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Introduction

The General Outline of the Book

In the bleak, dreary December of 1995, well after the introduction of *Perestroika* and *Glasnost*, I was invited to teach a short course in Moscow on what was loosely termed "capitalist law." My job was to initiate my young disciples into such Western ideas as the corporate form, commercial paper, and the other main subjects of *lex mercatoria*, broadly defined. Having detected many a blank expression among their young, eager faces, I quickly discerned the reason for their consternation: No one ever took the trouble to familiarize them with the fountainhead of all private law – contract. The law school curriculum was saturated, it turned out, with courses about such subjects as public law and criminal law. Private law in general, and contract law in particular, were conspicuously left out. Although the Russian Federation has a new civil code, which includes a hefty section on contract,[1] it does not appear to fare very well within the

[1] Vladimir Toumanov, "Freedom of Contract and Constitutional Law in Russia," in A. M. Rabello and P. Sarcevic (eds.), *Freedom of Contract and Constitutional Law*, Jerusalem: Harry Sacher Institute, 241 (1998). Toumanov speaks about present-day freedom of contract in Russia as a foregone conclusion. His own documentary evidence for this claim, however, leaves much room for doubt. Although Article 8 of the Constitution of the Russian Federation guarantees the freedom of *economic activity* (an inherently ambiguous term), the Constitution does not appear to refer directly to freedom of *contract*. The new Civil Code has (only) one telling reference to this term. It now reads: "Citizens and legal entities shall freely conclude contracts. Compulsory conclusion of contract is not allowed, except in particular cases where the responsibility to conclude a contract is stipulated by the present Code, law or an obligation that was voluntarily undertaken." The message of this section can be easily understood if examined against the backdrop of the former Soviet legal regime. Under Soviet law, "citizens and legal entities" were indeed forced to enter into legal obligations, farcically called "contracts," e.g., for the provision of certain production quotas. For a clear account of this "contractual" period, see Allan Farnsworth and Viktor Mozolin, *Contract Law in the USSR and the United States*, Lanham, MD: University Press of America, Volume 1, pp. 12ff (1987). The new Code frees all Russians of this coerced relationship, which is a significant step forward, but hardly an internalization of the ethos of contractual freedom.

Russian academic circles. Several of my Russian colleagues (law professors, as it were) had only a very fleeting notion of what contract law might be all about, and an astounding lack of curiosity to find out. One could simply not engage them in a meaningful conversation about such a lackluster topic. I then took to the frosty, snow-covered streets of the capital, where a lively, although, by Western standards, primitive private economy was then shaping up. I could not fail to notice that all the transactions that were visible to the naked eye were either barter transactions or "real" (spot) contracts, that is, involving instantaneous exchanges of goods for cash. All cash payments were closely scrutinized for fear of counterfeit. No personal checks were ever accepted as means of payment. Russian banks, it turned out, did not issue checkbooks to their customers. No one, not even luxurious (and immensely pricey) hotels in downtown Moscow would accept travelers' checks as a means of payment, although both Moscow and St. Petersburg boasted one location each where travelers' checks could be cashed out by the American Express Company. It then occurred to me that Russian law schools were not interested in coaching their students in the intricacies of contract law, because Russians were not keen to engage in contractual behavior. The state did not encourage contractual behavior by generating tools of commerce (checks, letters of credit, a credible securities market), nor did it establish a good record as an enforcer of broken promises. As I observed the ordinary Russian people in their shops and farms, in their humble sidewalk booths, and in their plush modern establishments, these folks simply did not contract.[2]

[2] One immediately apparent reason for shunning contracts as a means of alienating rights within Russian society has to do with the widespread corruption of the bureaucracy and the court system. If to win a case one has to be more efficient than one's adversary in either bribing the judge or intimidating her, there seems to be very little significance to nominal promises. This insight, of a potentially unbridgeable gap between promise and performance, led some thoughtful reformers to suggest that Russia adopt private and commercial laws that are "self-enforcing," i.e., that do not have to rely on the court system for assistance in cases of repudiation and breach. See Bernard Black and Reinier Kraakman, "A Self-Enforcing Model of Corporate Law," *Harvard Law Review* 109:1912 (1996). This "self-enforcing" model that was suggested by Black and Kraakman (for more on "self enforcing" norms, see the next footnote) was actually acted on by the Russian authorities, and a new corporate code was especially crafted to accommodate its insights. But, like so many other well-intentioned Western-propelled blueprints for reform, it failed, as was readily conceded by its own authors: See Bernard Black, Reinier Kraakman, and Anna Tarassova, "Russian Privatization and Corporate Governance: What Went Wrong?" *Stanford Law Review* 52:1731 (2000). In this newer piece of scholarship, the authors suggested that no privatization of the Russian economy would ever materialize until the system is "cleansed" of the corrupt elements in its infrastructure; when the system is rotten to the core, even self-enforcement cannot resuscitate its failing spirit. In this book I wish to reach beyond this corruption-based explanation. How could one explain that Russian promisees were left at the mercy of corrupt officials with little or no hope of vindicating their just expectations? And why didn't the same corrupt system impede other advances of the human spirit, like art and the *belles lettres* or scientific achievement? It is submitted that bare promises, unlike science or literature, were not perceived as a subject worth fighting for; they fell prey to corruption due to their own intrinsic feebleness, rather than as a consequence of the contaminated nature of the enforcement system itself.

This does not imply, of course, that *some* contracts were not being negotiated, signed, and even kept on Russian soil. The country does have some futures markets, where sellers get current consideration in exchange for postponed promises. Trading in oil futures is a good illustration of this necessity. Many *commercial* enterprises (as distinguished from private individuals) must trade promises to stay afloat the tide. Some major consumer transactions (e.g., buying an apartment or a house) cannot depend on instantaneous delivery of the finished product. Most of these necessary transactions, however, take place either among repeat players or among commercial enterprises. *Repeat players* are economic actors who repeatedly offer the same kind of goods or services in the same market and depend on their reputation for their long-term survival. Repeat players are constrained to keep their promises regardless of the law's command, and independently of the willingness of the state to come to the rescue of disappointed promisees. Even in a state of absolute anarchy – "the state of nature" in Hobbesian terms – repeat players would have an incentive to keep their promises and to guarantee customer satisfaction.[3] Unsurprisingly, Russian repeat players are commonly engaged in contractual relationships.[4] Contracts among enterprises, also very common, are of great interest to the outside observer. Following the demise of the socialist regime, it became apparent that the default rate of interenterprise debt was staggeringly high.[5] The government tried to address this problem by allowing victims of contractual breaches to obtain punitive damages at a *daily* rate of 0.5% of the value of their claims. When the initial post-Communist hyperinflation was partially arrested,

[3] Contracts among repeat players are actually the prime example of "self-enforcing" legal norms, i.e., of norms whose enforcement does not depend on the coercive effort of organized society. If more than a single merchant offers the same kind of merchandise in a given community, none can afford to deliver less than the stipulated bargain, because potential customers might move their business elsewhere. This basic insight is well documented in the theoretical contract literature; see, for example, Anthony Kronman, "Contract Law and the State of Nature," *Journal Law, Economics and Organization* 1:5 (1985).

[4] In a famous article written in 1974, Marc Galanter offered a different view of the behavior of repeat players, which he differentiated from "one shotters." Galanter suggested that the most obvious characteristic of repeat players lies in their interest to maximize gains in the long run (rather than in each individual transaction). Their main strategy is to adapt to new rules, legal and otherwise, that can be used for the attainment of this goal, including a judicious use of the legal system and the development of alternative dispute resolution techniques. See Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of the Legal System," *Law and Society Review* 9:95 (1974). In a recent article, it was suggested that Russian repeat players do not conform to Galanter's model. They do not use restraint in suing defaulting debtors and are less innovative in adapting to the changing legal environment than their Western counterparts. See Kathryn Hendley, Peter Murrell, and Randi Ryterman, "Do 'Repeat Players' Behave Differently in Russia? An Evaluation of Contractual and Litigation Behavior of Russian Enterprises," *Law and Society Review* 33:833 (1999). It goes without saying that these empirical results do not contradict the tautological assertion that repeat players engage in contractual behavior more often than "one shotters."

[5] Kathryn Hendley, "Growing Pains: Balancing Justice and Efficiency in the Russian Economic Courts," *Temple International and Comparative Law Journal* 12:303 (1998).

this rate assumed draconian proportions. Everybody, promisors and promisees alike, immediately responded impulsively and lawlessly to this effort to ensure contractual compliance. Promisees delayed their lawsuits to the last day of the statute of limitations, in order to obtain the largest possible penalty, although it was quite unrelated to their actual losses. Promisors simply did not pay the penalties (and, quite often, they did not pay the principal amount of their obligations, either). To force them to comply, the state promulgated a rule that penalties could be levied directly against the bank account of the defaulting enterprise. Numerous enterprises immediately responded by conducting their respective money transactions outside of the banking system. In the end, the state gave up and repealed its *imprimatur* of punitive damages.[6] In spite, then, of the numerous contracts that are negotiated, relied on, and even fulfilled in Russia today, Russian contracts, and Russian contract law, still rest on uniquely shaky foundations.

It is crucial to understand that to opt out of contract is not a trifling matter. The entire market economy is based on contracts. So is the process of privatization, and, indeed, in the Russian context, the hope for a prosperous future, freed from the yoke of a heavy-handed central planner. Obviously, there has never been a conscious decision to opt out of contract, certainly not on the national level.[7] This stark reality "forced itself," as it were, on Russian policy makers against their better judgment. As long as this reality lingers on,[8] however, it is hard to imagine how the Russian Federation can hope to get under way toward its much hoped-for economic recovery.[9]

[6] The different stages of this ongoing saga are narrated in detail in Kathryn Hendley, Peter Murrell, and Randi Ryterman, "Punitive Damages for Contractual Breaches in Comparative Perspective: The Use of Penalties by Russian Enterprises," *Wisconsin Law Review* 639 (2001). See also, David Campbell, "Breach and Penalty as Contractual Norm and Contractual Anomie," *Wisconsin Law Review* 681 (2001).

[7] Even the Soviet regime, during the reforms introduced by the Gorbachev administration, was painfully aware of the necessity to introduce market economy thinking, including contracts, to the Soviet Union as a means of revitalizing the economy. A new concept – a "law-based state" (*pravovoe gosudarstvo*) – was coined in preparation of a limited transition to the family of market economies. See, in general, Donald Barry (ed.), *Toward the "Rule of Law" in Russia? Political and Legal Reform in the Transition Period*, Armonk, NY: M. E. Sharpe (1992).

[8] Some commentators, the more optimistic, point to the possibility of enforcing some obligations in court (although conceding that most litigants prefer, based on their experience, extrajudicial forms of dispute resolution). The most insistent among them are Kathlyn Hendley, Peter Murrell, and Randi Ryterman. See their joint article, "A Regional Analysis of Transactional Strategies of Russian Enterprises," *McGill Law Journal* 44:434 (1999). Most commentators do not agree.

[9] The broad issue of where Russia is heading, from an economic point of view, is far from being settled. The first years of "transition" were not very good, and the entire economy approached a total state of collapse in August 1998, when Russia defaulted on its foreign debt. In the last months of 1998, and much more so during 1999, important macroeconomic steps were taken that resuscitated the Russian economy in many important respects. For a few years the economy grew at the robust annual rate of up to 6%, the external public debt declined, the stock market was revived, the fiscal balance turned around from a large deficit to a small surplus, and inflation was meaningfully curbed. Many of these positive developments, however, were probably linked to temporary causes such as the rise in the prices of oil worldwide and the

But is the Russian aversion to the idea of contract really a permanent feature of the country's legal culture? Many starry-eyed observers routinely claim that this may not be the case. They point to the fact that during the seventy-odd years of Socialist dictatorship, the ruling Soviet ideology repudiated private property, and the snubbing of contracts could be expected as an offshoot of the broader proposition. According to this point of view, it is only a matter of time until the old lore vanishes, making room, in its retreat, for the revival of secure property rights and of contracts.

The central theme of this book, however, is that this interpretation of history is both short-sighted and misleading. In my view, the Russian antipathy to contracts is much more deeply ingrained. It reflects a set of values that are as ancient as Christian Russia itself[10] and has its roots way back in the tenth

sharp devaluation of the ruble. Structural changes of the economy, including meaningful deregulation and a revival of the small business sector, have not been seriously attempted and most of the country's riches are accumulated in the hands of a few oligarchs, whose good fortunes are viewed with hostility by the general population. In more recent times, the economy has slumped again and many observers are concerned that the short revival of 1999–2002 is not a sustainable phenomenon, especially if the oil bonanza reverses itself and oil prices start to decline. See, generally, David Owen and David Robinson (eds.), *Russia Rebounds*, New York: International Monetary Fund (2003). As this manuscript goes to press there has been another revival of the Russian economy, mainly attributable to the unprecedented prices of oil in the world markets. But even this temporary improvement on the macroeconomic level has only marginal, if any effect on the observed data regarding the keeping of contractual promises. Surprisingly, some commentators do not share this view. According to at least one paper, the overall current record of contract enforcement in Russia roughly corresponds to the record of all but the most advanced legal systems. See Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Salinas, and Andrei Sheleifer, *Courts*, World Bank publications online, http://www.doingbusiness.org/ExploreTopics/EnforcingContracts/Details.aspx?economyid=159. The authors' methodology seems to have left, however, a lot to be desired, as they relied completely on responses they solicited from local attorneys. In fact, the authors looked for evidence concerning the efficiency of enforcement of just two kinds of contracts, bounced checks and eviction of nonpaying tenants, and neglected to pay attention to the fact that Russian banks do not issue checks to their customers. Nor have they noticed the means of enforcement (in the case of tenant evictions) that hardly conform, on many occasions, to some of the basic tenets of the Rule of Law. A much more careful recent study has revealed that, "while problems with contract enforcement can occur in any economy, in the transitional Russian economy they have reached epidemic proportions." See Elena Vinogradova, "Working Around the State: Contract Enforcement in the Russian Context," *Socio-Economic Review* 4:447 (2006). An absorbing theoretical explanation for the Russian economy's difficulties to rise to the challenge of free markets is offered in Mancur Olson's posthumous work, *Power and Prosperity, Outgrowing Communism and Capitalist Dictatorships*, New York: Basic Books (2000). Olson's observations commonly assume, however, that the missing link between the Russian economy (and other unsuccessful economies) and prosperity is to be found in the structure of these economies, rather than in the deeper cultural reasons for the existing structure.

[10] This does not mean, of course, that Russia has never experienced brisk commercial periods in its history. Both Kiev in the south and some urban centers in the north, notably the ancient republic of Novgorod, dominated important trade routes to Scandinavia, Germany, Byzantium, and the Asiatic markets. Moreover, as late as the sixteenth century, travelers' accounts narrate village prosperity and construction boom in the cities to an extent unrivaled in the West. One

century. While history may teach us that no historical processes are ever irreversible, the transformation of this particular pattern of path dependency may involve a rather radical transformation of the Russian collective psyche and is not likely to transpire anytime soon. The benevolent Western world, which holds its breath in anticipation of the Russian integration into the larger family of contracting nations, with privatized institutions and a vibrant market economy, might have to continue to hold its breath for a long, long time.

It is not an easy task to identify a set of values or cultural tenets that uniquely characterizes a whole nation. They emerge out of its history, theology, art, and letters. They leave their mark on the spiritual achievements of the nation in science, politics, and war; in this volume I examine a large number of these cultural manifestations; a special emphasis is put on one glaring expression of the Russian spirit, the Orthodox Icon. As will become readily apparent, Russian Orthodox iconography far transcends its own (significant) artistic value. It is, in fact, a window into the Russian soul. Nor is it limited to a theological method of interpreting the world. It contains, in its own microcosmic form, an entire social order. This social order is designed to be immutable and to hold its ground against the changing *mores* and the ever-frivolous tides of time.

The normative justification of Western idea of contract is also based on an identifiable set of cultural assumptions. Contracts and icons can be pitted, then, one against the other, with our eyes set for discerning similarities on the one hand and inconsistencies on the other. My point is not that these two cultural constructs are merely *different*. Different entities can be united in marriage and thrive. The point is that icons and contracts are based on *incompatible* sets of values. Put differently, I maintain that an "icon society" cannot be, at the same time, a "contract society." As long as Russia is going to preserve its ancient affinity to the values represented by the Orthodox Icon, the market economy, privatization, and a host of other occidental manifestations of the human spirit will be kept at bay.

Here is my game plan, which I strive to keep as simple as possible. This introductory chapter contains a short essay on the centrality of the Orthodox

sixteenth-century traveler wrote that the whole territory between Moscow and Yaroslavl "abounds with little villages which are so full of people that it is surprising to look at them. The earth is all well-sown with grain, which the inhabitants bring to Moscow in such enormous quantities that it seems surprising." Another wrote: "Furs and wax are taken from there to Germany . . . and saddles, clothing, and leather from there to Tataria; weapons and iron are exported only by stealth or with special permission. . . . However, they export broadcloth and linen garments, axes, needles, mirrors, saddlebags, and other such goods." See Alexander Yanov, *The Origins of Autocracy*, pp. 2–3 (1981). The author is quick to comment, however, that this temporary wealth did not survive for more than a few decades and was quickly dissipated, without ever regaining its momentum, not later than 1571, when, as a result of the unfortunate Livonian War, Moscow was sacked by the Tatars. Many other cities were ravaged as well; their young warriors were slaughtered and many were imprisoned and enslaved. Nor is there any evidence that, even during the brief periods of commercial prosperity, were commercial contracts, involving future promises, executed between Russian traders and their domestic or foreign counterparts.

Icon in Russian culture.[11] It is an essential part of this exploration for at least two reasons. First, I wish to substantiate my claim that icons may be used as credible proxies for Russian culture in general. This claim is certainly not trivial, given the enormous contribution of the Russian genius to world culture in such diverse (and seemingly "Western," or universal) fields as literature, music, and dance, to name just a few examples. Second, I counter the possible contention that Russian icons are pan-Orthodox in nature as much as they reflect uniquely Russian cultural traits. True, the first icons were originally imported to Russia from ancient Byzantium. Similar icons were either imported to, or crafted in, the other vast territories of the Byzantine cultural sphere of influence, in such regions as Greece, Serbia, Bulgaria, and the Middle East. However, Russia developed, and brought to perfection, a wholly original iconographic style that sets it apart from its Byzantine origin. Serb icons, for instance, or those that remained in the Sinai Peninsula, with all their striking beauty and great spirituality, are decidedly un-Russian. The Russian icon appears to be a uniquely Russian phenomenon.

In all the ensuing chapters, I pursue a pairwise comparison between the ideas that gave rise to the concept of contract in the West and the cultural substratum – literary, theological, historical, and otherwise – that shines through the Russian icon. I try to detect the intellectual pedigree of each important contractual notion, and then consider its mode of acceptance, or lack thereof, within the Russian culture. The second chapter deals with Western *humanism*, its impact on the development of contract, and its conspicuous neglect in Russian culture and iconography. The third chapter repeats the same pattern by exploring Western *individualism*. The fourth chapter stresses the historical submissiveness of the Russian people to a strong central *authority*, and its relative absence in the West, also an important reason for the observed contractual behavior in the two cultures. The West developed, as is shown in the fifth chapter, a strong inclination to interpret *wealth* as a value. The Russians have always been of two minds in this matter, as is self-evident in their culture and iconography. This too contributed to the contractual disparities between Russia and the West. Chapter 6 characterizes Western culture, as well as Western law, as based on *reason* and *experience*, on man's rationally motivated inquisitiveness with regard to the phenomenal world. This method of validating propositions left a clear mark on the ascent of contract in the West, but it made only a tardy and faint entry into the Russian scene. The seventh and last chapter characterizes Russian society as an icon society, one that perceives the world through *images* and through its unique *theology of presence*. The West, by counterdistinction, has forsaken the predominance of images in its commitment to accommodate the *printed word*, again a powerful tool in the development of occidental contract doctrine. The book ends with a brief set of concluding remarks. None of the chapters, viewed in isolation, can carry

[11] A fuller cultural discussion of the meaning of icons in Russian culture is deferred to Chapter 7, infra.

the weight of the entire argument, but the *cumulative* effect of this comparison yields, it seems to me, an overwhelming landscape of incongruity, inconsistency, and conflict. When the whole evidence is weighed and considered, the argument transforms itself from speculation to certainty. Obviously, the evidence is gleaned from many different disciplines. It rips apart, as it were, the traditional boundaries between law, art, theology, history, economics, and sociology. It is a tall order, I know, but quite necessary, I submit, for understanding the otherwise inexplicable puzzle leading to the failure of contract in modern Russian society.

A Terminological Note About Contract

I wish to clarify on the threshold what I mean by a "contract." The notion of exchange is almost as ancient as human civilization. Abraham bought a piece of real estate from Heth, which later became his (and the other patriarchs') site of entombment. The biblical Divinity itself was quite keen on striking agreements, and was notably firm in exacting a harsh price for their eventual breaches. I do not refer to these forms of exchange as "contracts." As used in this study, the term must include at least the following two attributes. First, the parties must be free to forge their agreement as they wish, without regard to pre-existing forms. For example, a contractual agreement need not correspond to any particular preset prototype (e.g., sale of goods, a real estate lease agreement, or a contract of employment). It can be completely idiosyncratic (a promise to manufacture a five-wheeled car). I refer to this feature of modern contract law as "the freedom to deviate from contractual prototypes."[12] Second, it need not depend for its validity on simultaneous exchange. This means that "bare" promises should be enforceable, even if the parties intend to fulfill them in the remote future, and even if they are not supported by present consideration. I refer to this feature of modern contract law as the "binding power of bare promises."[13]

For the modern Western mind, both of these properties, the freedom to deviate from contractual prototypes and the binding power of bare promises, are

[12] Although modern, the freedom to depart from contractual prototypes has it roots in ancient Roman Law, which recognized, at least in principle, the notion of the *contractus innominatus*, or the contract without a name. The closest paradigm of the *contractus innominatus* was obtainable by a rather simple method of contracting called *stipulatio*.

[13] The distinction between instantaneous exchange and executory promises and the binding effect of the latter came into being in the Renaissance. Chapter 2, infra, develops this legal theme within its historical perspective. Thomas Hobbes, in his *Leviathan* (1651) noted (in Chapter 14) that "one of the contractors may deliver the thing contracted for on his part, and leave the other to perform his part at some determinate time after, and in the meantime be trusted; and then the contract on his part is called a pact, or covenant: or both parts may contract now to perform hereafter, in which cases he that is to perform in time to come, being trusted, his performance is called keeping of promise, or faith, and the failing of performance, if it be voluntary, violation of faith."

more or less taken for granted. But this need not necessarily be the case. Come to think of it, it is not immediately apparent why the state should commit its coercive power to enforce some idiosyncratic private preferences, idly committed by one individual to another.[14] This puzzle is further aggravated when we consider that rather than finish off with their highly personalized set of preferences by an instantaneous exchange, the parties choose to procrastinate, and then to burden the keepers of the peace with the task of enforcing them at great public expense. But these are the vagaries that modern Western contract law goes by,[15] and it is in this sense that contractual behavior is notoriously lacking in Russia today.

Icons, Art, and Ideas

Many Russian (and non-Russian) icons are great works of art. They often radiate a soft translucent air of spirituality that illuminates the object from within and furnishes it with a great sense of serenity and beauty. Nevertheless, icons have never been produced, venerated, or valued for their mere artistic value. In that respect they differ greatly from most other artistic manifestations, whose value is largely attributable to their aesthetic characteristics. A Monet or a Velásquez, for instance, is valued precisely because it stimulates in its viewers an agreeable aesthetic sensation, while the "story" that it tells (say, water lilies resting in a pond, or a young *infanta* choked in her intricate girdles) is of a decidedly secondary interest.

This is hardly the case with icons. Icons send messages. These messages encrypt literary missives. They always seem to be making some sort of a statement, to which the viewers are expected to respond in kind. Thus, icons are admitted to the communion of the faithful as active participants with whom the faithful interact. They are valued for what they say and what they do, and for what the people who venerate them say and do to, and with them, rather than for what they simply look like. Icons have always raised a great deal of controversy. Some of these controversies have led to war, want, and misery. None of these wars were waged on aesthetic[16] grounds, for none of the warring factions paid the slightest attention to the beauty (or lack thereof) of the subject of dispute.[17] They were all waged for what the icons were imagined to

[14] See Arthur Leff, "Injury, Ignorance and Spite: The Dynamics of Coercive Collection," *Yale Law Review* 80:1 (1970).

[15] I make no claim here that the "basis of contract" in Western jurisprudence is necessarily promise, rather than something else (e.g., reliance or unjust enrichment). I do, however, make the more modest claim that in Western jurisprudence bare promises are commonly enforceable.

[16] The term "aesthetics" in this passage and throughout these pages is used in the narrower, Benedetto Croce–inspired meaning, which relates to artistic excellence, and not in the broader sense, which admits aesthetic considerations into other fields of human endeavor.

[17] Moshe Barasch, *Icon, Studies in the History of an Idea*, New York: New York University Press (1992). Barasch writes: "Now, it is important to remember in our context that in the various great debates concerning the icon's status, the aesthetic attitude never even came up for discussion.

have said or done, or for what their venerators seemed to have said or done to, or with them. Obviously, the best-known historical example (but by no means the only one) is associated with the so-called iconoclastic wars of the early Middle Ages, which did not terminate until the so-called "Triumph of Orthodoxy" in 843 A.D.[18] The enemies of icons, the iconoclasts, interpreted the material rendering of saintly images as a blatant violation of the Second Commandment. According to their rhetoric, the practice of iconography was in fact heretical and had to be forcibly eradicated as a form of idolatry. True to their doctrine, they actually went ahead and destroyed all the existing icons throughout the Byzantine Empire. The only early icons that were saved from their wrath were the inaccessible ones, notably the large collection in the Saint Catherine Monastery on Mount Sinai. The defenders of icons, the iconodules, far from invoking the redeeming *aesthetic* value of their objects of veneration, developed an alternative doctrine of their own, proclaiming the saintliness of the images and their redeeming *theological* value.[19] To be sure, the debate was much energized by hidden political undercurrents. Those secret agendas had very little to do with the theological hair-splitting debates that were raging on the surface. Rather, they concerned an agitated power struggle between the secular rulers of the Empire and the insurgent forces of the Church, who used icon veneration as a means of gathering influence and clout.[20] But whether the

For both the breakers of images and their defenders, the iconoclasts and the iconodules from late Antiquity to the Reformation, an aesthetic attitude was utterly beyond consideration. However dramatically opposed their views of icons may have been, they held the common conviction that the image does not exist for itself, that it is not autonomous, and that it should bring the spectator beyond mere contemplation" (ibid., 4).

[18] The doctrinal vindication of the sanctity of icons was ordained in the Seventh (and last) Ecumenical Council, which convened at Nicaea in 787 A.D. The proclamation of the Seventh Council was briefly overruled by the Emperor Leo V the Armenian in 815, but the veneration of icons was finally reinstated in 843 A.D. by the Empress Theodora, whose name was forever linked, following that event, with the Triumph of Orthodoxy.

[19] With some simplification, the theological argument holds that interpreting saintly images as an idolatrous violation of the Second Commandment ignores the dual nature of Christ and its crystallization in the Doctrine of Incarnation. By choosing to appear in the flesh, Christ himself perfected an icon of his own divine Self; thus, by rejecting Christ's own choice as a form of idolatry, the iconoclasts themselves are performing an act of heresy. They also fail to understand that icons are mere reflections of the human side of the represented entity, while its divine nature remains safely encased in the mystery of the invisible. See St. John of Damascus, *On the Divine Images: Three Apologies Against Those Who Attack the Divine Images*, translated by David Anderson (2000). St. John's classic work itself was completed at the height of the iconoclastic period, in the first half of the eighth century; his main arguments are still used in Orthodox services today in defense of the holy icons and the very essence of the Orthodox faith itself.

[20] See Jaroslav Pelikan, *The Christian Tradition*, Chicago: University of Chicago Press, Volume 2, Chapter 3 (1974) (which shows how this doctrinal dispute was used as a veil to hide the realities of an essentially political struggle). See also Arnold Hauser, *The Social History of Art*, London: Routledge, Volume 2, pp. 145ff (1951) (attributing Emperor Leo III's iconoclastic decrees to his interest in curbing the political power of the Church and his desire to align himself with certain social elites who were opposed to the veneration of images).