Effect and Technique in Legal Aesthetics

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Abstract

Discussions of legal aesthetics often proceed as if it were sufficient, in exploring law’s aesthetic dimensions, to refer to effects such as symmetry, balance, and proportionality. Those effects, however, might be produced by any number of techniques, and aesthetic technique tells us more about the meaning and context of legal ideas than effects do. After discussing various kinds of inquiry into legal aesthetics, this essay turns to Blackstone’s Commentaries as a source for the techniques that inform modern legal writing and analysis.

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Blackstone’s Commentaries on the Laws of England (1765-69) played a crucial role in the emergence of a particular alignment between legal and aesthetic considerations in eighteenth-century England. This alignment, which I characterize as “relational aesthetics,” involves the aesthetics of various doctrines within the legal system, and more particularly of the relations that obtain among those doctrines so as to create a consistent and coherent system. To speak of legal aesthetics in this sense is to capture an understanding of the grounds that make for a desirable solution to a legal problem, according to criteria that are frequently characterized by their proponents in language that strives to disavow any aesthetic substrate. Once the criteria are spelled out—in terms of balance, symmetry, congruence, proportionality, and integration within an orderly system—it is easy to see that some kind of aesthetic logic is at work, although specifying the values in this fashion fails to show which kind of logic is involved, because symmetry (for example) can be achieved through any number of aesthetic techniques. Symmetry is an effect, not a technique: a Rembrandt, a Rothko, and a Rorschach might all be symmetrical, but that hardly means that they belong to the same aesthetic.

Accounts that discuss legal aesthetics in terms of effects often proceed as if it were needless to ask how the effects are achieved, as if discerning the appearance of symmetry were sufficient to illuminate the aesthetics at work. By implication, the compositional methods that create this effect are irrelevant, either because symmetry is invariably produced in

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1 On the features that inform modern legal argument, see Patrick O. Gudridge, The Persistence of Classical Style, 131 U. Pa. L. Rev. 664 (1983); Gudridge describes the components of a style he characterizes as both contemporary and classical, and he “question[s] the idea that the only useful orienting images for legal argument are those that begin with notions of order or harmony or resolution.” Id. at 665.
the same fashion (regardless of the prevailing aesthetic theories of the day), or because the results are, in any case, indistinguishable. Richard Wolfson’s observations about these issues, offered seventy years ago, still remain pertinent: he proposed an “investigation [into] . . . whether the periods of style in law correspond to the style periods in the arts,” and he suggested that a legal aesthetics might probe the affiliations between styles of judicial writing and analysis, and movements such as “classicism, romanticism, Gothicism, impressionism, eclecticism, and perhaps even . . . expressionism and . . . functionalism.” Only the last of these has received much attention from scholars in this area, and even that inquiry usually treats functionalism itself as an effect rather than attending to the methods of its artistic expositors and practitioners. That is, functionalism is associated with a certain approach to legal problem-solving (one that promotes efficiency by avoiding duplication of tasks in legal analysis, coordinating relations among actors in the legal system, and connecting doctrinal requirements to the desired policy outcomes), but once these basic lineaments have been specified, their development is treated (if it is considered at all) as having purely jurisprudential roots. Our understanding of functionalism in law could be appreciably improved if it were seen as a phenomenon with an intellectual and imaginative kinship with the functional movement in architecture (for instance), which offers the examples of both Adolf Loos, who believed that “the form of a building must display its use” and Mies van der Rohe, whose buildings exhibited “mathematical clarity and precision, but . . . could be used for a dozen different purposes.” When aesthetic effects in law are discussed as if their basis could be taken for granted, because they capture features that are simply inherent in the object, the result is to treat law as isolated and autonomous—as disconnected from the very culture that commentators on legal aesthetics are usually at pains to examine as a source and context for law. This is a common problem in legal research, which often looks no further than political science as a means of supplying context, but the problem is particularly noticeable when a scholar calls attention to the law’s aesthetic designs (whether specified in terms of symmetry or functionalism) only to remain within the world of doctrine and legal commentary as the area of inquiry.

Insofar as contemporary lawyers openly embrace any aesthetic criteria for legal texts and arguments, they are the criteria most closely associated with neutrality and transparency: craft values that emphasize clarity and simplicity, such as the clean line, the streamlined sentence, the active voice, the plain and direct pronouncement. Even though


4 These recommendations are repeated in virtually every guide to legal writing. They bear a close kinship to the values taught in the M.F.A. programs that began to proliferate in the 1950s; see Mark McGurl, The Program Era: Postwar Fiction and the Rise of Creative Writing (2009).
these accounts tend to dwell primarily on examples of the techniques in question, rather than exploring the aesthetic premises that underwrite them, such discussions are welcome because they help to make explicit some of the governing assumptions that shape contemporary legal thinking. To bring out some of those assumptions even more clearly, we may observe that while the emphasis on concision and flow might be associated with modernism, this is not the fragmented, dissociative, kaleidoscopic modernism of Picasso, Stein, and Eliot. Rather, it is the modernism of the Precisionists, a group of early twentieth-century American artists such as Charles Sheeler, whose work combined “the hyperefficiency of Taylorist production principles” with values of objectivity that attempted to screen out the artist’s subjective perspective, “providing a purified rendering of the object qua object.”  

David Jenemann suggestively hints at the penchant for a muted, almost reticent stance that underlies Precisionist art (and one that also characterizes a prevalent view of effective legal argument and analysis) when he characterizes these paintings as “camouflage work.”

The claim to eliminate the observer and to abstract away from the individual party or advocate, to an objective presentation of the law, is one of the defining features of modern legal analysis. Gail Stavitsky also describes the Precisionist aesthetic in terms that track those of contemporary legal writing handbooks, explaining that Sheeler and his colleagues produced “hard-edged, static, smoothly brushed, simplified forms rendered in unmodulated colors.” Summarizing their goals, Stavitsky writes that “Precisionism proposed . . . a clarifying search for architectonic structure underlying the chaos of reality.” That goal describes a significant amount of contemporary legal scholarship, which analogously searches for law’s rational foundations, striving not simply to provide an index for the chaos of doctrines that fill the law reports, but to articulate the relations that reconcile and justify those doctrines. As we will see, this account also describes Blackstone’s method, with the significant difference that he generally treats the structure as readily visible, rather than requiring a search for underlying connections. For that reason, Blackstone stands as a forerunner of the style that modern lawyers favor, rather than as an exponent of it. Blackstone’s aesthetic techniques have affinities with those of neoclassical painting

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6 Id. For a helpful discussion of the history and technology of camouflage, see Hanna Rose Shell, Hide and Seek: Camouflage, Photography, and the Media of Reconnaissance (2012).

7 Jennemann, supra note 5, at 192 (quoting Gail Stavitsky, Reordering Reality: Precisionist Directions in American Art, in Precisionism in America 1915-1941, at 12, 34-35 (Diana Murphy ed., 1995)).

8 See Thomas Erskine Holland, Essays upon the Form of the Law 171 (1870) (insisting that legal science requires a “logical method,” and that “a chaos with a full index” will not yield “a satisfactory body of law”); Frederick Pollock, The Science of Case-Law, in Essays in Jurisprudence and Ethics 237, 238 (1882) (deploring the state of case law as merely a “chaos tempered by Fisher’s Digest”). The phrase has, of course, been repeated—and amended—to epitomize a conception of the jurist’s desire for order and clarity; see, e.g., Thomas C. Grey, Formalism and Pragmatism in American Law 58 (2014); Sionaidh Douglas-Scott, Law After Modernity 74 (2013); Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging 53 (2009).
and architecture, which emphasized sparse and clean detail, crisply delineated structures, and scenes in which the object of representation was fully present, rather than being only partly visible, with some features left out of the frame. Precisionism’s “clarifying search” for order uses many of these techniques, but typically seeks to bring an underlying structure into visibility, just as the contemporary lawyer’s art often uses the craft values mentioned above to reveal previously unrecognized connections among doctrines, or to extricate a principle that had been concealed in the thicket of the case law.

A thorough historical examination of the process by which Anglo-American lawyers came to adopt these methods and values must await further study, but it is worth emphasizing the need to understand this process in terms of aesthetics. I use that term here to describe lawyers’ ways of arranging contentions, choosing analogies, explaining precedents, and the various other choices that inform the construction of a legal argument, and that make other lawyers regard it as acceptable, apt, or even elegant. “Construction” is an important term in this account. Law’s designs on its audiences may not be fully attained, and may not even be readily discernible, in light of the designs that go into its composition, but nevertheless, design in the latter sense is crucial for an understanding of what a legal argument seeks to achieve. It is trite to note that judges, aiming at precision and clarity, prefer explanatory modes that make the outcome and its rationale appear natural (or neutral, or orderly), and yet when scholars ask what counts as natural, the inquiry rarely considers the means by which this effect changes over time. One need only turn back to decisions from the latter part of the nineteenth century to see how recently this perception has altered, and to see how easily those decisions can be misinterpreted when a contemporary lens is imposed on them. Historical comparison shows how vernacular, impressionist, and hyper-realist techniques might all drift in and out of the natural/unnatural binary, rather than simply constituting an undifferentiated mass aligned with the unnatural. Moreover, given that the affinity for clear expression and neutral tones is assumed to be the stylistic manifestation of judicial virtues such as transparency and impartiality, it is evident that this affinity itself correlates with various developments that have altered the landscape of Anglo-American law over the last two or three centuries, ranging from the elimination of the Crown’s ability to remove judges “at pleasure,” to the introduction of defense counsel for defendants in felony cases, to the rise of cause lawyering. A fuller account of the developments facilitating the modern

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forms of legal “camouflage work,” then, would consider aesthetic techniques in relation to policies, doctrines, and movements that have allowed judges (for example) to present themselves as detached, and to present disputes as balanced contests.\footnote{For just one example of how these assumptions may be called into question, consider the tonal shifts that judges often adopt in cases with self-represented litigants. The theory of party autonomy treats all parties as equally motivated and equally competent, but the \textit{pro se} litigant raises numerous problems for this theory.}

Before turning to the context in which a relational aesthetics emerged, I begin by discussing some of the conceptions that might be included more generally within the domain of legal aesthetics. The first part of the essay sketches out these conceptions, and indicates the place of relational aesthetics within that landscape. The second part attempts to identify some of the defining features of Blackstone's relational aesthetics.

\section{I. Aspects of Legal Aesthetics}

When speaking of legal aesthetics, one might have in mind any of a number of conceptions of the ways in which judges, lawyers, parties, and legal commentators adopt and promote certain styles of address, self-display, explanation, and exhortation. Legal rhetoric—particularly as elaborated by renaissance jurists and theorists—has been perhaps the most intensively studied aspect of legal aesthetics. Research in this area usually frames the inquiry in historical terms, looking to rhetoricians' manuals, acting guides, and commentators on theatrical and legal performance, and examining them in relation to reports of individual trials, writings on advocacy, and discussions of the courts and the legal system more generally.\footnote{See, e.g., Gudridge, supra note 1; Peter Goodrich, \textit{Ars Bablativa}: Ramism, Rhetoric, and the Genealogy of English Jurisprudence, in Legal Hermeneutics: History, Theory, and Practice 43 (Gregory Leyh ed., 1992); Holger Schott Syme, The Look of Speech, 2 Textual Cultures 34 (2007); Simon Stern, Forensic Oratory and the Jury Trial in Nineteenth-Century America, 3 Comp. Legal Hist. (forthcoming 2015); Lawrence Jenab & M.H. Hoeflich, Forensic Oratory in Antebellum America, 51 Kan. L. Rev. 449 (2003); Alfred L. Brophy, The Law of the Descent of Thought: Law, History, and Civilization in Antebellum Literary Addresses, 20 Law & Lit. 343 (2008); Laura Krugman Ray, Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions, 59 Wash. & Lee L. Rev. 193 (2002).} Besides the work in this vein, scholarship on legal aesthetics can be divided roughly into three other categories, sometimes explored in tandem with legal rhetoric. One area involves the material aesthetics of legal actors and institutions. This kind of research examines the visible emblems of legal authority and considers questions whose substance is essentially aesthetic, focusing primarily on courthouses and the legal regalia displayed there, but occasionally looking to other venues such as prisons, administrative bureaus, and lawyers’ offices. A second area involves doctrinal analyses in which aesthetic values operate at some level to define the content of legal categories—in fields such as copyright, free speech, zoning, and arts management. Finally, more conceptual questions about aesthetics arise when we consider how doctrines are crafted and aligned, how jurists conceive of the relations between harm and compensation, and how legal processes themselves are designed so as to allow parties to represent their grievances and to vindicate their claims. Generally speaking, the historical frame of reference tends to disappear as we move from material aesthetics to more conceptual questions about legal
systems and the relations within them. After all, it is difficult to study architectural and sartorial fashion without taking up historically specific instances, and while a similar focus can also help to illuminate the more abstract questions posed by the inquiry into forms of obligation and structures of liability, the very abstractness of these questions makes it easier to consider them in terms of aesthetic values that seem to escape historical reference.

In recent years, an increasing amount of research has been devoted to the material aesthetics of legal actors and institutions, which examines the visible and tacit emblems of legal authority, the exercise of legal power, and the management of participants in the litigation process. Investigations of this kind usually dwell primarily on the best-known site of litigation and legal argument—namely, courtrooms and their extensions in associated public areas. Some of this research examines courtroom architecture and the management of space, functions, and actors achieved through the physical organization of the building, its rooms, and its personnel.\(^1\) With respect to the courtroom itself, such inquiries typically focus on the allocation of different functions to distinctively framed spaces, set at higher or lower elevations, and surrounded by various kinds of prostheses, decorations, and softer or harder borders. A related line of work considers legal garb as a means of modulating perceptions of the actors’ bodies, thereby rendering them more or less abstract and authoritative, and endowing them with different kinds of agency.\(^4\) Beginning with the demarcations of physical space and the objects that fill it, this research sometimes then turns to artwork, in the form of the portraiture, statuary, and other embellishments that appear in and around courtrooms, and ultimately to the iconography of justice more generally (e.g., the portrayal of Justice as a blindfolded figure endowed with a balance beam).\(^15\) This short summation already suggests ways in which discussions of the material aesthetics of law can drift into discussions of law’s images of itself and its aims, and future work will probably extend that orientation.

A frequently invoked reason for studying legal aesthetics is to specify the values that guide judicial preferences, and this rationale explains much of the research that has sought to identify the aesthetic assumptions driving the operation of particular doctrines or areas of law—the mode of inquiry I characterized above as doctrinal aesthetics. In numerous contexts, aesthetic values operate at some level to influence the goals of the law, and to guide jurists and legislators in deciding what the law should protect. The nine-


teenth-century dispute over whether photographs qualify for copyright protection, for example, turned in part on the question of whether photographs exhibited features that deserved to be regarded as products of authorial intention.\textsuperscript{16} Indeed, modern intellectual property law has been suffused with questions of aesthetics, ranging from the place of originality in copyright law, to the distinction between “functional” and “nonfunctional” design elements in trademark law, to the form and significance of the patent specification.\textsuperscript{17} A series of battles involving realist, decadent, and modernist literature ultimately changed legal definitions of obscenity.\textsuperscript{18} In various other areas, such as zoning, cultural heritage law, and even libel, judgments of aesthetic value inform the content of legal categories and bear directly on the grounds of liability.\textsuperscript{19} Less predictably, assumptions about natural and artificial design have come into play in the law of voting rights: in \textit{Gomillion v. Lightfoot}, the transformation of a voting district “from a square to an uncouth twenty-eight-sided figure” was held to constitute a legal violation because the deviation from a regular shape could only be explained on discriminatory grounds.\textsuperscript{20} Some decades later, however, a federal district court repudiated the evaluative implications of the term “uncouth,” explaining that “[t]he objections to bizarre-looking reapportionment maps are not aesthetic (except for those who prefer Mondrian to Pollock).”\textsuperscript{21} More generally, American courts tend to opt for an aesthetics that favors “natural” appearances—whether in opposing federal measures that alter “an existing medium of expression . . . in ways which distort its usual functioning,” or when concluding, in the law of employment discrimination, that mem-


\textsuperscript{18} A vast scholarly literature has explored these issues. For some recent discussions, see, e.g., Katherine Mullin, Pernicious Literature, in Prudes on the Prowl 30 (David Bradshaw & Rachel Potter eds., 2013); Rachel Potter, Obscene Modernism: Literary Censorship and Experiment 1900-1940 (2013).

\textsuperscript{19} Jesse J. Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 Law & Contemp. Prob. 218 (1955); Patty Gerstenblith, Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning of Authenticity of Art Works, 35 Colum. J.L. & Arts 321 (2012); Sean Latham, The Art of Scandal: Modernism, Libel Law, and the Roman à Clef (2009). For a German example, consider the 1882 Kreuzberg decision of the Prussian Supreme Administrative Court, which struck down a height restriction on buildings near a war memorial; the court reasoned that the general police powers could not advance “aesthetic interests.” 9 PrOVGE 353 (1882); Markus Dubber, Preventive Justice: The Search for Principles 11 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914672). Though the case is usually discussed as a landmark in German administrative law, Thomas Lekan has considered it in relation to the law of landscape preservation; see Thomas M. Lekan, Imagining the Nation in Nature: Landscape Preservation and German Identity 48 (2004).

\textsuperscript{20} \textit{Gomillion v. Lightfoot}, 364 U.S. 339, 340 (1960); see also Shaw v. Reno, 509 U.S. 630, 644 (1993) (new district was “so bizarre on its face [as to be] unexplainable on grounds other than race”) (internal quotation marks and citation omitted).

bers of a protected class will naturally form the same ratio, in any given profession, that they form in the population as a whole. When considerations such as authorial intent, or the nature of originality, come into play in a particular legal domain, the scholarship that explores these legal-aesthetic dimensions usually places significant emphasis on their cultural and historical sources. When the law relies on values such as neutrality, regularity, and natural correspondences, however, the seemingly timeless nature of the values at stake, and their apparently self-explanatory content, can often lead commentators to assume that they require no historical contextualization. To be sure, courts often invoke these values in such a cursory fashion that one would be hard pressed to fix on a particular source or counterpart in the sphere of aesthetics. Yet even if their aesthetic basis cannot easily be specified, the legal penchant for these values does have a history, as I will try to show below.

Perhaps the majority of the research on legal aesthetics, in recent years, has involved the abstract and conceptual issues that the examples of redistricting and antidiscrimination begin to suggest. Because the object of scrutiny, in these accounts, is primarily conceptual, the discussion of aesthetics tends to be restricted to effects, often making it difficult to identify the features that align the legal theory, or system, or relation with any particular aesthetic technique or movement. As a result, it often remains unclear what alternatives (if any) might be open for consideration, because the alternatives might be produced by the very same techniques that yielded the results in question.

Whereas research on doctrinal aesthetics ventures into abstractions that are produced by the tests, rules, and decisions in a certain area of law, much of the scholarly work in this third category considers the aesthetic dimensions of legal systems and general structures of liability, rather than aesthetic criteria bearing on the imposition of liability within a particular area. Adam Gearey, for example, in a critical evaluation of the logic governing jurisprudential theories that require a symmetrical relationship between plaintiff and defendant, has sought to elaborate the “notion of the aesthetic” that governs these efforts, which assume that “an understanding of law’s formal beauty can illuminate the subject’s coherence [and] identity.” Mark Canuel, in a book that examines “the aesthetic component in thinking about moral and legal structures,” suggests that “the oscillating structure of the sublime yields a connection with an account of justice based upon argument, complaint, and repair, an account that combines general rights with allowance for particular rights and seeks to make room for human desire and passion alongside reason.” Oren Ben-Dor, in considering how “beauty and justice relate to law,” looks to a


“legal aesthetics which use[s] the panoply of humanist disciplines, from philology to fine art, in the exercise of the legal role and the scholarly understanding of its texts.” Observing that “[l]aw and art serve both as instruments of oppression and as means for emancipation,”Ben-Dor explores “the multi-layered happening of the aesthetics within which, and as which subjectivity is constituted, . . . reveal[ing] the manner structures of power operate.”25 Pierre Schlag, in an account of the “aesthetics of American law,” finds four dominant styles (characterized as “grid,” “energy,” “perspectivist,” and “dissociative”) typifying the “forms, images, tropes, perceptions, and sensibilities that help shape the creation, apprehension, and . . . identity” of American law, which in turn he finds exemplified by a range of “traditional legal materials, . . . canonical texts, sites, and scenes of law: appellate opinions, rules, doctrines, and the like.”26 These accounts (and numerous others that might be mentioned) draw on a conception of the aesthetic as a means of examining structures, relationships, organizational schema, and systems. A “grid,” for example, might seek to find a single right place for each doctrine and solution, or (as in the case of Karl Llewellyn’s canons and countercanons) might seek to defeat that goal.27

These conceptual questions about legal aesthetics, as much as those involving material and doctrinal aesthetics, need to be understood in historical terms. Legal scholarship abounds in reminders that older cases and their ongoing manifestations are misunderstood when we fail to perceive that they reflect features of a forgotten legal landscape. For example, Kenneth Abraham has suggested that the law of negligence could not help but be shaped by its origins in a legal culture that forbade “interested” parties from testifying in civil disputes.28 William Stuntz has shown that some otherwise puzzling features of the modern law of search and seizure can be explained by their emergence during “the short-lived regime of Boyd v. United States,” an 1886 decision that lasted only twenty years, but had a profound effect on the development of privacy norms in relation to the fourth amendment.29 Just as these reminders about now-forgotten doctrinal conditions can help us avoid misreading older cases through modern lenses, understanding the aesthetic values of an earlier era can clarify the aims of legal writings that embody and express those values. Modern jurists often invoke Blackstone’s Commentaries as an objectively accurate snapshot of the law during the third quarter of the eighteenth century, but as we will see, this assumption ignores many of Blackstone’s explicitly asserted aims.

II. Blackstone's Relational Aesthetics

Blackstone’s Commentaries are animated by the same impulses underlying other enlightenment projects that achieved their authority by collecting information and organizing it systematically to provide an orderly overview of some field of knowledge. In spirit, Blackstone’s enterprise recalls intellectual projects such as Johnson’s Dictionary (1755), the Encyclopédie of Diderot and d’Alembert (1751-72), and Linnaeus’s Systema Naturae (10th ed. 1758-59). The very idea of displaying the lineaments of English law in a comprehensive fashion distinguishes the Commentaries from other contemporaneous legal treatises, guides, and manuals, which rarely even presented themselves as indexes to the array of individual instances they encapsulated, but instead offered short summaries of this welter of details, as if a reader could build up an understanding of the subject only by proceeding inductively, by marinating in the specifics of numerous cases and hoping for insight at the end. This was, indeed, the advice typically given to aspiring lawyers, usually accompanied by the recommendation to read Coke’s Institutes (1628-44)—a text that, after the advent of the Commentaries, would be cordially dismissed as the work of “an uncouth and crabbed author” that had “disgusted and disheartened many a Tyro.”

Coke’s digressive and highly paratactic approach showcased his erudition; even his enthusiasts felt compelled to acknowledge that, when compared to Blackstone, Coke betrayed a lack of “method” and “perspicuity” that would probably “bewilder the most ingenious, and . . . baffle the industry of the most enterprising [sic] and indefatigable reader.”

Coke’s approach anticipates the association of ideas that would figure so prominently in Locke’s philosophy, and that would find literary expression in Lawrence Sterne’s Tristram Shandy (1759-67), but Blackstone—Sterne’s contemporary—has no enthusiasm for the famously convoluted line that Corporal Trim traces in the novel, nor even for the Hogarthian line of beauty to which it is sometimes likened (Appendix). Rather, Blackstone opts for the diagram, the map, the blueprint. These are appropriate devices for someone who favored cartographic metaphors for the law, who was trained in architecture, and whose earlier legal publications had been praised for their “perspicacious” use of diagrams. His procedure is, in many ways, familiar to modern lawyers: he enumerates in advance the topics and points he will explore; he shows how they comport with one another; he breaks the discussion down into manageable components.

30 The sentiment was Lord Mansfield’s. See John Holliday, The Life of William Late Earl of Mansfield 90 (1797). A later echo of this sigh of relief appears in Pollock and Maitland, who called Coke’s Institutes “a disorderly mass of crabbed pedantry.” 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I, at 591 (1895).

31 Frederick Ritso, An Introduction to the Science of Law 201 (1815).

Yet if his approach anticipates the precisionist style that I have proposed as an analogy for modern legal writing and analysis, Blackstone tends more to suggest than to practice the virtues of enumeration and specification. Just as his expository method may be distinguished from Coke’s (and Sterne’s) it also differs from the aesthetic of surface and depth that was starting to be cultivated around this time by novelists in their treatment of character.33 This may seem unsurprising, given the generic differences between a work of fiction and a discourse on law, except that Blackstone often follows a plot-like logic in elaborating the law’s development, and in various ways he personifies the law itself.34 And yet in doing so, Blackstone is not concerned with exposing hidden connections among seemingly disparate doctrines or legal fields, nor do his efforts recall—as the writings of other contemporaneous legal critics might—a Hogarthian art of caricature, which aims to produce insight by contrasting the high and low, or the serious and the comical.35 It is tempting to liken Blackstone’s approach to a different aspect of Hogarth’s art, characterized by a penchant for “linear abbreviation” and succinctly encapsulated by a drawing of “a Serjeant with his pike, going into an alehouse, and his Dog following him,” executed in “only three strokes” (Appendix);36 these three lines, however, represent a threshold and a pair of vanishing figures that depend on implication and inference, rather than the explicit kind of delineation that Blackstone preferred.

Blackstone would have agreed with those critics who insisted that his simplifications prevented the Commentaries from serving as a useful resource for the practicing lawyer; in fact, he suggests as much at numerous points, particularly in his introductory chapter. But what the critics meant as an objection, Blackstone would have considered merely a banal observation about his aim of providing a general overview of the legal system and the logic and methods governing it, rather than a pleader’s guide or a complete explanation of any particular field of law. As he explains, when elaborating the cartographic metaphor, readers should satisfy themselves with “marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities,” rather than learning “minutely the subordinate limits, or . . . fix[ing] the longitude and latitude of every inconsiderable hamlet.”37 Again, he disclaims any effort to provide a “thorough comprehension” of the doctrines of property law, which would involve the reader in “minute distinctions,” useless to anyone except “a lawyer by profession.”38 The effects for which Blackstone was praised—the balance and clarity that commentators are always sure to invoke when describ-

35 See, e.g., [Anon.], An Enquiry into the Nature and Origin of Literary Property (1762).
37 1 Blackstone, Commentaries, supra note 32, at 35.
38 Id. at 7.
ing his “classical” style—depend precisely on his avoidance of fine-grained doctrinal detail, or scrupulous care in identifying unsettled areas of law, or practical advice concerning the niceties of pleading. Indeed, Blackstone would probably have been surprised by the success of the Commentaries in the United States, where his work sold briskly in the form of countless adaptations for most of the nineteenth century. The editors of these volumes treated the text as a container whose generalizations could be redeemed by populating the footnotes—and sometimes the text as well—with the mass of doctrinal information that Blackstone had refrained from providing. Whether Blackstone would have welcomed this treatment is open to question. While it served to revamp a venerable structure for modern usage, to borrow Blackstone’s own metaphor, the result was to rearrange the relations between the parts that Blackstone had sought so assiduously to align harmoniously.

Occasionally, as he revised the text across the eight editions that appeared during his lifetime, we catch a glimpse of the legal changes that he considered important enough to record, but on the whole, he was less concerned with giving an accurate snapshot of the law as it stood, at a particular moment, and more interested in delineating its general shape and internal relations, even at the expense of doctrinal accuracy in a particular area. As an image of his enterprise, the cartography metaphor carries the risk of implying that his conception is always capable of accommodating more specific details—it carries this risk, that is, unless the metaphor is deployed in the same spirit in which he offers it, in his introductory chapter. It is easy to imagine an elaborate map or blueprint abounding in the density of detail that Blackstone’s critics would have preferred, but that level of specification would have interfered with the goal of sketching out an entire system while emphasizing the relations between its parts. Blackstone seeks only to inculcate “a few leading principles” rather than giving an exhaustive catalogue of doctrines, rules, and exceptions, on the one hand, or a carefully elaborated theoretical account, on the other hand. If his analysis can be characterized as thorough, it is a thoroughness of scope, rather than of complete and specific detail.

It is not coincidental that when explaining the kind of understanding he seeks to promote among his readers, Blackstone speaks only of “a few leading principles,” whereas modern legal scholars, and modern courts, are not reluctant to delve ever deeper to unearth as-yet undiscovered principles, and to offer ever finer taxonomies and distinctions within any given area of law. Blackstone’s relational aesthetic, again, requires him to limit the number of principles adduced as governing any particular area. Too many and the clear blueprint would disintegrate into an overpopulated mess, in which the general proportions are too hard to discern.

For the same reason, it is not surprising that Blackstone offers few suggestions by way of proposed reforms. A reform-oriented view would proceed by identifying goals or values that the legal system should embrace, and pointing to those areas that fail to redeem them. Insofar as Blackstone offers a conception of reform, it is one based on

39 Id.
“reconciling the little contrarieties” that have crept into the law over time—readjusting the law to remove imbalances and discrepancies (usually the result of hastily adopted statutes, as he later explains).40 This is a view of reform guided by consistency and calibrated allocation, a view in which “justification” might be understood both in terms of rationalization and the visual balance of the justified line on the page. Appropriately, one of Blackstone’s main themes, when he does recommend reform, involves proportionality in criminal punishment: arguing against the overuse of capital punishment, he explains that it improperly equates crimes of radically different magnitudes, and thereby creates disparities that serve to frustrate the law’s deterrent aims.41 Conversely, he praises preventative measures such as peace bonds and sureties—which he sees as uniquely English devices—because their flexibility means they can always be properly adapted to the harm they are used to prevent.42

Without necessarily subscribing to the view that judges only find the law, and do not make it, Blackstone as commentator takes his task to be that of expounding the existing legal system. He seeks to show how the parts fit together, rather than proceeding from a view of how the law should be, or exposing deeper and hidden grounds on which the existing laws might be adjusted. This is one way of distinguishing Blackstone from nineteenth-century formalists such as Langdell, for whom symmetry and harmony were also important—but less important than the excavation of deep principles on which the law could be explained and, if need be, adjusted. Langdell observed that “[t]he number of fundamental legal doctrines is much less than is commonly supposed,” because of “the many different guises in which the same doctrine is constantly making its appearance.”43 Like Blackstone, Langdell was confident that a few elementary building blocks would go a long way, and he similarly attempted to ensure that the fundamental doctrines are “so classified and arranged that each should be found in its proper place.”44 However, Langdell’s method of compartmentalizing—and more specifically, of establishing the grounds for compartmentalization—depends on a surface/depth aesthetic very unlike Blackstone’s. Langdell welcomed the task of seeking out those fundamental principles, discovering the animating logic that others, working too close to the surface, had missed; and the colleagues who took up this call were happy to discover more and more of these principles. For Blackstone, these efforts would have smacked of sophistication; throughout the Commentaries, he uses terms such as subtlety and finesse to disparage the Norman legal importations that he blames for complicating a common law that had previously adhered to a clearly discernible logic.45

40 Id. at 30; 4 Blackstone, Commentaries 4, 175 (1769).
41 4 Blackstone, Commentaries 4, 10.
42 Id. at 253.
44 Id. at vii.
45 See, e.g., 2 Blackstone, Commentaries 76, 112 (1766); 3 id. 52 (1768); 4 id. 410.
If there is a contemporary writer whom Blackstone’s work recalls, and whose aesthetic Blackstone shares, it is Samuel Johnson. His tale *Rasselas* (1759) is notable for its effort to manage human complexity, generally by classifying people and explaining their actions by reference to a few basic motives (avarice, jealousy, self-aggrandizement). One of characters describes the poet’s task in terms that resonate with Blackstone’s approach: “The business of a poet . . . is to examine, not the individual, but the species; to remark general properties and large appearances.” Rather than “number[ing] the streaks of the tulip, or describ[ing] the different shades of the verdure of the forest,” the poet should attend to “prominent and striking features” while ignoring “minuter discriminations.” This is a literary agenda that Blackstone himself might have embraced. Johnson is, indeed, better known as an essayist than as either a poet or a novelist, and his talents were evidently well-suited for legal exposition: he helped to write the lectures that Robert Chambers would deliver as Blackstone’s successor in the Vinerian Chair.

Following the publication of Blackstone’s *Commentaries*, a new legal literature emerged in England, featuring treatises that sought to discern similarly rational structures within particular fields or subfields, or even at the level of particular doctrines. Within a generation, the relational aesthetics that animates the *Commentaries* as a whole became a commonplace feature of Anglo-American legal analysis. As has already been suggested, Blackstone’s concern with overall proportion quickly vanished as various areas of law became increasingly complex, making it impossible to acquire a general understanding of the system as a whole. Yet his concern with balance, congruity, and integration continues to hold a firm and tacit place in lawyers’ minds as essential features of legal justification.

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46 Samuel Johnson, The History of Rasselas, Prince of Abyssinia 22 (Thomas Keymer ed., 2009) (1759). Because these lines have been seen as exemplifying some of the basic tenets of neoclassical aesthetics, they are often quoted in discussions of contemporaneous aesthetic theory; see, e.g., Geoffrey Tillotson, Imlac and the Business of a Poet, in Studies in Criticism and Aesthetics 1660-1800, at 296, 297, 311-12 (Howard Anderson & John S. Shea eds., 1967); Scott Elledge, The Background and Development in English Criticism of the Theories of Generality and Particularity, 62 PMLA 147, 150 (1947); Joseph Carroll, Literary Darwinism: Evolution, Human Nature, and Literature 118 (2004).


Appendix: Illustrations

Figure 1: Trim’s flourish, 9 Lawrence Sterne, The Life and Opinions of Tristram Shandy, Gentleman 17 (1767)

Figure 2: Hogarth’s line of beauty, from William Hogarth, The Analysis of Beauty, Written with a View of Fixing the Fluctuating Ideas of Taste (1753)

Figure 3: Excerpt from John Nichols, Biographical Anecdotes of William Hogarth 65 (3d ed. 1785)

Hogarth boasted that he could draw a Serjeant with his pike, going into an alehouse, and his Dog following him, with only three strokes;—which he executed thus:

A. The perspective line of the door.
B. The end of the Serjeant’s pike, who is gone in.
C. The end of the Dog’s tail, who is following him.
There are similar whins of the Caracci.