1944

Aesthetics In and About the Law

Richard F. Wolfson
United States Circuit Court of Appeals

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Law and Philosophy Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol33/iss1/2

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
AESTHETICS IN AND ABOUT THE LAW

BY RICHARD F. WOLFSON

The subject-matter of philosophy has traditionally been divided into metaphysics, ethics, logic, and aesthetics. And although such a classification may be unsatisfactory in categorizing the results of philosophical speculation, it nevertheless provides a convenient critical tool in judging the purposes of philosophical literature.

Yet little attempt has been made similarly to classify the philosophies of particular branches of knowledge, such as the philosophy of history or of science. And in jurisprudence, here considered the equivalent to philosophy of law, criticism has generally proceeded according to an historical thesis rather than according to content broadly considered. It is my belief that an evaluation of legal philosophy according to content will demonstrate that although three of the four categories have at some time been systematically treated, no such effort has been made in the field of aesthetics. The purpose of this paper is not, however, to develop any specific theory of a jurisprudence of aesthetics but rather to do the spadework by indicating and outlining the sources from which such a theory might be derived.

It is first necessary to discuss in some detail the four-fold categorization of jurisprudence; for arbitrary and unsatisfactory classification of knowledge may properly be included within "metaphysics."

For the sake of simplicity, I have assumed that epistemology may properly be included within "metaphysics."

Great debate is, of course, possible whether any branch of knowledge can possess a philosophy of its own. It has been argued that the phrase "philosophy of history" or "philosophy of law" is a contradiction in terms.

See, for example, Pound, Outlines of Lectures on Jurisprudence (5th ed. 1943) 4-39. Cf. Frank, Book Review (1943) 52 Yale L. J. 934, 936: "The reader is tempted, just for fun, to try new classifications which would, for instance, lump together Aristotle's great manual on how to win law suits, comprising a considerable part of his Rhetoric, with Holmes's famous "bad man" thesis, found in his paper, The Path of the Law, and to collocate parts of Plato's totalitarian theories, found in his Republic and Laws, with current Nazi writings on government."

A single and brilliant exception is Llewellyn, On the Good, the True, the Beautiful, in Law (1942) 9 U. Chi. L. Rev. 224, esp. at 227-250.
tory though it be, it does in a measure demonstrate the lack of sympathy on the part of legal philosophers with what might be a large body of theory.

Of the four categories, the one apparently most difficult to correlate with law is metaphysics. Jurisprudence normally has not been concerned with the recurring problems of metaphysicians: free will as against determinism; the choice between solipsism, empiricism, and other established philosophical hypotheses. Yet Pound, in his staggering bibliography of jurisprudence, deems it proper to describe as "metaphysical" a great deal of nineteenth century jurisprudential literature, one of the many schools springing from Kant.5 And it is probable that what Pound terms "social-philosophical" could with equal right also be called metaphysical.6 But if we accept only Pound's own choice of terminology, names such as Kant, Sartre, Fichte, and Hegel are included.7

The relationship of law to ethics has been more fully treated.8 Not only can the natural-law schools be included but, perhaps, the many other groups which have sought not to criticize the law by some external standard of morality but have been intrigued by the correspondence (or lack of correspondence) between the law and the moral standards of the community.9

As to logic, two quite distinct schools of thought are apparent. The first has concerned itself with the creation of a legal vocabulary which can be employed precisely and meaningfully and which describes legal result.10 The second has sought to organize law into a sequential series of legal propositions, as in the case of Austin.11 But it may be objected that

---

5 Pound, op. cit. supra note 3, at 65-66, 188-199. Pound also terms one group as "neo-metaphysical." Id. at 203.
7 See note 5 supra.
9 See Pound, op. cit. supra note 3, at 8-10.
10 The definition might be so broadened as to include important parts of both realistic and sociological jurisprudence. Cf. Llewellyn, On the Good, the True, the Beautiful, in Law (1942) 9 U. Chr. L. Rev. 224.
the concern of Austin and others with a symmetrization of law is in truth a theory of aesthetics, since symmetry and cohesion in doctrine as well as in artistic achievement are appealing to one’s sense of the beautiful. Yet the conscious purpose of the analytical school or of the codifiers was to propose and enact a system of law which was to be the logical development of a major premise they held to be intellectually valid. They drew no distinction, as do the logical positivists, between the truth and beauty of pure logic and that truth which comes from the closest possible approximation to “fact.” Certainly, they would have denied that the intellectual appeal of logical form or other aesthetic considerations played any part in their efforts.

We come now to the fourth category, aesthetics. It is, of course, conceivable that the nature of law precludes any aesthetic hypothesis. The initial presumption, however, is that

---


15 See Arnold, Institute Priests and Yale Observers (1936) 84 U. PA. L. REV. 811, 814: “We dramatize the rule of law in our judicial system and in our constitution. We do not conduct ceremonies as they do both in England and Japan. Our ceremonies are built on the pattern of a feast of pure reason. The spectacle of a hundred or so prominent lawyers and scholars sitting in a great hotel listening to the Restatement discussed section by section is congenial to our protestant way of looking at the symbols of government. It was this love of dialectic and fear of ceremony which made the Restatement take the form it did. Yet the same distrust of ceremony forced the members of the American Law Institute to deny that their function was ceremonial at all.”

Contra: Llewellyn, On the Good, the True, the Beautiful, in Law (1942) 9 U. CHI. L. REV. 224. Professor Llewellyn seems to feel that men such as Langdell and the codifiers had a very explicit aesthetic goal in mind: “This... view of legal esthetics sees law not as a matter of language in general, but as a matter of rules cast into language... 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.” Id. at 228.

15 Santayana, The Sense of Beauty (1896) 2: “That aesthetic theory has received so little attention from the world is not due to the unimportance of the subject on which it treats, but rather to lack of an adequate motive for speculating upon it, and to the small success of the occasional efforts to deal with it. Absolute curiosity, and love of comprehension for its own sake, are not passions we have much leisure to indulge: they require not only freedom from affairs but, what is more rare, freedom from prepossessions and from the hatred of all ideas that do not make for the habitual goal of our thought.”
the aesthetic sense extends to all fields of human endeavor. Yet what little writing there has been on the aesthetic in law either has not sought to generalize from particular cases or has been embarrassingly naive.

Aesthetic theory "may be divided into two groups: that group of writings in which philosophers have interpreted aesthetic facts in the light of their metaphysical principles, and made of their theory of taste a corollary or footnote to their systems; and that group in which artists and critics have ventured into philosophical ground, by generalizing somewhat the maxims of the craft or the comments of the sensitive observer." Here we discuss only the sources for the latter type of aesthetic theory. To undertake an investigation of the possible sources for the former would impose an obligation to examine the basic premises of all the deductive philosophies of law which have been evolved, clearly an overwhelming task.

Yet because of the uncertainty as to what type of aesthetic theory can be developed from "the law," all the possible sources, divergent in nature though they may be, must be shown. We must look to all the points where the lines of law and of art cross. Four such crossings are apparent:

1—Artistic and literary creations which employ illustrations from the law;
2—Literary creation within the law;
3—Decisions involving aesthetic judgments on the part of triers;
4—The general nature of the legal system.

These areas are chosen on the general assumptions that it is likely that law, like other arts and sciences, reflects the cultural temper of the times; that law like art may be approached aesthetically as well as psychologically and sociologically; and that before any theory of juristic aesthetics is developed, some critical vocabulary new to the law must either be originated or borrowed.

For purposes of the first source, creations using illustrations from the law, plentiful examples can probably be found not only in the most likely field, that of literature, but also in

---

9 U. CHI. L. REV. 224, 227 et seq.

See, for example, Chandler, The Attitude of the Law Toward Beauty (1922) 8 A.B.A.J. 470. But see the exception noted in footnote 4 supra.

See Santayana, op. cit. supra note 15.
painting\textsuperscript{19} and drawing,\textsuperscript{20} sculpture,\textsuperscript{21} architecture,\textsuperscript{22} music,\textsuperscript{23} and combinations of the arts such as the ballet.\textsuperscript{24} It is, however, literature which has received the most study. Shakespeare,\textsuperscript{25} Dickens,\textsuperscript{26} Conrad\textsuperscript{27} and many others have been combed by lawyers for their use of the law. Yet all these studies have either sought to determine the legal accuracy of the writer or have directed "the attention of lawyers to the pleasures . . . of a class of reading which, while not strictly professional, is diverting and entertaining, and which will be indirectly profitable to them in their own special field of learning."\textsuperscript{28} Because of this belief that "legal" literature has no importance to the lawyer other than that of light entertainment, no lists similar to Wigmore's compilation of a hundred legal novels\textsuperscript{29} have been

---

\textsuperscript{19} For a painting in the modern idiom, see Lawyer by Tchelitchew, reproduced in Soby, TCHELITCHEW (1942) 52.\textsuperscript{20} Many satirical drawings of Daumier are concerned with lawyers, courtroom scenes, etc.\textsuperscript{21} Examples are the various interpretations of "Justice."\textsuperscript{22} See, for example, the Sterling Law Building, Yale University, New Haven, Connecticut. Not only does the incidental decoration use the law as motif, but the building is said to have been planned after the English Inns of Court.\textsuperscript{23} For example, the music in Gilbert and Sullivan's operetta, Trial by Jury. Also pertinent, perhaps, is the incidental music in the many movies dealing with legal matters.\textsuperscript{24} Two examples are: Hear Ye! Hear Ye! Book: Ruth Page and Nicholas Remisov. Music: Aaron Copland. Scenery and Costumes: Nicholas Remisov. Choreography: Ruth Page. First Produced: Chicago Opera House, Chicago, Nov. 30, 1934. Symphonie Fantastique (esp. Part IV). Book: Hector Berlioz. Music: Hector Berlioz. Scenery and Costumes: Christian Berard. Choreography: Leonide Massine. First Produced: Royal Opera, Covent Garden, London, July 24, 1936. For further reference, see Beaumont, COMPLETE BOOK OF BALLETS (1938) 778-79, 754-57.\textsuperscript{25} Clarkson and Warren, THE LAW OF PROPERTY IN SHAKESPEARE AND THE ELIZABETHAN DRAMA (1942).\textsuperscript{26} Holdsworth, CHARLES DICKENS AS A LEGAL HISTORIAN (1928).\textsuperscript{27} Roughhead, Conrad on Crime (1928) 40 JURID. REV. 250.\textsuperscript{28} Hitcher, The Reading of Lawyers (1928) 33 DICK. L. REV. 1, 12. See Roesch, Is Acquaintance with Legal Novels Essential to a Lawyer? (1926) 21 ILL. L. REV. 109; Hunt, Law, Lawyers and Literature (1937) 5 J.B.A. KAN. 234.\textsuperscript{29} Wigmore, A List of One Hundred Legal Novels (1922) 17 ILL. L. REV. 26.
made of poetry or of drama. And Wigmore himself, although writing in 1922, did not include one of the greatest of such novels, *Crime and Punishment*, by Dostoievsky. Not only is the chief character of that book a law student, but the entire book is an intricate and subjective study of the moral foundations of obedience to the legal system imposed by the social order. And no recognition is to be found in the law reviews of the expressionistic novel, *The Trial*, by Franz Kafka, which employs the German legal system as its consistent metaphor or, at least, as its point of departure. Kafka, it is to be assumed, chose the law as a metaphor because, being a deliberate artist, he found in the law some aesthetic effect he wished to convey to his readers, perhaps in his case a relentless procedure. A broad study of legal art and literature might well throw light on the "outsider's" view of law as a pattern, aesthetic or no, and perhaps on comparative relationships of art to society and law to society. A second function of such a study would be to provide law, if found to have any connection whatsoever with artistry, with a critical terminology. That such a terminology has been absent in the law can be seen in the writing of lawyers upon the literature of the law, as, for example, Dickens' *Bleak House*. In advising the reading of such and such a novel, no more accurate or incisive critical language than "good literature" or "interesting" is to be found.

Nor is more satisfactory criticism to be discovered within the limits of our second source, that is where lawyers have looked to their own law-books for literary content. Holdsworth, for example, in one article made up what might be considered an anthology of literature to be found in the cases; yet he gives no standards, no reasons for his choices. Only the

---

30 One professor has been known to include in his examination on property law a question requiring the students to criticize the property concepts in the poem, *Legal Fiction*, by the young English critic and poet, William Empson. It can be found in *New Poems* 1943 (edited by Oscar Williams) 87-88. See also "Law, Say the Gardeners, Is the Sun" in *Auden, Another Time* (1940); "The Habeas Corpus Blues" in *Aiken, Brownstone Eclogues* (1943).


33 (trans. from the German by Willa and Edwin Muir, 1937).

34 (centenary ed., 1911).


36 Holdsworth, *Literature in Law Books* (1939) 24 Wash. U.L.Q. 153. But see id. at 171-72 for the reasons why literature is to be found in the law at all.
acute Cardozo, who in a single essay showed his ample literary background by referring to Henri Beyle, Henry James, and George Bernard Shaw, among others, created any sort of legal-literary criticism of the opinions of judges.

An imaginative investigation into courts' opinions might have the same purposes as the forementioned study of the way in which artists and authors use the law as illustration. Since the judge is also author and actor, it is likely that, in an aesthetic sense, he reflects in his opinion his views as to the drama, the intensity, the symmetry, the function of law, even as the sculptor memorializes in stone his artistic tastes, aims, and beliefs. Once again, any possible correlation between art and law as a culture product might be further developed. And secondly, it might provide or at least make more familiar a critical vocabulary and critical standards.

Insofar as quantity of discussion is concerned, the third possible source for a theory of legal aesthetics—where, from the nature of the case, the trier makes a determination of aesthetic value—has been adequately covered. Within this area come questions of obscenity, copyright, zoning legislation, and so on. But it must be recognized that it is doubtful whether any complete aesthetic system can be drawn from the cases in these fields. Judges are obliged to decide only minimums. They can-

---

37 See Hamilton, Cardozo the Craftsman (1938) 6 U. Ch. L. Rev. 1, 5, n. 9.
38 Law and Literature in Cardozo, Law and Literature and Other Essays and Addresses (1931) 3-40. See id. at 4-5:
"But I over-emphasize and exaggerate if I seem to paint the picture of any active opposition that is more than sporadic and exceptional to so amiable a weakness as a love of art and letters. A commoner attitude with lawyers is one, not of active opposition, but of amused or cynical indifference. We are merely wasting our time, so many will inform us, if we bother about form when only substance is important. I suppose this might be true if any one could tell us where substance ends and form begins. . . . The two are fused into a unity." Cf. Calamandrei, Eulogy of Judges (1942) 78-79, 85-86.
39 Cairn, Plato's Theory of Law (1942) 56 Harv. L. Rev. 359, 368: "Law for Plato is a form of literature, and the legislator's responsibility is greater than the poet's. The legislator is himself the author of the finest and best tragedy he knows how to make. In fact, all his poility has been construed as a dramatization of the fairest and best life, which is in truth the most real of tragedies."
40 Cohen, Transcendental Nonsense and the Functional Approach (1935) 35 Col. L. Rev. 809, 845; "We know . . . judges are craftsmen, with aesthetic ideals, concerned with the aesthetic judgments that the bar and the law schools will pass upon their awkward or skilful, harmonious or unharmonious, anomalous or satisfying, actions and theories; but . . . we have no specific information on the extent of this aesthetic bias in the various branches of the law."
not recommend artistic design or improve literary content. The issue is ordinarily only one of drawing the line. Moreover, aesthetic judgments, if made, are likely to remain unexpressed since, one, they are usually overshadowed by economic and other social policies and, two, the law has traditionally avoided deciding cases on aesthetics alone.

Yet despite obstacles, aesthetic judgments are to be found. The extremes can be seen in the majority and dissenting opinions in United States v. One Book Entitled Ulysses where the Second Circuit Court of Appeals finally vindicated the literary critics and permitted the intelligent public to read what it had been reading anyway. But the dissenting opinion of Judge Manton, stern and puritanical, explicitly condemned “art for art’s sake” literature and upheld the imposition of moral standards from above upon the people. Even more liberal in some respects was the decision in People v. Gotham Book Mart, which permitted the sale in New York of If It Die by the French novelist, Andre Gide. This autobiography, containing for the most part detailed particulars as to the author’s childhood and early adulthood, did, however, also include a

---

41 See Alpert, Judicial Censorship of Obscene Literature (1938) 52 HARV. L. REV. 40, 71: “Not only is the general law of obscenity absurd as applied to literature, and not only is the task of judging literature beyond the average judge’s capacity and ability, but as a matter of physical organization courts are not able to do justice to literature, in the main, even had they such capacity and ability.” Donnelly, The Police Power and Esthetic Zoning (1937) 5 J. B. A. KAN. 215, 223: “An administrative body composed of experts offers no panacea for the problem of esthetic zoning. Zoning is a negative art. It is more conspicuous by its absence than by its presence. If the architectural design and the general beauty of American cities is to be greatly improved, it must come from something other than legal regulations and restrictions. In some instances a degree of beauty may be a by-product of the law, but its creation must come out of constructive design. . . .”

“The problem to be faced is that by arbitrary legal restrictions, there is no stimulation toward the positive creation of beauty. The best in architecture is discouraged or prohibited. To this extent, mediocrity is fostered by present-day zoning practice. . . .”

42 For a thorough and sophisticated exposition of the law of obscenity, see Alpert, Judicial Censorship of Obscene Literature (1938) 52 HARV. L. REV. 40.

43 72 F. (2d) 705 (C.C.A. 2d, 1934).

44 “The people need and deserve a moral standard; it should be a point of honor with men of letters to maintain it.” Id. at 711.


46 Gide has been one of the authors most preoccupied with legal problems and one most neglected by lawyers. Having sat as a juror in a French court, he wrote Recollections of the Assize Court (trans. from the French by Philip A. Wilkins, London, 1941).
lurid confession and defense of Gide’s homosexuality. Moreover, Gide was little known to the American public; his following was one of “literati;” he was at the time (and still is) definitely avant-gardiste in character. Thus, when the court said that “Andre Gide is considered a great author; he is therefore entitled to be heard,”47 it was accepting the opinions of the most advanced portion of the readers. It was permitting the sale of a book which could appeal to only a small minority, and it was trusting the moral discretion and literary judgments of this group.

Very fully considered has been the question whether courts should permit the police power in zoning and bill-board legislation to be used for purely aesthetic purposes.48 And it has been in this field that judges and lawyers have tried to define and make concrete their definitions and attitudes as to beauty. On the one hand, an author speaks of “aesthetic security”49 and a judge believes that “our sensibilities are becoming more refined;”50 on the other hand, we find courts either expressly or impliedly linking beauty and property values.51

49 Terry, The Constitutionality of Advertising Signs on Property (1914) 24 YALE L. J. 1, 9.
50 State ex rel Carter v. Harper, 183 Wis. 148, 159, 196 N. W. 451, 455 (1923). See also Noel, Unaesthetic Sights as Nuisances (1939) 25 CAN. L.Q. 17: “Unquestionably, the aesthetic sensibilities of the public generally are increasing. . . .”
51 General Outdoor Adv. Co. v. Department of Public Works, 289 Mass. 149, 173, 193 N.E. 799, 811 (1935): “Because of the serious aversion to such signs and billboards, they substantially and materially annoy and disturb the occupants and interfere with the comfortable enjoyment of their homes. The introduction of signs and billboards into such a neighborhood tends seriously to injure and depreciate the value of the property.” But note id. at 201, 193 N.E. 823, that where the court had under consideration signs near the State House at Boston it relied almost entirely on aesthetic grounds: “The State House by its commanding position, its distinguished architecture, and above all by its civic importance as the home of the executive and legislative departments of government, is entitled to surroundings not detracting from its dignity. . . . We think that refusal on grounds of fitness and taste to renew the permit to the plaintiff . . . was within the scope of the authority conferred. . . .” Cf. State v. City of New Orleans, 154 La. 271, 284, 97 So. 440, 444 (1923): “The beauty of a fashionable residence neigh-
But rare are the cases which sustain in fact zoning regulation for aesthetic reasons alone. The usual view is that "... for mere aesthetic purposes, having no reference to the safety, health, morals or general welfare of the community at large, the state may not under its police power regulate or control the use by the owner of private property." Yeager v. Traylor is unique; there a Pennsylvania court permitted an apartment-hotel in a residential district to erect a parking-garage for its permanent tenants on the condition that:

"The proposed building ... must be enclosed entirely and conform in architectural design to the building to which it is attached. Ramps and other devices having a tendency to disturb the peace and quiet of the neighborhood must be avoided, and all means for raising and lowering cars must be within the walls of the building. If it is proposed to supply parking space upon the roof, an effective screen must be provided by means of a suitable balustrade or other device to hide the unsightly appearance which would be the result of such practice. No repairs of any character accompanied by noise should be carried on, and the sale of gasoline and oil should be limited strictly to tenants occupying the apartments and having cars stored in the garage."

Thus, where the nature of a residential area was in issue, the court seemed to feel that its duty was to maintain architectural uniformity and purity as well as quiet and absence from noxious odors. It may be asked whether such a doctrine would not restrict adventures in modernistic design.

Typical of cases sustaining by dictum regulation on purely aesthetic grounds are: Ware v. City of Wichita, 113 Kan. 53, 214 Pac. 99 (1923); dissenting opinion, State ex rel Twin City B. & I. Co. v. Houghton, 144 Minn. 1, 12-13, 174 N.W. 885, 888 (1919); dissenting opinion in Piper v. Ekern, 180 Wis. 586, 599, 194 N.W. 159, 164 (1923). Fruth v. Board of Affairs, 75 W. Va. 456, 463-64, 84 S.E. 105, 108 (1915).

Although this is a nuisance case, I see no reason why it should not be included under a discussion of zoning legislation. The remedy of a court, particularly in the instant case, in a nuisance action is, in effect, zoning; for it reinforces or denies reinforcement to the general character of the neighborhood. Thus, a study of the nuisance cases (garages, factories, undertaking establishments, etc.) might help to show the aesthetic preconceptions of the judges. Unfortunately, the most pertinent fact—whether or not the judge knew from personal experience the neighborhood in question—would ordinarily be lacking.

Id. at 535, '160 Atl. 109 (1932).

No extended discussion is needed to show that in problems of copyright infringement, for example, similar aesthetic judgments are to be found. A court is often obliged to determine the exact scope of the original creation, and to do so it must decide what elements of the work in question make it original and unique. Indeed, in all questions of copyright, from public policy to copyrightability, aesthetic taste is constantly shown. Fuller v. Bemis is an instance; the court held that a series of dance tableaux were not copyrightable, since the statute required “a dramatic composition”:

“It is essential to such a composition that it should tell some story. The plot may be simple. It may be but the narrative or representation of a single transaction, but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary. . . . The end sought for and accomplished was solely the devising of a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, telling no story, portraying no character, depicting no emotion. . . . Such an idea may be pleasing, but it can hardly be called dramatic.”

Would the same court decide that the painters of non-objective art are entitled to no protection?

Similar aesthetic considerations are to be found in trade-
mark\textsuperscript{61} and patent law,\textsuperscript{62} but the discussion need not be extended: the type of case has been indicated.

We come now to the fourth source, the nature of law, that is to say, the general system of law as aesthetic. The aesthetic approach, it should be realized, is in no sense exclusive. It does not deny (indeed, it ordinarily affirms) historical\textsuperscript{63} and psychological\textsuperscript{64} interpretation. It differs only in approach, being a horizontal rather than a vertical standard, horizontal in that it believes that a similarity in cultural products can be seen from those products themselves.\textsuperscript{65}

Nor is terming law poetry\textsuperscript{66} or art a completely novel idea. John C. H. Wu, in his essay, The Art of Law,\textsuperscript{67} was explicit:

"I am not speaking metaphorically or being rhetorical when I compare law with the other arts. I perceive real identities between law on the one hand and music, poetry and painting on the other. All works of art are the results of selection, a process which 'naturally involves the acceptance of some elements and the rejection of others.' They are all products of thoughtful and heartfelt selection

\textsuperscript{61}See, for example, Derenberg, Trade-Marks Ante Portas (1943) 52 YALE L. J. 829.


\textsuperscript{63}SANTAYANA, THE SENSE OF BEAUTY (1896) 5: "The second method consists in the historical explanation of conduct or of art as a part of anthropology, and seeks to discover the conditions of various types of character, forms of polity, conceptions of justice, and schools of criticism and of art." Cf. Kuhn, The Function of the Comparative Method in Legal History and Philosophy (1939) 13 TUL. L. REV. 350.

\textsuperscript{64}Id. at 5-6. "The third method in ethics and aesthetics is psychological, as the other two are respectively didactic and historical. It deals with moral and aesthetic judgments as phenomena of mind and products of mental evolution. . . . Such an inquiry, if pursued successfully, would yield an understanding of the reason why we think anything right or beautiful, wrong or ugly."

\textsuperscript{65}See Ayres, Book Review (1942) 51 YALE L. J. 881, 882: "What do lawyers mean by 'juristic beauty'? Evidently something quite distinct from the mores content of the law, something which can be perceived, judged and approved without reference to the mores-norm of the people whose law it is."

\textsuperscript{66}SPENDER, LIFE AND THE POET (London, 1942) 31: "The amazing influence of the Old Testament may be partly due to the fact that the Jewish law is not only a great social institution but also that it provides a poetic description of life. The Jewish law is poetry. Again, the Sermon on the Mount is both a series of admonitions on behavior and also poetry."

\textsuperscript{67}In THE ART OF LAW AND OTHER ESSAYS JURIDICAL AND LITERARY (Shanghai, 1936).
and arrangement of the telling elements. These telling elements, which in music are sounds, in poetry words, and in painting colors, happen in the art of law to be interests. There is only a difference in the media and the materials; the essential thing in all arts remains the same, namely, an orderly, symmetrical, and harmonic arrangement and organization of the telling element."

Unfortunately, however, when Wu attempted to illustrate this theory of law as art, it appeared that "art" in law was to him no more than the typical Poundian view of the law as a reconciliation of social interests. Terming this process "art" added nothing.

More satisfactory by far has been Professor Llewellyn's attempt to evolve a theory of jurisprudence founded on the aesthetic approach. He recognized that it was essential to such an approach to divide law into "style-periods." Yet several objections are to be made. In the first place, although realizing the similarity of law to other arts, Llewellyn does not attempt to correlate legal "style-periods" with other contemporaneous cultural "style-periods." Thus, he deals only with American law and divides our law into three periods: formative, maturity, and the new period characterized by a conscious concern about policy. He does not suggest that, for example, the same periods would be applicable to American architecture. That is to say, he does not at all accept the thesis that law as a cultural product may have the same characteristics as other cultural manifestations, typically art and literature. Secondly, Llewellyn speaks of "art" as if it meant only "good art." He speaks of beauty as though it were an isolated phenomenon. And thirdly, he differentiates between method and

\[\text{Id. at 3.}\]

\[\text{Wu, Proportionately between Means and Ends: A Study in the Art of Law in THE ART OF LAW AND OTHER ESSAYS JURIDICAL AND LITERARY (Shanghai, 1936).}\]

\[\text{Llewellyn, On the Good, the True, the Beautiful, in Law (1942) 9 U. CH. L. REV. 224, esp. 227-250.}\]

\[\text{Id. at 230.}\]

\[\text{Id. at 230: "The esthetic phase of a legal system is cognate to architecture as it is not, for instance, to painting, and as it rather rarely is to music. Architecture and engineering strike most closely home—perhaps because both look so directly and so inescapably to use."}\]

\[\text{Llewellyn, The First Struggle to Unhorse Sales (1939) 52 HARV. L. REV. 873, 876: "And the work of the artist, accomplished with poor intellectual equipment, is not clearly intelligible to the inept readers. . . . Thus one beautiful opinion, or six beautiful opinions, still give no guaranty of further decision being in accordance with them unless they are kept from being mixed in with quantities of poor}\]
content, a distinction that no critic of painting or of the novel would lightly undertake in describing the "style" of a period. Subject-matter and craft, content and form, are inextricably bound together, and it is surprising to find a "realist" differentiating between them even for the limited purposes of his article. And even more surprising are Llewellyn's limited aesthetic ideals for the law. After stating that "the prime test . . . of legal beauty remains the functional test" and that "Legal aesthetics are in essence functional aesthetics" he makes important qualifications:

"With the idea of functional evaluation I have no desire to take over into legal esthetics the exaggerations and to my mind absurdities of those extreme 'functionalists' in architecture and related arts who hold no form, no piece, no ornament to be esthetically legitimate which is not, with maximum economy and efficiency, a working portion of the thing designed."

It is a paradox that Llewellyn, long the law's avant-garde, looks with disfavor on the theories of the avant-garde of architecture, although architecture is his own prime example of an art related to the law.

From these criticisms of Llewellyn can be derived the final necessary requisites of methodology before the system law itself can be usefully employed as a source of legal aesthetic theory. An investigation should be made to determine whether the periods of style in law correspond to the style periods in the arts. It is at least likely, working on the premise that law is

opinions which misanalyze and manhandle the same type of situation. Thus, in 1870 to 1900, a period which I see as one of great confusion in American Sales law, there are to be found judgments which in result, reasoning, concept, and explanation are very lovely. Nor are such judgments really rare. What they are, is noncharacteristic. They do not control their brethren in the judicial democracy." See also Llewellyn, Across Sales on Horseback (1929) 52 Harv. L. Rev. 725, 739.

Llewellyn, On the Good, the True, the Beautiful, in Law (1942) 9 U. Chi. L. Rev. 224, 235.

See also Llewellyn, Across Sales on Horseback, 52 Harv. L. Rev. 725, 739.

Llewellyn, On the Good, the True, the Beautiful, in Law (1942) 9 U. Chi. L. Rev. 224, 235.

Ibid.

Id. at 235.

Cf. id. at 235: "One meets, in law, too, the impatient, relentless clamor for modernity—whether need or fad."

See Wright, An Organic Architecture (London, 1939) 15: "I am speaking of this new movement . . . as the ideal of a life organic, of buildings as organic, of an economic system truly organic. A statesman would be a great architect in this sense of knowing life at its best to be organic.

See Lifschitz, The Philosophy of Art of Karl Marx (1938). The Marxists emphasize the interdependence of political concepts and aesthetic beliefs. Thus, romanticism is termed "a politico-aesthetic doctrine." Id. at 31.
a typical product of the culture, that we have in the law classicism, romanticism,81 Gothicism, impressionism, eclecticism, and perhaps even the beginnings of such modern movements as expressionism82 and certainly functionalism.83 This is not to say that any absolute correlation will be found. Law, founded on precedent, may show a time-lag; courts are not museums of modern art. In any case, for the purposes of such an investigation, account must be taken not only of the techniques of law but of the content of legal doctrine, judicial and legislative, and of the hierarchy of legal doctrines. If some continuing connection between artistic and legal style-periods is found, law can once again be looked upon as a community endeavor and its function in the community existence more fully comprehended.84 It will aid us in distinguishing between dead law and living law, law that belongs in the rare book rooms of libraries and law which is to be encouraged—to be written, read and learned.

81 Llewellyn, The Good, the True, the Beautiful, in Law (1942) 9 U. CHI. L. Rev. 224, 231: "One meets also in law the romantic trend, the urge to cure the immediate past by recourse to the 'good' past, more remote."

82 The attempts of the legal realists to approach law from many different directions—psychological attitudes of the judge, regroupings of cases, courses which cut across traditional law-school curriculum—might be compared with the efforts of modern artists to find a new vitality in their medium by a reexamination of spatial and lineal relationships. And the realists' objective examinations of what they consider the result, among other things, of the subjectivism of judges, is, in some ways, similar in intent to expressionistic art.

83 Although Llewellyn rejects thoroughly functional law, the city planners and functional architects insist that the social and legal structure of the community be reorganized ("reintegrated") in accordance with their beliefs. See MUMFORD, TECHNICS AND CIVILIZATION (1934); MUMFORD, THE CULTURE OF CITIES (1938).

The following members of the Law Journal staff are in the armed forces of the United States:

- WILLIAM BUFORD
- W. R. KNUCKLES
- JAMES COLLIER
- MARCUS REDWINE, JR.
- CARLETON M. DAVIS
- POLLARD WHITE
- W. H. FULTON, JR.
- JOHN J. YEAGER

ADVISORY BOARD FROM THE STATE BAR ASSOCIATION

Term Expires 1945

- CHARLES ADAMS, Covington
- CHESTER ADAMS, Lexington
- LAFON ALLEN, Louisville
- THOMAS BALLANTINE, Louisville
- W. H. FULTON, Frankfort
- DAN GRIFFITH, Owensboro
- M. S. HOLLINGSWORTH, Wheeling, W. Va.
- D. COLLINS LEE, Covington
- BARBARA MOORE, Frankfort
- FOREST HUME, Frankfort
- HENRY STITES, Louisville
- EARL WILSON, Louisville

Term Expires 1946

- HENRY H. BRAMBLETT, Mt. Sterling
- CLINTON M. HARRISON, Lexington
- ROBERT P. HOBSON, Louisville
- RALPH HOMAN, Frankfort
- JOHN E. HOWE, Mt. Sterling
- GEORGE HUNT, Lexington
- THOMAS J. MARSHALL, Jr., Paducah
- SCOTT E. REED, Lexington
- SAMUEL M. ROSENSTEIN, Frankfort
- ABSALOM RUSSELL, Louisville
- ROBERT M. SPRAGENS, Frankfort
- E. H. SMITH, Glasgow