

The Instrumental Value of Beauty in the Pursuit of Justice

By NANCY PERKINS SPYKE*

SIX YEARS AGO PROFESSOR Elaine Scarry published *ON BEAUTY AND BEING JUST*,¹ the manifesto in which she argues that experiencing beauty impacts us in ways that can assist us in achieving justice. Some commentators have analyzed Scarry's theory in the abstract, suggesting it represents a new, free standing theory of justice;² others have taken a more limited view, approving of her work's resurrection of beauty as a category worthy of consideration.³ The goal here is to consider Scarry's work differently, in a more instrumental and practical way. The link between beauty and justice that Scarry so gracefully exposes is grounded in personal experience and effect. She proposes that the reality of that experience and those effects attune people to justice. If that is so, then social institutions should encourage artistic creation and protect beauty. The law is no exception.

This practical suggestion has yet to be acted upon, let alone articulated. As already noted, theories of justice typically are relegated to the realm of the metaphysical. The same is true of beauty.⁴ However, some theories of beauty and art, and even justice, have been convincingly tied to human experience. John Dewey's ideal of art as

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1. ELAINE SCARRY, *ON BEAUTY AND BEING JUST* (1999). Professor Scarry is the Walter M. Cabot Professor of Aesthetics at Harvard University.

2. See generally Ethan J. Leib, *On the Difficulty of Imagining an Aesthetic Politics*, 12 *YALE J.L. & HUMAN.* 151 (2000).

3. See generally James W. Torke, *The Aesthetics of Law: On Beauty and Being Just*, 48 *AM. J. JURIS.* 325 (2003).

4. See generally *PHILOSOPHIES OF ART & BEAUTY: SELECTED READINGS IN AESTHETICS FROM PLATO TO HEIDEGGER* (Albert Hofstadter & Richard Kuhns eds., 1976) [hereinafter *SELECTED READINGS IN AESTHETICS*].

experience⁵ and Simone Weil's theory of justice⁶ are two examples that fit nicely with a pragmatic interpretation of Scarry's work. Taken together, these three philosophies provide a utilitarian underpinning for laws that promote and protect beauty, which are often supported by vague or unsatisfying rationales. The Scarry-Dewey-Weil triad also establishes a consequential norm. If there is too little justice in our communities, perhaps we need to provide more beautiful things and surroundings for those who live and work nearby as a means of improving the public good.

This is not an article about legal aesthetics in the tradition of those such as Pierre Schlag,⁷ who explore the aesthetic qualities of various schools of legal thought and practice. Neither is it an essay about the dark side of aesthetics and its legal consequences,⁸ or the generally positive aspects of aesthetics.⁹ Rather, it addresses the qualities of beauty that theoretically promote justice and the policy implications of that thesis. John Costonis, who has written prolifically in the field of aesthetic regulation, tells us that "we are condemned to come to terms with aesthetics, whether we like it or not."¹⁰ Unlike that sentiment, this Article is not a grudging acknowledgment of aesthetics, but instead reaches out to three experience-oriented theories to craft a positive and practical justification for those laws that protect and promote beauty in its natural and human-made forms.

After a summary of Scarry's work and a discussion of Dewey's complementary thought, this Article will address beauty's connection to justice with a focus on the writings of John Rawls and Weil. The organic conception of beauty and justice that emerges will then be considered in relation to a handful of laws, among them nuisance, the National Environmental Policy Act ("NEPA"), and the National Foun-

5. See generally JOHN DEWEY, *ART AS EXPERIENCE* (1934), portions reprinted in *SELECTED READINGS IN AESTHETICS*, *supra* note 4, at 577-646.

6. See generally RICHARD H. BELL, *SIMONE WEIL: THE WAY OF JUSTICE AS COMPASSION* (1998).

7. See Pierre Schlag, *The Aesthetics of American Law*, 115 *HARV. L. REV.* 1047 (2002).

8. See, e.g., Desmond Manderson, *Health and the Aesthetics of Health—An Historical Case Study*, 11 *J. CONTEMP. HEALTH L. & POL'Y* 85 (1994) (detailing how appeal to aesthetic judgments led to government-sanctioned discrimination against the Chinese in nineteenth century Australia).

9. See, e.g., James Charles Smith, *Law, Beauty, and Human Stability: A Rose Is a Rose Is a Rose*, 78 *CAL. L. REV.* 787 (1990) (reviewing JOHN J. COSTONIS, *ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE* (1989)).

10. John Nivala, *Constitutional Architecture: The First Amendment and the Single Family House*, 33 *SAN DIEGO L. REV.* 291, 304 (1996) (quoting JOHN J. COSTONIS, *ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE* 15 (1989) [hereinafter *ICONS AND ALIENS*]).

dation on the Arts and Humanities Act in order to shed light on beauty's utility in the quest for justice.

I. Beauty and Justice—Scarry's Connection

In her book, Professor Scarry carefully demonstrates how various characteristics of beauty, and more particularly our experience of beauty, assist us in achieving justice.¹¹ She tells us that the totality of beauty's impact instructs and inspires us in ways that enable us to respond to injustice.¹²

This remarkable result occurs not only because of the qualities that make something or someone beautiful, but also because of our reactions to those qualities. Things that are aesthetically pleasing are symmetrical; they have a sense of proportion and harmony.¹³ To Scarry, this balance exists in faces, works of art, even laws.¹⁴ Far more important to her, however, are the ways in which observers respond to aesthetic proportion.

Scarry describes how beauty both inspires and requires us to create and imitate things of beauty.¹⁵ Our desire to see beautiful things causes us to bring new things of beauty into existence.¹⁶ At the same time, beauty is life-saving, in that it makes the observer's existence "more vivid, animated . . . worth living."¹⁷ Not only are we personally enriched when we experience a beautiful object, but the object itself takes on a life of its own, which in turn makes us want to protect it.¹⁸ The result is a life-giving/life-saving compact between the beholder and the object of beauty.

11. SCARRY, *supra* note 1, at 80, 90–91, 93. The link between beauty and justice is not as easily seen by other scholars. Theologian Walter Brueggemann, writing about the Old Testament, points out that Israel is directed to listen to Yahweh's commands and is obligated to do justice. WALTER BRUEGGEMANN, *THEOLOGY OF THE OLD TESTAMENT: TESTIMONY, DISPUTE, ADVOCACY* 421 (1997). Israel is also invited to gaze upon Yahweh's "presence, holiness, and beauty." *Id.* at 425 (citing SAMUEL TERRIEN, *THE ELUSIVE PRESENCE: TOWARDS A NEW BIBLICAL THEOLOGY* (1978)). Brueggemann believes that there is a tension between the obligations to do justice and to gaze on the beauty of Yahweh, although he feels they can be practiced in a complementary manner. *See id.* at 429.

12. SCARRY, *supra* note 1, at 62.

13. *Id.* at 97–99 (finding support in the writings of Plato, Boethius, and Augustine).

14. *Id.* at 46. All of these things are beautiful, as are scenic vistas, poems, and attractive buildings. This Article, however, focuses on the law's ability to further the aims of justice by protecting natural beauty and art in general.

15. *Id.* at 4–5.

16. *Id.* at 88.

17. *Id.* at 24–25.

18. *See id.* at 80, 88–90.

Experiencing beauty also inspires deliberation. When we observe a beautiful thing we initially delight in the object, but the mind soon begins to search for things to which the object can be compared.¹⁹ This search brings the mind back in time as it searches for “precedents,” even to a point without precedent, or to the immortal and truth.²⁰ Throughout this search we confront errors we have made in earlier aesthetic judgments, making the process deeply personal.²¹

A final way in which beauty impacts us is through radical decentering, which refers to beauty’s ability to dissipate self-centeredness. When our gaze falls on a thing of beauty we are no longer at the center of the world.²² But rather than ignoring everything and everyone surrounding us (a phenomenon known as “lateral disregard”),²³ this decentering makes us want to share beauty’s benefits laterally, to distribute its goods.²⁴ While we may initially (and involuntarily) focus exclusively on a beautiful object, what follows is a voluntary extension of our attention to others. We become more perceptive of those around us and are urged to distribute the benefits of beauty²⁵ and to make beauty accessible to society at large and future generations.²⁶

How, then, do these qualities of beauty lead to justice? It is somewhat difficult, after all, to think of justice as beautiful in the abstract.²⁷ The connection is all the more odd given the fact that beauty, of late, has been shunned by the humanities and deemed politically unworthy.²⁸ Yet Scarry refutes those trends and securely links her conception of beauty to Rawls’s theory of justice as fairness.²⁹

Relying on etymological evidence, she initially takes some time to demonstrate that the word “fairness,” so often associated with justice,

19. *Id.* at 29–30.

20. *Id.* at 30–31.

21. *See id.* at 52.

22. *Id.* at 111, 113–14.

23. *Id.* at 80–81.

24. *Id.* at 66–67, 80.

25. *Id.* at 81–82.

26. *Id.* at 117–19. Scarry states that, if asked, people would want beauty in the world, not just for themselves but for others, now and in the future. *Id.* at 117–18.

27. *Id.* at 103, 106. Scarry points out, however, that justice can be beautiful when it occurs in specific instances, such as in a town meeting. *See id.* at 103.

28. Scarry discusses (and refutes) the arguments that beauty distracts us from society’s ills and can lead to its own destruction. *Id.* at 68–71. She also demonstrates that the two political arguments against beauty are contradictory. Both arguments claim that beauty is undeserving of attention, but one does so because beauty is natural, the other because it is artifactual. *Id.* at 78–79.

29. *Id.* at 93, 97.

is derived from ancient words that carried aesthetic meanings.³⁰ Scarry also traces the word to roots that mean to fit, to join, and pact, concluding that “fairness” is an amalgam of the aesthetic and the ethical.³¹ However, the link between beauty and justice runs deeper.

Scarry argues that the life-saving/life-giving exchange we enjoy when experiencing beauty³² leads us to care for the item observed as well as the aliveness of others.³³ She points out that the lateral sharing inspired by beauty—its distributional consequence—combines with its life-saving/life-giving qualities to foster justice. As she explains, an experience with a beautiful object

begins within the confined circumference of beholder and beheld who exchange a reciprocal salute to the continuation of one another’s existence; this two-member salute becomes, by the pressures against lateral disregard, dispersed out so that what is achieved is an inclusive affirmation of the ongoingness of existence, and of one’s own responsibility for the continuity of existence.³⁴

Scarry thus builds upon the human reaction to beauty to find an impulse for ethical response. In doing so, she also makes use of beauty’s sense of proportion: “[B]eautiful things give rise to the notion of distribution, to a lifesaving reciprocity, to fairness not just in the sense of loveliness of aspect but in the sense of ‘a symmetry of everyone’s relation to one another.’”³⁵ Not only are justice and beauty marked by harmony, but beauty’s symmetry assists us in discovering the balance and equality that are the hallmarks of justice.³⁶

Scarry also suggests that beauty’s creative impulse urges us to imitate and replicate, which can inspire us to create institutions and laws.³⁷ She additionally draws an analogy between the pleasure we experience from beauty’s decentering and the satisfaction we feel as citizens who live in fair societies.³⁸ There are also similarities between Rawls’s three types of justice and various creative approaches, and between the intergenerational equity concerns of both beauty and justice.³⁹

30. *Id.* at 91–92.

31. *Id.*

32. *Id.* at 89–90.

33. *Id.* at 90. “Beauty seems to place requirements on us for attending to the aliveness or . . . quasi-aliveness of our world, and for entering into its protection.” *Id.*

34. *Id.* at 92.

35. *Id.* at 95.

36. *See id.* at 97.

37. *Id.* at 115.

38. *Id.*

39. *See id.* at 116, 123.

The implications of ON BEAUTY AND BEING JUST are many. The work might herald an altogether new theory of justice, as suggested by Professor Ethan Leib.⁴⁰ If so, it is a radical departure from Rawlsian concepts and most other political thought, which begin with abstractions.⁴¹ While Leib admits that metaphysical theories of justice are not without their critics, he also exposes the difficulties inherent in a theory based on aesthetics.⁴²

Beauty's subjectivity, in particular, makes it a difficult starting point for a theory of justice, since consensus may be hard to reach.⁴³ In addition, the dissection of beauty into various components and an emphasis on symmetry in particular "scientizes" beauty.⁴⁴ Leib also notes that Scarry fails to adequately address the possibility that some visions of beauty might lead to political regimes that we would find abhorrent.⁴⁵

It is clear, however, that Scarry offers a unique starting point for her theory. Unlike Rawls's hypothetical original position, Scarry begins with the human experience of beauty.⁴⁶ Leib seems attracted to a factual starting point, since it addresses a shortcoming of Rawls's fictive account.⁴⁷ Nevertheless, Leib accuses Scarry of unevenness, claiming that she, occasionally, slips into the metaphysical, despite her contention that her theory is not speculative.⁴⁸

Ultimately, Leib admits that Scarry's work may represent something more modest than a new theory of justice. Perhaps she merely wants to say that beauty can assist us in achieving justice.⁴⁹ If this is so, Leib fails to see the lasting value of her work, since numerous metaphysical arguments end up at the same place. Moreover, if Scarry's theory is viable it does little to deal with practical political problems, such as deciding how best to achieve the distributional aims of justice.⁵⁰

Professor James Torke, a colleague of Scarry, views her work differently. Like Leib, Torke acknowledges that Scarry's starting point is

40. See Leib, *supra* note 2, at 151.

41. See *id.* at 152.

42. See *id.* at 155-56.

43. *Id.* at 156.

44. *Id.* at 162.

45. *Id.* (referring to the "Nazi" aesthetic).

46. *Id.* at 163.

47. See *id.* n.53 (citing Frank I. Michelman, *How Can the People Ever Make the Laws?*, in *ESSAYS ON REASONS AND POLITICS* 145, 170 (James Bohman & William Rehg eds., 1997)).

48. *Id.* at 164-65.

49. See *id.* at 166.

50. See *id.* at 166-68.

factual and accepts her recitation of the effects of one's personal experience with beauty.⁵¹ He agrees that the attributes of beauty—object, experience, and imitation—stir an ethical impulse that makes justice accessible.⁵² But he believes that Scarry may be telling us something more, that beauty not only assists us in coming to justice, but “is necessary to and determinative of justice.”⁵³ The force of Torke's suggestion is significant, since it warns us that we will not know justice unless we first know beauty.⁵⁴ In this light, Scarry succeeds in elevating beauty to a category relevant to political thought.⁵⁵

Scarry's account, then, casts beauty either as the foundation of justice or an indispensable component of justice. A more modest interpretation, which both Leib and Torke briefly consider, is adopted here. Rather than being the *sine qua non* of justice, Scarry may be telling us that beauty has the potential to help society on its journey toward justice, one person at a time. Our personal experience of beauty can prepare us to do justice in very real ways.

II. Experience and Artistic Creation—Dewey's Connection

An interesting counterpoint to Scarry's theory of beauty and justice is John Dewey's philosophy of art. In his classic work, *ART AS EXPERIENCE*,⁵⁶ Dewey theorized that art emerges from the environment and life events experienced by the artist⁵⁷ and that the artist's work reflects, and even thrives upon, the ebb and flow of life.⁵⁸ At first glance, these ideas seem unconnected to Scarry's understanding of beauty. Dewey's beliefs emphasize the front-end of artistic beauty—the artist's creative impetus—while Scarry focuses on beauty's aftereffects—the experience of beauty's beholder. Still, both theories are sited in the realm of experience, which aligns them in an important way.

Dewey's argument succeeds in grounding art, plucking it from abstraction. In some sense, his thesis validates Scarry's theory by lending support to her factual account of beauty. Dewey understood artistic beauty as a product of real life, and Scarry tells us that beauty is real, with real consequences. To Scarry, the beauty of an art object

51. See Torke, *supra* note 3, at 326, 327. Yet, unlike Leib, Torke feels Scarry does not adequately deal with beauty in the abstract. *Id.* at 326.

52. *Id.* at 329.

53. *Id.*

54. *Id.*

55. *Id.* at 333.

56. DEWEY, *supra* note 5.

57. See *id.* at 579.

58. *Id.* at 588–89.

arises from the reality of life and inspires us to imitate, to share, to desire order and symmetry in our world. Together, Dewey and Scarry see artistic beauty as a medium between an artist's moment in time in a particular environment and an onlooker's experience. Scarry takes the point further, by arguing that beauty's impacts have the ability to inspire justice in the beholder.

Dewey knew well that his artistic ideal was not reflected in early twentieth century America. The housing of art in museums rendered it unimportant to the vast majority of people.⁵⁹ Artists, too, were isolated; rather than working amidst people and the rough and tumble of life, they labored alone in studios, engaged in pure self expression. Dewey saw the art of his day as individualistic and remote, peripheral to the immediate world and increasingly dedicated to the goals of nationalism and capitalism.⁶⁰

Dewey sought to resurrect the link between ordinary and aesthetic experience by embracing the continuity between aesthetic experience and the "normal processes of living."⁶¹ This Darwinian conception of art recognizes the dependency of the artist's creative urge on the biological cycle of harmony and discord.⁶² His view of art as experience imbues artistic beauty with an immediacy that springs from the natural rhythm of life. Experience is "art in germ,"⁶³ and art, in turn, "concentrate[s] and enlarge[s] an immediate experience" through imaginative expression.⁶⁴

Only briefly did Dewey contemplate the impact of art grounded in experience. He saw a power in the artistic beauty he conceived, one that could unleash possibilities of human behavior that could not be achieved by laws or other institutions.⁶⁵ With this provocative thought, Dewey edges toward Scarry. He saw, in the organic artistic beauty he envisioned, a force that could change human relationships.⁶⁶

59. *Id.* at 581.

60. *Id.* at 584.

61. *Id.* at 585.

62. *Id.* at 588-90. Dewey wrote that the cycle of balance and counterbalance presents a dynamic pattern of life that generates "esthetic experience." *Id.* at 590. Dewey's "mature" philosophy and functionalism were heavily influenced by Darwin. *Id.* at 577 (editors' introductory note).

63. *Id.* at 592.

64. *Id.* at 642. Umberto Eco suggests that Dewey's naturalistic philosophy owes much to the insights of medieval aesthetics. See UMBERTO ECO, *ART AND BEAUTY IN THE MIDDLE AGES*, 118-19 (1986).

65. DEWEY, *supra* note 5, at 645-46. Dewey describes the power of art as "liberating and uniting." *Id.* at 646.

66. *Id.*

It is true that Dewey's work focuses exclusively on artifactual beauty and may appear to have no bearing on the beauty that exists in the natural environment, a beauty that Scarry certainly acknowledges. Yet Dewey never dismissed natural beauty; his affinity for the biological arguably would prevent him from doing so. Instead, Dewey naturalized art by recognizing it as the product of the balance and beauty of nature as well as the artist's cultural surroundings. Artistic beauty is steeped in experience, and natural beauty is one of the things that feed human experience. In some sense, then, natural beauty is relevant to Dewey's thinking.

Both Scarry and Dewey understand beauty as a conduit between everyday experience and a better place. The beauty in art, often inspired by natural beauty, is something very real and organic, with qualities that make justice possible. Once beauty is seen in this way, as immediate and effectual, its legal utility becomes more apparent.

III. Scarry, Rawls, and Weil—the Justice Connection

To accept the premise that art is experience and facilitates justice begs the question, "Which conception of justice are we talking about?" There are as many possibilities as there are theories of justice, but three will be considered briefly with a goal of finding a fit with the complementary visions of Dewey and Scarry.

A. Beauty as the Source of Justice

Some have suggested that Scarry intends to offer her own theory of justice, one that sees beauty as the sole means to an end.⁶⁷ If so, beauty becomes the source of justice, the single underpinning of political theory,⁶⁸ and assumes priority as a "first philosophy."⁶⁹ This view, however, is riddled with problems. As Leib maintains, Scarry's suggestion of our absolute need for beauty moves her from the factual into the world of "metaphysical moralisms."⁷⁰ She strays again when she depicts an original position from which foundational decisions are made regarding beauty.⁷¹

More pointedly, it is difficult to square the idea of a stand alone theory of justice with Scarry's own language, which tells us repeatedly

67. See *supra* text accompanying notes 40–50.

68. See Leib, *supra* note 2, at 152.

69. *Id.* at 155–56, 158.

70. *Id.* at 165.

71. *Id.* at 166.

that beauty assists us in coming to justice.⁷² Her frequent allusions to Rawls is yet another reason to reject the idea that she seeks to promote her own aesthetic theory of justice. Nowhere in her text does Scarry state that beauty is the first and only philosophy of justice, and—even if she did—the practical implications of her theory would raise concerns.⁷³

Beauty, then, is not justice's *raison d'être* but is instead something that helps us move toward justice in very important ways. This more realistic reading of Scarry provides the opportunity to consider whether other theories of justice support an instrumental perspective of the beauty-justice connection.

B. Justice as Fairness

It is possible that Scarry does not care to pin her theory to any particular conception of justice but simply seeks to relate her thought to the dominant view of justice in the twentieth century. She may, then, have discussed Rawls's philosophy because of its popularity rather than its uniquely good fit with her thesis. At the very least, Scarry's reference to Rawlsian justice suggests that she feels her theory is aligned with justice as fairness to some extent. While her linkage with Rawls succeeds at some level, it is not altogether persuasive.

In *A THEORY OF JUSTICE*,⁷⁴ John Rawls presents his acclaimed conception of justice as fairness, a justice that results from choices made by individuals operating under a veil of ignorance in a hypothetical original position.⁷⁵ Rawls's decision makers act with mutual respect⁷⁶ and seek to maximize reciprocal advantage.⁷⁷ The principle of equal basic liberties and the difference principle are the result. Rawls believes that in a just society people will cooperate and agree to a minimum social entitlement to resources that will enable each person to become a responsible citizen.⁷⁸ To him, the ultimate goal of social

72. *Id.*

73. *Id.* See *supra* text accompanying note 50.

74. JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter *THEORY OF JUSTICE*].

75. See generally *id.* ch. 3 § 24. The original position is an "initial status quo" from which fair agreements can be reached. *Id.* at 17. It is also an ahistorical position where all parties are rational, equal, and free to make suggestions. Nothing and no one is ranked, and all operate under a veil of ignorance. *Id.* at 19.

76. Thomas Nagel, *Rawls and Liberalism*, in *THE CAMBRIDGE COMPANION TO RAWLS* 63 (Samuel Freeman ed., 2003) [hereinafter *CAMBRIDGE COMPANION*].

77. *THEORY OF JUSTICE*, *supra* note 74, at 178–79.

78. Samuel Freeman, *Introduction: John Rawls—An Overview*, in *CAMBRIDGE COMPANION*, *supra* note 76, at 9. Rawls's two principles provide that all people have equal basic liberties, and that any social and economic inequalities that exist must result from a system

justice is a fair arrangement that “maximize[s] the worth to the least advantaged of the complete scheme of equal liberty shared by all.”⁷⁹

Stability and a sense of justice are key to Rawls’s vision. The human motivations that cause us to “develop sincere attachments towards persons and institutions that affirm our good” help stabilize society.⁸⁰ This emotive reciprocity is psychologically driven, arising from feelings of love, friendship, and caring.⁸¹ These same motivations cultivate a sense of justice, which also assures a stable and just society.⁸²

Over time, Rawls modified his theory, but he never wavered from the ideals of reciprocity and mutual respect. What changed was his conception of the actors in his just society. He came to see them as citizens who tolerate one another’s diverse fundamental moral views.⁸³ Justice is now politicized, achieved by the “overlapping consensus” of citizens with reasonable but differing religious and moral beliefs.⁸⁴ Although different viewpoints are acknowledged, mutual respect prevails in the realm of public reasoning, where arguments must be based on reason.⁸⁵ Rawls now sees that a myriad of “comprehensive views” can support a sense of justice and stability.⁸⁶ His two principles of justice remain, but they operate within a pluralistic setting.⁸⁷ This liberal evolution in Rawls’s thought yields a macro theory of justice that applies to entire societies and their institutions.⁸⁸

Rawls’s hypothetical original position and veil of ignorance have their critics. Feminists charge that he ignores emotions and relationships, which can make positive contributions to justice.⁸⁹ Martha Nussbaum has accurately dispelled this argument by pointing out that

of equal opportunity and must “be to the greatest benefit of the least advantaged members of society.” Nagel, *supra* note 76, at 66 (citing JOHN RAWLS, *POLITICAL LIBERALISM* 5–6 (1993) [hereinafter *POLITICAL LIBERALISM*]).

79. *THEORY OF JUSTICE*, *supra* note 74, at 205.

80. Freeman, *supra* note 78, at 24.

81. *Id.* at 24 (citing *THEORY OF JUSTICE*, *supra* note 74, at 473–74). Here Rawls draws upon the Aristotelian psychological principle that tells us that we are driven to use our talents at an increasingly higher level; thus, citizens in his well-ordered society will strive to act in ways that further the ends of his conception of justice as fairness. *Id.* at 26–27 (citing *THEORY OF JUSTICE*, *supra* note 74, at 86).

82. *THEORY OF JUSTICE*, *supra* note 74, at 454; *see also* Freeman, *supra* note 78, at 22.

83. Freeman, *supra* note 78, at 33. Rawls’s modified theory appears in his 1993 work, *POLITICAL LIBERALISM*.

84. *Id.* (citing *POLITICAL LIBERALISM*, *supra* note 78, at 44).

85. Nagel, *supra* note 76, at 75–77.

86. Freeman, *supra* note 78, at 34–35, 37.

87. *Id.*

88. *See* Nagel, *supra* note 76, at 63.

89. Martha C. Nussbaum, *Rawls and Feminism*, in *CAMBRIDGE COMPANION*, *supra* note 76, at 488–90.

Rawls takes emotion into account in a serious way, in particular in his belief in society's sense of justice.⁹⁰ In that portion of his thinking he invokes "principles of moral psychology"⁹¹ that derive from parental love and "fellow feeling,"⁹² and he admits that we cannot push those feelings aside "without disfiguring ourselves."⁹³

Somewhere within the psyches of the decision makers in his hypothetical state, Rawls sees an emotive impulse that feeds a sense of justice and, in turn, a stable society. Yet his reference to emotions is not enough to deter other critics. Liberal communitarians oppose Rawls's highly individualistic view and his failure to recognize people's special ties to community and place. They favor a less "atomistic" and more holistic form of liberalism that runs counter to Rawls's teaching.⁹⁴

Scarry does not criticize Rawls. In fact, she repeatedly aligns her views on beauty and justice with fairness in the Rawlsian sense.⁹⁵ What makes this connection initially appealing is her etymological analysis of the word "fair," in which she links the "fairness" Rawls endorses with her concept of beauty.⁹⁶ Yet this demonstration and her other references to Rawls make clear that her beliefs are more a supplement to, rather than a replacement for, Rawlsian justice. When discussing justice, she speaks of someone else's theory, not her own. Scarry might well accept the idea that a sense of justice as fairness arises from Rawls's original position, but that is not the point of her book. Instead, she sets out to explain how beauty helps us achieve that conception of justice. It is a force that awakens in us the life-saving, distributional, and imitative urges that invigorate our sense of justice in the Rawlsian tradition.⁹⁷

If she wished, Scarry could have tied her theory to Rawls in other ways. Her belief in beauty's ability to inspire lateral distribution and symmetrical imitation are consistent with Rawls's difference principle, as is her position regarding intergenerational accessibility to beauty.

90. *Id.* at 490–91.

91. THEORY OF JUSTICE, *supra* note 74, at 491.

92. *Id.*

93. Martha C. Nussbaum, *Rawls and Feminism*, in CAMBRIDGE COMPANION, *supra* note 76, at 491 (quoting THEORY OF JUSTICE, *supra* note 74, at 489).

94. BELL, *supra* note 6, at 34–35.

95. See SCARRY, *supra* note 1, at 115–16 & n.27 (referring to Rawls's three visions of justice, the original position of equality in justice as fairness, and the duty of justice (citing THEORY OF JUSTICE, *supra* note 74, at 83–87, 12, 115)).

96. See *supra* text accompanying notes 30–31.

97. Torke interprets Scarry in a similar fashion. See *supra* text accompanying note 51–52.

One might suggest that the radical decentering that results from an experience with beauty lends support to Rawls's second principle as well. In addition, beauty's ability to engage us in a search for truth in a deliberative way arguably prepares us for the give and take that occurs in Rawls's domain of public reasoning.

While all of these attributes of beauty are in harmony with Rawlsian justice, there is a troubling dissonance. The very personal, emotive, and real experience of beauty that Scarry depicts seems a mismatch for a vision of justice that emerges from a fictive position of neutral parties who make decisions in forced ignorance. Even if we acknowledge Rawls's understanding of emotions, he still puts them to use in an artificial setting. Further, some of the qualities of beauty that Scarry champions, in particular its ability to spark a beholder's imitative, cooperative, and protective urges, do not square with Rawls's first principle of individual rights and liberties. The majority of Scarry's effects suggest outreach rather than self-preoccupation.

The less than perfect fit with Rawls becomes more pronounced when Scarry's ideas are supplemented by Dewey's philosophy, which ties the creation of artistic beauty to experience in a complex and very real environment. His vision underscores Scarry's focus on the immediate and real experience of beauty and points towards a utilitarian, rather than a metaphysical, application of Scarry's work. Once art and beauty are perceived as factual and contextualized, and understood as enabling us to come to justice, it is difficult to conceive of that end as an abstraction, born from a fictive, unknowing status quo. An experiential conception of art and beauty begs for a more organic conception of justice.

C. Justice as Compassion

Simone Weil offered such a theory, one that stands in sharp contrast to Rawls's liberal political philosophy.⁹⁸ Like Rawls, Weil relies on the metaphysical, but she situated her theory with the divine rather than a sterile original position. And while Rawls focuses on fairness, Weil asks us to think of justice as compassion.

For Weil, justice is a "new virtue" of caring that holds the promise of legal and social transformation.⁹⁹ It is active, arising directly from

98. BELL, *supra* note 6, at 34. Weil's thinking, which was heavily influenced by Greek, Chinese, and Buddhist philosophers, is closely aligned with communitarians, virtue ethicists, and feminists. *Id.* at 88, 96.

99. *Id.* at 37.

interpersonal relationships within communities.¹⁰⁰ It occurs when God awakens the spirit of justice that dwells within us, enabling us to act compassionately toward those who are worse off than we.¹⁰¹ Weil eschewed rights-based theories of justice and emphasized the value of life;¹⁰² her work is devoid of economic theory, which she believed was detrimental to the common good.¹⁰³ She accepted the reality of social inequality and even considered it necessary for justice to impose itself.¹⁰⁴

Key to Weil's thinking are the concepts of divine love, attention, consent, and rootedness. Her love is immediate and personalized, lived and practiced within one's community to achieve justice.¹⁰⁵ It is a "mad love" that originates from God, becoming "manifest within and through human action by attention, renunciation, and fellow-love."¹⁰⁶ Her justice is revealed in individual acts of compassion toward those who are afflicted and is only made possible with divine help. It is a one-on-one justice springing from the supernatural.¹⁰⁷

Divine intervention occurs only when two conditions exist: attentiveness to those in need and consent to the reality of divine love. Attention is a skill that demands selflessness and the ability to discern what others experience.¹⁰⁸ It requires one to empty all thoughts of self and lose oneself in the plight of those who suffer.¹⁰⁹ Attending to others is only possible with consent, which is a personal agreement to receive God-given love. It requires trust in God and the acceptance of God's intervention to ignite acts of compassion and justice.¹¹⁰ Only when we become selfless, by attending to others, is there room for consent.¹¹¹

100. *Id.* at 38.

101. *Id.* at 74. In addition to love of others, Weil also recognized a love based on friendship. Between friends there is equality and respect of individual autonomy; between one and an afflicted neighbor necessity and compassion are key. *Id.* at 64 (citing SIMONE WEIL, *FIRST AND LAST NOTEBOOKS* 128 (Richard Rees trans., 1970)).

102. *Id.* at 39-41.

103. *Id.* at 36.

104. *Id.* at 63.

105. *Id.* at 207-08.

106. *Id.* at 60-61.

107. *See id.* at 130 (referring to "face to face contact among those who share some common environments").

108. *Id.* at 46-49 (citing Weil's essay, *Human Personality*). Weil believed that attention toward others is a skill that must be learned. *Id.*

109. *Id.*

110. *Id.* at 51-52, 57.

111. *Id.* at 57 (citing Simone Weil, *Are We Struggling for Justice*, PHIL. INVESTIGATIONS, Jan. 1987, at 53 (Marina Barabas trans.)). Weil was one among a number of thinkers who

A final precondition to Weilian justice is rootedness, which refers to the special relationship each of us has with our community and with others. Rootedness is highly contextualized, evolving from life's activities and spiritual sensibilities. Families, professional activities, religion, education, and other social experiences help root us.¹¹² By experiencing these life connections in various milieus, we learn about friendship and respect and become attuned to our culture.¹¹³ And, importantly, we become sensitized to those in distress.¹¹⁴ Rootedness builds a bottom-up morality in a society full of connections and readies us for the work of justice.¹¹⁵

The core, then, of Weil's justice is the practice of acts of compassion between individuals, made possible by their rootedness in community, attention to the cries of the afflicted, and consent to supernatural intervention.¹¹⁶ If these preconditions are met, God bestows the love that fuels acts of compassion.¹¹⁷

It is important to recognize beauty's contribution to Weil's thought. In a general way, Weil's compassion bears similarities to beauty. Both are uplifting and recognize a spiritual universal order,¹¹⁸ and like beauty, Weil's God-inspired justice is harmonious.¹¹⁹ More pointedly, Weil alludes to the importance of beauty in helping us become rooted. She notes that life's rituals are often marked by beauty,¹²⁰ as are other beautiful things that exist in the web of envi-

wrote of divine love. For example, Reinhold Niebuhr, the prodigious Protestant theologian of the twentieth century, recognized a similar type of "self-sacrificial love," one that required a "selfless identification with the needs of others." KAREN LEBACQZ, *SIX THEORIES OF JUSTICE* 83–84 (1986). Unlike Weil, however, Niebuhr believed such love and the hope of perfect justice was an earthly impossibility due to the reality and pervasiveness of sin. *Id.* at 84–86.

112. BELL, *supra* note 6, at 103–04, 123 (citing SIMONE WEIL, *THE NEED FOR ROOTS* 43 (Arthur Wills trans., 1971)).

113. *Id.* at 125. Weil explains that rituals of all kinds help us become rooted by providing a sense of community and of the sacred. *Id.* at 134–35.

114. *Id.* at 134–35.

115. *Id.* at 78.

116. *See id.* at 57, 61. Indeed, her justice is beyond our control. *Id.* at 61.

117. Weil believed that legal systems should be the bridge between the human and spiritual spheres. Laws should bind us together by way of obligation and should guide us in fulfilling our obligation to one another, but should not get in the way. *Id.* at 113, 115, 117. She would have law schools teach students that there is a difference between asking "Why am I being hurt?" and "Why has somebody else got more than I have?" and instruct them that the first question is the one that matters. *See id.* at 118 (citing SIMONE WEIL, *SELECTED ESSAYS* 30 (Richard Rees trans., 1962)).

118. *See id.* at 62.

119. *See id.* at 61.

120. *Id.* at 134–35.

ronments in which we live. The cumulative beauty to which we are exposed helps to connect and root us in our worlds.¹²¹ Weil was keenly aware of the need for people to be attentive to beauty and to respond to it.¹²²

The contrast between Weil and Rawls could not be more dramatic. Weil's conception of justice has nothing to do with the fair distribution of goods; instead, it focuses on making people fair and just.¹²³ Rawls's fairness is symmetrical and horizontal, and Weil's compassion, which is so dependent on cosmic intervention, is asymmetrical and vertical.¹²⁴ Rawls considers human equality a given and human rights of paramount importance; Weil, however, requires inequality and concentrates on obligation.¹²⁵ The character of social institutions is important to Rawls, yet Weil would be far more concerned with the character of the people in charge of those institutions.¹²⁶ Perhaps the most crucial distinction between the two is the initial setting of their theories. While Rawls's original position is free of context, Weil's justice begins with individuals who are deeply rooted in their communities.¹²⁷

As distant as Weil's compassion is from Rawls's fairness, it bears an important similarity to Dewey's theory of art. Her concept of rootedness arises from an environment much like the surroundings that are crucial to Dewey's idealized art experience. To Weil, one's unique existence within a community makes one attentive to others; to Dewey, that same contextualized existence feeds the artistic urge. Both believed that the public good is served by individual relationships with, and connections to, people, environments, and the circumstances of life. This understanding complements Scarry's theory and strengthens the argument for an instrumental conception of beauty and justice.

Scarry's discussion of Rawls in a book designed for mainstream reading is understandable, since his theory is near canonical in the West and beyond.¹²⁸ However, as has been shown, there are difficul-

121. *Id.* at 138.

122. *Id.* at 207-08. In this regard, Weil saw nature's beauty as sacred. *Id.* (citing SIMONE WEIL, *WAITING FOR GOD* 166 (Emma Craufurd trans., 1951)).

123. *Id.* at 54.

124. *Id.* at 58.

125. *Id.* at 82-83.

126. *Id.* at 71 (citing ANDREA NYE, *PHILOSOPHIA: THE THOUGHT OF ROSA LUXEMBURG, SIMONE WEIL, AND HANNAH ARENDT* 122 (1994)).

127. *Id.* at 80-81.

128. Freeman, *supra* note 78, at 1.

ties with her alignment with Rawls. More comfortable connections exist between beauty, as understood by Scarry, and Weil's conception of justice as compassion.

Weil's unquestioned belief in God-given love may seem anachronistic in an age of political correctness and absolute neutrality. Yet the divine love that feeds acts and compassion is no harder to grasp than Rawls's original position. The point here is not to debate the worthiness of the origins of their respective theories but rather to emphasize the contrast between the breadth of Rawls's conception of justice and the far more intimate justice of Weil. When the two theories are distinguished in this manner, Weil's compatibility with Scarry becomes clear.

Weil's justice, like Scarry's depiction of an experience with beauty, is immediate, personal, and factual. Both are organic in the sense that they involve beings in highly contextualized life settings. This common ground avoids the mismatch between Scarry's theory and Rawls's abstraction.

There are more similarities between Scarry and Weil besides context. Beauty's ability to radically decenter us, one of the most important features of Scarry's theory, makes us selfless and better able to attend to others, which is one of the predicates of Weil's justice. Further, as beauty coaxes us to escape from ourselves, we are free to pay attention to the narratives and environments that surround us, making us more rooted.

Beauty's deliberative effect is also consistent with Weil's compassion. The search for precedents and the divine that beauty triggers is a process that can prepare us for consent and the gift of love and compassion. Beauty's life-saving and life-giving qualities and the protective and imitative stimuli they engender also facilitate compassion by urging us to act on behalf of the afflicted.

As the potential of beauty's role in Weilian justice is revealed, the instrumental value of beauty becomes apparent. Dewey's grounding of artistic beauty in experience makes the utility of Scarry's theory even more apparent. Not only do beauty's properties help us to become rooted and attentive, but Dewey suggests that beautiful objects are rooted in a highly contextualized personal experience in the first place. The inspiration for the creation of a work of art, one's experience with that object of beauty, and the resulting urges yield a more immediate, interpersonal justice. The entire process—the creation of beauty, beauty itself, and its positive impact on justice—begins with the individual and community.

Scarry's thesis is better seen as a pivotal piece of an intimate philosophy of artistic beauty and justice than as a macro-theory of justice in the tradition of Rawls. Her work illuminates the importance of, and connections between, the human environment and artistic creation, the experience of beauty, and justice. Dewey and Scarry tell us that both the creation and impact of beauty are situated in human experience, and Weil tells us that justice can begin at the same place. The integration of these three philosophies has practical implications for law and policy.

IV. Aesthetic Regulation, Nuisance, NEPA, and the NEA— the Law Connection

The utility of beauty in the pursuit of justice is its ability to prepare us to appreciate justice, and perhaps to act justly. That utility suggests that the law should both protect and promote beauty in ways that make it accessible to as many people as possible. There are a number of opportunities for the law to carry out this task; however, this discussion will highlight aesthetic regulation and nuisance, NEPA, and the National Foundation on the Arts and Humanities Act, the latter of which establishes the National Endowment for the Arts ("NEA"). These legal instruments promote and protect beauty yet, with a rare exception, none of their stated policies even hint at the possibility that beauty, on its own, is supportive of justice.

The choice of these laws is admittedly motivated by the author's personal bias in favor of policies that protect cultural and environmental resources. By no means do they represent the sole candidates for an infusion of the beauty-justice connection. Nevertheless, this selective discussion suffices to demonstrate, in a few discrete ways, how beauty's latent power can be tapped to further the work of justice.

A. Aesthetic Regulation and Nuisance

The positive externalities arising from aesthetically pleasing surroundings and the ability of the environment to inspire artistic creation have been recognized for centuries.¹²⁹ In the late 1800s Thoreau wrote of this phenomenon,¹³⁰ and by the mid-twentieth century the Supreme Court expressly recognized the value of attractive neighbor-

129. See Nancy Perkins Spyke, *The Promotion and Preservation of Culture as Part of Environmental Policy*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 243, 244, 254 (1996).

130. Henry David Thoreau, *Autumnal Tints*, ATLANTIC MONTHLY, Oct. 1862, at 387, 396, cited in Randall J. Cude, *Beauty and the Well-Drawn Ordinance: Avoiding Vagueness and Overbreadth Challenges to Municipal Aesthetic Regulations*, 6 J.L. & POL'Y 853 (1998).

hoods.¹³¹ Since that time, aesthetic regulation has proliferated,¹³² and aesthetic nuisance has become an increasingly recognized cause of action.¹³³ Still, both areas of law struggle with subjectivity,¹³⁴ and local governments continue to overlook aesthetics as an interest that justifies the exercise of the police power on its own account.¹³⁵

Early judicial decisions that upheld aesthetic regulations often did so on the theory that they preserved property values.¹³⁶ As such, the ordinances fell safely within the parameters of the police power. More recent cases gravitate towards two other rationales, one that might be termed the “feel good” argument, and another that promotes community stability. Neither rationale is particularly satisfying.

The feel good argument simply recognizes, as Thoreau did, that our visual environment impacts us in direct and significant ways.¹³⁷ Aesthetically pleasing surroundings enhance our well-being by positively impacting our personality and sense of happiness.¹³⁸ It therefore makes sense to enact laws that aim to make the built environment more beautiful and to give landowners the right to sue when their use and enjoyment of land is substantially degraded by a neighbor’s unsightly land use practices.

This reasoning is at the heart of the Supreme Court’s majority opinion in *Berman v. Parker*.¹³⁹ In upholding the District of Columbia Redevelopment Act, Justice Douglas, in often-cited prose, proclaimed that the public welfare encompasses aesthetic concerns: “The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”¹⁴⁰

131. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

132. Smith, *supra* note 9, at 790–91; see also Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L.J. 141, 159 (1987).

133. See, e.g., Allison v. Smith, 695 P.2d 791 (Colo. Ct. App. 1984); Foley v. Harris, 286 S.E.2d 186 (Va. 1982); Coletta, *supra* note 132, at 150.

134. See Coletta, *supra* note 132, at 141–42, 144–45; see also Cude, *supra* note 130, at 854.

135. Cude, *supra* note 130 at 911.

136. See, e.g., State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305, 309–10 (Mo. 1970) (upholding an ordinance that provided, in part, that unsightly structures decreased property values).

137. Coletta, *supra* note 132, at 142.

138. *Id.* at 160.

139. 348 U.S. 26, 33 (1954).

140. *Id.*

Although *Berman* establishes that aesthetic concerns can justify an exercise of police power,¹⁴¹ its brief reference to spiritual enrichment never fully explains why that benefit is worthy of legal attention. This same shortcoming appears in other cases in which courts summarily validate aesthetic regulation as furthering the general welfare with occasional references to beauty.¹⁴²

Other writers offer a deeper insight into aesthetic regulation, claiming that it enhances community stability. This argument has been presented in depth by John Costonis, who argues that attractive environments contribute to their inhabitants' psychological and emotional stability in ways that forge a bond between them and their surroundings.¹⁴³ John Nivala similarly writes that the built environment "enhance[s] our identity and our understanding of our culture."¹⁴⁴ The meanings and values that we derive from our environment are so significant that our spirits are shaken when our surroundings are altered or destroyed.¹⁴⁵

The psychological impacts of aesthetic regulation and its ability to stabilize communities offer firmer support for aesthetic regulation than do vague references to the public welfare and beauty.¹⁴⁶ Professor Costonis in particular believes that aesthetic regulation is not really about beauty at all, but rather serves to reassure us that our communities will remain stable and resistant to environmental change.¹⁴⁷ The substitution of stability for beauty may seem little more than a redefinition, but if so, it is an expanded definition that provides aesthetic regulation with a more concrete justification.¹⁴⁸

Aesthetic nuisance benefits from this same rationale. If our personal and community identities are impacted and stabilized by the

141. By pinning aesthetic regulation to spiritual health, the Court came close to recognizing that aesthetics impact the psychological well-being of a community. If so, those regulations protect the public health in addition to the public welfare. See Smith, *supra* note 9, at 794–95.

142. *ICONS AND ALIENS*, *supra* note 10, at 78; see also Smith, *supra* note 9, at 792.

143. See John J. Costonis, *Law and Aesthetics: A Critique and Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 430 (1982).

144. John Nivala, *Saving the Spirit of Our Places: A View on Our Built Environment*, 15 UCLA J. ENVTL. L. & POL'Y 1, 2 (1996–1997).

145. *Id.* at 18. Costonis similarly sees environmental change as threatening and destabilizing. *ICONS AND ALIENS*, *supra* note 10, at xv, 1–2; Smith, *supra* note 9, at 793.

146. See *ICONS AND ALIENS*, *supra* note 10, at 79–80.

147. *Id.*; see also Smith, *supra* note 9, at 793.

148. See Smith, *supra* note 9, at 794. Professor Smith ultimately questions Costonis's suggestions regarding the means of aesthetic regulation claiming that they fail to fully address his stabilization premise. *Id.* at 797–800. He also questions Costonis's handling of the inevitable conflict between aesthetic regulation and freedom of expression. *Id.* at 803–04.

emotional and symbolic meanings of our visual environment, then we should be protected if our neighbors use their land in ways that alter those meanings and threaten our sense of identity. Courts facing aesthetic nuisance claims should recognize the psychological and community values that arise from a stable aesthetic environment.¹⁴⁹ As they do, they can avoid dealing with the intractable problem of beauty's subjectivity.¹⁵⁰

The vast majority of the rationales supporting aesthetic regulation and nuisance rely on conclusory references to public health and welfare, or use a feel good or stability argument. All of these arguments are one-dimensional, limited in the sense that they emphasize how beautiful surroundings impact us. Only rarely is there a discussion of an active aesthetic response to our surroundings. Those occasional references recognize that we process and shape aesthetic experiences based on our sociocultural backgrounds,¹⁵¹ but even these arguments fail to address how we use those experiences in our personal lives.

The traditional justifications of aesthetic regulation and nuisance are convenient but incomplete. The feel good argument largely limits the impact of beauty to the beholder, and the stability argument, which adds to the value of aesthetic regulation, nevertheless is restricted to the observer and immediate community. Furthermore, the occasional acknowledgement that we respond to our aesthetic experiences leaves us to wonder about the nature of the response. Scarry's theory of justice fills this gap with a more expansive, multi-dimensional justification.

If we apply her thesis to communities with natural and built amenities of beauty, which are experienced by individuals on a daily basis, then a new justification for aesthetic regulation and nuisance presents itself. It becomes possible to argue that those laws, by deterring affronts to aesthetic sensibilities, work in subtle and small ways to make those communities more just. They have the potential to slowly build a sense of justice in observers one at a time. Aesthetic regulation and nuisance do not guarantee a just society; instead, they make possi-

149. See generally Coletta, *supra* note 132. Specifically, Professor Coletta argues that courts should inquire whether a targeted land use is consistent with the aesthetics of the community, with its "established community patterns and values," using an objective standard. *Id.* at 161.

150. *Id.* at 161–62.

151. See *id.* at 154.

ble a much more intimate justice, founded on individual experience and interpersonal relationship.

Aesthetic regulation promotes beautiful surroundings and aesthetic nuisance protects landowners from interference with aesthetically pleasing environments by others. In doing so, those laws allow us to experience beauty more freely and consistently and provide opportunities for beauty's urgings to feed our sense of justice. The beauty and order protected by those laws can inspire individuals to imitate the harmony they experience, make them more deliberate and attentive to others, and make them more likely to engage in small acts of compassion. Beauty's ability to spark individual tendencies toward justice is as yet an unspoken policy of aesthetic regulation and nuisance, one that can deepen the justification for those laws.

B. NEPA and SEQRA

Environmental laws that seek to protect aesthetics could also benefit from a policy of justice. NEPA and state equivalents, such as New York's State Environmental Quality Review Act ("SEQRA"), are two examples.

NEPA, a landmark environmental statute enacted at the outset of the environmental decade, sets forth the nation's environmental policy and requires federal agencies to prepare environmental impact statements for actions that significantly affect the human environment.¹⁵² It also creates the Council on Environmental Quality ("CEQ") within the executive office of the President.¹⁵³ NEPA is designed to "foster and promote the general welfare"¹⁵⁴ and, in addition to its concern with traditional environmental media, assures all Americans "esthetically and culturally pleasing surroundings."¹⁵⁵ CEQ regulations require each environmental impact statement to evaluate historic and cultural resources, urban quality, and the "design of the built environment."¹⁵⁶

NEPA's aesthetically-oriented policies originated in the Senate bill and were included in the conference substitute that became law.¹⁵⁷ The conference report fails to discuss why cultural and aes-

152. 42 U.S.C. §§ 4331-4332 (2000).

153. *Id.*

154. *Id.* § 4331(a).

155. *Id.* § 4331(b)(2).

156. 40 C.F.R. § 1502.16(g) (2004).

157. H.R. REP. NO. 91-765 (1969) (Conf. Rep.), as reprinted in 1969 U.S.C.A.N. 2767, 2768.

thetic assets were selected for protection. Nevertheless, NEPA leaves little doubt that natural and built features of beauty are part of the human environment and are to be protected in order to promote the general welfare of all Americans.¹⁵⁸ To that extent, NEPA echoes the language of *Berman v. Parker*.¹⁵⁹

In the years following NEPA's passage, many States enacted similar statutes. New York's SEQRA,¹⁶⁰ like NEPA, requires the preparation of an environmental impact statement if agency actions are likely to result in significant adverse environmental impacts.¹⁶¹ Unlike NEPA's purely procedural directives, however, SEQRA expressly requires state agencies to avoid adverse environmental impacts.¹⁶²

SEQRA is clear in its concern for New York's aesthetic assets. It includes aesthetic amenities in its definition of "environment"¹⁶³ and requires state agencies to deny applications if a project's negative impacts cannot be avoided or adequately mitigated.¹⁶⁴ Apart from its goal of stymieing environmental degradation, the statute provides little explanation for its protection of the state's natural beauty. However, courts have not hesitated to uphold permit denials under SEQRA's visual impact provisions¹⁶⁵ and have recently held that the statute authorizes the denial of a project application based on visual impact alone.¹⁶⁶

SEQRA's aesthetic protection provisions raise concerns about subjective assessments, and its substantive language is not always

158. 42 U.S.C. § 4331(a), (b)(2).

159. 348 U.S. 26 (1954).

160. N.Y. ENVTL. CONSERV. LAW § 8-0101-0117 (McKinney 1997).

161. See John W. Caffry, *The Substantive Reach of SEQRA: Aesthetics, Findings, and Non-Enforcement of SEQRA's Substantive Mandate*, 65 ALB. L. REV. 393, 395 (2001).

162. N.Y. ENVTL. CONSERV. LAW § 8-0109(1); see also N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(d) (2000); Caffry, *supra* note 161, at 394.

163. N.Y. ENVTL. CONSERV. LAW § 8-0105(6); see also Caffry, *supra* note 161, at 403. Washington State's Environmental Protection has also been held to allow discretionary denials of building permits due to negative visual impacts. See *Polygon Corp. v. City of Seattle*, 578 P.2d 1309 (Wash. 1978); see also Nivala, *supra* note 144, at 24–25.

164. See *Lane Constr. Corp. v. Cahill*, 704 N.Y.S.2d 687, 688–90 (App. Div. 2000); see also Caffry, *supra* note 161, at 397.

165. See *WEOK Broad. Corp., v. Planning Bd.*, 592 N.E.2d 778, 784 (N.Y. 1992); *Walmart Stores Inc. v. Planning Bd.*, 668 N.Y.S.2d 774, 777–78 (App. Div. 1998); see also Caffry, *supra* note 161, at 398.

166. See *Lane Constr. Corp.*, 704 N.Y.S.2d at 690, *appeal denied*, 739 N.E.2d 1145 (N.Y. 2000); see also Caffry, *supra* note 161, at 399. Visual impact litigation is on the rise in New York, in part because SEQRA expressly includes aesthetic amenities in its definition of "environment." N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1997); see also Caffry, *supra* note 161, at 403.

treated seriously.¹⁶⁷ Yet, like NEPA, it unquestionably protects things in the environment that are beautiful. Neither statute, however, provides a satisfying rationale for doing so. Instead, they consider natural and built things of beauty part of the environment and afford them protection in order to promote the welfare of the people. Legislators were likely motivated by the feel good argument; there is little room to argue that scenic vistas and beautiful historic monuments do not feed the spirit of those who experience them. It is also likely that lawmakers recognized that many of the amenities they sought to protect were not only beautiful, but irreplaceable. The threat that some state-sponsored projects pose to beautiful surroundings is very real and was likely in the minds of lawmakers. This policy of preservation distinguishes environmental assessment legislation from aesthetic regulation and nuisance and arguably provides NEPA and similar laws with a broader rationale.

Nevertheless, the objectives of these laws can be expanded further by considering the instrumental value of the connection between beauty and justice. The preservation and protection of beautiful vistas and culturally significant structures is important, not merely because they are part of the environment, but because they enrich us, or because they might otherwise be lost forever. By preserving their beauty the law additionally keeps them accessible to observers whose experience will feed their sense of justice and perhaps prepare them for just acts toward others. The added potential of these laws to inspire justice one person at a time is especially important at a time when NEPA and SEQRA have been criticized,¹⁶⁸ and NEPA in particular is under siege.¹⁶⁹

C. NEA

The National Foundation on the Arts and Humanities Act¹⁷⁰ provides another opportunity to consider the utility of Scarry's theory. The statute, enacted in 1965, sought primarily to address a funding disparity between science and the arts by establishing a National Foundation ("Foundation") that was charged with establishing a national

167. See Caffry, *supra* note 161, at 407, 410–11. The Department of Environmental Conservation requires that the staff members who make aesthetic judgments under SEQRA have some relevant expertise in the area, most often in architecture or landscape architecture. *Id.* at 407.

168. See *id.* at 410–11.

169. See, e.g., *First Hearings on NEPA Draws Full House, Criticism of Foundation*, 36 *Env't Rep.* (BNA) 874 (Apr. 29, 2005).

170. 20 U.S.C. §§ 951–976 (2000).

policy for the arts and humanities.¹⁷¹ Endowments for the arts and humanities were established within the Foundation to provide support for a wide array of artistic activity by groups and individuals, and to support research, training, and publication of scholarly work in the humanities.¹⁷² The NEA provides grants to artists and arts organizations for works that emphasize American creativity and excellence.¹⁷³

The law's legislative intent is well expressed in the House Report, which describes the uneven support for the sciences and humanities and refers to the financial crisis then facing the arts.¹⁷⁴ Congress realized that the arts support human knowledge in various ways¹⁷⁵ and could enrich an American public that was enjoying more leisure time than ever before.¹⁷⁶

Lawmakers also believed that civilized nations are judged in part by their contribution to the arts and humanities.¹⁷⁷ More importantly, they were mindful of the ominous "'cultural offensive' being waged by Communist ideologies"¹⁷⁸ and recognized the political and economic potential in exporting American art and culture. Only a few decades earlier Dewey had roundly criticized the use of art for nationalistic and capitalistic gain,¹⁷⁹ a sentiment that was lost in the politically-charged Cold War era.

Just three years later, Congress voted to fund the Foundation through 1970, and as it did, it reiterated its belief that promoting arts and humanities was a "hallmark of a mature nation."¹⁸⁰ In its short history the law had experienced a number of achievements, but it was clear that more support was necessary.¹⁸¹ The reauthorization package included amendments that made identical changes to the defini-

171. H. REP. NO. 89-618, at 1, 5 (1965), as reprinted in 1965 U.S.C.C.A.N. 3186, 3187, 3190. At the time the law was passed, the arts were in the midst of a financial crisis. *Id.* at 3, as reprinted in 1965 U.S.C.C.A.N. at 3188.

172. *Id.* at 2, as reprinted in 1965 U.S.C.C.A.N. at 3187.

173. 20 U.S.C. § 954 (2000).

174. H. REP. NO. 89-618, at 4, 5, as reprinted in 1965 U.S.C.C.A.N. at 3188, 3190.

175. The House Report states that "the arts translate into tangible, creative, and abiding form, the scope of human knowledge." *Id.* at 5, as reprinted in 1965 U.S.C.C.A.N. at 3190. The statute itself focuses on this idea by proclaiming that the arts foster democracy, respect for diversity and multiculturalism, and global respect. 20 U.S.C. § 951 (2000).

176. H. REP. NO. 89-618, at 5, as reprinted in 1965 U.S.C.C.A.N. at 3190.

177. *Id.* at 3190 (citing President Eisenhower's 1960 COMMISSION ON NATIONAL GOALS REPORT).

178. *Id.* at 3191. Coming as it did during the throes of the Cold War, Congress's desire to export American art and culture in order to deter Communism is unsurprising. *See id.*

179. *See supra* text accompanying note 60.

180. S. REP. NO. 90-1103, at 1, as reprinted in 1968 U.S.C.C.A.N. 2090, 2091.

181. *Id.* at 3, as reprinted in 1968 U.S.C.C.A.N. at 2092.

tions of "the arts" and "the humanities," expanding the meaning of the terms to include their "study and application . . . to the human environment."¹⁸² The legislative history makes note of the growing belief that the arts and humanities not only bring beauty to our lives but are pertinent to "social problems."¹⁸³

Like aesthetic regulation, nuisance, and NEPA, the National Foundation and in particular the NEA, protect and promote things of beauty. Yet the NEA's objective is unique. It is not so much that things of beauty make us feel good, stabilize society, or are irreplaceable, but rather that they say something about our society and serve the political goal of national aggrandizement. Most interesting is Congress's brief acknowledgement that beauty is relevant to social ills. The legislative history's reference to social problems is intriguing, and of all the laws considered here, it is the only language that suggests a policy that links beauty to those who are suffering, and thus hints that promoting the arts in some way promotes social justice.

A pragmatic interpretation of Scarry's theory takes that step with more certainty and offers a fresh argument to support legislation that has lost support in recent decades.¹⁸⁴ Government sponsorship of the arts is justified because artistic beauty can promote justice. The more society is exposed to things of beauty, the greater the chance that observers will be drawn to their symmetry and think less about themselves. As this happens, and as those observers additionally experience protective and imitative urges, their sense of justice will be enriched, perhaps to the point where they will turn their attention to the needs of others.

Conclusion

This Article's instrumental thesis attempts to take beauty off its pedestal and put it to work. It suggests a way to justice that should be given a chance. There is no suggestion here that beauty is the sole path toward justice, or that it is the most important of numerous paths; certainly other conceptions of justice with their own practical implications exist. What is offered, with Scarry's insight and with appreciative nods to Dewey and Weil, is a means-ends proposal, drawn from the connection between beauty and justice, along with a few

182. *Id.* at 7, as reprinted in 1968 U.S.C.C.A.N. at 2096; see also 20 U.S.C. § 952 (a), (b) (2000).

183. S. REP. NO. 90-1103, at 7, as reprinted in 1968 U.S.C.C.A.N. at 2096.

184. See Spyke, *supra* note 129, at 245-50.

ideas of how that connection can provide a policy boost for laws that deal with beauty in one way or another.

In order to think in this way we need to place human-made beauty within the realm of experience and recognize, as Dewey did, that artistic beauty arises out of ordinary, everyday life. We also need to acknowledge, as Scarry has, that the experience of natural and artificial beauty within our surroundings helps to root us within our communities and make us agents of justice. And we need to understand, as Weil did, that justice can begin with the sensibilities and little acts of individuals who are moved to treat the afflicted with compassion. Scarry shows us that beauty has a utility. That utility can further justify laws that protect and promote natural and artificial beauty, laws that often offer weak or conclusory rationales.

Aesthetic regulation and nuisance, NEPA and SEQRA, and the National Foundation on the Arts and Humanities Act, have been singled out as laws whose policies could be enriched if expanded to embrace the connection between beauty and justice. There are other laws that could similarly benefit, most obviously historic preservation laws, laws that promote public art, and state education laws that mandate arts and environmental education. The beauty-justice connection stands ready to support other laws as well. Policymakers should consider the contribution beauty can make, not just to the observer's spirit, to the public welfare, or even to the nation's global status and economy, but to justice.

