarity, and rigor, grids can sometimes develop into extraordinarily intricate constructions with no obvious use-value to anyone other than those who are involved in refining the grid. Disagreement can occur at levels of excruciating detail. In one sense, this is a disciplinary defense mechanism: so long as grid thinkers are preoccupied with tiny disputes, the big picture remains incontestable — indeed beyond view.[58] At the same time, however, this is a pathology: the grid and its custodians become increasingly insular and divorced from other enterprises, so that when a reality principle is finally encountered, it is in the form of a crisis.

H. Legal Change

It is an old, and apparently persistent, question: if the courts are to find but not create law, then how does law change?[59] For a law cast in the image of the grid, this question is aesthetic trouble. The grid is inert. It does not move. To apprehend or represent the law in terms of the grid works fine so long as there is no need to represent motion, change, or action. But once it becomes necessary to represent law as dynamic, the image of the grid is inadequate. This is an aesthetic difficulty, one that gives rise (repeatedly) to more "substantive" or "political" questions about the authority or legitimacy of judicial change.

There are four obvious aesthetic solutions to this problem:

First, one can remain loyal to the grid aesthetic and simply deny that law changes. Apparent examples to the contrary, of course, may present a problem, but these nonconforming judicial decisions can simply be dismissed as pathological — "not really law." The vulnerability of this aesthetic solution is that, in the face of accelerating change, one must reject an increasingly large number of judicial decisions as pathological.[60] At the extreme, what grid thinkers describe as pathological turns out to be what everybody else calls "law."

A second solution is to supplement the grid with some aesthetic device that enables legal change. It is not clear, however, how this would be accomplished. Vectors on the grid? Arrows across the sectors? From where? In what direction? Note that the aesthetic diffi-

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58 Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997).

59 *See* Roscoe Pound, *The Progress of Law — Analytical Jurisprudence, 1914–1927*, 41 HARV. L. REV. 174, 174 (1927) (noting that all thinking about law has "struggled to reconcile the conflicting demands of the need of stability and of the need of change").

60 Imagine, by way of example, the number of precedents that would have to be declared invalid under Justice Thomas's ostensibly originalist understanding of the Commerce Clause. *See* United States v. Lopez, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

culty here lies not in representing change on the grid;[61] the real difficulty is that the representation of change on the grid impugns its fundamental aesthetic integrity: the semblance of order, stability, and fixity. To represent change on the grid would be an aesthetic admission of jurisprudential problems, not the resolution of these problems. The aesthetic inadequacy of the grid in representing change is reflected in "substantive" jurisprudential problems. Indeed, this inadequacy underlies many of the impasses of contemporary legal theory.[62]

A third option is to supplement the grid with some off-grid mechanism to enable change. But this solution also corrodes the aesthetic integrity of the grid. It is, in itself, a demonstration that the grid's representation of law is neither comprehensive nor universal. It is, in short, an admission that law is not just a grid.

A fourth aesthetic possibility is simply to allow changes in the grid to occur covertly. But this solution also impugns the aesthetic integrity of the grid. It is effectively an admission that some unknowable source can, at any time and for reasons left unstated, disrupt the order of the grid. In substantive terms, it amounts to a declaration that the rational ordering of law can be upset by some unknown exogenous force. There is, of course, nothing "wrong" or impossible in such a vision. It is, however, inconsistent with the perceived virtues of the grid aesthetic: comprehensiveness, stability, clarity, and the like.

None of these four solutions is aesthetically satisfactory. Indeed, they can be seen as symptoms of decline. Ironically, to even pose the problem of legal change is already to weaken the grid.[63]

I. Restraint Anxiety

Inasmuch as the grid cannot satisfactorily represent force, motion, or action, the grid is incapable of ensuring that judges will follow it. If law is inert like an object and static like a structure and if the legal self is left off the grid, then how does law restrain or control a judge's decision? Such a law has no force or authority.[64]

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[61] Note also that one could juxtapose grids to indicate change. For instance, one could compare the West Publishing Company grid for constitutional law from 1920 with a similar grid from 1990. This juxtaposition would certainly reveal quite a few changes, but it would not reveal how these changes were produced. The sources and agencies of change would remain a mystery, something that had occurred off the grids.

[62] There are some aesthetic resolutions, though these will compromise the grid and its virtues. For a discussion of such efforts, see section II.G, pp. 1077–80, below.

[63] The problem of change surfaces again and again among judges and legal thinkers. The obvious solution — that law is itself already changing — demands a more elaborate aesthetic.

[64] Foucault notes that if law were simply a register to be consulted, it would have the solidity of "external things" and as such could be followed or not. Such a law for Foucault would lack the force and prestige to command respect. MICHEL FOUCAULT, *The Thought of the Outside*, *in* 2 AESTHETICS, METHOD, AND EPISTEMOLOGY 147, 157 (James D. Faubion ed., Robert Hurley et al. trans., 1998).

Insofar as the grid locates law in discrete legal artifacts — object-forms such as cases, holdings, statutes, principles, values, policies, etc. — the question may arise: what is the connection between these artifacts and judicial decisionmaking? In the space demarcated by the term "connection," the unsavory prospect arises that judges may fail to apply the objective materials of law "correctly." In our contemporary idiom, the fear is that they may impose their "personal values" through their decisions.

For the grid thinker, this prospect can lead to an obsessive concern with questions of judicial restraint — how best to constrain errant judges.[65] This question bedevils the grid thinker because the judge is left off the grid; she escapes representation and thus control. As a result, the search is on to find something that will constrain the judge. This dilemma is expressed in a variety of classic jurisprudential problems: judicial review, judicial restraint, indeterminacy, and the like. The attempt to restrain the judge yields a kind of quixotic jurisprudence: the repeated efforts to find a source of constraint founder because legal thinkers don't have much understanding of who or what they are trying to constrain.[66] Indeed, what little literature there is pertaining to the psychology, the institutional pressures, and the political preferences of judges tends to be slighted in both legal education and legal scholarship.

None of these difficulties should be understood to imply that the grid has vanished as an image of law. On the contrary, the grid aesthetic continues to shape law and legal thought in the twenty-first century.[67] Larry Kramer aptly describes the continued hold of box-thought. As he recently put it:

> [M]odern recognition of the inherently political nature and structure of law still accepts the fundamental premise that law can and should be separated from politics. *Law is, if you will, the part of politics* that is supposed to be left to courts and judges. Placing something in a *"law" box* thus shifts our expectations and assumptions about authority to interpret. If the Constitution is law, then it is those who would argue that courts

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[65] *See generally* J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1142 (1991) (describing the problem of the "rogue judge").

[66] The efforts made to find some mediation that will link the object-like law of the grid with the subject known as the judge are numerous and somewhat vague: good judgment, craftsmanship, situation sense, interpretive communities, forms of life, practical reason, or some other such theoretical unmentionable. The radical underspecification of these cheery mediations, of course, makes it possible to give less comforting accounts of the mediation: politics, power, violence, and the like. *See infra* p. 1111.

[67] The point is graphically demonstrated in J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986) (deploying decision trees to describe contemporary legal doctrine).

> should not be its authoritative expositor who bear the burden of justifying what amounts to an exception to our normal practice.[68]

The grid aesthetic is sedimented in our representations and practices of law. And there is much in our jurisprudence — stare decisis, controlling case doctrine, respect for tradition, settled expectations, custom, and the like — that requires attention to and respect for the legal past. In fact, not only do the old forms rule from the grave, but much of their substance is still around as well.[69]

As one example, consider that much of contemporary legal research and legal thought still bears the marks of the West digest system — a system inaugurated in the late nineteenth century.[70] The West digest system is a deeply layered numerical indexing system that allows retrieval of case law in terms of a systematic hierarchy of categories.[71] This grid plays an important role in the location and retrieval of case law.[72] It helps determine what counts as "relevant" case law as well as what does not.[73] Over time, reliance on the West digest system leads to a grid-dependence whose effects go well beyond the organization of research strategies. The West system, by virtue of its ubiquity, entrenches and reinforces a mode of legal thought that is perforce grid-like, objectivist, and hierarchical. Indeed, one might say that the practice of "case crunching" and the authority of "lines of cases" owe much to West Publishing Company. Obviously, the West digest is neither originary nor closed. Still, there is an important feedback loop here: the West grid offers up the case law it then classifies.

It is important not to overstate the significance of the West system, particularly in light of computer search services. But West was there first and the entrenchment of its grid will not soon be overcome.

The West grid is hardly the only grid in town, however. The law school curriculum remains largely grid-like. Then there are the grids of student study aids — the outlines and decision trees laid out in Gilbert's, Emanuel's, Barron's, and the like. The picture of knowledge presented in these study aids is that of a massive, highly differentiated grid. One supposes that this picture has some relation (presumably, a

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[68] Larry Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 10 (2001) (emphasis added).

[69] *Cf.* F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1 (A.H. Chaytor & W.J. Whittaker eds., 1963) (discussing the enduring influence of the forms of action in property law).

[70] For a brief history of the genesis of the West digest headnote system, see John Doyle, *WESTLAW and the American Digest Classification Scheme*, 84 LAW LIBR. J. 229 (1992).

[71] *Id.* at 234.

[72] Barbara Bintliff, *From Creativity to Computerese: Thinking Like a Lawyer in the Computer Age*, 88 LAW LIBR. J. 338, 341 (1996) (noting the importance of the West digest system in the shaping of American law).

[73] One noxious effect is that the grid can effectively lead a legal professional to overlook case law that falls outside the relevant headnote categories but may in fact be more relevant to her case. Doyle, *supra* note 70, at 253.

strong one) to another important determinant of legal aesthetics — namely, the image of law enforced in the final exam.[74] Surely, not all exam questions (or modes of grading) call for or reward a grid-like view of law. But the classic "issue-spotter" begs for a response driven by an outline or decision tree.[75] And conventional "point-system" grading tends to reward that kind of approach.

Nor is the grid confined to law school low culture. The grid aesthetic continues to flourish in the high culture of the most ethereal academic precincts. For example, recent debates in analytical jurisprudence about the relative strengths and weaknesses of soft positivism, positive positivism, negative positivism, inclusive positivism, and exclusive positivism display an extreme degree of conceptual subdivision.[76]

Rather strikingly, even postmodern legal thought explicitly deploys the spatial image of the grid, of multiple spaces in a field. The pluralism so characteristic of the postmodern sensibility is accommodated on the grid through the notion of overlap.[77] For instance, Santos, a noted postmodern thinker, describes legal pluralism in terms of "maps."[78] Indeed, Santos has even argued that since modernism is plotted in temporal metaphors, postmodern thought ought to use spatial metaphors.[79] What is striking here is not that postmodern thinkers would resort to spatial metaphors per se,[80] but that they would resort specifically to a grid-like conception of space. This invocation of the grid yields an odd postmodern reinstitution of law as discrete object-forms.

In sum, the grid is so well entrenched as one of our images of law that it cannot be discarded in any representation of law destined for use by legal professionals. It is easy to deride the grid aesthetic, but whatever its failings or naïveté, it exhibits a certain aesthetic coherence. Llewellyn, even as he ridicules Langdell, testifies to this coherence:

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74 For an intellectually serious analysis of the structure of the law school exam, see RICHARD MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS (1999), which provides an extended excursion into legal reasoning under the guise of exam preparation.

75 *See id.* at 55–86 (describing "forks in the facts" and "forks in the law").

76 For a helpful introduction to these debates, see Brian Bix, *Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate*, 12 CAN. J.L. & JURISPRUDENCE 17 (1999).

77 *See* Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y. REV. 869, 870 (1988) (defining legal pluralism as two or more legal systems that coexist "in the same social field").

78 BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 420 (1995).

79 *Id.* at 400.

80 It would seem difficult — even as this sentence takes shape — to avoid spatial metaphors and images altogether.

> The rules, and the concepts . . . are to stand together; they are to merge into majestic harmony; they are to be a structure. Structured beauty becomes thus the esthetic goal — an intellectual architecture, clean, rigorous; above all, carried through in sharp chiseling to body out the predetermined plan, in every vault, in each line, into each angle . . . . Langdell's amazing theory . . . is not only the most familiar American example, but the one most clean of line, most bald of eye-deflecting cover . . . . Nothing could be more simply stated, more rigorously thought, more tightly integrated . . . .[81]

One can make fun of the grid, but nonetheless it remains part of the architecture of the curriculum, the organization of treatises and study aids, the structure of briefs, the layout of law review articles, and the formatting of the legal mind. It is in the framework of high normative theory and even in the structuralist moments of critical thought. Moreover, it will not go away soon: to the extent that our "legal realities" are socially and cognitively sedimented in this aesthetic, there is no way to take cognizance of these realities without at least a momentary genuflection to the grid.

II. THE ENERGY AESTHETIC

The energy aesthetic leaves the stasis of the grid behind. Instead, energy becomes the dominant metaphor and image for law. Energy and its manifestations — "change," "transformative change," "reform," "progress," "progressive legal change" — become the ruling motifs. The implicit premise is that the law and the legal profession are on the move. Law is pictured as an arrow pointed to the future.[82]

A. Moving Transformations

As the law is reconfigured from a grid into energy, it is set in motion. Hence precedents have direction; they pass from one juridical constellation to another. Like planets or meteors, precedents have "gravitational pull" or "gravitational force."[83] Policies and principles "conflict." They are cast as vectors (on the blackboard and elsewhere) that push and pull the law in various directions. In the more chaotic imagery of critical legal studies (cls), the policies, principles, and doctrines contradict one another.[84]

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[81] . . . more fascinatingly absurd to teach." Llewellyn, *supra* note 9, at 228.

[82] Of course, it could be that it is always the same arrow — frozen in place, never leaving and never arriving, and always pointing at the same future. *See infra* section II.H, p. 1080.

[83] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111, 113 (1977).

[84] *See, e.g.*, Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 210–11 (1979) (describing Blackstone's *Commentaries* as a series of structures for the denial of contradiction).

Causation comes to replace conceptualist logic as the source of entailments and connections. The judicial opinion is no longer merely a set of legal propositions (subdivided into holding, obiter dicta), but a legal force in the social world.[85] Particularly in the legal realist cosmology, precedents and laws are reconfigured as causes, effects, antecedents, and consequences.[86]

B. Law Is on a Mission

In the scholarly literature, law becomes "an interpretive enterprise," trying to become the best it can be.[87] Or it becomes a drive for "efficiency" — a force that imposes its inexorable transaction-cost-reducing, Kaldor-Hicks-market-replicating logic on one legal subject after another.[88] Law is on a mission — propelled by its own moving principles, policies, and values. These are active forces that can variously

> Predominate,
> Override,
> Require,
> Extend,
> Contract,
> Constrain,
> Direct,
> Promote,
> Achieve,
> Deter,
> Advance, and
> Perform all sorts of other moving actions.

Not surprisingly, the energy aesthetic and its invocation of physics imagery — mass, weight, push, pull, force, etc. — are conducive to "social engineering" and its more scholarly incarnation, "functionalism." The decisions of individual judges are seen as occasions to prescribe directives for the organization of "society."[89]

The great appeal of law as energy is the sensation that things are happening: Law is on the march. It is progressing. Wealth is being

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[85] For a polemical justification of this switch, see Cohen, *supra* note 46, at 842–47. Cohen is so forceful in his arguments that he overstates his case. Jeremy Waldron argues that precedents and rules have meaning, not just by way of consequence, but by way of propositional systematicity. Jeremy Waldron, *"Transcendental Nonsense" and System in the Law*, 100 COLUM. L. REV. 16 (2000).

[86] *See, e.g.*, Cohen, *supra* note 46, at 842–47.

[87] DWORKIN, *supra* note 10, at 413.

[88] *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW *passim* (5th ed. 1998).

[89] *See* BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW 1–5 (1984).

maximized. Accidents are being deterred. Reform is on the way. The kettle is boiling. Legal professionals feel that they are part of an enterprise that is going somewhere or doing something. Law has power; it's charged. And the legal professional can be energized by this power.[90] Even the law student can be empowered when she is asked in class what the court should do, what the law should be. Compared to the humble and dutiful chiseling of the grid thinker, this is a grand image of law.

But what does the judge or the legal academic do with all this conflict and collision — all this energy? Indeed, once the law is pictured as energy, its identity is very much in question. Energy can take all sorts of forms, some more explosive than others.

C. Let's Quantify and Commensurate

Insofar as the conflicting forces of principle and policy shape law, judicial decisionmaking arguably requires an assessment of their relative values. Within the energy aesthetic and within the profession generally, this is one of the dominant images of the judicial task. At its most mundane, the image is of the judge "weighing conflicting considerations," a contemporary incarnation of Justitia with her scale.

The image of law as a series of considerations that need to be weighed is so prevalent and seems so natural that one could easily overlook the underlying aesthetic at work here: the image of law as quantum. In order to loosen the hold of this image, one can ask: Just how is it that law can be pictured as quantifiable in the first place? And why is this an appealing way to apprehend law at all?

Still, the vision of law as quantum is everywhere: Legal professionals routinely argue that

> This consideration *outweighs* . . .
> This factor *overrides* . . .
> The consideration is *substantially greater than* . . .
> The *degree* of . . .
> Etc., etc., etc.

In assessing the importance of factors, considerations, values, and interests, legal professionals routinely strive to evaluate them in terms of intensity, weight, scope, and burden. From constitutional means/ends tests to torts policy analyses, the energy aesthetic presents law as a question of degree: how much will this rule advance this state interest, or that policy?

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[90] Hence, the cls references to being "energized." Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1587–88 (1984).

Among judges, one of the most prevalent resolutions of the tension is the attempt to "balance" the conflicting considerations.[91] In this approach, all of the internally conflicting energies of law must be considered, evaluated, assessed, and measured to determine which will prevail (and by how much).

It is true that, as a matter of positive law, balancing tests are not nearly as ubiquitous as commentators seem to think. Indeed, Richard Fallon points out that the Supreme Court rarely employs full-out balancing tests in constitutional law.[92] At the same time, however, balancing is extremely common as a method or mode of thought. Judges balance their way to all sorts of legal regimes — multifactor tests, prophylactic rules, per se rules, and so forth.

Balancing often appears aesthetically incomplete and intellectually unsophisticated.[93] Its successes or failures depend crucially upon the intelligence and sensitivity of the particular judge who actually does the balancing work. Balancing effectively defers to the judge the resolution of the key difficulties. She must decide what values to attach to the various interests, considerations, and factors.[94] This exercise in valuation can be a formidable task because it is often unclear how the various factors can fit on the same scale.[95] Then too, the very articulation of the terms to be balanced against each other skews the judgment to be made.[96] Not surprisingly, in some cases, the balance struck can seem so precarious that if one were to reverse the court's balancing exercises, the opinion might still be just as persuasive.[97]

For some, balancing (in any form) will seem inadequate, ad hoc, unprincipled, and incoherent. Instead, some more intellectually respectable method must be used that will reduce the multiplicity of forces, values, and the like to some common metric or scale.

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[91] *But see* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 76 (1997) (noting that Supreme Court Justices disfavor balancing in constitutional law because it seems "insufficiently law-like").

[92] *Id.* at 150.

[93] *See* Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 4–5 (1987) (criticizing balancing as an unacceptable foundation for the exercise of judicial review). Judges are likely to have some faith in their own professional capacities. By contrast, legal academics are likely to be less enthusiastic about balancing.

[94] For a sustained discussion of problems with the mechanics of balancing, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972–1005 (1987).

[95] This is the difficulty in trying to determine whether a "particular line is longer than a particular rock is heavy." Bendix Auotolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

[96] *See infra* pp. 1075–1077.

[97] One can try to do this with just about any balancing case. For instance, in the famous procedural due process case, *Mathews v. Eldridge*, 424 U.S. 319 (1976), the opinion of the Court is not obviously any less plausible if one inserts a "not" at each of the Court's crucial determinations about the four factors at stake (private interest, risk of erroneous deprivation, value of additional safeguards, and government interest).

D. Measuring Value

In American law, the two most successful attempts to articulate a unitary metric derive from utilitarianism and microeconomics.[98] Both of these jurisprudential approaches promise to translate all values into a common metric: the util[99] or the dollar (including dollar equivalents). The unitary currencies of both utilitarianism and microeconomics make it seem as if anything and everything can be translated into the two currencies. Accordingly, both approaches appear to provide a rational technique to assess value.

As between utilitarianism and microeconomics, the latter seems to provide a more reliable method of ascertaining value. Utilitarianism, which requires a measurement of the amount of happiness people derive, requires a great deal of cultural guesswork. By comparison, microeconomics gives at least the impression of a structured technique for quantification and measurement. In part, this sense of reliability (it feels rigorous) has to do with the patterning of economics itself on the image of physics.[100]

But the appeal of microeconomics as a commensuration mechanism has other sources. Because so many of the values at stake are often monetized in an actual market (or in analogous product markets), frames of comparison are readily available. And as markets increasingly colonize customs, habits, and other forms of life, microeconomics will correspondingly appear to have a greater hold on social and economic realities.

The great problem for microeconomic commensuration is one of social perception or social recognition. Conceding for the time being that it is coherent to speak of individual preferences in terms of dollar valuations, what is lacking in microeconomics is a method by which to ascertain actual dollar valuations by individuals in noncommodified settings. This is not merely a problem of making correct guesses about dollar valuations. As will be seen, it is also an aesthetic problem — the analogue of the "what do we balance?" difficulty discussed above.[101]

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98 Attempts to formulate grand normative theories that govern entire fields have been far less successful. And among the judiciary and the bar, they are generally viewed as Icarus jurisprudence.

99 While it would be fundamentally wrongheaded to assimilate microeconomics to utilitarianism, they do exhibit a certain aesthetic affinity. Kenneth Burke, the great American rhetorician, for instance, notes that Jeremy Bentham's utilitarian philosophy of values is framed within the metaphor of price, the activity of accounting, and the ideal of arithmetic. KENNETH BURKE, PERMANENCE AND CHANGE 194 (3d ed. 1954).

100 *See* PHILIP MIROWSKI, MORE HEAT THAN LIGHT: ECONOMICS AS SOCIAL PHYSICS: PHYSICS AS NATURE'S ECONOMICS (1989). This shared aesthetic enables easy translation between the disciplines of economics and law.

101 *See supra* p. 1073.

E. Energy Unbound

Whatever its difficulties, the energy aesthetic is seductive. It offers the allure of change, movement, progress. In a word, it is dynamic. And insofar as one is part of a current of energy, there is a manifest excitement to this vision.

Sometimes, legal professionals devote activities to the unleashing of this energy. In the academy, cls is perhaps the paradigmatic example of energy unbound. Hence, adherents of cls once dedicated themselves to "liberating subjective potential."[102] The point was to advance a "vision of an individual who expresses and affirms her personhood by *bursting free of the constraints* imposed by the reified structures of social life."[103] In Duncan Kennedy's phrase — ubiquitous in cls circles of the 1980s — the point was "making the kettle boil."[104] Cls was "trying to liberate 'contradiction,' 'alienation,' 'desire,' 'irony,' 'doubleness,' 'despair,' 'ecstasy,' and 'yearning.'"[105] Correspondingly, cls thinkers displayed an intense allergic reaction to any (grid-like) attempt to contain, constrain, thingify, or reify this energy.[106]

The prospect of energy unbound is latent in the energy aesthetic itself. Unrestrained, the energy aesthetic portends a potential maelstrom of legal activity. Not surprisingly, attempts are made to channel the action in desired directions. But collision and contradiction remain live possibilities. And with all this action, motion, and energy, containment can become a real issue. Without some sort of containment, the release of energy might produce chaos.

F. The Missing Architecture

The great problem for the energy aesthetic comes down to this: the energy aesthetic is only coherent if it has a structure, but in none of its substantive incarnations (balancing, law and economics, cls) can it provide one.

In balancing, the issue arises in terms of "what do we balance?" Some sort of frame (some kind of grid) is necessary to help determine what needs to be balanced. Otherwise, balancing can yield any and all conclusions, depending upon what is placed on the scale.[107] The difficulty is well illustrated in Justice Stevens's wry observation in a freedom of speech case that "few of us would march our sons and daugh-

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[102] James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 745 (1985) (emphasis omitted).

[103] *Id.* at 742 (emphasis added).

[104] Peter Gabel & Duncan Kennedy, *Roll over Beethoven*, 36 STAN. L. REV. 1, 17 (1984).

[105] KENNEDY, *supra* note 10, at 345.

[106] *See* Gabel, *supra* note 90, at 1590; Gabel & Kennedy, *supra* note 104, at 36 (complaining about cls critiques being turned into "a cluster of pods").

[107] *See* Aleinikoff, *supra* note 94, at 977–78.

ters off to war to preserve the citizen's right to see 'Specified Sexual Activities.'"[108] But if instead of "Specified Sexual Activities," we abstracted to sexual speech or expression generally, the conclusion might be different. The problem is: what is to be balanced? The difficulty here is not that one will necessarily fail to come up with an answer; the problem is that the energy aesthetic alone cannot furnish one. The energy aesthetic is necessarily parasitic upon some extrinsic structure (for example, the grid).[109] Another way to put it is that there is no such thing as balancing in the air.

The same problem arises in law and economics, though it is seldom noticed. In order for microeconomic analysis to yield recommendations for wealth maximization, it must necessarily invoke some notion of who wants to trade what and with whom.[110]

More specifically, the economist has to know how the product market should be defined and who counts as a potentially interested party. Sometimes, making that determination will be relatively easy — because there are explicit exchanges registered on a market (or a closely analogous market). But most of the interest in and import of law and economics concerns those hypothetical markets in which transaction costs make explicit exchanges impossible. In those markets, the economist has to make some guesses regarding both the product market (the stakes) and the interested parties (the players).

The question is: what allows him to do so?[111] Posner, in his treatise, uses common, statutory, and constitutional law regimes to frame his markets. The problem, of course, is that the law's definitions of the players and the stakes have not been vetted for efficiency.[112] One could, of course, use common sense to define the players and the stakes, but common sense also has not been vetted for efficiency. One could use empirical research — surveys, for instance — to try to ascertain the players and the stakes. But while that sort of work might well reveal preferences, it will not furnish much of a basis for converting those preferences into dollar amounts.

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108 Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976).

109 Aleinikoff, *supra* note 94, at 973–75.

110 In the typical illustrative pedagogical examples of crop fields and tramways or automobile drivers and pedestrians, these aesthetic difficulties are not particularly acute. But these examples are misleading for precisely that reason. Ronald Coase suggests as much. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960) (endorsing his mentor Frank H. Knight's statement that problems of welfare economics must "ultimately dissolve into a study of aesthetics and morals").

111 For an extended discussion, see Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1679–87 (1989).

112 Economic analysis could presumably provide satisfactory evolutionary accounts of how legal rules in specific settings approximate efficient definitions of the players and the stakes. Such an encyclopedic undertaking would be interesting.

Having said all this, it is obviously possible to have intelligent and helpful conversations about the identities of the players and the stakes. The point here is a modest one: aesthetic judgments will necessarily feature at some point in that conversation,[113] and economic analysis alone cannot generate those aesthetic judgments. Something more is needed to provide the missing architecture — the definition of the players and the stakes.[114]

That leaves empirical research with the daunting task of revealing the identities of the (potentially) interested parties and what they wish to trade. So far, however, this work remains underdeveloped relative to the ambitions of law and economics. As it stands, the overwhelming majority of law and economics work is simply parasitic on common sense or legal definitions of the market.[115]

The same problem arises within the cls deployment of the energy aesthetic. In critical legal studies, the problem is experienced in political terms. After the demystification, the deconstruction, and so on, what happens next?[116] What are the connections, if any, between cls critiques and leftism? To push further: what is leftism?[117] In their more perspectivist moments, cls thinkers can live with — indeed will even insist upon — this clash.[118] But for many the myth of progress, the allure of transformation, and the cause of change die hard.

Putting the complexities aside, the important point here is a simple one: balancing, microeconomics, and cls share certain difficulties. These difficulties are traceable to their common aesthetic. There is a missing architecture in all these approaches, one that the energy aesthetic alone cannot supply.

G. Safe Energy

One aesthetic response to this missing architecture is to invoke a grid aesthetic to contain all this movement and energy. But the invocation of the grid imagery is not entirely satisfactory: There is an arbitrariness in determining where to cut off the action. The characteristic

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113 *See* Coase, *supra* note 110, at 43.

114 None of this, of course, is offered here to suggest that economic analysis is useless or wrong or anything of the sort. It is to suggest, however, that the persuasiveness of any specific microeconomic analysis will depend on the extent to which its aesthetic presumptions are controversial.

115 For elaboration, see Pierre Schlag, *An Appreciative Comment on Coase's* The Problem of Social Cost*: A View from the Left*, 1986 WIS. L. REV. 919, 933–43. For an argument that this characteristic conceptual parasitism leads to wrongheaded economic analysis, see Schlag, *supra* note 111, at 1676–87.

116 For a discussion of this question, see Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992).

117 For a discussion of "leftism" in the context of modernism/postmodernism, see KENNEDY, *supra* note 10, at 339–64.

118 *Id.*

grid anxieties return in full force. "Where do we draw the line?" "Will the line hold?" But now that the energy aesthetic is unleashed, these grid problems become more acute.[119]

With the advent of the energy aesthetic, it has become permissible, indeed entirely legitimate, to push and pull judges openly through the invocation of policy and principle. The resulting tension is palpable. The stasis of the grid is pitched against the dynamism of energy — the immovable object against the irresistible force. There is a question of hierarchy. To state it crudely: do the object-form categories of the grid (rules, doctrines) delimit the reach of the forces of energy (principles, policies), or is it the other way around? A great deal of scholarly effort has been and continues to be devoted, explicitly or not, to this problem. The goal is to combine the two aesthetics in some pleasing or coherent arrangement.

Perhaps the best known theoretical attempt to mediate the tension was H.L.A. Hart's distinction of a "core" of settled legal meaning from a "penumbra" of uncertainty. Hart illustrates his solution with a hypothetical that has since become famous.[120] Hart argues that the ordinance "No vehicles in the park" applies clearly to some vehicles (automobiles) and not so clearly to others (bicycles).[121] The automobile falls within the core of settled cases, the bicycle within the periphery.

Hart's aesthetic resolution was less a novel development than an expression of an aesthetic strategy already in use by the courts.[122] With or without Hart, the notion of a settled core and an uncertain periphery appears in all sorts of other ways throughout decisional law. The cores are the so-called "easy cases." From the core, policies and principles radiate outward, but only so far as their "scope" or "reach" or "orbit" permits. On the margins, we have "emanations,"[123] "penumbras,"[124] "twilight zones."[125]

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119 For a discussion of this problem in the context of judicial review, see Seidman, *supra* note 33, at 1042–52.

120 For Hart's framing of the hypothetical, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

121 *Id.*

122 *See, e.g.*, Schlesinger v. Wisconsin, 270 U.S. 230, 241 (1926) (Holmes, J., dissenting) ("But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured."). For a helpful discussion of the "penumbra" metaphor, see Burr Henly, *"Penumbra": The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81 (1987).

123 Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

124 *E.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) ("The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. There is no penumbra of uncertainty obscuring judgment here." (citation omitted)).

125 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (recognizing a "zone of twilight" in which the President and Congress may have concurrent authority or in which the distribution of authority is uncertain).

Hart's solution displays a certain aesthetic cleverness. In one sense it is a variation on the grid — a kind of fuzzy grid with blurred boundaries at the peripheries. In another sense, it is a variation on law as energy — a centering of energy in terms of densities known as cores.

Still, despite this cleverness and despite the evident popularity of the core/periphery image among judges and legal academics, Hart's solution remains, in some respects, aesthetically unsatisfying. For one thing, he resolves tension only by reproducing it at a higher level of abstraction. Is there a clear boundary between core and periphery, or is there a policy-like fudging of the two? If one reads Hart's article closely, it seems that he does answer this question. But ironically, it is precisely the answer he gives that undoes the solution. It seems from Hart's original article that he privileges the core (the grid). This preference is no surprise, given that Hart's original aim was to sustain linguistic formalism against the advent of fuzzy policy reasoning.[126]

Another well-known attempt at reconciliation, occurring somewhat later in the twentieth century, was Ronald Dworkin's effort to integrate a number of different jurisprudential considerations into an ostensibly unitary theory of law. Specifically, Dworkin tried to yoke energy (politics) with observance of the grid (the authority of the institutional legal materials) and aesthetic determinations (coherence, fit, and integrity) in a crypto-Gadamerian jurisprudential hermeneutic.[127] Dworkin portrayed law as the relentless effort to articulate each term in light of the others so as to make law the best it can be. He pressed his claims for a perfect equilibration at a breathtakingly ethereal level of abstraction.

But therein lay the aesthetic difficulty. Dworkin achieved his elegant solution only by climbing to an exceedingly rarefied level of abstraction, leaving one to wonder what possible earthly role his resolution could play. Dworkin's jurisprudence often seems like pure energy — never touching the ground, always spinning in on itself. The jurisprudential hermeneutic becomes diaphanous as the law works itself pure (that is to say, empty).

Hart's and Dworkin's efforts at mediation between grid and energy illustrate the uneasy tension between the two. Dworkin's enterprise is

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126 Not surprisingly, Hart is typically understood in just this way. *See* Thomas D. Eisele, *The Activity of Being a Lawyer: The Imaginative Pursuit of Implications and Possibilities*, *in* LAW AND AESTHETICS, *supra* note 8, at 177, 191 (noting that Hart commits us to the view of law as "object," specifically, the view of law as rules). Lon Fuller, Hart's archetypal antagonist, criticizes both Hart and jurisprudence precisely for treating law as a piece of "inert matter" and its constituent words as constant in meaning. LON L. FULLER, THE MORALITY OF LAW 123 (2d ed. 1969); Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 669 (1958).

127 *See* Cover, *supra* note 6, at 1610 n.24.

seduced by the spin of its own energy, while Hart's efforts are weighed down by the cores of his metaphors. In both cases, the mediations collapse as each thinker champions one aesthetic over the other.

H. Depletion

We have already seen how the energy aesthetic is threatened by its own explosive, uncontrollable force. Ironically, it is also threatened with exhaustion: the expenditure of energy leads to its depletion.[128]

Policies and principles that once moved static doctrine or inert precedents become themselves incorporated within the (static) doctrine or the (inert) precedent. As policies and principles gain the authority of judicial recognition in case law, they become frozen in place — words without force.

The point is perhaps easiest to see in the case of balancing. When balancing first gained credibility as a decisionmaking procedure, it was thought that, in contrast to categorical rules, this new approach would compel judges to think hard about the reasons for their decisions.[129] After a few decades of balancing, however, the technique is often reduced to a routine and mindless process, a commitment to a safe and ironically invariant middle of the road.[130] Oddly, the institution of multifactor and balancing tests as reigning doctrine effectively defuses the energy aesthetic. The same thing happens with principles, policies, and values. As these become juridically recognized and integrated into the law, the changes they once promised become institutionalized.[131] Yesterday's policy analysis is today's formula and tomorrow's mindless incantation.[132]

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[128] Consistent with this aesthetic point, courts and commentators often speak of the need to "preserve the capital" of the court — that is, to avoid wasting resources on inefficient or ineffectual decisions. The assumption is that the stock of energy is finite. For a judicial articulation of this point, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992).

[129] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897) (noting that if judges do not weigh the considerations at stake in a dispute, the grounds of judgment will be left "inarticulate . . . and unconscious").

[130] *See* Al Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFF. L. REV. 383 (1979).

[131] We operate within the images and metaphors of our own aesthetics. In the energy aesthetic, these images and metaphors give us the sense of change. But inasmuch as there is no guarantee that the energy aesthetic has any hold on anything other than itself, this sense may simply be an illusion.

[132] As for the insistence that the law should strive to achieve *X*, this may well be just another version of staying in place. In fact, it may even be the dominant mode of staying in place — namely, making arguments (over and over again) that law should keep moving.

III. PERSPECTIVISM

The moment of transition from the energy aesthetic to perspectivism was aptly captured by Felix Cohen in 1950:

> The absolute space of unchanging rules and unmoving precedents that characterized traditional jurisprudence is gone. In its place we have a "life space" with many "value regions." Whatever passes from one region to another, — a rule, a precedent, or a statement of facts — changes its weight, its shape, and its direction in accordance with "the lay of the geodesics" of that region.[133]

According to Cohen, the nineteenth-century "ether" of the grid and the Newtonian emptiness of "absolute space" become a force field.[134] It becomes a charged space that, as Cohen says, "direct[s] the flow of events in the space we call law."[135] The result is that "the force and direction of a precedent vary with the field in which it is observed."[136] (Energy yoked with perspective.)

Similarly, the "value" of a legal meaning depends on its location in legal space. Cohen illustrates the point by suggesting that if a headline in the *Wall Street Journal* read "SOVIET ARMIES INVADE YUGOSLAVIA," it is predictable that the Soviet paper, *Pravda*, would carry a headline such as "YUGOSLAV PEOPLE LIQUIDATE PUPPETS OF CAPITALIST POWERS."[137] Because of the different political charges within the field (*Wall Street Journal* vs. *Pravda*, or capitalism vs. communism), the perspectives yield different valuations and accordingly, different headlines. Cohen's description of law as a force field highlights the notion of context. According to Cohen, the meaning — or more radically, the identity — of legal artifacts varies as a function of context.[138]

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133 Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 250 (1950) (footnote omitted). Cohen's description here combines aspects of both the energy aesthetic, *see supra* p. 1070, and the perspectivist aesthetic, *see infra* pp. 1081–83.

134 Cohen, *supra* note 133, at 249–51. This force field image implies the importance of position and perspective in the apprehension and representation of law. *See* Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

135 Cohen, *supra* note 133, at 251; *see* Tribe, *supra* note 134.

136 Cohen, *supra* note 133, at 249.

137 *Id.* at 243.

138 As a banal example, the meaning of the term "contract" varies depending on whether the legal context is common law, constitutional law, or government procurement law. Similarly, the meaning of a legal term, such as the "color-blind constitution," changes as a function of alterations in ideological or historical context. *See* J. M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 872–73 (1993) (arguing that the commitment to a color-blind constitution has a progressive valence in the context of *Plessy v. Ferguson*, but a conservative political valence in the era following *Brown v. Board of Education*).

More recently, Laurence Tribe and Tom Grey have each offered similar descriptions of perspectivism. Tribe draws explicitly on post-Newtonian physics to evoke the image of curved legal space:

> A parallel conception in the legal universe would hold that, just as space cannot extricate itself from the unfolding story of physical reality, so also the law cannot extract itself from social structures; it cannot "step back," establish an "Archimedean" reference point of detached neutrality, and selectively reach in, as though from the outside, to make fine-tuned adjustments to highly particularized conflicts. Each legal decision restructures the law itself, as well as the social setting in which law operates, because, like all human activity, the law is inevitably embroiled in the dialectical process whereby society is constantly recreating itself.[139]

Tom Grey invokes the poetry of Wallace Stevens to offer a similar account:

> Stevens recognized that reality transformed by imagination could become, in social life, a new reality, as imaginative integrations cross from art into common speech and thought, hardening and adding to the coral reef of collective thought. For Stevens, all religions exemplify this process, as do "the four seasons and the twelve months." But while imagination integrates wholes that exceed the sum of their parts in both art and life, there is no method, no logic, that guarantees these achievements. The world largely remains distributed into its separate parts, elements whose relations with each other, if happy at all, are contrapuntal and dialogic rather than harmonious and synthetic.[140]

A. Switching Grounds/Changing Contexts

This notion that the identity or meaning of a legal text changes as a function of context is a recognition of the importance of perspective to the articulation of law. The interplay between "text" and "context" enables a multitude of perspectives to be brought to bear on the articulation and resolution of legal issues. In law and legal studies, this sort of text/context interaction is organized in terms of homologous dualities:

Text/context,[141]
Foreground/background,[142]

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139 Tribe, *supra* note 134, at 7–8.

140 Grey, *supra* note 18, at 1582.

141 *See, e.g.*, Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1629 (1990) (describing "the call to look at context" as a call to examine certain neglected aspects of human relations, such as gender and race).

142 *See, e.g.*, Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1048 (1991) (noting the importance of reexamining and redescribing the background).

Decision/baseline,[143]
Object/frame,[144] and
Figure/ground.[145]

These dualities can be understood as versions of each other. Whatever they are called, they are the conceptual levers that enable "frame shifting" or "flipping" — the deliberate alteration of context to produce different perspectives on legal issues and conclusions.[146]

One early example of frame shifting is the legal realist Robert Hale's inversion of the characteristic tendency to view property rights from the perspective of the "haves" (owners) rather than the "have nots" (workers). With this switch, Hale revealed that property rights function not simply as grants of entitlements to owners, but as impositions of disablements on nonowners.[147] As another example, consider Charles Reich's much-celebrated 1964 article on the "New Property." In that article, Reich argued that, with the transition from a liberal to a welfare state, government "privileges" such as licenses or welfare benefits have come to play the same role as common law "property" (and ought to be treated as such in constitutional law).[148]

B. Decentering the Subject

In the perspectivism described so far, the self is pictured as viewing, or more broadly, as experiencing an object (for example, a law) from different vantage points. Hence, Hale imagines what property law does, not simply from the perspective of owners, but from the perspective of nonowners. Similarly, Reich imagines the significance of governmental grants and benefits, not simply from the government's perspective, but from the vantage point of those dependent upon this largesse. Neither of these switches in perspective requires any change

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143 *See, e.g.*, Cass Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 874–75 (1987) (discussing and criticizing the *Lochner* Court's implicit reliance on a common law baseline for the definition of neutrality in constitutional adjudication).

144 *See, e.g.*, Jennifer Jaff, *Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning*, 35 J. LEGAL EDUC. 249, 252–57 (1986).

145 *See, e.g.*, Steven Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1881–90 (1991).

146 *See* Jaff, *supra* note 144.

147 *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472–73 (1923). For a discussion of the importance of Hale's insight to adjudication, see DUNCAN KENNEDY, SEXY DRESSING ETC. 83–100 (1993). From an ideological standpoint, the sting of Hale's insight lies in showing that ostensibly "consensual" transactions such as voluntary market exchanges occur within a coercive common law setting that specifies the terms under which laborers or property owners can withhold their labor or property. For discussion, see BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 44–59 (1998).

148 Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

in the identity of the observing self — only that the self take on different points of view.

Imagine now that perspectivism is turned toward the self. Imagine, in other words, that the self is no longer external or immune from the play of perspectives, but rather that this play of perspectives comes to shape, orient, and even organize the self. With this change, what may previously have seemed a unitary, self-directing, coherent, integrated self will now come to have mutable identities depending upon the play of perspectives. Whatever overarching principle or structure may once have seemed to organize the self (soul, will, autonomy, personality, whatever) is now decentered.

It is this image of a decentered self (a self without a stable center and a self that is no longer the center) that enables postmodern thinkers to speak of the contingent, mutable, and even fractured character of the self.[149] And it is also this image that enables structuralists and poststructuralists to speak, in unfortunately overdramatic tones, of "the death" of the author,[150] of man,[151] perhaps even of the self.[152]

What is at stake in these various claims is not so much a liquidation of author, man, self, but rather the dethroning of a certain specific image of author, man, and self as unitary, self-directing, coherent, and integrated. This image — so common in Anglo-American thought and law — is seen as a culturally sanctioned form of bragging, as itself an effect of texts, social forces, etc. In the perspectivist aesthetic, this rather grand image of the self as an autonomous choosing agent is felt to be strangely vacant, a kind of fraud. Indeed, in trying to specify what we mean by "autonomous" or "choosing," it does not take too long before we start repeating ourselves.[153] It is true, of course, that tremendous intellectual efforts have been devoted to explicating ideas such as autonomy and choice, but it is not at all obvious that these concepts are any more perspicuous than notions such as "being in the zone" or "karmic excellence."[154]

In the perspectivist aesthetic, the self morphs as it enacts a variety of roles, discourses, performances, and thoughts. It is not that the co-

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149 *See generally* Steven L. Winter, *The "Power" Thing*, 82 VA. L. REV. 721, 727 (1996) (exploring the reciprocal social construction of power and self).

150 SEÁN BURKE, THE DEATH AND RETURN OF THE AUTHOR: CRITICISM AND SUBJECTIVITY IN BARTHES, FOUCAULT AND DERRIDA 22–33 (1992) (describing Roland Barthes's account of the death of the author).

151 *Id.* at 64–77 (describing Foucault's death of man).

152 *Cf. id.* at 17 (describing the notion of self common to Anglo-American thought as absurd).

153 The entire constellation of concepts known as agency/self *and* author/subject *and* choice/intent *and* autonomy/self-direction is elliptical, arriving fairly quickly at self-referential definitions.

154 The main difference, of course, is that comparatively little attention has been devoted to identifying the eleven different ways of "being in the zone," to say nothing of the eight or sixteen fundamental hierarchies of "karmic excellence."

herence, continuity, or unity of the self disappears; it's just that they are understood to be only particular images or experiences of the self. Ironically, the same is true of the self's perception of its pluralization: that, too, (mercifully) is a "sometimes" thing. This experience of the self's pluralization can add to one's own intellectual, aesthetic, and moral repertoire.[155] Once one recognizes that the self is in the perspectivist play, it becomes possible to take responsibility for the kind of self enacted. No longer does the judge "receive" the law as a given. She understands that her apprehension and experience of the law depend not only upon the perspective from which she sees the law, but also upon the kind of self that is being enacted, brought forth, to see the law.[156] Thinking law, doing law, now includes working on the self.

This working on the self is not simply an internal dialogue. The perspectivist implicitly appreciates that the views and commitments of others already shape the law.[157] In the perspectivist aesthetic, law is experienced as the joint production of many different actors — judge, legislator, lawyer, bureaucrat, citizen, and so on — each construing the "law" in terms of its meanings for the others.[158]

This effort to discern what someone's perspective looks like in terms of yet another person's perspective is bound to seem dizzying. But dizzying or not, this experience is a significant aspect of the life of the judge and the lawyer (or at least the good ones).

C. Missing Perspectives

The introduction and development of a perspectivist aesthetic in American law owes much to feminist and critical race theory scholarship of the 1980s and 1990s. In the works of many feminists and critical race thinkers, perspectivism emerges both as a recognition of and a

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155 Autonomy is all fine and well, but from a perspectivist angle, the unrestrained pursuit of autonomy is often achieved at the cost of a certain shallowness.

156 *See generally* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) (describing the reasoning process of a hypothetical judge facing a conflict between precedent and preference for a certain outcome).

157 Thus, for instance, a perspectivist approach to constitutional originalism would involve an attempt to discern how the framers intended the Constitution to be interpreted and implemented by the citizenry, future generations, courts, and so on and so forth. *Cf.* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (deciphering the framers' original intent regarding the appropriateness of original intent as a mode of constitutional interpretation).

158 One striking example can be found in Justice Jackson's opinion in the famous separation of powers case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In his concurrence, Justice Jackson noted that judicial attempts to rein in executive power are unavoidably limited by the President's political power — his political leverage, felt loyalties, and the necessities of the office. *Id.* at 653–55 (Jackson, J., concurring). He voiced the same *realpolitik* doubts about the limits of law and the efficacy of the courts in the infamous Japanese-American internment case, *Korematsu v. United States*, 323 U.S. 214 (1944). *See id.* at 246–48 (Jackson, J., dissenting).

response to the exclusion of their own perspectives from law. Indeed, these thinkers sought to introduce the legal academy to certain excluded perspectives: namely, the views of women and persons of color.

One of the key obstacles to the introduction of those views was the legal orthodoxy's sometimes explicit, often implicit, claim to objectivity, neutrality, and universality. Such claims, according to feminist and critical race writers, negated the importance of point of view, while at the same time elevating a particular point of view (that of the white male) into an objective, neutral, and universal truth.[159]

The affirmation of perspectivism eroded the aesthetic high ground for such claims by refashioning the legal orthodoxy as one point of view among many. In turn, the focus on point of view led back to an examination of the party having that point of view. Once attention turned in that direction, one was just as likely to recognize a politically interested, socially situated, racially endowed, gendered party (flesh and blood) as some "ideal observer" expounding a neutral, objective, and universal conception of law. By focusing attention on point of view and ultimately agency, perspectivism put the legal orthodoxy on the rhetorical defensive. The champions of neutrality, objectivity, and universality were cast in the proverbial position of the Wizard of Oz: "Pay no attention to that man behind the curtain."[160]

Not only did perspectivism unsettle the aesthetic grounds for claims of objectivity, neutrality, and universality, but it enabled the political orientations generally known as multiculturalism and identity-politics to be stated in the first place. Indeed, those orientations are so steeped in a perspectivist aesthetic that it is difficult even to conceive of them apart from that aesthetic.

But the search for missing perspectives, once started, is not easily arrested. Just what kinds of perspectives should be recognized? One answer, of course, is those perspectives that correspond to important social characteristics such as race and gender. But these social determinations are not clearly monolithic. And then, too, there are others: class, economic status, age, bodily integrity, etc. And there are all the various combinations. And these social categories are themselves perspectivist constructs.

Two significant and related difficulties emerged. The first was the proliferation of missing perspectives (an echo of the taxonomic proliferation of the grid aesthetic). The second was the homogenization of different perspectives within a single, essentialized perspective.

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[159] *E.g.*, Minow & Spelman, *supra* note 141, at 1601.

[160] Nancy Levit, *Critical of Race Theory: Race, Reason, Merit and Civility*, 87 GEO. L.J. 795, 805 (1999) (review essay) (quoting THE WIZARD OF OZ (Metro Goldwyn Mayer 1939)).

In the legal literature, these problems reached their most acute articulations in feminist jurisprudence and critical race theory under the names "intersectionality"[161] and the "essentialism/anti-essentialism debate."[162] In these disputes, perspectivism impugns the very attempt to ascribe a fixed identity to the agent (for example, woman or woman of color).[163] The problem for this agent-centered perspectivism is that, in its more radical manifestations, it has a real potential to annihilate the political client.[164] Indeed, the pressure to avoid "essentializing" the political client leads to respected fracturing of the client into a multiplicity of particularistic and local identities until nothing is left.

On the other hand, the attempt to stabilize select categories — women, women of color, black women, and so on — is contrary to the perspectivist aesthetic. It is an uneasy combination of the grid aesthetic and perspectivism.

D. Institutional Perspectivism

Recognition of a multiplicity of perspectives is, in one sense, quite consonant with the ideas and institutions of law. The perspectivist moment enables a variety of different political perspectives and social phenomena to be translated faithfully into the language of the law. In a related sense, perspectivism can act as a kind of check on legal decisionmaking, enabling decisionmakers to look at transactions from many different angles — some of which will, depending on the context, be more insightful than others.[165]

In legal studies, perspectivism is materially inscribed in the institutionalized juxtaposition of different, arguably incommensurable, schools of thought: law and economics, critical legal studies, critical

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161 *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

162 *See, e.g.*, Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43, 70 (1994); Joanne Conaghan, *Reassessing the Feminist Theoretical Project in Law*, 27 J.L. & SOC'Y 351 (2000); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990); Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273 (1999); Susan H. Williams, *Utopianism, Epistemology, and Feminist Theory*, 5 YALE J.L. & FEMINISM 289, 289–95 (1993) (book review).

163 This problem gives rise to the essentialism/anti-essentialism debate. *See* Harris, *supra* note 162, at 585 (arguing that race-essentialism necessarily ignores the intersectionalities of class, gender, politics, sexual orientation, disability, and more).

164 Conaghan, *supra* note 162, at 367.

165 In his famous essay, *Violence and the Word*, Robert Cover observed that American law is institutionally cast in redundancies; it requires many decisionmakers, including lawyers, trial courts, juries, appellate courts, en banc courts, etc., to produce an ultimate determination of guilt or liability. *See* Cover, *supra* note 6, at 1618–21. Richard Sherwin expands on this idea to show that the institutions and rules of American law are designed to permit a range of different disciplines and agents to contribute in the adjudicatory (and one might add, administrative and legislative) processes. *See* RICHARD K. SHERWIN, WHEN LAW GOES POP 4–5 (2000).

race theory, analytical jurisprudence, doctrinalism, feminist jurisprudence, law and literature, postmodernism, law and society.[166] Many will recognize in this list a rather clichéd and crudely reified description of contemporary legal scholarship. But the clichés and reifications are socially very real. The different identities of these schools are materialized in their independent associations, conferences, sections at the American Association of Law Schools, citation chains, law review symposia, and in some cases, endowments.

As a general matter, legal academics tend to make poor perspectivists. Although they have both the time and the freedom to experience the many different perspectives that constitute law, they have little motivation to do so. Legal academics, after all, typically deal with a law apart from the constraints of any pending case, free from the narrowing concerns of a real client and reprieved from actually having to persuade a court of anything. This academic habitat understandably yields a kind of law *in abstractu*: law in air — gratuitous jurisprudence. The understandable insecurity that stems from a professional life dedicated to producing law in the air leaves many legal academics running for the shelter of the grid. In a pinch, any formalization will do. A thoroughgoing perspectivism, by contrast, threatens to reveal what many legal academics already know but wish dearly to disavow: there is not much *here* here. Meanwhile, the well-entrenched form of the law review article — the outline format, the rhetoric of advocacy, the bold print, the visually imposing piles of supporting authority, the acute hierarchy of signals, the monistic reductivism of the ubiquitous explanatory parenthetical — is not particularly hospitable to a perspectivist aesthetic.

The ritual site par excellence of the perspectivist moment is the trial. It is there that the multitude of stories and knowledges are enacted in an elaborate, highly stylized, yet often fractious choreography. The trial brings together evidence, experts, witnesses, writings, parties, evidentiary rules, ritual utterances, sound recordings, and opening and closing narratives by counsel. The participants, especially the lawyers and the judge, compete to direct the choreography of the trial.

The less willing courts of appeal are to review trial court decisions, the more deference is given to the perspectivist moment. This means, in turn (and this is what troubles so many lay and scholarly commentators) that the party who gives the best performance is likely to have a significant effect on the outcome. That party will not always be the

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166 For general discussion of these various schools, see Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1 (1999); and GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 83–185 (1995). For an excellent historical treatment, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 301–509 (1995).

trial court judge; it may well be one of the lawyers, clients, witnesses, or jurors. This is not to say that a judge cannot impose a very grid-like structure on a trial. Nor is it to say that trials are chaotic collisions of perspectives. It is to say, however, that trial court proceedings enable a kind of perspectivism much more difficult to sustain in an appellate forum.

But even a trial ends on a monistic note: a verdict, an order. A court's decision must close on such a note, a singular prescription, determination, ruling, or holding. A trial court can declare a mistrial. An appellate court can say, "Case remanded." Either court can issue vague or open-ended orders. But there are limits. A trial court cannot say, "We are and are not declaring a mistrial." An appellate court cannot say, "Gee, it's all so perspectival. We don't know whether we are remanding or not. So ordered." There must always be, and in the end there always is, a determination. Perspectivism pushed through to the end of a judicial opinion will frustrate the achievement of a singular, monistic conclusion. By the end of the opinion, then, perspectivism must give way to the imposition or authorization of a legal consequence. In the end, perspectivism seems to be subsumed by monism.[167]

Of course, this observation is itself but one perspective. True, it often seems as if the last line of the opinion ends on a unitary or monistic point, but the last line is often less stable or unitary than it seems. Indeed, the order is subject to interpretation. And this interpretation refers the addressee back, not simply to the holding announced, nor just to the doctrine articulated, but to the reasoning of the opinion, the assemblage of authorities invoked, the play of principles and policies, and so on and so forth. Moreover, the opinion itself has to be wrested from or reinserted into the juridical field of authorities, policies, and principles that give it meaning, in an endless sequence of referrals and deferrals. Then too, the opinion may well delegate ultimate decision-making authority to a plurality of agents — parties, arbitrators, and the like. The unitary form of the last line, "It is so ordered," may well be deceptive, more a juridical ideal than a reality.

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[167] Even those jurisprudential approaches most shaped by perspectivism (for instance, feminist jurisprudence and critical race theory) confront the same dilemma. Precisely because these approaches are explicitly committed to the *advancement* of a politics or a political group, they ultimately seek to bring perspectivism to a close. For one interesting effort to negotiate this tension, see Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1 (2001).

E. Stabilizing Perspectives

The techniques available to negotiate the tensions wrought by perspectivism are familiar.[168] As already seen, one of the ways to attempt a stabilization of perspectivism is through the imposition of a grid or energy aesthetic. The potential chaos of unbridled perspectivism is cabined or channeled through a variety of stylized devices: domestication, fundamentalism, going meta, and going mini.

Domestication. — This aesthetic device enables the assimilation of perspectivism within a permissive version of the grid or energy aesthetic. The dizziness of perspectivism is stabilized by

> Multifactor standards (like those so common in the Restatements of the American Law Institute);
> The ubiquitous technique of balancing; and
> Selective bows to context and contextualism.

Fundamentalism. — This technique lies in the forceful assertion of the superiority of a single perspective. This is accomplished through insistence on the finality or conclusiveness of certain kinds of authority:

> Expertise (training, certification, pedigree);
> Status (juridical, academic);
> Canonical texts and figures (the Constitution, Justice Holmes); and
> Select social identities (gender, ethnicity, sexual orientation).

It is worth noting that virtually any perspective (including perspectivism itself) can be distorted into a fundamentalism.[169]

Going Meta. — This is the view from above: the attempt to encompass multiple perspectives in an overarching (often abstract) theoretical frame. Going meta encompasses a range of devices, including invocations of

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[168] In fact, they were largely mapped out by Kenneth Burke, the great American rhetorician, some time ago:

> Discouraged by the ways in which the perspectives of different people, classes, eras, cancel one another, you may decide that all philosophies are nonsense. Or you may establish order by fiat, as you bluntly adhere to one faction among the many, determined to abide by its assertions regardless of other people's assertions. Or you may become a kind of referee for other men's contests, content to observe that every view has some measure of truth and some measure of falsity.

KENNETH BURKE, THE PHILOSOPHY OF LITERARY FORM 404 (3d. ed. 1973).

[169] *See, e.g.*, Grey, *supra* note 18, at 1576–77 (suggesting that sometimes postmodernists become entrapped in a fundamentalist perspectivism).

The perspective of an unusually gifted agent (Hercules, the person in the original position, the ideal observer);[170]
A universal solvent (dollars and dollar equivalents, wealth, utils);[171] and
Enlightened ad hocery (good judgment, tradition, craft, practical wisdom).[172]

Going Mini. — In this strategy, one looks for those commitments and concerns that are shared among all the varying perspectives. Only these shared aspects are translated into law. The most common devices here include

Recognizing the overlap among different perspectives (overlapping consensus)[173] and
Resisting the articulation of any perspective to increase the chance that a legal regime will satisfy all perspectives (incompletely theorized agreements).[174]

Often, these devices work by ignoring or by understating the problem of incommensurability. They often bypass the genuinely difficult issues posed by incommensurability.[175]

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[170] *See* DWORKIN, *supra* note 83, at 105–30 (Hercules); JOHN RAWLS, POLITICAL LIBERALISM 22–35 (1993) (person in the original position); Roderick Firth, *Ethical Absolutism and the Ideal Observer*, 12 PHIL. & PHENOMENOLOGICAL RES. 317 (1952) (ideal observer); *see also* Philip Soper, *Legal Theory and the Problem of Definition*, 50 U. CHI. L. REV. 1170, 1172 (1983) (book review) (ideal observer).

[171] On the use of dollars and dollar equivalents as a commensuration device, see POSNER, *supra* note 88, *passim*. For recent defenses of utilitarian commensuration, see PETER SINGER, A DARWINIAN LEFT: POLITICS, EVOLUTION AND COOPERATION (1999); and PETER SINGER, HOW ARE WE TO LIVE? ETHICS IN AN AGE OF SELF-INTEREST (1995).

[172] *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 542–45 (1961) (Harlan, J., dissenting) (good judgment and tradition); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960) (craft); Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747, 776–93 (1989) (practical wisdom); Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1046 (1996) (good judgment).

[173] *See* JOHN RAWLS, A THEORY OF JUSTICE 340 (rev. ed. 1999).

[174] *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995).

[175] There is a vast literature on the problems posed by incommensurability for adjudication. Much of this literature is quite helpful. Much of it, however, suffers from a precritical stance in which the analyst presumes that his or her perspective is itself somehow exempt from problems of incommensurability. Similarly, much of this literature suffers from the unexamined supposition that the main problem of incommensurability for law lies in reaching resolution, rather than in recognizing and experiencing values other than one's own. Likewise, much of the literature is given over to a grid-like taxonomic excess (of limited value outside its circles of self-reference).

F. *The Marginalization of Perspectivism*

In the legal academy, the perspectivist aesthetic has had little success in decentering the "official speakers" of law (judges, legislators, lawyers, and legal academics) as the privileged authors of law. And among these privileged speakers, the judges remain *primi inter pares*.[176] Correspondingly, legal study remains, by and large, centered on appellate doctrine and the incremental digestion of judicial opinions. Even the growth of interdisciplinary studies in law has not displaced the fundamental ontology of law as appellate doctrine.

The problem for perspectivists is not only that they seek to displace the grid and energy aesthetics, but also that they purport to strip law of its integrity as an object. Moreover, they do so in such an unceremonious, not to say disrespectful, manner: they keep referring law back to the predilections, beliefs, fears, hopes, and concerns of the agents who ostensibly produce or interpret that law. There is a deep aesthetic discord here.[177] The grid and energy thinkers proclaim, "This is what the law is. This is what the law should be." The perspectivist answers, "How long have you been having thoughts like this?"

Another difficulty for perspectivism is its tendency to drive itself into the ground. In a pathological version, perspectivism can become the one perspective that dominates all the others. Pushed to its limits, perspectivism devotes itself to the exploration of perspective, form, and representation at the expense of object, content, and referent. Paradoxically, even as it drives itself into the ground, the ever-increasing, ever more radical reflexivity of perspectivism leads to disintegration. Indeed, it leads to the dissociative aesthetic.

IV. THE DISSOCIATIVE AESTHETIC

The dissociative aesthetic is a radicalization of perspectivism. In its weak form, perspectivism depicts a legal artifact — say, for example, a law — as meaning different things depending upon one's perspective. Hence, in a weak perspectivism, a law appears to mean different things depending upon whether it is perceived from the vantage point of a judge, a litigator, a client, an enforcement official, and so on. What makes this perspectivism "weak" is that even as the meaning of

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176 For an unusual example of jurisprudential populism, see RICHARD D. PARKER, "HERE, THE PEOPLE RULE:" A CONSTITUTIONAL POPULIST MANIFESTO (1994).

177 David Kennedy captures the typical reaction succinctly: "As a colleague of mine once said: 'I analyze the real world and you analyze me.' This, of course, was itself meant as a criticism of me, in the real world, just as it imagined my interlocutor somewhere outside the real world, a scholar, a proposer . . . ." David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 462 (2000).

the law changes depending upon the perspective, the identity of the law remains the same. In a stronger perspectivism, a law is itself always a construct of a variety of perspectives — each of which is in part a reflection of the others. In this stronger perspectivism, the meaning of a law for one party (for example, the judge) is at least in part what it means for another party (for example, the lawyer), which in turn . . . and so on and so forth. An even more radicalized perspectivism (and this brings us to the dissociative aesthetic) dissolves stable identities. Not only is the image of a stable identity independent of perspective gone (strong perspectivism), but the multiplicity of perspectives no longer seems to cohere sufficiently to produce stable identities. With the advent of this dissociative aesthetic, we experience the dissipation of form and the dissolution of identity.

All this no doubt seems somewhat elliptical. So by way of example, begin with a short statement by Duncan Kennedy imagining himself as a judge deciding a case. Kennedy sees himself working in a field of law — a field of precedents, authorities, and doctrine. He then asks:

> *Who is the field?* The messages that constitute the [legal] field are on one level just a set of verbal formulae. On another, they are speech I imaginatively impute to the "ancients." On a third level, the resistance of the field is another name for my ambivalence . . . . To the question "who is the field," the answer has ultimately to be that the field is me, resisting myself.[178]

In this seemingly fractured account, the field of cases, doctrines, and authorities appears in several different guises:

> A set of verbal formulae (legal doctrine),
> Speech imaginatively imputed to the ancients (speech of the ancients), and
> The judge resisting himself (working on the self).

At first, this account might be read as an instance of a rather severe jurisprudential cubism: Kennedy's account seems to offer three sharply divergent perspectives on the identity of law. But it is also possible to have the reverse experience. In other words, it is possible to appreciate that the "speech of the ancients" is a kind of "work on the self," which in turn is a construct of "legal doctrine" and so on in all sorts of complex ways. After a while, it will become difficult to tell which is which. In fact, with enough thought (perhaps too much), the everyday common sense of confidence that one can separate out "the speech of the ancients" from "work on the self" from "legal doctrine" begins to evaporate.

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[178] Kennedy, *supra* note 156, at 551.

This collapse of differentiations is characteristic of the dissociative aesthetic. It is a movement toward the loss of form. This is one of the reasons it is so difficult to describe this aesthetic. It is also a reason this aesthetic can feel so destructive, at least to the grid or energy thinkers. It is their forms, after all, that are being dissolved. But to reject this aesthetic as destructive, on the ground, for instance, that it renders law impossible, is to shut oneself off from an important experience of law and its creative aspects.[179] So, consider an example.

A. What Is a Corporation?

In 1935, Felix Cohen took some poor New York court to task for asking, "Where is a corporation?"[180] The court had posed this question in an attempt to determine the permissible reach of personal jurisdiction over a foreign corporation. Cohen's response was indignant: A corporation is not anywhere. It is not a thing, nor a person. It does not travel from state to state.[181]

Well then, what is a corporation? Cohen never made this entirely clear. He seems to have thought that a corporation was not a tangible presence, but rather a set of legal relations.[182] If so, he was wrong. If a corporation is merely a set of legal relations, then it is impossible to determine in any rational way where it should be sued. It might as well be anywhere. The fact of the matter is that a corporation is a more or less mutable coalescence of physical embodiments (headquarters, factories, assembly plants), market economics (the firm, capital formation), employment patterns (corporate culture, infighting), identity metaphors (corporations as persons, entities), sundry legal relations (routinized contractual relations, fiduciary obligations of directors, limited liability of shareholders), and so on.

So again, what is a corporation? The problem is that a corporation is pretty much all or some of these things in a variety of different combinations. A corporation is not any one thing, but a more or less objectified coalescence of possible meanings, practices, and habits that are, at certain moments, integrated into the singularity of an individuated thing.

The momentary singularity of the "corporation-thing," "corporation-concept," "corporation-formation," "corporation-sign," or "corporation-fiction" is a kind of effect — call it a "text effect" for short. This

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179 I realize, of course, that this aesthetic might well be its own pathology. (It's not called dissociative for nothing.) Still, I think there is much to be gained from the experience of this aesthetic.

180 Cohen, *supra* note 46, at 810.

181 *Id.* at 811.

182 In 1926, John Dewey proposed a similar argument. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 661 (1926).

text effect is at once real and illusory: real because we successfully invoke and rely upon "text effects" to do legal work; illusory because as we begin to question the integrity of the text effect, it begins to unravel. Its identity as a singular, unified entity begins to look contrived, artificial, and ultimately untenable until we no longer know what we are talking about.

So to get back to the inquiry: what is a corporation? In the dissociative aesthetic, not only does the answer elude us, but the question itself also begins to seem strange. What are we asking? Are we asking about the law and the law's "understanding" of the corporation? Are we asking about a certain kind of social formation known as the corporation? Are we asking something about the meaning of "corporation" in language? Or are we asking something about our real or idealized images of the corporation? Just what are we asking about?[183]

Often these questions do not arise; our various images or understandings of corporations are not splintered. On the contrary, the corporation-concept, corporation-event, corporation-sign, and corporation-fiction are already glommed together in a singular corporation-thing. But at other times, the corporation-thing falls away and we experience a kind of ontological crash — we have lost the identity of the thing we were supposedly talking about.[184]

This dissipation of text effects is not simply some sort of "deconstruction" of concepts on the page. It is not some sort of "argument" about why concepts fall apart. It is a description of an experience — one that I am trying to trigger in you.

B. What Is Law?

Another example may help — a familiar one. Consider that ubiquitous three-letter word, "law." This is what we have been told:

> We have been told by Plato that law is a form of social control, an instrument of the good life, the way to the discovery of reality, the true reality of the social structure; by Aristotle that it is a rule of conduct, a contract, an ideal of reason, a rule of decision, a form of order; by Cicero that it is the agreement of reason and nature, the distinction between the just and the unjust, a command or prohibition; by Aquinas that it is an ordinance of reason for the common good, made by him who has care of the community, and promulgated; by Bacon that certainty is the prime necessity of law; by Hobbes that law is the command of the sovereign; by Spinoza that it is a plan of life; by Leibniz that its character is determined

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[183] In the attempt to discern the meaning of a corporation, we are thrown into a series of webs within which the referent is intertwined: the conceptual, social, linguistic, fictional, and so on. In turn, the integrity of those last distinctions dissolves as we realize that each web is itself already intertwined with the others.

[184] Just a caution: the observation that this disturbing description applies to itself is obvious. It would be silly, however, to suppose that this, in and of itself, somehow invalidates the description.

> by the structure of society; by Locke that it is a norm established by the commonwealth; by Hume that it is a body of precepts; by Kant that it is a harmonizing of wills by means of universal rules in the interests of freedom; by Fichte that it is a relation between human beings; by Hegel that it is an unfolding or realizing of the idea of right.[185]

Now, as generously inclusive as this compilation may be, it still greatly understates everything that might plausibly be taken as law or as a constitutive aspect of law. Arguably, law is also

> a collection of stylized markings in law books,
> a conceptual system,
> a social practice,
> a mode of thought,
> a form of behavior,
> a coercive apparatus, and
> a combination of some or all of the above (and many more).

So then, what is law?

Many answers might be given at this point.[186] One of them is that law is a bit of *this* and a bit of *that*. This view is so graciously accommodating that one could easily overlook the fact that it is not so much an answer as a restatement of the question. Sure, law's a bit of this and a bit of that, but how much of a bit? And what precisely are the relations between the "bit of this" and the "bit of that" — hierarchy, envelopment, penetration, tension, symbiosis, or what?

And which aesthetic (it was the grid) allowed us automatically to presume that the "bit of this" is somehow severable from the "bit of that"? In the dissociative aesthetic, identities are not organized in the whole/part image of the grid. There 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.

Consider, for instance, the positivist "command view" of law — that law is what the state commands, backed by force. At first, this

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[185] HUNTINGTON CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 556 (1949). Interestingly, Cairns does not seem to recover from his provocative inventory. He discounts the possibility that these visions of law might be synthesized into a harmonious whole. *Id.* at 55. He ends his book with vague ruminations about ontology and with an admonition to relate problems to "the whole structure of phenomena." *Id.* at 567.

[186] The classic answer — namely, that law can be defined however one wishes for whatever purpose — is not helpful here. It is an answer to a different question. The problem here is not that we have different conceptions of law. For an articulation of that problem, see Williams, *supra* note 56. In the dissociative aesthetic, the problem is that none of us can succeed in offering any stable and perspicuous conception of law. No conceptual definition or distinction can separate out the "law" it wishes to identify from the intermeshings of the many seamless webs.

seems like an auspicious start. Even if one disagrees with this definition, at first blush, it seems intelligible.

But then, of course, one wants to inquire about the identity of that word "state." The state, it turns out, is many things at once: an author, an agency, an institutional network, a series of mediating devices, a prize, a social formation, a set of legal rules, and more.

All these terms, themselves, require unpacking. Start with "legal rule." One could say that a legal rule is a norm stated in general terms. It has a relatively stable meaning by virtue of the fact that it is customarily read to mean roughly the same thing by those charged with its observance and enforcement.

But what is custom? Custom could be described as a kind of modus operandi that has become routine for a given group of people. It is a settled way of doing things that has become internalized in a given group as part of each member's psychological dispositions.

Notice that this slippage could keep going through one conception of law to another. Each conception can, with enough thought, collapse into the next. To summarize the slippage above:

> Law as commands dictated by the state,
> The state as a set of legal rules,
> Legal rules as customary,
> Custom as shared psychological dispositions,
> Psychological dispositions as . . .
> And so on and so forth.[187]

One concept lapses into the next as the differentiations dissipate. In the dissociative aesthetic, the state, legal rules, custom, and psychological dispositions are not external to each other; they are already glommed onto each other. In the dissociative aesthetic, one comes to recognize that various identities — to wit, law, the state, rules, custom, psychological disposition, and more — are already so conjoined that no conceptual work can separate them out. The sensation here is of conceptual quicksand, of distinctions that dissipate — a kind of virtual jurisprudential reality in which identities morph into each other.

The experience of dissociation might be described as the unraveling of a secure identity to the point at which we really do not know what it is anymore. But this disintegration is not nonsense. The idea that the state is an author, an agency, an institutional network, a series of mediating devices, a prize, a social formation, and a set of legal rules, may be difficult to get one's mind around, but it is not nonsense. To

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[187] Notice that there is no necessity to this particular jurisprudential slippage. Indeed, the slippage could have gone in numerous directions and taken many different forms.

say that a "corporation" is a more or less settled coalescence of physical embodiments, market economics, employment patterns, identity metaphors, and sundry legal relations is intelligible. And this experience, as suggested above, is not just a breakdown. In a more constructive vein, one comes to recognize the many associations that compose the identity of "the corporation" or "the state." For the lawyer or the judge, there is a practical implication: in recognizing the associations, foregrounding some, backgrounding others, she can represent "the state" or "the corporation" in ways conducive to her point of view. This is the flipside of the dissociative aesthetic at work.

There is another practical aspect to all this for the lawyer and the judge: to appreciate the ways in which legal identities can collapse into a multitude of associations allows the advocate or judge to reconstruct those identities in desired ways. This breakdown and reconstruction is perhaps the most intense aesthetic moment in law — the point at which the legal professional is creating law.[188]

There is a sense in which lawyers and judges know this already. The litigator, for instance, knows that "the law" and "the facts" are created in light of each other. Practicing lawyers know that, in an important sense, "the facts" are effects of sundry performances: recollections, statements, behaviors, affects, linguistic performances of clients, witnesses, experts, and more.[189] They know, as well, that the law is, in an important sense, an amalgamation of signs, beliefs, events, linguistic expressions, habits, perceptions, and prejudices that the lawyer helps compose for the occasion: for the client, the judge, and other relevant audiences.[190] The lawyer knows that both law and facts are, in important ways, productions. In experiencing the fluidity of law and fact, the lawyer is enacting the dissociative aesthetic. It is, of course, often her job, as she writes her brief or her closing argument, to reduce this fluidity to the crystal clarity of a grid or to the moving force of energy. In a tough case, however, it will often be a better brief and a better closing argument if she has experienced the dissociative aesthetic (before engaging in the reduction).

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188 This brings us back to Duncan Kennedy's description of the field. *See supra* p. 1093.

189 Given the highly bureaucratized character of contemporary life and its segmentation of information and responsibility, many lawyers often operate in circumstances in which nobody (not the lawyers, not their institutional clients, not the employees, and not the judge) knows the facts. The facts, in those kinds of cases, are simply the "effects" of the various performances of the participants.

190 None of this should be taken to imply that the law can be constructed any which way. On the contrary, lawyering is often a constrained experience. But the lawyer experiences constraint not so much because the law states *X*, *Y*, or *Z*, but rather because his relevant audience sees the law as *X*, *Y*, or *Z*. The lawyer faces a known judge, with known proclivities, inclinations, tastes, cognitive aptitudes, imagination, and so on.

C. *But Is It Law?*

Having said all this, the dissociative aesthetic is not one we can expect to see deliberately represented in *U.S. Reports* any time soon. On the contrary, if a judge must arrive at a single, unitary holding, it helps considerably to begin the opinion from a place where legal identities and their relations are already formed (as opposed to, say, in dissolution). But one should not confuse the logic of discovery with the logic of justification.[191] The ritual obligation of the judge to issue an opinion cast in a certain form does not dictate her thought processes. Like the lawyer, she brainstorms. That is where one will find the dissociative aesthetic at work — in chambers, back at the office, writing the opinion on the tough side of the case.

Yes, but is it law? The drive to rationalize — to make law coherent — is extremely powerful among legal professionals. This is understandable: When the litigator argues in court, it is typically to praise the law, particularly the law that favors her client. When the judge writes an opinion, it is usually to show that her decision is consonant with virtue, goodness, wisdom, canonical authority and, most of all, what the law requires. When the legal academic criticizes the law, it is typically on the premise that it can be reformed in desirable ways — usually ways that the academic has already picked out herself.[192] These practices are certainly not conducive to the dissociative aesthetic and its unraveling of identities.

Still, stepping back, what we call "law" today is an accretion of sundry modes of conceptual and social forms: feudal organizational principles, subjected to common law narrative, systematized in nineteenth-century juristic science, stripped down by the turn-of-the-century legal realist positivist philosophy, displaced onto the legal process of the 1950s, and rationalized by late twentieth-century economic and normative theory. Notice that this eclectic and unsteady interplay of various historical legacies is consonant with the dissociative aesthetic. In one sense, the successive acts of rationalization have served to minimize the historical accretion of dissonance. At the same time, these successive acts of rationalization have themselves added to the heterogeneity of the historical mix.[193]

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[191] RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 27 (1961) (distinguishing between the way a judge decides a case and the way he justifies his decision).

[192] For explorations of the hegemony of this normative practice in the academy, see PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 7–30 (1999); and Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991).

[193] If this is difficult to follow, simply imagine Kathleen Sullivan, dean of Stanford Law School, hosting a dinner party in Palo Alto. A warm breeze wafts quietly over the chaparral. Christopher Langdell and Bruce Ackerman arrive on time (which is to say early). Langdell is early be-

Not surprisingly, this rather heterogeneous and unholy admixture of jurisprudential genres is unwittingly expressed in judicial opinions. It is true, of course, that we are a long way from doing feudal policy analysis, but judges have been known to switch from legal formalism to legal realism with just one verb. Indeed, the judicial opinion remains one forum in which one can find legal process subjects doing legal realist things to some hapless and unsuspecting formalist direct object — all in a single sentence.

At the same time, however, it is difficult to imagine judges consciously deploying the dissociative aesthetic in judicial opinions. And to the question, "Is it law?", it would be hard to give a positive answer. The dissociative aesthetic seems threatening to, and ultimately incompatible with, the other aesthetics of law (and in that sense, with law itself).

This incompatibility may mean, of course, that the judicial opinion will be a significant check on the spread of the dissociative aesthetic. But that is not the only possibility worth considering. To the extent that the dissociative aesthetic becomes an important organizing aesthetic in social and economic life, it is the judicial opinion that will have to follow suit or lose authority. One can easily imagine a situation in which certain economic and social relations come to be organized in the mutable and rapidly rearranging forms of the dissociative aesthetic. Business arrangements, intellectual property transactions, capital formation vehicles, even information dissemination, might morph at such a rapid rate that artifacts beholden to other aesthetics (such as judicial opinions) would become largely irrelevant — antiquated, clumsy, no longer terribly credible as mechanisms of social control.[194] Judicial opinions would function less as authorities that regulate transactions and more as minor irritants to be circum-

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cause he is a numerologist and punctual to a point, Ackerman because he has misplaced his watch. Finding a seat next to the guest of honor, Justice Sandra Day O'Connor, they immediately engage in a discussion over the transformative moments of American law. They have all drawn their chairs in a tight circle, hoping to dissuade the young Jerome Frank from joining them. Duncan Kennedy, meanwhile, is on the back porch, smoking a cigarette. Lord Coke apparently refused to show, miffed that Blackstone had also been invited.

Impossible?

Sure, but instructive.

194 In the nineteenth century, the railroads were quite confident of their economic security. They were confident because they mistook their product market as railroading, when in fact it was transportation. Theodore Levitt, *Marketing Myopia*, HARV. BUS. REV., July–Aug. 1960, at 45, 45. The same might be said of judicial opinions (and perhaps even of statutes): legal professionals, particularly judges, seem to be quite confident of the security of their authority. But perhaps they are making the same category mistake as the railroads, believing that the product market is positive law, when in fact the market may turn out to be social control. *Cf.* PAUL CAMPOS, JURISMANIA 179–88 (1998) (questioning the American legal system's prospects for survival).

vented.[195] To explore this possibility, a great deal of work would need to be done. But the observation at least cautions against the complacent supposition that because the reigning legal aesthetics are currently incompatible with the dissociative aesthetic, the latter is irrelevant to the fate of law.

As for academic legal thought, it is now pervasively pluralized: its claim to say what the law is — never very great to begin with — must now be generously shared with the social sciences and the humanities. This pluralization of the study of law entails a proliferation of idioms, methods, and the like. In the classic academic scenario, a "new" form of knowledge is "discovered." A novel method is developed. Conferences are held. Symposia are organized. And a few years later, no one remembers. All that is left are the rows upon rows of silent, bound books neatly shelved in the law library. Differentiations are produced. But they lack staying power.

There is a kind of aesthetic logic at work here. The acceleration of differentiation (perspectivism) exceeds the capacity for integration, yielding a hypertrophied differentiation. And sooner or later, there is a moment at which the accumulation of differentiations comes crashing down, leaving the legal self flailing around in intellectual mush.[196]

V. AESTHETICS AT WORK

As suggested earlier, the presentation here partakes of each aesthetic. Indeed, the reader (depending upon her aesthetics) can take away different experiences from this work. The classic law review outline layout used here bespeaks a grid aesthetic — one which encases each aesthetic into a certain distinct object-form. Much as we may disparage the grid, it is not possible to give it up. And there is value in grid-like understandings. Identification of the four aesthetics enables certain diagnostics: as one learns to identify an aesthetic in a particular legal regime or in the work of a particular legal thinker, one begins to know what to anticipate, what to look for next. Meanwhile, a reader more taken with the energy aesthetic will recognize a movement here, a narrative flow that suggests how each aesthetic emerges from the prior ones. As for the perspectivist, she will pick up the cues in this Commentary that suggest that each aesthetic is but one way of

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[195] *Cf.* Lawrence Lessig, *Antitrust and Verify: Will Microsoft Admit It Has Lost?*, NEW REPUBLIC, July 23, 2001, at 14 (describing in amusing detail how Microsoft and the popular media are recasting the appellate court opinion as a victory for Microsoft).

[196] In this sense, oddly enough, the postmodern celebration of the play of surfaces is not so much an embrace of dissonance as a defense mechanism to ward off a plunge into the depths (which would yield a much more serious kind of confusion). For a celebration of the play of surfaces, see Stanley Fish, *Play of Surfaces*, *in* LEGAL HERMENEUTICS: HISTORY, THEORY & PRACTICE 297 (Gregory Leyh ed., 1992).

apprehending and experiencing law. Moreover, she will understand reflexively that each aesthetic in this Commentary is itself apprehended and experienced from within some aesthetic. The thinker who appreciates the dissociative aesthetic will come to understand that the simultaneous melding and disintegration of legal identities renders the project pursued here, or indeed any serious intellectual project in law, in some sense impossible. Finally, for those who experience law in terms of all the aesthetics, a great number of jurisprudential problems become at once clear, rationally insoluble, and no longer terribly interesting.[197] Though each reading provides a unique angle on this work, each one in isolation is necessarily incomplete and skewed. While it is true, of course, that any of these aesthetics can be ruthlessly deployed to subordinate all the others, this subordination is contingent. (It works until it doesn't.)

Experiencing each aesthetic in a way faithful to its own form is no easy task. It is not the sort of thing that one simply "chooses" to do. A legal aesthetic is something that a legal professional both undergoes and enacts, most often in an automatic, unconscious manner. A legal aesthetic helps to constitute not only the way one thinks, but also the law one encounters, the tasks at hand, and the already launched projects of an already constituted legal self. These are not the sorts of things that one routinely "chooses."[198] One can, of course, try and, over time, even succeed in abandoning one aesthetic to take up another. In the short run, one can even train oneself to use the tropes and images of a foreign aesthetic. But one cannot simply give oneself instructions to become a grid man or a perspectivist and expect changes to take hold by morning. One cannot exchange a form of thought, experience, or sensibility in the way that one can switch breakfast cereals or legal theories.

The aesthetics shape the ways in which we think law, do law, and imagine law's future directions. They shape its very identity. This is true both of the most ethereal legal theory and the most down-to-earth legal argument. And in shaping the apprehension, experience, and creation of law, the aesthetics leave behind as legal artifacts their marks — rules, principles, doctrines. The aesthetics fashion law as a presence, as an identity upon which we can reflect.

Each aesthetic emerges most prominently in a specific legal forum. The grid and energy aesthetics are most obviously manifested in appellate judicial opinions, learned treatises, and the like. Meanwhile, the

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[197] These problems include those mentioned earlier (reflexivity, rightness, and essentialism) and others. *See supra* note 23.

[198] Except, of course, within the reigning mythology of American law and legal studies, which typically frames law as if it were a priori subject to the dictates of reason, intelligence, and really good normative arguments.

preeminent site of the perspectivist aesthetic is the trial. As for the dissociative aesthetic, it is an experience generated mostly in the office — the lawyer brainstorming a theory of the case, the law student following the links of a Lexis or Westlaw search. Indeed, it may well be that the prime site for the dissociative aesthetic is in that realm which legal professionals typically call "the facts." Arguably, it is in the facts of an increasingly cybernetic, capitalist culture and its accelerating reconfigurations of previously stabilized social ontologies that law confronts the dissociative aesthetic.

The aesthetics are often intermeshed and combined in many different ways. One aesthetic can

> subordinate,
> envelop,
> disrupt,
> abstract, and
> otherwise "verb"

another aesthetic.

Part of this intermeshing can be understood in terms of the role of authority in law. Indeed, obeisance to authority compels legal professionals to deal with the aesthetics of generations long since past (regardless whether these aesthetics are helpful or confused, intelligible or nonsensical).[199] To some extent, authority is accorded to the past by virtue of "methodological" legal precepts — stare decisis, controlling case doctrine, argument by precedent. Sometimes law defers to the past in more openly "substantive" ways — deference to tradition, reliance interests, expectations. These explicit requirements of obeisance to legal authority are themselves sufficient to create a combination of different aesthetics. But even apart from such explicit legal commitments, the aesthetics of law are inscribed in much more resistant and enduring materialities: artifacts, practices, habits, professional formations, institutional infrastructures, architecture, and the like.

There is another reason why the aesthetics are rarely seen in pure form. In regulating its various objects, law must perforce work through forms, styles, images, and tropes that are appropriate to its object. Accordingly, any given law will integrate or internalize some of

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[199] For example, it may be that the constitutional distinction between commerce among the several states and local commerce has become, in contemporary circumstances, conceptually unintelligible. *See* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 129–30 (arguing that commerce reaches "practically every activity of social life"). Nonetheless, the compulsion to observe legal authority seems to require an effort to render the distinction intelligible. At least our Justices seem to feel this way. *See* United States v. Lopez, 514 U.S. 549 (1995).

the aesthetics associated with its objects (even as it represents these objects in terms of a legal aesthetic). There is a kind of seepage from the forms of facts. A simple example is *Roe v. Wade*:[200] The scientific idiom used by Justice Blackmun to set constitutional standards for state abortion laws tracks the growth of the fetus.[201] In terms of the classic constitutional means/ends test, it is an unusual instance when a state interest increases in tandem with the growth of its object. One can see this seepage from the forms of facts to the forms of law everywhere — in everything from regulation of commerce[202] to the law of drug use.[203]

It is important to understand that there is also a reverse process at work. Often the facts of cases arrive already thoroughly juridified. This means that the identity of the facts or the case is already fashioned in a legalist aesthetic.[204] This point is important because the contest of aesthetics is played out not simply in terms of the identity of law, but in terms of the characterization of facts.

Legal aesthetics come to organize social life in part through the ways in which laws apprehend facts and thus form the "fact-fields" in which the aesthetics operate. This point is perhaps most evident in the law school classroom. When a law professor concocts a legal hypothetical and asks, "What should the judge do in situation *X*?" we often forget that situation *X* is already aesthetically charged. The way in which the law professor frames the legal hypothetical — the aesthetics of the facts, so to speak — makes it more or less difficult to resolve the hypothetical within this or that aesthetic. For instance, the professor can describe a particular transaction in a fairly grid-like way — thus facilitating grid-like solutions — or she can go perspectivist in describing the facts, in which case the choice of regime will be inextricably linked to the context or point of view. Of course, this aesthetic lesson may be part of the point: the function of legal education may be not simply to impart a working knowledge of the law, but through this effort, to inculcate sub rosa a certain aesthetic of social and economic relations.

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200 410 U.S. 113 (1973).

201 *See id.* at 164–65.

202 *See* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1199–206 (1989).

203 *See* MANDERSON, *supra* note 8, at 143–53.

204 For law students this is almost always the case: they often learn of sundry social and economic transactions for the first time in law school, so their apprehension of the "reality" or "essence" or "character" of these transactions is a legalist one. The social and economic "realities" learned by law students thus seem strikingly amenable to regulation and manipulation through law.

VI. THE CONTEST OF AESTHETICS

While the aesthetics can meld into hybrids, they can also conflict. Whether conducted in the realm of facts or law, these aesthetic conflicts are negotiated in stylized and highly elaborated (though often arrested) disputes. Indeed, a great many legal arguments in appellate courts tend to devolve explicitly into these highly patterned aesthetic disputes. While it would be possible to provide a number of different combinations in the battle of the aesthetics, two strike me as most developed, entrenched, and important.

A. The Battle of the Aesthetics: Grid vs. Energy

The collision of the grid aesthetic and the energy aesthetic is well known in terms of various binary oppositions:

> Legal Formalism vs. Legal Realism,[205]
> Rules vs. Standards,[206]
> Formal Reasoning vs. Functionalism,[207] and
> Formalism vs. Instrumentalism.[208]

The opposition of the two aesthetics seems to recur in every field of law, in contexts as narrow as fox hunts to those as broad as the constitutional structure of the federal government.[209]

In one sense, it is not surprising that legal disputes (in appellate courts and in law review articles) should be framed in these patterned aesthetic terms.[210] One would expect that, over time, the rehearsal of legal arguments would become organized in terms of those recurrent oppositions most difficult to resolve.[211] These, of course, will often be aesthetic in character. Indeed, once a dispute becomes explicitly aesthetic, rational argument has reached a kind of terminus. Once a dispute becomes explicitly a contest of aesthetics, there is not a whole lot more to say other than, "Well, that's just the way I see things." The obvious reply, "Well, you should see things my way," is perhaps worth

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205 *See supra* pp. 1053–54.

206 *See supra* note 45.

207 *See* Cohen, *supra* note 46.

208 *See* KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 153–59 (1996).

209 *Compare* Pierson v. Post, 3 Cai. R. 175, 177–80 (1805) (determining ownership of a dead fox by reference to precedent and principle), *and id.* at 180–82 (Livingston, J., dissenting) (reaching the opposite conclusion through a policy analysis), *with* INS v. Chadha, 462 U.S. 919 (1983) (asserting that separation of the branches of the federal government should be governed by a rule), *and id.* at 967–1003 (White, J., dissenting) (favoring a standard).

210 Often, of course, the substantive context colors the aesthetic dispute so thoroughly that the aesthetic character of the dispute goes unnoticed.

211 Certainly, the whole litigation process from pre-filing to final appeal can be seen in this way.

a try, but it is just as likely to meet with the answer, "I tried, but I just don't see it that way."[212]

B. The Battle of the Aesthetics: Grid and Energy vs. Perspectivism

The perspectivist aesthetic presents a challenge to the image of law as objective, neutral, and universal. Indeed, perspectivism reveals the images of objectivity, neutrality, and universality as already animated by a closet particularity, partiality, and bias.

For many grid and energy thinkers, perspectivism is a perverse, upside-down vision of law. Grid thinkers and even many energy thinkers demand a law that expunges or suppresses partiality, individuality, and personality. Perspectivists, by contrast, arrive on the scene only to dismantle all this hard work of self-effacement.

Not surprisingly, adherents to the grid and energy aesthetics display an acute allergic reaction to the perspectivist aesthetic. Their sense of outrage is akin to the protests of the conservative art critic who looks at abstract expressionism and declares, "This is not art!" In the law schools, the cry is, "This is not law!"

Perspectivists, meanwhile, return the compliment. From their vantage point, both the grid and energy aesthetics seem naïve. For the grid thinkers, the acute exercises of conceptual subdivision are to be celebrated as "rigor." But from the perspectivist aesthetic, these finely wrought distinctions are pointless overkill. Given the multiplicity of frames of reference, no grid is hard and fast. Why then spend time refining the grids? Further specification does not produce greater rigor; it simply produces more finely wrought conceptual subdivisions.[213] Because no grid lasts very long in a perspectivist world, the production and mastering of these subdivisions seems, from an intellectual standpoint, a poor investment choice. The same could be said for ever more refined attempts to harness energy. If anything, conceptual subdivision within the energy aesthetic is more difficult and less successful.

From a perspectivist angle, the insistence on conceptual refinement can easily seem like an aesthetic fixation. And the professional personae associated with the grid and energy aesthetics — the master of the grid and the lord of energy — can easily seem like quixotic figures. As for the kind of academic discourse engendered by the grid and energy aesthetics, they, too, can easily seem pointless. To the question once asked by the grid thinker, "Is this case correct?", the perspectivist wonders (with more or less incredulity), "Correct by reference to what?" To the quintessential question in the energy aesthetic, "Where

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[212] *See infra* pp. 1111–12.

[213] *See* Schlag, *supra* note 58, at 906–12.

should we go?", the perspectivist queries, "What do you mean *we*?" or more radically still, "What makes *you* think *we* are going somewhere?"

The prototypical questions of the grid and the energy thinkers engender "rightness disputes" — the kind of ritualized academic argument that presumes that the point of inquiry is to determine through a shared process who is right and who is not.[214] But for the perspectivist, such a shared discursive touchstone is often unavailable.[215] The absence of the touchstone has a depressive effect on the value of rightness disputes as well as on the motivation to engage in such disputes. Moreover, a single-minded focus on rightness disputes tends to overshadow and even stifle any number of other, perhaps more promising, intellectual enterprises: edification, demonstration, and creation, among others. These enterprises will not get very far if they are continually conscripted into a conversation about why they are "right" or "correct." If everyone must give epistemological warrants for his or her intellectual activity, then we face the truly unsavory prospect that everyone will be doing epistemology all the time.[216]

C. Rightness

Which aesthetic is the right one? That question may not be the right one. Consider that the ways in which one can be right, if at all, depend on the aesthetic in place. Rightness — this need or desire to get things right — is something that can be satisfied within the grid aesthetic ("The real meaning of common carrier is . . .") and even in a modest form within the energy aesthetic ("But the defendant's negligence was far greater than . . ."). But as soon as one gets to the perspectivist and dissociative aesthetics, the rightness question becomes problematic. Once we are within the perspectivist aesthetic, the

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214 Duncan Kennedy disparages "rightness" and rightness claims. KENNEDY, *supra* note 10, at 340–42, 364. But in the perspectivist or even dissociative aesthetic, it is not rightness disputes that are offensive, but rather the social demand that one engage in a highly stereotyped practice of coercive argumentation: "You are wrong for the following 33 reasons, and you have committed 25 mistakes (11 of which are fundamental), whereas I am right for the following 41 reasons. Also, 4 out of 5 Yale Law School professors agree with me."

215 Not surprisingly, perspectivists tend to be much more comfortable with the notion of law as a kind of fiction. The celebration of narrative and the insistence on disturbing the distinction between fiction and nonfiction is a crucial aspect of some critical race theory. *See, e.g.*, RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE 190–211 (1995); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 73–79 (1991); Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 7–13 (1985).

216 One of the more bizarre, though prevalent, effects of protracted rightness disputes is that the antagonists become so focused on the demonstration of who is right and who is not that the object of their dispute recedes into the background. At the extreme, their discourse becomes little more than a constellation of rightness arguments. The original object of arguing comes to serve mainly as the occasion for the practice of rightness arguments.

shared touchstone for deciding who is right has a vexing tendency to disappear. Within the dissociative aesthetic, the problem of rightness becomes even more taxing: right about what? Quite obviously, those thinkers beholden to these last two aesthetics will have a hard time showing that their aesthetic is "right" (in any deep sense of the term). They will also, if they are true to their form, be far less interested in doing so.

Indeed, to approach the law in terms of rightness or truth is itself a partial standpoint, one which eclipses other takes on law (including most topically, the aesthetic). Put in less grid-like terms, rightness is not simply "a claim" but also a state of affairs or a state of mind in which we operate.[217] To say that rightness games are partial is very far from a knockdown argument. But then again, perspectivists are very far from thinking that there are many interesting knockdown arguments to be made in law. In fact, from a perspectivist angle, there is often an inverse relation between the logical necessity of an argument and its significance: The more "knockdown" an argument appears to be in legal studies, the more it will be based on an aesthetic so formalized as to render the argument irrelevant, uninteresting, or both. The more one is swayed by the perspectivist and dissociative aesthetics, the less interesting and less pressing rightness questions become.

But which aesthetic is the right one? The question, understandably, does not go away easily. The grid and energy aesthetics, together with the roles they fashion for the legal professional, are deeply ingrained within legal culture and figure profoundly in our law and our professional selves. This is why in law — as contrasted, say, with poetry or painting — rightness cannot be put so easily aside.

But which aesthetic is the right one? Each aesthetic contributes to and detracts from our apprehension, experience, and representation of law. There is a self-fulfilling truth to each aesthetic: the enactment of each aesthetic furnishes the "grounds" for its truth. Even the grid aesthetic, which might seem naïve, nonetheless contributes significantly to the actual structuring of contemporary law and the legal self. In that sense, it cannot simply be disregarded as wrong. At the same time, of course, no aesthetic encompasses or triumphs over any of the others definitively (except, of course, within its own world).

What happens then to rightness in the later aesthetics? It is not so much jettisoned as it is demoted in favor of other enterprises. Rightness is put aside, not because it has been defeated in "rightness dis-

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[217] KENNEDY, *supra* note 10, at 364 (describing rightness as a way of dealing with "despair, depression, and internal contradiction").

putes," but because once demoted to one concern among many, it loses its claims to universality and intellectual supremacy.[218]

To understand law as already shaped in these aesthetics is to recognize that no one aesthetic "gets things right" in any transcendent sense. Each aesthetic contributes to the conceptual and material construction of the law that is then, in turn, apprehended and expressed through the various aesthetics (and so on).

D. Arrested Dialectics

There is a kind of arrested character to the rightness disputes and the battles of the aesthetics. One eventually discovers that the antagonists are forever skewing the game by presupposing the validity of their own aesthetics.[219] This is not a criticism, but rather an observation about the inevitably aesthetic aspect of argument.

Sometimes, of course, a dialectic becomes arrested precisely because one aesthetic triumphs over the others. This sort of "triumph" enabled us earlier to link, for instance, an aesthetic to a particular jurisprudence: grid to formalism, energy to legal realism. At some point — *where* is a different question — an aesthetic becomes pathological.[220]

On the other hand, since it is law that is at stake here, it is rather difficult to give up on the idea of getting it right. To put it another way, "getting it right" — whether a coherent notion or not — is very much a part of what it means to think or do "law" (not to mention, academic work).

VII. SO WHAT? HOW IT MATTERS

To appreciate the aesthetic dimension of law is to understand that the forms of law mark not only the law we apprehend as already in place, but also the ways in which we think and do law and the ways in which we imagine its future. This is true of both the most ethereal legal theory and the most down-to-earth legal argument. There is thus an unavoidably creative moment (not necessarily yours or mine) in the construction of law, a moment that does not answer to choice or reason.[221] This does not mean that we cannot sometimes choose or reason about a particular aesthetic mode — clearly we can — but it does

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218 Except, of course, within those aesthetics in which rightness is accorded universality and intellectual supremacy.

219 In the context of the determinacy/indeterminacy disputes at the end of the twentieth century, David Kennedy shows how the attempt to resolve the disputes unavoidably depends upon and is skewed by an aesthetic commitment on the very question at issue. *See* David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377 app. (1985).

220 *See infra* section VII.D, pp. 1115–17.

221 . . . except, of course, if the aesthetic in place has already situated choice and reason as being in charge.

mean that any such "choice" or "reasoning" will itself have been shaped by some aesthetic.

Well, so what?

If this is still not enough for you and me, it is in part because we are enthralled by the energy aesthetic. The demand that all of this should "go somewhere," as opposed to simply revealing to us where we are, is a telltale sign of the energy aesthetic — the notion that law is and should be on the move. This image — one that shapes the dominant normative orientation of legal thought — is so prevalent that it warrants a response.

A. The Politics of Aesthetics: Form and Substance

The various aesthetics, as suggested, are more or less conducive to various political or ethical tendencies. Perhaps a more helpful way of putting it is that political or ethical tendencies are themselves expressed in terms of the various aesthetics. It would be difficult, for instance, to articulate what we call "progressive legal thought" without the energy aesthetic and its images of energy, motion, and change. Similarly, it would be difficult to articulate multiculturalism or identity-politics without perspectivism. And similarly, it would be difficult to articulate conservatism without at some point relying on the notion of status quo and some notion of the grid.

Not only do political tendencies depend upon aesthetic commitments, but arguably, it is also an intrinsic aspect of a political tendency (progressive change, multiculturalism, conservatism, etc.) to assert and affirm its own aesthetic. To put it yet another way, none of the political tendencies mentioned above are indifferent to aesthetics. To be a conservative or a progressive is not just to take certain "substantive" positions, but to be committed to a particular aesthetic of social and political life.

At the same time, a political tendency is often obliged to play on someone else's aesthetic turf. Sometimes, even the insistent assertion of one's own aesthetic will encounter resistance, perhaps fatal resistance. Recall the failed attempts of the Supreme Court at the turn of the twentieth century to limit Congress's commerce power by drawing a grid-like distinction between commerce, on the one hand, and manufacturing, mining, and agriculture, on the other.[222] Or recall the "all deliberate speed" and "prompt start" formulae of *Brown II*,[223] which despite the invocation of an energy aesthetic, failed to summon the en-

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[222] *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[223] Brown v. Bd. of Educ., 349 U.S. 294 (1955).

ergy necessary to overcome the inertia of well-entrenched, architecturally inscribed dual school systems.[224]

Another reason that a political tendency cannot simply be yoked to a particular aesthetic is that there are political objectives that each political tendency *will strive to reach* (the energy aesthetic), certain *positions it cannot surrender* (the grid aesthetic), *contextual considerations* that must be accommodated (the perspectivist aesthetic), and things that must be *fudged* because they cannot be stabilized (the dissociative aesthetic).[225]

All of this is to say that despite its own irreducible aesthetic, each political tendency is also driven by its "substantive commitments." And in service of those commitments, any political tendency will at times opportunistically compromise or even jettison its own aesthetic. Arguably, within any political tendency there are trade-offs, conscious or not, between form and substance, aesthetics and politics.

Viewed from the dissociative aesthetic, this very point is suspect. Indeed, it is not clear at all that politics and aesthetics are sufficiently well differentiated either conceptually or as social formations to allow us to speak cogently of a "trade-off." The relation of form and substance only arises as a political problem once form has been somehow differentiated from substance.[226]

The felt need as well as the attempt to link form to substance and law to politics depends upon a prior separation of the two. Simply to presume an unproblematic separation is to eclipse an important point about politics and power: if law is an aesthetic construct, then the moment at which an aesthetic is asserted or deployed is a moment of power.[227] This is the point at which someone affirms a certain distinction — the grid — or asserts a normative goal — energy. The dissociative aesthetic enables us to step back and look askance: Why picture

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[224] *See* L.A. Powe, Jr., *The Road to* Swann*: Mobile County Crawls to the Bus*, 51 TEX. L. REV. 505 (1973) (recounting the efforts in southern states to circumvent school desegregation). For an empirical account of the meager effects of *Brown v. Board of Education*, 347 U.S. 483 (1954), on segregation, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–169 (1991).

[225] This is why politics is fraught with recurrent paradoxes — conservatives engaged in activism, liberals who think like fundamentalists, anarchists who insist upon secret governmental organizations, civic republicans who refuse to talk, and so on.

[226] Indeed, that is one of the practical uses of the dissociative aesthetic: it allows us to see that a distinction that may have seemed sensible — form versus substance or law versus ideology — in fact does not stick.

[227] It is also a moment that can be variously described as "creative," "constructive," "violent," and many more things. The attempt to identify the conceptual character of this moment is difficult (to say the least), precisely because it is an aesthetic imposition that escapes determination by reason. It is the artistic, rhetorical, political moment par excellence. It is important to avoid romanticizing this moment. It may be a creative moment, but it is one with very high stakes, and it is not necessarily benign. *See supra* note 47.

the situation in terms of a distinction, or a goal, at all? Why are these positions helpful or even possible?

B. On Being Taken in

There are, of course, rhetorical uses of the aesthetics. To the extent that these aesthetics are recognizable forms in law or legal thought, it becomes possible to characterize positions, arguments, and views as instances of this or that aesthetic. In other words, a "substantive position" can be characterized/distorted, for instance, as energy-like and then be criticized in terms of the vices characteristic of the energy aesthetic. Such rhetorical efforts can work precisely because we are accustomed to seeing law, legal arguments, theories, and the like in terms of these aesthetics. Consciously or not, we will read "substantive positions" in terms of these aesthetics.

To the extent that legal professionals are unaware of the aesthetics of law, they can be induced or seduced into accepting political or moral conclusions that they would not otherwise accept. A wonderful example is provided by a typical reaction to the opinions in *Griswold v. Connecticut*.[228] Typically, law students want to find the "uncommonly silly law"[229] banning the sale of contraceptives unconstitutional. They also wish to recognize a constitutional right of privacy. Nonetheless, they experience Justice Stewart's dissent, which denies the existence of a constitutional right of privacy, as a solid and compelling argument. Justice Stewart writes:

> As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law . . . .
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> . . . .
>
> What provision . . . then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.[230]

Why is this argument compelling? In particular, why does it seem compelling to legal professionals, including possibly Justice Stewart himself, who wanted to find this "uncommonly silly law" unconstitutional?

By way of answer, notice the aesthetic representation of the Constitution in Justice Stewart's dissent. Justice Stewart repeatedly divides "The Constitution" into discrete parts: discrete provisions, distinct constitutional amendments, separate cases. He invokes and evokes the

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[228] 381 U.S. 479 (1965).

[229] *Id.* at 527 (Stewart, J., dissenting).

[230] *Id.* at 528–30.

grid. If Justice Stewart's argument seems compelling, it is because he has pictured the Constitution as an inert thing subdivided into "parts" and "provisions," none of which contain the words "right of privacy." Correspondingly, Justice Stewart exemplifies the image of the ideal grid judge. The boundaries of the law have already been set. The grid is in place, and the question is: can a judge *find* a right of privacy anywhere within the boundaries of any part of the Constitution? No. Look in any part of the Constitution. It's just not there. So if Justice Stewart's ultimate conclusion seems convincing, it is largely because his grid-like depiction of the Constitution is compelling. Justice Stewart's Constitution and his argument are clear, fixed, static, and solid. His opinion has the sobriety of law.

By contrast, Justice Douglas's opinion for the Court reads more like an amateur exercise in metaphysical poetry than law. Justice Douglas's Constitution is in motion. Indeed, it is so much in motion that its trajectories can seem somewhat confusing. According to Justice Douglas, the specific guarantees of the Bill of Rights yield certain "emanations"; these in turn form "penumbras."[231] In this case, those penumbras "create" (a word used repeatedly by Justice Douglas) a "zone of privacy."[232] His opinion evokes motion, expansion, sweep, light, and shadow.

One will recognize the energy aesthetic at work. Justice Douglas's Constitution is energized: it moves; it does actual work. Strikingly though, his argument seems unpersuasive. The reason is simple: it looks like all the reasoning is being done by a patchwork of images and metaphors. The reader almost cannot fail to recognize that Justice Douglas's images are doing all the work (and that these images seem contrived). This contrasts sharply with Justice Stewart's opinion, in which the aesthetic remains hidden. It is hard to be taken in by an aesthetic when someone throws it in your face, which is precisely what Justice Douglas does. Notice, however, that once the aesthetics are revealed, Justice Stewart's image of the Constitution as a collection of parts organized in an inert grid is no more obviously compelling than Justice Douglas's view of the Constitution as extending the protection of rights. In fact, once we cast Justice Douglas's hyperboles aside, what he does for constitutional rights in *Griswold* is not very different from what Chief Justice Marshall did somewhat more elegantly for the powers of Congress in *M'Culloch v. Maryland*.[233]

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231 *Griswold*, 381 U.S. at 484.

232 *Id.*

233 17 U.S. (4 Wheat.) 316 (1819). Stripped of its flamboyant images, Justice Douglas's rhetoric is an altogether reasonable argument for "implied rights" — one that parallels Chief Justice Marshall's argument for "implied powers." *See id.* at 359.

The point is that one can be taken in by the aesthetics of law. A position that may seem inexorable, or compelling, may upon reflection turn out to be an effect of operating or thinking within a particular aesthetic — one that is itself neither necessary nor particularly appealing. In *Griswold*, for instance, once one recognizes Justice Stewart's deployment of a grid-like aesthetic, his opinion loses much of its rhetorical power.[234] Legal professionals can be taken in by aesthetic images for the simple reason that the aesthetics are taken to be the articulation of law itself. And one ends up, as often as not, working within an aesthetic that is not at all hospitable to one's own political or ethical views. The reverse, of course, is also true: one is sometimes taken in by a political or ethical view that is not at all conducive to one's own aesthetics.

C. The Construction of Self

Each aesthetic creates the self in its own image, and thus the intelligibility or appeal of a particular legal aesthetic is a function not just of the field to which it might apply, but of the self that experiences the legal aesthetic and its ostensible field of application. Moreover, in constructing the self in different ways, each aesthetic engages the self in different kinds of projects.

The grid situates the self outside its representation of law. The grid is thus associated with a style that effaces the self, leaving only what I will call the *formal self*. This formal presentation of self remains prevalent today among judges, lawyers, law professors, and law students. In their respective formal precincts — the opinion, the brief, the law review article, the moot court argument — these legal professionals seldom invoke the "I." The "I" is simply not supposed to matter. The effect of this erasure is to create an imaginary and highly abstract community of legal selves ostensibly connected to each other through the shared law of the grid. Legal professionals are supposed to think law and do law as if they all saw the same thing. The value of any formal self is a function of its mastery of the grid. The ideal formal self — the one most valued — is the one with the most detailed recall and the most complete mastery of the grid.[235] In the formal self, personality and personal idiosyncrasy are or should be erased, or at least subdued. Understandably, this sort of self seems controlled, re-

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[234] Much, but not all. Even after one has noticed the grid aesthetic, one might nonetheless be convinced that Justice Stewart gets the constitutional analysis right.

[235] Consonant with the linearity of the grid imagery, this mastery often goes by the name of "rigor."

pressed, and a bit cold.[236] Encountering this self feels like encountering a mask. One supposes that there is somebody behind the mask, but in fact, very often there is not; the self has become the mask. In its perfected and unattainable state, this self would be an exact mirror image of the grid: pure law.

In the energy aesthetic, the location of the self is unclear. The self can be the genesis, the vehicle, or even the master of law's energy. The energy aesthetic mobilizes the self for action. The self here is an *engaged self*, one that is moved by the forces of law, the experience of the push and pull of values and principles. The engaged self is itself a mover. Hence, the energy aesthetic is associated with prescriptive or normative thought: the "should" of law. The value of this sort of self is measured by its energy and efficacy: how many cases argued or heard, how many articles written, how much law created, or how much change produced. This professional self is on a mission; it is a crusader. To encounter this sort of self is to be swept up in a current of energy.

The perspectivist aesthetic is associated with a *decentered self*. In spatial terms, one can imagine the self positioned at many vantage points looking at an object in the center. But to describe the decentered self in this way is to relapse into the grid aesthetic. A more thoroughgoing perspectivism constructs the self as enacting a number of roles and personae. There is no single unitary self, but rather a plurality of enactments of self. Unlike the engaged self of the energy aesthetic, the decentered self isn't obviously going anywhere.

The dissociative aesthetic enacts a *dissolution of the self* — the moment in which the self is propelled through language, thought, writing, and social behavior without any obvious sense of self-control. In one sense, it is not obvious how this kind of self would connect in any way with the practice of law. In another sense, of course, this is the moment of thought, the moment when a reference or a distinction, or a conclusion that previously made a great deal of sense, makes no sense at all.

D. Pathological Aesthetics

Each aesthetic has its own "logic," which if left to its own devices, can spin out of control. Of course, deciding when that point has been reached will itself be, inter alia, an aesthetic matter, calling for an aesthetic judgment. At some point, however, each aesthetic produces illu-

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[236] A more severe diagnosis is a tendency to authoritarianism. *See generally, e.g.*, T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (Am. Jewish Comm., Studies in Prejudice, 1950).

sions of its own successes that, for various reasons, an individual or a community cannot sustain.[237]

For example, the endless subdivision of the grid aesthetic can give the impression that a serious and precise form of knowledge is being constructed. This impression may be "right." It also may be seriously mistaken in the sense that the only thing being constructed is a community of tenured people who subdivide things and then subdivide them further. The pathological expression of the grid aesthetic is precisely this sort of hypertrophied exercise in making distinctions and subdividing categories. It is possible for academic "knowledge" to lapse into this sort of exercise: the extended classificatory schemes of juristic science at the turn of the nineteenth century are an obvious example.[238] One suspects that the extraordinarily variegated and insular creations of contemporary analytical jurisprudence might be an example as well.

The energy aesthetic can also lead to its own pathology. With its sense of action, motion, and energy, this aesthetic yields the impression that something is happening. For those who are taken with the energy aesthetic, it is easy to believe that simply by enacting their aesthetic, by endorsing progress and transformative change, they are ipso facto contributing to this progress and change. But this may be an illusion wrought of an aesthetic that sees law as constantly on the move. In its most pathological expression, the energy aesthetic may lead thinkers to believe that they are getting somewhere when they are in fact simply staying in place, endlessly repeating the energy aesthetic to themselves and each other — the jurisprudential equivalent of Stairmaster.

The perspectivist aesthetic has its own pathology. The attempt to see or understand everything from every place at once may, in the end, yield no understanding at all. It's a fine line between collage and total garbage. The crimped and cramped gestures of some poststructuralist work, for example, display the contortions that result from trying to avoid any foundationalist or essentialist moment — an attempt that is, in an important sense, doomed to fail. Moreover, the attempt to take in all perspectives can simply lead to indecision or paralysis. *Tout comprendre, c'est tout pardonner.* A contrary pathology is also common: the celebration of perspectivism may turn out to be merely a vehicle for the privileging of just one perspective — namely, one's own.

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[237] The question when an aesthetic becomes pathological is an entirely different and contestable matter.

[238] *See supra* sections I.A–B, pp. 1055–58.

Left to its own devices, the dissociative aesthetic leads to a kind of nonsense and to an inability to say anything: as identities dissipate one after another, what can one say?[239]

In each case, the aesthetic becomes pathological because it becomes enthralled with its own logic and thus fails to recognize or encounter resistance. This tendency is not surprising, given that each aesthetic constructs or enacts the self in its own image. The grid thinker sees order everywhere, and if it is not ordered, he does not see it. The engaged self is energized and thus always on the move — even when she stays in place. The decentered self sees perspective everywhere from every vantage point, which ironically makes it see always the same thing: namely, a lot of perspectives. The dissociative self dissolves everything and risks leaving everything as it is.

VIII. CONCLUSION

Legal aesthetics are important because they help constitute law and its possibilities in different ways. Often these constitutive effects occur at a prereflective level.[240] To be under the sway of an aesthetic is not only to think in a certain way, but also to perceive law in a certain way, and even more, to encounter certain tasks and perform certain kinds of actions.

Recall the grid thinkers. They slice and dice. They maintain the boundaries. For them, the key issues in law are questions of limits and classification. To operate within a law cast in the grid aesthetic leads not only to the immobilization of law, but also to the effacement of self. People literally feel bound by law. Some people like the security of the grid (feels safe in here), while others find it debilitating (conceptual claustrophobia).

The energy thinkers evaluate, quantify, and commensurate. Law, for them, is not so much about drawing lines and setting limits, but rather about balancing considerations and furthering policies. People who operate within a law cast in the energy aesthetic do not just think in terms of motion, direction, goals, and ends; they also feel as if they and the law are going somewhere — somewhere good (progress) or somewhere bad (decline), but somewhere.

For perspectivists, law is in the eye of the beholder. Perspectivists understand law as a question of orientation, framing, and context. That is where the "real" work of law is done — in foregrounding dif-

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239 . . . that does not always and already unravel into some further subtext . . . and then into silence . . . .

240 Sometimes, of course, an aesthetic gesture, such as the invocation of a picture or the use of a metaphor, is a conscious and deliberate act. But even deliberate aesthetic acts work (assuming they do work) only because they tap into a prereflective aesthetic already in place.

ferent backgrounds, in shifting the frame, in triggering gestalt shifts. Law is a political and intellectual contest of competing perspectives, faculties, and commitments.

To enact or inhabit the dissociative aesthetic is to reel through differentiations that keep falling away. But it is also to appreciate law as a creative enterprise — collective and individual. Indeed, it is precisely at the point where the aesthetic coherence (or coherences) of law breaks down that the aesthetic dimension of law becomes so apparent. By contrast, if one has never had the experience of identities collapsing and of differentiation falling away, it is difficult to appreciate how both were formed and established in the first place. It is only upon reaching this last aesthetic that one can come to appreciate the extent to which law is itself an aesthetic enactment.