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Janice Toran

Cleveland-Marshall College of Law

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ESSAY

'TIS A GIFT TO BE SIMPLE: AESTHETICS AND PROCEDURAL REFORM

Janice Toran*

If a poet could at the same time be a physicist, he might convey to others the pleasure, the satisfaction, almost the reverence which the subject inspires. The aesthetic side of the subject is, I confess, by no means the least attractive to me.

Albert A. Michelson¹

A philosopher of science, after examining the papers of Albert Einstein, recently reasserted what other scholars had long believed to be true: Einstein developed his theory of relativity at least partly for aesthetic reasons.² In his first relativity paper in 1905, Einstein was concerned with unifying, simplifying, and rationalizing the physical world. He expressed dismay over "asymmetries" in the subfields of physics and sought a general principle to reconcile and unify them.³ Einstein believed that scientific theories must not only be verified empirically but also must possess inner perfection, a quality encompassing both naturalness and logical simplicity, in order to mirror more closely the natural universe.⁴ He rejected certain theories contradictory to his own, not because they were mathematically unsound, but because they produced inelegant, disorderly results.⁵ In fact, Einstein

* Professor, Cleveland-Marshall College of Law. B.A. 1969, Smith College; J.D. 1974, Northeastern University. — Ed. This essay is dedicated to the memory of Evelyn I. Toran. I wish to acknowledge with gratitude the financial support of the Cleveland-Marshall Fund and to thank the staff of the Institute of Advanced Legal Studies, University of London, England, for providing a congenial and stimulating environment for writing this piece. I am also grateful to Professors Peter Garlock, Lynne Henderson, Marjorie Kornhauser, Stephan Landsman, and Stephen Subrin and to Peter Toran for their helpful comments on earlier drafts of this essay.

1. A. MICHELSON, *LIGHT WAVES AND THEIR USES* 1 (1903). In 1887, Albert Michelson and Edward Morley conducted an experiment, the result of which forced scientists to discard the widely-held belief that empty space was filled with an ether through which light passed. The Michelson-Morley experiment cleared the way for Albert Einstein's Theory of Relativity.

2. See G. HOLTON, *THE ADVANCEMENT OF SCIENCE, AND ITS BURDENS* 77-91 (1986).

3. Einstein was particularly concerned about asymmetries between mechanics on the one hand and electrodynamics and optics on the other. By uniting previously separate concepts and applying them in all parts of physics, Einstein placed the subfields of physics on an equal footing. *Id.* at 88-89 (citing Einstein, *Zur Elektrodynamik bewegter Körper*, *ANNALEN DER PHYSIK* ser. 4, 17 (1905)); see also H. MARGENAU, *OPEN VISTAS* 93-101 (1961) (demonstrating the impact of aesthetics on the development of relativity theory).

4. G. HOLTON, *supra* note 2, at 74-76, 85.

5. *Id.* at 71-72.

allegedly gave a lecture at Princeton in which he asserted that the laws of physics should be simple. When asked by someone in the audience, "But what if they are not simple?" he replied, "Then I would not be interested in them."⁶

The quest for the simple and elegant solution pervades the history of science. In his classic work, *The Structure of Scientific Revolutions*,⁷ Thomas Kuhn describes the role of aesthetic considerations in replacing an old scientific paradigm with a new one:

[T]here is also another sort of consideration that can lead scientists to reject an old paradigm in favor of a new. These are the arguments, rarely made entirely explicit, that appeal to the individual's sense of the appropriate or the aesthetic — the new theory is said to be "neater," "more suitable," or "simpler" than the old.⁸

Of course, paradigm shifts are not invariably based on aesthetic factors. A new paradigm may solve problems insoluble under the old paradigm, or it may predict phenomena totally unsuspected under the old paradigm — in short, the new paradigm may simply work better than the old. But where proof is impossible or premature, Kuhn considers aesthetic considerations decisive.⁹ Aesthetic considerations encourage supporters of the new paradigm, even in the absence of empirical proof, to attempt to convince the rest of the scientific community to choose a new guiding principle. The tenacity of these early supporters is sometimes based only on personal and inarticulable aesthetic considerations. Indeed, Kuhn points out that "[m]en have been converted by [aesthetic considerations] . . . when most of the articulable technical arguments pointed the other way. . . . Even today Einstein's general theory attracts men principally on aesthetic grounds, an appeal that few people outside of mathematics have been able to feel."¹⁰

The aesthetic appeal of simplicity extends beyond science. Its force is particularly evident among reformers, including those who would promote a new social, political, or economic order. Eighteenth-

6. *Id.* at 74 (recounting anecdote recorded by John A. Wheeler).

7. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2 International Encyclopedia of Unified Science No. 2, 2d ed. 1970).

8. *Id.* at 155.

9. *Id.* at 156.

10. *Id.* at 158. Other philosophers of science take the view that scientific progress is evolutionary, not revolutionary, in nature. Gerald Holton, for example, maintains that scientific innovations do not require the "complete and sudden reorientation" implied by the revolution model but are instead part of an evolutionary process. Einstein apparently saw himself as part of an evolutionary chain, working on modifications of earlier theories. See G. HOLTON, *supra* note 2, at 26-27, 101-03; see also D. HULL, *SCIENCE AS A PROCESS: AN EVOLUTIONARY ACCOUNT OF THE SOCIAL AND CONCEPTUAL DEVELOPMENT OF SCIENCE* 432-76 (1988) (demonstrating that science is an evolutionary process).

century political reformer Thomas Paine, for example, elevated simplicity to the status of a compelling first principle, stating: "I draw my idea of the form of government from a principle in nature which no art can overturn, viz. that the more simple any thing is, the less liable it is to be disordered, and the easier repaired when disordered"¹¹

Like reformers in other realms, law reformers¹² are also drawn to simple, elegant solutions, not only because such solutions may prove more workable but also, one suspects, because they are more aesthetically pleasing than more complicated alternatives.¹³ This attraction of the simple is evident in some of the positions taken by certain nineteenth-century law reformers who criticized the common law writ system, particularly its use of fictional allegations to encompass new disputes within existing forms of action.¹⁴ Yet the writ system, although not perfect, worked reasonably well and evolved in such a way that most disputes were heard.¹⁵ For the critics, however, an instrumental defense of the common law was inadequate; theirs was an aesthetic vision of an ideal system at once complete, spare, and scientific. Even if the old system had worked perfectly, its use of fictional pleadings could not be tolerated because such a practice spoiled the

11. T. PAINE, *Common Sense*, in 2 THE LIFE AND WORKS OF THOMAS PAINE 102 (W. Van der Weyde ed. 1925). Paine used simplicity in other contexts as well. For example, in response to the question, "Which is the easiest and most practicable plan, RECONCILIATION [with England] or INDEPENDENCE?" Paine noted:

He who takes nature for his guide, is not easily beaten out of his argument, and on that ground, I answer generally — *That Independence being a single simple line, contained within ourselves; and reconciliation, a matter exceedingly perplexed and complicated, and in which a treacherous capricious court is to interfere, gives the answer without a doubt.* *Id.* at 172, 175.

12. In America, law reform usually refers to improvement in the formal parts of law. See Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U. L.J. 351, 352-54 (1969). Law reform includes, among other things, revision of statutes, codification of doctrines, improvements in the court system, and simplification of the administration of justice. *Id.* at 354.

13. Professor Robert Gordon has noted both a tendency toward simplicity and an aesthetic orientation among law reformers favoring codification. In addition, he suggests that simple rules may also be attractive because they preserve the position and power of their elite drafters. Gordon observes that codification is not inherently democratic, but rather notes that it has been "the instrument of despotic authority striving to enforce its will through plain, succinct rules; and . . . the program of academic lawyers with the largely aesthetic aim of achieving *elegantia juris*." Gordon, Book Review, 36 VAND. L. REV. 431, 443 (1983). Regarding the drafting of the Federal Rules of Civil Procedure, Professor Emeritus Benjamin Kaplan has observed that Charles Clark, Reporter to the Advisory Committee that drafted the Rules, "seemed to think that rulemaking was really for the coterie of experts, though some concessions should be made toward informing the public (preferably after the event)." Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2128 (1989).

14. See, e.g., C. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND § 45 (1897); see also J. POMEROY, REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION ACCORDING TO THE REFORMED AMERICAN PROCEDURE §§ 521-22 (2d ed. 1883).

15. See Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 20-21 n.41 (1989).

simple and elegant shape of an ideal system.¹⁶

Procedural reform illustrates with special clarity the aesthetic quest for simplicity. Perhaps this should not be surprising: procedure bears some relationship to science, and the link between aesthetic considerations and scientific progress is well-documented. Like the mathematical or scientific formula in its pure, unapplied state, procedural systems and procedural rules have a formal structure of their own.¹⁷ Procedures can thus be perceived in the abstract, quite apart from their application. As a matter of form, a procedure may be deemed "elegant" or "simple" or "coherent." Of course, this analogy only goes so far. In seeking the simple, scientists attempt to reflect the order of the natural universe; however, no such order is present in the world of human affairs, the world with which procedure concerns itself. Nevertheless, like science, procedure may be appreciated for its formal qualities, even if that appreciation is sometimes misplaced.

This essay advances the hypothesis that aesthetic considerations play a role in the formulation of new legal procedures and the preference for one procedure over another. Of course, other considerations like the social impact of a particular procedure or procedural system, its economic consequences, and its role within existing legal institutions are important, often decisive, factors influencing procedural choice. My argument is simply that additional unarticulated and unrecognized aesthetic considerations also play a role in the procedural reform process. I refer to these elements as "aesthetic" because they focus on the formal qualities of a procedure (simplicity, elegance, coherence, and the like) rather than the results of applying that procedure.

What makes a human response or reaction aesthetic is difficult to

16. Professor Bone summarizes the nineteenth-century jurists' attitude toward the common law writ system:

Any system that relied on fiction was simply "unscientific" — and therefore bad. The label "technicality" was often used to denote features of the positive law that failed to conform to the rights-based ideal. A "technicality" might be inconsistent with the general principles of the ideal, or it might be superfluous, that is, it might not serve any purpose at all within an ideal legal system and thus be expendable. Both defects were bad. An ideal system was not only internally consistent but it was also spare; it contained only those elements that were necessary to its operation.

... In short, nineteenth century critics evaluated the common law not only on the basis of the outcomes that it generated, but also the shape it assumed. A good system not only operated like a scientific theory; it looked like one as well.

Id.

17. This abstracted vision of procedure tends to obscure the inevitable link between procedure and substance. See, e.g., Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 722-40 (1975); Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 929-31 (1987).

define with precision and I have not presumed to do so.¹⁸ I have developed, however, some parameters for understanding the issues and language of aesthetics. In Part I, I develop a philosophical framework for considering the influence of aesthetic considerations on procedural reform. Next, in Part II, I examine how legal scholars have written about or made reference to aesthetics. Using categories and definitions gleaned from these two sources, in Part III I then identify and discuss aesthetic elements in the writings of a number of procedural reformers. Particularly noticeable is the attraction of several generations of reformers to procedural simplicity — an attraction that I suggest is partly aesthetic.

In Part IV, I conclude that a consciousness of the role of aesthetics in procedural formulation and choice is important. An aesthetic perception of procedure may spur valuable innovation: as in Kuhn's model of scientific revolution, proponents of a new order must sometimes cling tenaciously to their beliefs only on the strength of unarticulated aesthetic considerations. On the other hand, a view of procedure "for its own sake" may blind proponents to the social and institutional effects of a procedure or procedural system. In particular, the predominance of a single aesthetic vision can distort the way that procedure operates in fact. To assume, for example, that simpler procedures are always better is to overlook the disorderly and complicated world in which procedures must operate. This world contrasts sharply with the ordered simplicity of the natural universe. Thus, while Einstein could justifiably insist that the laws of physics be simple to mirror the natural perfection of the universe, simplicity alone may not justify a legal procedure. A procedure must function in the chaotic world of human transactions. Judged against this instrumental, nonaesthetic criterion, simpler procedures may not always be better.

The process of formulating and choosing procedures may never be free of aesthetic considerations, nor should it be. The human tradition of striving toward a world which inspires and pleases us is a venerable one. Nevertheless, bringing an awareness of aesthetic components to the surface may help to ensure that the role of aesthetics is controlled and positive. Such an awareness may also encourage the development of alternative aesthetic visions, less dependent on simplicity and more reflective of the complexity of human interactions,¹⁹ on which to build future reforms.

18. Even philosophers who specialize in aesthetics have diverse views about the nature of aesthetic experience. See *infra* note 22 and accompanying text.

19. See *infra* note 279.

I. AESTHETICS AS PHILOSOPHY

Aesthetics is a distinct branch of philosophy concerned with the contemplation of aesthetic objects and resulting concepts and issues. This branch studies "a rather heterogeneous collection of problems: those that arise when we make a serious effort to say something true and warranted about a work of art."²⁰ One philosopher terms aesthetics "the philosophy of criticism, or *metacriticism*" because "[a]s a field of knowledge, aesthetics consists of those principles that are required for clarifying and confirming critical statements."²¹ Not surprisingly, philosophers have utilized numerous approaches to the many issues that aesthetics encompasses.²²

One need not consider the entire range of aesthetics issues to extract a framework for analyzing aesthetic elements in procedural formulation and choice. I have isolated two questions for examination: "What does it mean to view something aesthetically?" and "What sorts of observations are aesthetic?"

A. *The Aesthetic Attitude*

Many philosophers believe that an aesthetic way of looking at things differs from other ways of experiencing these things. Some describe this aesthetic attitude as detached or disinterested: to view something aesthetically, one must focus only on the aesthetic object and its properties without reference to external factors such as the person who created the object or the culture of which the object is a part.²³ This intense concentration produces "the kind of admiring

20. M. BEARDSLEY, *AESTHETICS: PROBLEMS IN THE PHILOSOPHY OF CRITICISM* 3 (1958).

21. *Id.* at 3-4. The philosophy of art is a subset of aesthetics, concerned with issues that arise in connection with works of art and excluding the aesthetic experience of other types of objects. Art criticism is distinguishable from aesthetics because it is concerned with critical analysis and evaluation of works of art, while aesthetics seeks to elucidate the concepts involved in such critical judgments. Hospers, *Problems of Aesthetics*, in 1 *THE ENCYCLOPEDIA OF PHILOSOPHY* 35, 36 (P. Edwards ed. 1967).

22. There are, for example, those who maintain that in order to appreciate a work of art one must view it on its own, without any reference to surrounding circumstances. See, e.g., C. BELL, *ART* 25-30 (1913). In contrast, contextualists, as the name implies, believe that appreciation of works of art is enhanced by knowledge of context, including history, the artist's intention, the artist's biography, and other works by the same artist. See Hospers, *supra* note 21, at 44-45. Another dichotomy exists between the formalist theory of art, which considers only formal properties of visual art relevant to aesthetic experience, and the expression theory, which maintains that a work of art must be expressive and that representation, emotion, and ideas can be legitimate aspects of aesthetic experience. See, e.g., R. FRY, *VISION AND DESIGN* (rev. ed. 1923) (formalist theory); C. DUCASSE, *THE PHILOSOPHY OF ART* (1929) (expressionist theory). Referring to the disarray in the field, one writer comments: "Indeed, aesthetics has long been contemptuously regarded as a stepsister within the philosophical family. Her rejection is easy to explain, and partially excused, by the lack of tidiness in her personal habits and by her unwillingness to make herself generally useful around the house." M. BEARDSLEY, *supra* note 20, at 11.

23. See Hospers, *supra* note 21, at 37.

contemplation, without any necessary commitment to practical action, that is characteristic of aesthetic experience."²⁴

The aesthetic attitude is different from the practical attitude, which is concerned only with an object's utility. In contrast, the aesthetic attitude requires looking at something for its own sake: it is "the artistic attitude of pure vision abstracted from necessity."²⁵ Aesthetician Monroe Beardsley observes:

For example, you might say that there are at least two ways of regarding an apple. You might take a "practical" interest in it: you might want to judge its economic value, or worminess, or estimate the success of an apple harvest, and so on; that would be taking the apple as a clue for the manipulation of the physical environment. Or you might be interested only in savoring its "surface qualities," its color, texture, and taste. If you approach it in the latter way, it is for you, at that time, and in that respect, an aesthetic object. An analogous distinction can be made with respect to, say, Darwin's *Origin of Species*. If you are interested in learning facts about natural and artificial selection, or the history of biological theory, you are taking a practical attitude. But, if you wish, you can read it as an enormously patient and sustained argument, or as a masterpiece of style, or as the record of a dedicated and selfless pursuit of an important truth about the world. In that case, you are after its "aesthetic qualities," and considering it not *qua* biological treatise, but *qua* literary work.²⁶

The aesthetic attitude also differs from both the cognitive attitude, which views an object with the aim of analyzing it and thereby increasing knowledge, and the personal attitude, through which a viewer considers an object only in relation to himself. Like the practical way of looking at things, both the cognitive and personal attitudes may be highly desirable and may produce important insights; they simply are not aesthetic. For example, a student may look at a building and identify its architectural style and time and place of construction. This cognitive approach is quite different from enjoying the experience of simply viewing the building "for its own sake."²⁷ Similarly, the man who goes to see a performance of *Othello* and thinks only of the similarity of Othello's situation to his own real life situation, rather than concentrating on the play itself, is not viewing the play aesthetically.²⁸

Despite the seemingly exclusive focus of aesthetics on works of art, philosophers generally contend that aesthetic experience is not limited to works of art. Even Beardsley, who restricts his definition of "aes-

24. M. BEARDSLEY, *supra* note 20, at 529.

25. R. FRY, *supra* note 22, at 25.

26. M. BEARDSLEY, *supra* note 20, at 62.

27. See Hospers, *supra* note 21, at 36.

28. *Id.* at 37.

thetic object" to works of art,²⁹ admits that "quite often aesthetic experiences of some degree of magnitude are obtained in the regular course of life from other things than aesthetic objects."³⁰ Furthermore, aesthetic attention is not necessarily limited to perceptual objects in the physical sense, that is, to objects that can be seen or heard.³¹ One can also appreciate abstract entities aesthetically; literature, which consists of meanings rather than sounds or marks on paper, is an example of an aesthetic object that is not strictly perceptual. In this regard, one writer comments:

When we enjoy or appreciate the elegance of a mathematical proof, it would surely seem that our enjoyment is aesthetic, although the object of that enjoyment is not perceptual at all: it is the complex relation among abstract ideas or propositions, not the marks on paper or the blackboard, that we are apprehending aesthetically. It would seem that the appreciation of neatness, elegance, or economy of means is aesthetic whether it occurs in a perceptual object (such as a sonata) or in an abstract entity (such as a logical proof), and if this is so, the range of the aesthetic cannot be limited to the perceptual.³²

B. *Aesthetic Value*

In attempting to identify when critical statements refer to aesthetic value, I rely heavily on the work of Monroe Beardsley, whose theory of aesthetic value helps in classifying responses as aesthetic. While recognizing that other schools of aesthetic thought might approach

29. M. BEARDSLEY, *supra* note 20, at 63-65.

30. *Id.* at 530. Beardsley prefers an objective definition of "aesthetic object" based, first, on dividing perceptual objects according to their sensory fields ("some are seen, some heard"). Then, within these fields, he makes further distinctions — musical composition, for example, is distinguished from bird song and only the former is an aesthetic object. *Id.* at 63-64. Aesthetic objects produce aesthetic experiences of "the highest magnitude" and do so "most dependably." *Id.* at 530. Nevertheless, Beardsley allows that "sometimes people will use perceptual objects that are not aesthetic objects by our definition as if they were aesthetic objects, and sometimes these objects serve moderately well in this unexpected capacity." *Id.* at 63. Others take a broader view of art as anything that generates aesthetic experience. See Kostelanetz, *Contemporary American Esthetics*, in *ESTHETICS CONTEMPORARY* 26-29 (R. Kostelanetz ed. 1978).

31. See Hospers, *supra* note 21, at 38-39. Some attempts have been made to exclude smell, taste and touch as inappropriate for aesthetic attention. *Id.* at 39.

32. *Id.* at 38. Beardsley agrees that a mathematical proof or scientific investigation may produce an aesthetic experience but continues to tie that experience to the perceptual:

Carrying through a triumphant scientific investigation or the solution of a mathematical problem may have the clear dramatic pattern and consummatory conclusion of an aesthetic experience, but it is not itself aesthetic experience unless the movement of thought is tied closely to sensuous presentations, or at least a phenomenally objective field of perceptual objects.

M. BEARDSLEY, *supra* note 20, at 530. It should be noted that some philosophers deny the existence of a unique aesthetic attitude, pointing instead to aesthetic reasons for critical judgments. See Hospers, *supra* note 21, at 39. My approach in this essay follows the more traditional view, acknowledging the existence of an aesthetic attitude. The process of understanding and identifying such an attitude seems to me to be useful in clarifying the relationship between aesthetics and law.

the issues raised herein differently, I have chosen Beardsley's approach as a structuring mechanism because of its accessibility and clarity. Beardsley takes what may be called an objectivist approach to aesthetic value; he maintains that the properties that constitute aesthetic value are properties of the object itself.³³ Beardsley has attempted to organize and categorize statements of aesthetic value. These categories help to clarify and illustrate what it means to make a statement of aesthetic value, as opposed to, for example, social, political, or economic value.³⁴

Beardsley devises his criteria for judging aesthetic value by examining the nature of critical judgment and identifying the various types of reasons given in support of critical evaluations. Those reasons referring to the features of the aesthetic object itself are called objective reasons and fall into three main groups: (1) those that bear upon the unity or disunity of the work; (2) those that bear upon the degree of complexity or simplicity of the work; and (3) those that bear upon the intensity or lack of intensity of the work. These categories are examined below.

1. *Unity*

Beardsley identifies two components of unity: completeness and coherence. *Completeness* is a simple quality, not analyzable into simpler qualities. To say that an object has completeness "is to say that it

33. Theories of aesthetic value may be subjectivist or objectivist. Subjectivist theory maintains that aesthetic value derives from the reactions of aesthetic consumers; in contrast, objectivist theory holds that aesthetic value inheres in properties of the aesthetic object itself. One type of subjectivist theory posits that statements of aesthetic value ("X is aesthetically good/bad") are actually only claims of taste ("I like it / I don't like it"). This approach is problematic for a number of reasons. First, it confuses autobiographical judgments with statements of aesthetic value. A person may "like" a painting, for example, without thinking it aesthetically "good," or vice versa. Second, the subjectivist view makes disagreement on aesthetic matters impossible. Claims of taste are likely to be true; people are unlikely to lie about their likes and dislikes. Thus, if the person who says "X is good" merely means "I like X," and the person who says "X is not good" merely means "I don't like X," there is no basis for disagreement. Subjectivism thus renders criticism arbitrary and absurd. See Dewey, *The Meaning of Value*, 22 J. PHIL. 126, 131 (1925); see also Hospers, *supra* note 21, at 53-54.

Similar problems arise when "X is good" is taken to mean that the majority of people, or the majority of critics, or the majority of the "best" critics like X. Under this theory, the statement "X is good" still tells us more about those who are judging X than it does about X itself. See Hospers, *supra* note 21, at 54. Louis Schwartz appears to rely in part on a consensus approach to aesthetic value. See *infra* note 92; text accompanying notes 77-78.

Relativism, which attempts to avoid pitfalls of both subjectivism and objectivism, is another approach to aesthetic value. For an argument in support of relativism, see B. HEYL, *NEW BEARINGS IN ESTHETICS AND ART CRITICISM* 125-55 (1943). For a critique of the relativistic method, see M. BEARDSLEY, *supra* note 20, at 478-89.

34. As this section illustrates, Beardsley's approach to aesthetic value is one among many. I have chosen to present it here in detail, and to utilize it later as a tool for analysis, because it allows statements of aesthetic value to be analyzed and opened up for discussion, thus avoiding the subjectivist dilemma. See *supra* note 33.

appears to require, or call upon, nothing outside itself; it has all that it needs; it is all there.”³⁵ *Coherence* refers to how the parts of an object fit together. Beardsley isolates these principles of coherence³⁶ as focus, balance, and harmony.

By *focus*, Beardsley refers to the dominant pattern or compositional scheme of an object. In the visual arts, the focus “may be that part of the painting that has the greatest perceptual strikingness or to which the eye is led . . . by the convergence of strong lines.”³⁷ Beardsley’s second principle of coherence, *balance* or equilibrium, connects the parts of a whole, and ensures that a design does not disintegrate into separate parts. Thus, the problem of connecting two figures in a painting is really a problem of creating a balanced and therefore coherent work. *Harmony*, Beardsley’s third touchstone, refers to similarities among the parts of a design. Beardsley notes:

As a rough generalization, we may say that, other things being equal, the more similarities there are among the parts of the design, the more coherent the design will tend to be.

Similarity of texture, or, in other words, consistency of style, throughout the design, is one of the most powerful perceptual conditions of coherence.³⁸

2. Complexity

Complexity is correlative to unity.³⁹ By complexity, Beardsley means the number of parts, and the number of differences between these parts, within an aesthetic object. Beardsley uses the following example to explain his definition:

Unity and complexity are set over against each other: very broadly speaking, the former is increased by similarities of parts, the latter by differences. Thus if we take, say, a design of a given sort, with several distinguishable areas, we can always change it in two directions. If we

35. M. BEARDSLEY, *supra* note 20, at 192. In the representational arts, completeness refers to a quality independent of representation. Beardsley uses this example:

A piece of sculpture that is merely a torso, or even a classic statue with arms or legs missing, may be nevertheless quite complete as a design, though from a physiological point of view there is evidently something missing. Thus Rodin did not destroy the completeness of his statue *The Inner Voice* — later used for the Victor Hugo monument — when he left off the arms because arms, he said, imply action, and action is the enemy of meditation.

Id. at 193.

36. “[S]uch a principle is a statement that, other things being equal, such-and-such a set of elements or of relations will tend to produce, or to increase, coherence.” *Id.* at 194.

37. *Id.*

38. *Id.* at 195.

39. Beardsley cautions: “The two notions [complexity and unity] need to be distinguished with care, for though the opposite of ‘unity’ is ‘disunity,’ and the opposite of ‘complexity’ is ‘simplicity,’ it will occasionally be found that critics use the term ‘simplicity’ when they mean what I have chosen to mean by ‘unity.’” *Id.* at 205.

cut down on the variety of color-tones, we will, other things being equal, increase its unity but decrease its complexity; if we make every area of a different color-tone, we will increase its complexity, but decrease its unity.⁴⁰

3. *Intensity*

Beardsley's final objective reason supporting critical evaluation is intensity, the requirement that "a good aesthetic object must have *some* marked quality, and not be a sheer nonentity or a zero. The quality does not matter — it can be sad or cheerful, graceful or rugged, soft or stern, provided it be *something*."⁴¹ To praise a painting because it exudes a sense of calm and stillness is to praise it for the intensity of a certain pervasive quality.⁴²

Beardsley argues that the concepts of unity, complexity and intensity are broad enough to be deemed General Canons under which all objective reasons can be organized. He concludes that all objective reasons used in making aesthetic judgments appeal directly or indirectly to these General Canons. Beardsley's justification of this conclusion is instructive.⁴³ He examines cases of critical reasoning and demonstrates how each uses the General Canons. Since critics do not necessarily use the terms "unity," "complexity," and "intensity," Beardsley in effect translates and abstracts these general themes from the passages that he examines. For example, a critic who refers to a poem as "very tightly organized" and another as "more confused" appeals to the Canon of Unity.⁴⁴ Similarly, a critical reference to the "richness and depth" of a work due to its "imaginative grasp of diverse materials" appeals to the Canon of Complexity, as does a reference to "economy" when it means variety of significance in line and shape.⁴⁵ Generally, references to "dramatic force," "dramatic power," and to "energy" invoke the Canon of Intensity.⁴⁶

40. *Id.* at 208. Beardsley extends the use of the terms unity and complexity to the analysis of literary works and finds that they can be used in the same sense in this context as when analyzing painting or music. *Id.* at 252-53.

41. *Id.* at 463.

42. Hospers, *supra* note 21, at 55.

43. Beardsley summarizes his argument:

To sum up, the three general critical standards, unity, complexity, and intensity, can be meaningfully appealed to in the judgment of aesthetic objects, whether auditory, visual, or verbal. Moreover, they are appealed to constantly by reputable critics. It seems to me that we can even go so far as to say that all their Objective reasons that have any logical relevance at all depend upon a direct or an indirect appeal to these three basic standards.

M. BEARDSLEY, *supra* note 20, at 469-70.

44. *Id.* at 466-67.

45. *Id.* at 467.

46. *Id.* at 467-68.

The Canon of Unity is most relevant to the present analysis. It subsumes the notion of simplicity that is so prevalent in the writings of procedural reformers. Simplicity relates to both the completeness and coherence aspects of unity. A simple object is complete because it contains nothing superfluous, is all of one piece, and has everything it needs. A simple object is also coherent. Its parts integrate into a harmonious whole and its disparate elements meld into a single, clear, unconfused entity.

An understanding of these basic philosophical approaches helps to clarify the relationship between aesthetics and law. Law may, like a mathematical proof, be perceived aesthetically and provide aesthetic enjoyment. Critical assessments of a law or a legal system, particularly observations relating to simplicity or complexity, may convey judgments of aesthetic value. These insights serve as reference points for considering the writings of legal scholars discussed in the next section.

II. AESTHETICS IN LEGAL SCHOLARSHIP

A number of scholars have recognized the relevance of aesthetics to law. Some have used aesthetics explicitly either as a formal mode of analysis⁴⁷ or as a descriptive category.⁴⁸ Others have employed arts metaphors, implicitly invoking aesthetic norms as a way of understanding law.⁴⁹ No single approach to aesthetics prevails, nor does the word "aesthetic" itself have a discernible fixed meaning. Philosophical notions of aesthetics are present in legal scholarship, if at all, only as remote and shadowy reference points. Nevertheless, a number of writers suggest useful frameworks for applying aesthetics to law.

In this Part, I examine the use of aesthetics by four legal scholars: Robin West, Mark Kelman, Drucilla Cornell, and Louis Schwartz. After discussing their writings, I then attempt to distill common threads of meaning for use in analyzing the works of procedural reformers.

47. See, e.g., West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985); Kelman, *Spitzer and Hoffman on Coase: A Brief Rejoinder*, 53 S. CAL. L. REV. 1215 (1980).

48. See, e.g., Schwartz, *Justice, Expediency, and Beauty*, 136 U. PA. L. REV. 141 (1987); Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985); Kelman, *The Past and Future of Legal Scholarship*, 33 J. LEGAL EDUC. 432, 434 (1983).

49. See, e.g., Luban, *Legal Modernism*, 84 MICH. L. REV. 1656 (1986); Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073 (1986); L. Weinberg, *Law as Design: Does Neatness Count?* (June 16, 1987) (unpublished manuscript of talk presented at the 37th Intl. Design Conf., Aspen, Colorado); cf. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115 (1987) (using cognitive psychology as a mechanism for analyzing procedure).

Robin West uses aesthetic principles to analyze modern legal theories.⁵⁰ In particular, she views legal theories as, in part, "aesthetic objects" because of their narrative component.⁵¹ West proceeds to analyze these theories as literature. To approach aesthetics in a direct and clearly defined manner, she employs Northrop Frye's *Anatomy of Criticism*.⁵² In this classic work of literary criticism, Frye developed four "aesthetic myths" recurrent in narratives.⁵³ West first describes and then applies these myths to Anglo-American jurisprudence, using an aesthetic vocabulary inspired by Frye. Legal theorists are cast as narrators who combine either a "comic" or "tragic" vision of the world with either a "romantic" or "ironic" theoretical method. Using this approach, West is able to characterize the "aesthetic posture" of the critical legal studies movement as "dark, ironic comedy, tinged with awareness of the demonic"⁵⁴ and the "aesthetic stance" of the political reactionary as "[r]omantic method coupled with a comic contentment with the present world."⁵⁵ By contrasting aesthetic analysis with both "pure philosophical analysis" and "political rhetoric,"⁵⁶ she draws powerful conclusions, and calls for an understanding of legal theories as art:

To the extent that legal theory is narrative . . . it is also art. Therefore we must decide not whether the worlds we envision are true or false, right or wrong. Rather, we must decide whether they are attractive or repulsive, beautiful or ugly. Our acceptance or rejection of these aesthetic visions will in turn influence the historical choices we must make. The aesthetic quality of our art, like the quality of our play, deeply affects our lives: our imaginings are not only a part of our present, but a way of determining the limits of our future.⁵⁷

Mark Kelman uses aesthetics in a less formally defined, more pervasive manner. For example, in replying to a critique of his article on the Coase Theorem,⁵⁸ Kelman contrasts aesthetic and empirical approaches to the theorem. He implies that his critics have not understood the aesthetic components of his approach and have instead

50. See West, *supra* note 47.

51. *Id.* at 146.

52. N. FRYE, *ANATOMY OF CRITICISM* (1957).

53. *Id.* at 151-58.

54. West, *supra* note 47, at 155.

55. *Id.*

56. *Id.* at 204-09.

57. *Id.* at 210-11.

58. Kelman is responding to Spitzer & Hoffman, *A Reply to "Consumption Theory, Production Theory, and Ideology in the Coase Theorem,"* 53 S. CAL. L. REV. 1187 (1980), which is a critique of Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979).

insisted on an empirically based analysis: "Even if I could convince [my critics] that their 'data' is useless, I sense I would not succeed in making a case that is ultimately intended to be as 'aesthetic' as it is 'empirical.'"⁵⁹ According to Kelman, the theorem is "a world-creating expression," not "a world-describing hypothesis."⁶⁰ He labels this view hermeneutic/aesthetic: "[T]he Coase Theorem is not primarily an *external* statement about a culture or a statement that describes it. Rather, it is an *internal* statement expressing a culture. It is both description and ideology; a mixture of 'is' and 'ought.'"⁶¹ The hermeneutic/aesthetic view rejects the positivist notion that empirical data can potentially falsify or verify the theorem. Instead, this view asserts that the Coase Theorem is a story about "a world in which everything *must* have its price."⁶² Kelman continues, using aesthetics in a manner nearly identical to that of Robin West:

As with any story, one's reaction to this one must be in large part aesthetic; what human potentials are unfolded and revealed, which ones are suppressed? Is it a pretty world the story-tellers picture? To a considerable extent, a revealing study of economics must be a study of economists and the aesthetic pleasure we derive from their construction of a world.⁶³

Elsewhere in his work, Kelman uses the notion of aesthetics in varying contexts with somewhat different shades of meaning. In explaining his dislike of formalist legal scholarship, Kelman focuses on its "inelegance."⁶⁴ He characterizes his negative reaction to certain policy analysis scholarship as "simply aesthetic: what seems reassuringly familiar to some, a comfortable, well-grounded resting place for discussion, strikes me as numbingly boring and predictable. Not everyone likes *E.T.*"⁶⁵ When discussing the rules-standards debate in *A Guide to Critical Legal Studies*,⁶⁶ Kelman posits that "the rule *form* may always tend to appeal to the *substantive* individualist because its formal virtues match up aesthetically with the virtues he is inclined to admire."⁶⁷ Rules appeal to "the aesthetics of precision, to the psychology of denial or skeptical pragmatism," while standards appeal to "the aesthetics of romantic absolutism, to the psychology of painful

59. Kelman, *supra* note 47, at 1215.

60. *Id.* at 1223.

61. *Id.* at 1220 (footnote omitted).

62. *Id.* at 1221.

63. *Id.*

64. Kelman, *supra* note 48, at 433.

65. *Id.* at 434.

66. M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).

67. *Id.* at 59.

involvement in each situation, to the pragmatism that rejects the need for highfalutin generalities.”⁶⁸ In an article identifying conscious and unconscious constructs pervasive in substantive criminal law,⁶⁹ Kelman concludes that his role in writing the article “would be largely aesthetic” if the constructs he was discussing did not have political meaning, if they were only “nonrational filters” enabling human beings to perceive and communicate.⁷⁰ He would exercise his aesthetic criticisms — to expose the emptiness of rhetoric proclaiming that legal results in cases are rational — “on behalf of those who no longer like to listen to people making arguments that mask a hidden structure of ‘nonarguments’ with insistent, false rigor.”⁷¹

Drucilla Cornell describes as aesthetic the commitment necessary to reconstruct ethical group life and shape a better future.⁷² She contrasts the aesthetic aspect of this commitment with “instrumentally rational reasons”: commitment to a reconstruction of our social world is aesthetic because it must be made “without the promise or security of a rational guarantee.”⁷³ Instead, an aesthetic commitment is based on a vision of what we may become. Cornell concludes that “[t]he moment of commitment is aesthetic in its orientation. It demands not only the capacity for judgment but also the ability to dream of what-is-not-yet. The ethical cannot be reduced to an aesthetic, but neither can it do without an aesthetic.”⁷⁴

Louis Schwartz gives aesthetics yet another shade of meaning in his essay *Justice, Expediency and Beauty*.⁷⁵ He proposes “that an important criterion of justice is aesthetic: a just decision or statute will be beautiful in that it fits, is proportionate to, or is ‘just right’ for its setting and era.”⁷⁶ Schwartz contrasts the aesthetic criterion with the goal of expediency, which he rejects as a necessary condition for justice, noting that an expedient law or decision — one that promotes the greatest good for the greatest number — may nevertheless be unjust.⁷⁷ Rather than expedient, justice should be “beautiful” in the sense that

68. *Id.* at 61.

69. Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

70. *Id.* at 671. Kelman considers that the interpretive constructs he identifies may be a vehicle promoting class domination.

71. *Id.*

72. Cornell, *supra* note 48, at 380.

73. *Id.*

74. *Id.*

75. Schwartz, *supra* note 48.

76. *Id.* 141.

77. *Id.* at 145.

beauty represents "an abiding aspiration for a quality that transcends utility or expediency. It is a quality that evokes in the appropriate audience a recognition of rightness, of fittingness according to a complex of psychological, historical, and political background shared by that audience."⁷⁸ To rescue aesthetic justice from the criticism that it is hopelessly subjective, Schwartz emphasizes the importance of the aesthetic responses of citizen observers⁷⁹ and admonishes the mass media to take more seriously its role in shaping citizen attitudes.⁸⁰

No single aesthetics approach emerges from a study of these writings. The term "aesthetic" is not always used with precision; some writers define their use of aesthetic analysis, while others seem to assume that readers have a shared understanding of what aesthetic means. Even the same writer may use "aesthetic" to mean one thing in one context and something different in another context. Nonetheless, several categories of meaning can be distilled from these writings.

Formal mode of analysis. Aesthetics, as a philosophical discipline, has its own literature and language.⁸¹ An art critic may apply aesthetic principles to a work of art just as a mathematician may apply a theorem to a given problem or a law professor traditional legal analysis to the study of a legal opinion. Used in this way, aesthetics has a formal reality, an academic reference point, even though the validity or appropriateness of this reference point is open to challenge.⁸²

Taste. One characterization of aesthetic response takes the form "I like it" or "I don't like it." This kind of response might include an inability or a reluctance to discuss the matter further: "I don't know why — I just like it" or "I don't want to argue about it — I simply don't like it." Such a subjective notion of aesthetics poses a central dilemma for Louis Schwartz, who realizes that his vision of justice as beautiful prompts the question "beautiful to whom?" He concedes that "[w]ithin the single culture of our time and country, the aesthetics of some are satisfied only by the orderliness and harmony of Bach; others must have the romantic passion of Beethoven, Tchaikovsky, or

78. *Id.* at 145-46.

79. Schwartz observes that "[i]f there is a consensus that the regime governs justly, . . . the regime will be stable." *Id.* at 179.

80. *Id.* at 181-82.

81. As with most disciplines, there is controversy within the field of aesthetics about approaches to basic principles. See *supra* note 62 and accompanying text.

82. The most obvious example of the use of aesthetics as a formal mode of study is Robin West's analysis. See West, *supra* note 47; see also Kelman, *supra* note 47, at 1219 n.16 (referring to Heidegger as a basis for his method of analysis). Louis Schwartz may be paying oblique homage to aesthetics as a philosophical discipline when he refers to Keats' and, in particular, Aristotle's views on beauty and justice. See Schwartz, *supra* note 48, at 146.

Brahms.”⁸³ When Mark Kelman expresses his dislike for a certain type of legal scholarship on aesthetic grounds, surely he is asserting his taste: “Not everyone likes *E.T.*”⁸⁴ These claims of taste are not, on the surface, debatable: “you like Bach — I like Beethoven” or “you like *E.T.* — I don’t.”⁸⁵

Transcendent universal qualities. A judgment of aesthetic value may go beyond a claim of taste. Robin West’s challenge to evaluate legal theories in terms of “whether they are attractive or repulsive, beautiful or ugly”⁸⁶ and Mark Kelman’s aesthetic approach to the Coase Theorem⁸⁷ refer to notions of the “attractive,” “beautiful,” or “pretty” and their opposites that seem to transcend individual preference. When Kelman explains his aversion to formalistic scholarship because it is “inelegant,” he may be expressing his personal taste but he also may be referring to a more universal quality of “elegance” and its opposite.⁸⁸ Even though Louis Schwartz accepts the existence of competing aesthetic judgments, his theory of justice rests on a concept of “beauty” that eludes definition, but that “expresses an abiding aspiration for a quality that transcends utility or expediency.”⁸⁹ Unlike claims of taste, these transcendent aesthetic values have a universal quality; critics can agree that the concept of beauty or elegance exists and has certain parameters and this agreement allows them to evaluate works more objectively.

Psychologically determined preference. Some scholars link aesthetics and psychological makeup. For example, Mark Kelman describes his vision of the aesthetic element in the rules-standards debate as the “aesthetics of precision” to which rules appeal, which is linked to “the

83. Schwartz, *supra* note 48, at 145.

84. Kelman, *supra* note 48, at 434.

85. One part of Drucilla Cornell’s reference to the aesthetic suggests a claim of taste. She cautions that “[t]he ethical cannot be reduced to an aesthetic” which might be read as “the ethical cannot be reduced to merely a matter of individual taste.” See Cornell, *supra* note 48, at 380. However, the context of her appeal to an aesthetically based commitment to the reconstruction of ethical group life more strongly suggests other meanings. See *infra* text accompanying notes 97-100. So too one may read Mark Kelman’s theory of the aesthetic dimension of the rules-standards debate as an account based on taste (e.g., “certain kinds of people simply like rules better”). However, his account relies more clearly on psychology than on nondebatable claims of taste. To the extent that psychology determines taste, this may be a distinction without a difference.

86. West, *supra* note 47, at 210.

87. “Is it a pretty world the story-tellers picture?” Kelman, *supra* note 47, at 1221.

88. Kelman also reacts to perceived hypocrisy: formalists extol elegance but write inelegantly. Kelman, *supra* note 48, at 433.

89. Schwartz, *supra* note 48, at 145. Schwartz finds that the Constitution itself identifies transcendent values, such as freedom of speech and religion, beyond the reach of legislatures. He considers that “the Framers created a hierarchy of values and saved beauty from condemnation as a totally subjective criterion of justice.” *Id.* at 147.

psychology of denial" and the "aesthetics of romantic absolutism," to which standards appeal, is linked to the "psychology of painful involvement in each situation."⁹⁰ Kelman contends that rules appeal to the stereotypically individualistic/masculine person while standards appeal to the stereotypically altruistic/feminine person. He intertwines the aesthetic and psychological dimensions, asserting, for example, that "the rule *form* may always tend to appeal to the *substantive* individualist because its formal virtues match up aesthetically with the virtues he is inclined to admire."⁹¹ Kelman uses psychology not simply to rationalize individual taste but also to circumscribe groups of individuals who will respond in an aesthetically similar manner.⁹²

Noninstrumental viewpoint. Several writers contrast the aesthetic point of view with the empirical, rational and instrumental. For example, Drucilla Cornell describes as "aesthetic" a commitment to reconstructing ethical group life made "without the promise or security of a rational guarantee,"⁹³ a commitment "that cannot be proven."⁹⁴ Louis Schwartz seeks to inject into a definition of justice a notion of beauty "that transcends utility or expediency."⁹⁵ Mark Kelman approaches the Coase Theorem in a manner "intended to be as 'aesthetic' as it is 'empirical.'"⁹⁶ These writers share the view that an aesthetic approach differs in kind from standard result-oriented modes of inquiry and measurement.

Expression of human potential. Viewing the Coase Theorem as a story, Mark Kelman reacts aesthetically by asking "what human potentials are unfolded and revealed, which ones are suppressed?"⁹⁷ Other scholars also present the aesthetic response as forward-focused and concerned with future reality: "a mixture of 'is' and 'ought.'"⁹⁸ Robin West claims that "[t]he aesthetic quality of our art, like the

90. M. KELMAN, *supra* note 66, at 61.

91. *Id.* at 59.

92. Louis Schwartz also recognizes the link between group psychology and aesthetic response. Although he equates justice with beauty and "fitness of judgment to circumstances," he allows that a lynch mob cannot do justice to gratify its own conception of what is fitting. According to Schwartz, "[t]hat would be akin to abdicating literary or artistic criticism to the most vulgar tastes." Schwartz, *supra* note 48, at 179.

93. Cornell, *supra* note 48, at 380.

94. *Id.* (quoting K. OTTO-APPEL, *The Communication Community and the Foundation of Ethics*, in *TOWARDS A TRANSFORMATION OF PHILOSOPHY* 225 (G. Adey trans. 1980)).

95. Schwartz, *supra* note 48, at 145.

96. Kelman treats the theorem not as empirically falsifiable or verifiable but as an expression of our culture. Kelman, *supra* note 47, at 1215.

97. *Id.* at 1221.

98. *Id.* at 1220.

quality of our play, deeply affects our lives: our imaginings are not only a part of our present, but a way of determining the limits of our future."⁹⁹ In a similar vein, Drucilla Cornell links aesthetic commitment to the reconstruction of our social world and "not only the capacity for judgment but also the ability to dream of what-is-not-yet."¹⁰⁰

These categories of meaning are not mutually exclusive and the terms "aesthetic" and "aesthetics" are richly textured. Some of the meanings invoked by legal scholars echo philosophical approaches examined in the preceding section. Two are particularly important: the aesthetic viewpoint as noninstrumental and different in kind from rational or empirical approaches and aesthetic value as resting on transcendent universal qualities. In the next Part, these meanings, augmented by philosophical notions, form the focus of my analysis of the role of aesthetic considerations in procedural reform.

III. AESTHETICS AND PROCEDURAL REFORM

My definition of "aesthetic" here incorporates many of the views of the scholars discussed above. A number of their approaches to aesthetics, however, have been excluded from my analysis. I suspect, for example, that subjective characteristics — among them, taste and personal psychological-sociological profile — may predispose individuals toward certain types of procedures.¹⁰¹ Yet, philosophy teaches us that claims of taste and individual predisposition, while not necessarily invalid, present serious problems for the aesthetician.¹⁰² For purposes of my analysis, not only are such claims difficult or impossible to prove but, even if proved, they may simply describe the human condition rather than provide any insights into a more specific link between aesthetics and procedural reform. Accordingly, I ignore these factors in my analysis.

Philosophy suggests that other aspects of my argument have more secure moorings in aesthetics. I contend that procedural reformers sometimes perceive procedure in a noninstrumental manner, as pure form rather than applied formula, and that reformers judge procedures partly on the basis of transcendent formal qualities. The notion of an aesthetic attitude detached from practical, cognitive and per-

99. West, *supra* note 47, at 211.

100. Cornell, *supra* note 48, at 380.

101. Mark Kelman sometimes uses "aesthetic" in this sense. See, e.g., *supra* text accompanying notes 64-68, 84-85, 92.

102. See *supra* note 33.

sonal concerns is central to aesthetics as a philosophical discipline;¹⁰³ legal scholars have also recognized a distinct aesthetic viewpoint and have contrasted it with instrumental modes of perception.¹⁰⁴ Similarly, philosophers and legal scholars have acknowledged the existence of universal qualities on which aesthetic value is based.¹⁰⁵

Admittedly, *proving* a link between aesthetics and procedural reform may be impossible. As Mark Kelman said in a similar context, "as with most aesthetic claims, there is little way to prove the connection other than by laying it out and directly assessing its plausibility."¹⁰⁶ Proceduralists rarely, if ever, make explicit references to aesthetics, nor has aesthetics ever been openly recognized as part of the process of procedural reform.¹⁰⁷ Mindful of these limitations, I focus on identifying aesthetic orientations of procedural reformers who advocated procedural codes and those who promoted uniform rules of federal procedure; I then consider briefly the role aesthetics plays in the work of modern reformers, particularly those who seek reforms drawn from comparative procedure.

A. *Code and Federal Rules Reformers*¹⁰⁸

Simplicity and flexibility were the watchwords of the reformers re-

103. See *supra* text accompanying notes 23-32.

104. See *supra* text accompanying notes 93-96.

105. Monroe Beardsley's General Canons provide a useful articulation of these qualities. See *supra* text accompanying notes 34-46; see also *supra* text accompanying notes 86-89.

106. M. KELMAN, *supra* note 66, at 59.

107. Cf. Bone, *supra* note 16, at 20-21 n.41 (nineteenth-century critics of common law writs based their criticism on the "unscientific" nature of the writ system, but in reality they were expressing their desire for an ideal form of procedural system); Gordon, *supra* note 13, at 443 (codification justified as democratic reform, but it was also used to consolidate the power of the elite and to render the law more aesthetically pleasing); T. KUHN, *supra* note 7, at 155 (in science, aesthetic reasons for rejecting an old paradigm are "rarely made entirely explicit").

108. Several recent articles provide detailed analyses of the social, political and intellectual climate surrounding procedural codification in the late nineteenth century and federal rules reform in the early twentieth century. Judith Resnik traces the world view of the drafters of the Federal Rules in an effort to discover the influences that animated Rules reform. See Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986). Stephen Subrin considers social and political factors affecting code and federal rules reformers and places both reform efforts in historical perspective. See Subrin, *supra* note 17. Robert Bone explores the normative framework underlying the rhetoric of procedural reform from the Field Code to the Federal Rules of Civil Procedure. See Bone, *supra* note 16. I am indebted to these authors and have often relied on their insights in this article. My own approach to the code and Federal Rules reformers is necessarily different; in essence, I seek to illuminate a small corner of the territory explored by Professors Resnik, Subrin, and Bone. For purposes of this article, I consider portions of the written and spoken works of four reformers in an attempt to discover clues to their aesthetic attitudes and values. My aim is therefore not a historical, political, or ideological overview but instead a microcosmic, perhaps somewhat eccentric view of one among many motivating forces behind procedural change.

sponsible for the Federal Rules of Civil Procedure.¹⁰⁹ The 1938 Rules were the product of several decades of procedural evolution and debate, much of it focusing on the issue of how simple, symmetrical and flexible procedure should be. By 1934, it was clear which direction would be taken at the federal level: President Franklin D. Roosevelt, signing legislation that gave the Supreme Court power to promulgate procedural rules for the federal courts, commented: "For the complicated procedure of the past, we now propose to substitute a simplified, flexible, scientific, correlated system of procedural rules prescribed by the Supreme Court."¹¹⁰ Complexity and technicality were evils to be avoided¹¹¹ and both were linked to the common law. As a result, reformers used equity as a guide to shape the new Federal Rules.¹¹²

Several procedural reformers were particularly influential in the process leading up to the 1938 Rules, prominent among them David Dudley Field, Roscoe Pound, Thomas Wall Shelton, and Charles E. Clark.¹¹³ Described as an "inexhaustible one man codifying machine,"¹¹⁴ David Dudley Field, a member of the New York Commission on Practice and Pleading, was the architect of the Field Code of 1848, adopted in over half the states by the end of the nineteenth century.¹¹⁵ Field had no direct involvement in the formulation of the Federal Rules; however, the Field Code charted a course followed in part by the drafters of the Federal Rules.¹¹⁶ Roscoe Pound, a law school dean and philosopher of law, delivered his well-known address on *The Causes of Popular Dissatisfaction with the Administration of*

109. FED. R. CIV. P. 1-86. For an in-depth account of the Rules drafting process, see Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

110. 3 F. ROOSEVELT, *THE PUBLIC PAPERS AND ADDRESSES* 304 (1938) (statement on signing the Enabling Act of 1934).

111. See *infra* text accompanying notes 168-81.

112. For a thorough and thoughtful account of the influence of equity on the framing of the Federal Rules, see Subrin, *supra* note 17. See also Bone, *supra* note 16, at 27-45, 89-103 (discussing *inter alia* the role of equity in Code and Federal Rules reform).

113. Both the choice of focusing on these particular reformers and the descriptions herein of their personalities and predilections are inspired by, and often drawn directly from, Stephen Subrin's excellent article on the history of Federal Rules reform. See Subrin, *supra* note 17. I am grateful to Professor Subrin for the rich materials he has uncovered concerning these reformers and the period during which they worked. Whenever possible, I have relied directly on primary sources. In this section, those sources are quite often ones to which Professor Subrin's work has led me. My debt to him is thus greater than any footnote or footnotes may reflect.

114. Gordon, *supra* note 13, at 435.

115. See C. HEPBURN, *supra* note 14, at 14-15.

116. Some maintain that the Federal Rules were a natural outgrowth of the Field Code. See, e.g., F. JAMES, *CIVIL PROCEDURE* § 2.5, at 65-66, § 2.11, at 85-86 (1st ed. 1965); C. WRIGHT, *THE LAW OF FEDERAL COURTS* 436 (4th ed. 1983). Professor Subrin points out significant differences between the approach taken by Field and that taken by the Federal Rules reformers, notably Field's distrust of the judiciary and respect for the jury. See Subrin, *supra* note 17, at 931-39.

*Justice*¹¹⁷ to the American Bar Association's annual meeting in 1906. His spoken and written commentary in the early part of the twentieth century¹¹⁸ sounded many themes which influenced the development of the Federal Rules. Thomas Wall Shelton was a Virginia lawyer and the first chair of the ABA Committee on Uniform Judicial Procedure. He enthusiastically lobbied for the Enabling Act, legislation granting the Supreme Court rulemaking authority for the federal courts, and he was a proponent of the early conservative ideology behind that Act.¹¹⁹ Charles E. Clark, professor and later Dean at the Yale Law School, was Reporter of the Supreme Court Advisory Committee that drafted the Federal Rules of Civil Procedure.¹²⁰ Through his scholarship,¹²¹ and his role as Reporter,¹²² Clark exerted a powerful influence on the shape the Rules would take.

Aesthetic attitude. None of the four procedural reformers under scrutiny had an exclusively aesthetic attitude toward procedure. Each had in mind a practical goal for procedural rules to accomplish. Yet on occasion each viewed procedure in a detached, noninstrumental manner, without a commitment to practical goals. Each had his own view of procedure for its own sake.

David Dudley Field loved astronomy and mathematics; his affinity for science colored his view of procedure.¹²³ He saw procedural and substantive law together as forming "the science of the law," a carefully constructed body of rules to prevent the "maladministration of

117. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906). This address has been reprinted at 35 F.R.D. 241, 273-91. Citations herein are to the latter publication.

118. See, e.g., Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905); Pound, *The Etiquette of Justice*, 3 PROC. NEB. ST. B.A. 231 (1906-1909); Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388 (1910) [hereinafter Pound, *Some Principles*]; Pound, *supra* note 117.

119. See Subrin, *supra* note 17, at 949 (pointing out that conservatives were the initial supporters of the Enabling Act but later liberals "took the Act as their own").

120. See *Appointment of Committee to Draft Unified System of Equity and Law Rules*, 295 U.S. 774 (1935).

121. See, e.g., Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517 (1925); Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1 (1925); Clark & Moore, *A New Federal Civil Procedure* (pts. 1 & 2), 44 YALE L.J. 387, 1291 (1935).

122. See Subrin, *supra* note 17, at 973 (noting that Clark was committed to equity procedure before the Advisory Committee had met and so stated on an early agenda sent to committee members).

123. Professor Subrin quotes from a journal written by Field when he was 28: "[Mathematics'] superiority over every other department of learning (and superiority I think it has) is to be ascribed, I fancy to the precision of its language." Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 315 (1988); see also *id.* at 328-29 (Field's science-based view of the universe led to his preference for a pleading system grounded on "facts constituting a cause of action.").

justice" by curbing judicial discretion and caprice.¹²⁴ Field stated, "The law is our only sovereign. We have enthroned it."¹²⁵ For Field, procedure could advance law as a scientific enterprise by providing a framework for ascertaining "facts" and thus objective reality. The Field Code required that a complaint contain "facts constituting the cause of action"¹²⁶ and used the term "cause of action" to describe those fact groupings that would trigger judicial intervention.¹²⁷ Field wanted procedure to be orderly and simple, but also definite and impervious to change through exercise of judicial discretion. In this latter respect, he differed significantly from the reformers who followed.¹²⁸

For Roscoe Pound, procedure was "the mere etiquette of justice."¹²⁹ Nevertheless, he viewed procedural form as important, commenting that "form is, if I may say so, the substance of adjective law."¹³⁰ Like Field, Pound was drawn to science and was trained as a botanist.¹³¹ His ideal procedural system called for a more scientific approach: procedure should be "systematic and scientific" so as to promote "precision, uniformity and certainty in the judicial application of substantive law."¹³² Despite his emphasis on certainty, Pound favored a flexible procedural system that granted judges liberal discretion in fashioning procedures for their courtrooms.¹³³

Thomas Shelton, who admired Pound, came to share Pound's view of procedure.¹³⁴ Shelton envisioned a procedure separate from, but facilitative of, substantive law. He likened procedure to a clean pipe,

124. D. FIELD, *Magnitude and Importance of Legal Science*, reprinted in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 517, 530 (A. Sprague ed. 1884) (address at the opening of the Law School of the University of Chicago, Sept. 21, 1859) [hereinafter FIELD SPEECHES].

125. *Id.*

126. 1848 N.Y. Laws 379, § 120(2).

127. NEW YORK COMMISSIONERS ON PRACTICE AND PLEADINGS, FIRST REPORT 141 (1848) [hereinafter 1848 REPORT], discussed in Subrin, *supra* note 17, at 935; see also 1 FIELD SPEECHES, *supra* note 124, at 240-41.

128. See Subrin, *supra*, note 17, at 934-36. The Federal Rules reformers valued flexibility and believed that the liberal use of judicial discretion eliminated the need for technical rules. See *infra* text accompanying notes 180-81; Subrin, *supra* note 17, at 944-45, 951, 964.

129. Pound, *supra* note 117, at 284.

130. Pound, *Some Principles*, *supra* note 118, at 389.

131. D. WIGDOR, ROSCOE POUND, PHILOSOPHER OF LAW 49-67 (1974).

132. Pound, *Some Principles*, *supra* note 118, at 388. Pound called for "the highest scientific standard in the administration of justice." Pound, *supra* note 117, at 278.

133. See Bone, *supra* note 16, at 98-100; Subrin, *supra* note 17, at 946-48.

134. Shelton had initially favored a formal procedural system which restricted judicial discretion, finding that the law is "worse than meaningless when left to unfettered individual inclination." Shelton, *The Relation of Judicial Procedure to Uniformity of Law*, 72 CENT. L.J. 114, 117 (1911). However, from 1910 to 1913, Shelton reversed his position and came to favor simple, flexible rules which leave judges free "to administer justice" rather than "to follow technicali-

an unclogged artery, a clear viaduct, or a bridge.¹³⁵ Following Pound's lead, Shelton formulated a "scientific"¹³⁶ procedural ideal which incorporated modern notions of efficiency and cut through technicalities with streamlined, straightforward rules.¹³⁷

Charles Clark emphasized the secondary role of procedure: "procedural rules are but means to an end, means to the enforcement of substantive justice."¹³⁸ He saw procedure as "the hand-maid and not the mistress of justice"¹³⁹ and believed that "rules of pleading or practice should at all times be but an aid to an end and not an end in themselves."¹⁴⁰ In college, Clark excelled in mathematics.¹⁴¹ Unlike Field, however, whose mathematical interest led him to focus on ascertaining facts through procedural rules, Clark adopted a then-modern view grounded in legal realism: facts cannot be determined scientifically and a procedural system that rests on distinctions between law, facts and evidence is seriously flawed.¹⁴² Clark's desire to strip away procedural technicalities and formal obstructions reflected his modernism. He described the pared-down pleading provisions of the Federal Rules as "the best there is in pleading today"¹⁴³ notwithstanding his awareness that more case-specific pleading rules were sometimes warranted.¹⁴⁴

ties." Shelton, *Hobbled Justice — A Talk with Judges*, 13 MINN. L. REV. 129, 129-30 (1929). See generally Subrin, *supra* note 17, at 949-56.

135. T. SHELTON, *SPIRIT OF THE COURTS* 17, 32, 72 (1918).

136. Subrin, *supra* note 17, at 959.

137. See, e.g., T. SHELTON, *supra* note 135, at 83-96; Shelton, *Campaign for Modernizing Procedure*, 7 A.B.A. J. 165, 166-67 (1921); Shelton, *A New Era of Judicial Relations*, 23 CASE & COM. 388, 393 (1916). Frederic Winslow Taylor's ideas about scientific efficiency were attractive to both progressives and conservatives during the early twentieth century. Subrin, *supra* note 17, at 959 n.294; see also *infra* note 157 and accompanying text.

138. Clark, *Fundamental Changes Effected by the New Federal Rules* (pt. 1), 15 TENN. L. REV. 551, 551 (1939) [hereinafter Clark, *Fundamental Changes*]; see also Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 443 (1935) [hereinafter Clark, *The Challenge*] (referring to procedure as "only the process or machinery for getting court work done efficiently and effectively").

139. Clark, *Fundamental Changes*, *supra* note 138, at 551 (citing *In re Coles*, [1907] 1 K.B. 1, 4 (opinion of Collins, M.R.)).

140. *Id.*

141. Subrin, *supra* note 17, at 962. According to Clark's son, Elias Clark, Clark thought that the study of mathematics was the best preparation for law school. *Id.* at 962 n.309.

142. See generally Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259 (1926); see also Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 450 (1936) [hereinafter Clark, *Proposed Rules*] (distinction between facts and evidence indefensible); Clark, *The New Federal Rules of Civil Procedure: The Last Phase — Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) [hereinafter Clark, *The Last Phase*] (proof of facts is not the function of pleading); Bone, *supra* note 16, at 86-87 (discussing influence of philosophical pragmatism on Clark's views regarding rights and facts).

143. Clark, *The Challenge*, *supra* note 138, at 456.

144. See *infra* note 169.

For each of these reformers, procedure possessed a disembodied quality. Field thought procedure should facilitate the enforcement of substantive law,¹⁴⁵ a carefully crafted set of rules both simple and orderly, part of his "scientific" construct. For Pound, Shelton, and Clark, procedure was thoroughly divorced from substance: procedure constituted mere rules of etiquette, an unclogged artery through which substantive rights could flow, a means to an end.¹⁴⁶ These varied visions were at once instrumental and noninstrumental; instrumental because procedure had a function to perform but noninstrumental¹⁴⁷ because significance was attached to procedural form. Field thought a procedural code should have "[u]nity of design and uniformity of expression."¹⁴⁸ For Pound, form was "the substance of adjective law"¹⁴⁹ and materialized as a clear viaduct in Shelton's writing.¹⁵⁰ Clark, a thoroughgoing pragmatist concerning the role of procedure, still insisted that procedural rules be modern, elastic, sleek¹⁵¹ even when pragmatism dictated the need for more detail and complexity.¹⁵²

Science was invoked by Code and Federal Rules reformers alike. Field believed in the "science of the law,"¹⁵³ Pound desired a "systematic and scientific" procedure,¹⁵⁴ Shelton underscored the scientific basis of the new judicial procedure,¹⁵⁵ and Clark sought to advance the science of pleading by freeing pleading from technical requirements.¹⁵⁶ Legal science and scientific efficiency held a powerful attraction during the nineteenth and early twentieth centuries.¹⁵⁷ Common law techni-

145. Professor Bone points out that late nineteenth-century code reformers tended to view legal right and legal remedy as fundamentally dichotomous. Procedure was seen as instrumental to the proper enforcement of substantive law: "a decision about *procedure* ought to be made by reference to what was necessary to enable the court to craft the *remedy* that best fit the natural structure of *rights* involved in a dispute." Bone, *supra* note 16, at 8. See generally *id.* at 9-45.

146. Twentieth-century procedural reformers rejected the rights-remedy dichotomy of the late nineteenth-century jurists. They tended to adopt a pragmatic view according to which procedure was the vehicle for finding the facts of a concrete dispute and identifying substantive norms applicable to it. See Bone, *supra* note 16, at §0-98.

147. Of course, simply because an attitude is noninstrumental does not mean it is aesthetic. See, e.g., R. COVER & O. FISS, *THE STRUCTURE OF PROCEDURE* 2-3 (1979) (describing as noninstrumental essays focusing on social and cultural context of procedure).

148. *Reasons for the Adoption of the Codes by New York*, in 1 FIELD SPEECHES, *supra* note 124, at 362-63.

149. Pound, *Some Principles*, *supra* note 118, at 389.

150. See *supra* text accompanying note 135.

151. See, e.g., Clark, *Proposed Rules*, *supra* note 142, at 448-49; Clark, *The Last Phase*, *supra* note 142, at 976-77.

152. See *infra* notes 165, 169.

153. 1 FIELD SPEECHES, *supra* note 124, at 519; see also Subrin, *supra* note 123, at 315.

154. Pound, *Some Principles*, *supra* note 118, at 388.

155. See *supra* text accompanying notes 136-37.

156. Clark, *The Last Phase*, *supra* note 142, at 976.

157. See, e.g., F. FREIDEL, *AMERICA IN THE TWENTIETH CENTURY* 36-37 (2d ed. 1965); R.

calities were considered "unscientific"; science provided a model for achieving certainty and adaptability in the law.¹⁵⁸ Science also played an aesthetic role: it represented efficiency and modernity, embodying many of the qualities which contributed to the reformers' aesthetic vision of procedure. Clarity, precision, simplicity, and symmetry were each values that science seemed to possess. In fact, during the time of the early Federal Rules reform efforts, the scientific world itself had been transformed by the relativity theory of Albert Einstein, a scientist who considered aesthetics important.¹⁵⁹

Even though they did not agree about all aspects of a procedural ideal, to the extent that the Code and Federal Rules reformers appreciated certain stylistic qualities in procedure, their attitudes were aesthetic. This does not mean that their perceptions were limited to, or by, aesthetic sensibilities; it does suggest that aesthetic considerations exerted an influence on reforms. The philosophy of aesthetics describes how an object can be perceived in a number of ways. Beardsley, for example, notes that one may judge an apple for its practical, economic value but also may savor its surface qualities of color, texture and taste.¹⁶⁰ These two forms of perception are not mutually exclusive. In more abstract realms, the same principle holds true: one may appreciate a mathematical formula for its neatness, elegance, or economy without detracting from its usefulness.

The moment of detachment from the practical and instrumental characterizes the aesthetic attitude. Each procedural reformer above seems to have had such a moment, when concern over pragmatic outcomes gave way to appreciation of something more abstract, a system whose very shape — simple or elastic or certain or symmetrical — could be admired. Admittedly, this claim is virtually impossible to substantiate; yet, the feeling that aesthetics played an important role in the process emerges from the reformer's remarks taken as a whole. One senses that a reformer begins by seeking simplicity for pragmatic reasons but that at times the search for simplicity takes on a life of its own, overriding practical concerns. In these instances, the rhetoric of

WIEBE, *THE SEARCH FOR ORDER 1877-1920*, at 145-57 (1967); Bone, *supra* note 16, at 24; Gordon, "The Ideal and the Actual in the Law": *Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51-59 (G. Gawalt ed. 1984); Gordon, *supra* note 13, at 445-58.

158. See Bone, *supra* note 16, at 20 n.41; Gordon, *supra* note 13, at 445-46. Professor Friedman points out that legal educators, led by Langdell, also embraced the scientific model and developed methods stressing law's universal and systematic aspects. See Friedman, *supra* note 12, at 370-71.

159. See *supra* text accompanying notes 2-6.

160. M. BEARDSLEY, *supra* note 20, at 62; see *supra* text accompanying note 26.

instrumentalism masks an unconscious striving toward an aesthetically pleasing procedural form.

Some procedural features suggest a hidden, perhaps subliminal, aesthetic agenda. The Field Code, for example, required joinder of necessary parties, defined as those persons whose "rights" might suffer "prejudice" as a result of "a complete determination of the controversy" between the parties before the court.¹⁶¹ But this "prejudice" was not due to *res judicata* or estoppel:

[N]onparties were no more bound by the decree in code procedure than they had been in equity. Nor was the code primarily concerned about the decree's creating actual harm to the absent person or practical impediments to her ability to vindicate her rights in a separate proceeding. Rights were "prejudiced" when a court analyzed and determined them, even though its determination had no binding effect on the absent [party].¹⁶²

Why then require joinder of such parties? One commentator explains the requirement as part of the Code reformers' focus on remedy: courts should be able to grant at least a minimally adequate remedy without determining the rights of a nonparty.¹⁶³ An aesthetic perspective suggests that the code reformers also required joinder because it preserved a more desirable procedural shape. A party was free to choose a remedy or remedies and thus to shape party structure.¹⁶⁴ Once this choice was made, however, the Code insisted that the resulting structure retain an acceptable level of aesthetic unity. Joinder of necessary parties can be explained as a mechanism for eliminating clutter and ensuring completeness.

Hints of aesthetic motivation also exist in the Federal Rules of Civil Procedure, although mostly through omission. For example, the Rules contain no mechanism for separating cases according to differing procedural needs despite Clark's own recognition of the desirability of such a sorting mechanism.¹⁶⁵ Professor Subrin explains the

161. This provision was contained in the Field Code as amended in 1849. See 1849 N.Y. Laws 640, § 122.

162. Bone, *supra* note 16, at 68.

163. *Id.* at 69-71.

164. Professor Bone questions the code drafters' decision to give parties freedom to shape party structure rather than compelling joinder of all proper parties. He speculates that this form of party autonomy may have been intended to reduce the number of lawsuits or, more probably, that remedy choice was considered a private matter. *Id.* at 70 n.219.

165. In the late 1920s and early 1930s, Clark conducted a series of empirical studies concerning state and federal litigation. In a study of civil litigation in the federal courts, Clark observed that complex cases involving the government required different procedures than simpler cases and that a sorting mechanism would be desirable. See Subrin, *supra* note 17, at 965-66, 995-96; see also AMERICAN LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, PART II, CIVIL CASES (1934); Resnik, *supra* note 108, at 509 (discussing the ALI study).

omission: "Such an integration of procedure and substance . . . would have required a degree of technicality, categorization, and definition that was at odds with the simplicity and uniformity themes the proponents had developed to propel their reform."¹⁶⁶ An aesthetic perspective would add that a mechanism for separating simple and complex cases would have spoiled the unified shape of the Rules and disturbed their aesthetic "focus."¹⁶⁷ This aesthetic concern might well have preceded, at an unconscious level, a reformist platform based on uniformity and simplicity.¹⁶⁸

Similarly, the Rules do not contain different pleading requirements for different kinds of cases, although the reformers were aware of differences among cases that would have made it pragmatically desirable to fashion case-sensitive pleading rules.¹⁶⁹ The rejection of case-specific pleading seems based, at least in part, on a commitment to an aesthetically simple pleading system, coherent and complete, streamlined and uncluttered. Perhaps unconsciously, the Rules reformers, despite their instrumental, pragmatic agenda, took an aesthetic attitude toward procedure and advanced simplicity of form¹⁷⁰ even when pragmatism might have suggested a more complicated or more detailed path.¹⁷¹

166. Subrin, *supra* note 17, at 995-96.

167. See *infra* text accompanying notes 207-12; see also Resnik, *supra* note 108, at 508-12 (demonstrating that the private damage action was the principal paradigm case underlying the Rules and that the drafters discounted differences among kinds of cases).

168. In the same way, aesthetic concerns, quite apart from political, social, or other motivators, may constitute part of an explanation of "trans-substantive" procedural rules. See Cover, *supra* note 17, at 732-33.

169. See Subrin, *supra* note 17, at 977. The refusal to countenance a procedural system with a variegated pleading mechanism is based largely on a reformist commitment to uniformity and simplicity. Clark himself acknowledged the reformer's strategic inability to compromise, stating that "reformers must follow their dream and leave compromise to others; else they will soon find that they have nothing to compromise." Clark, *The Federal Rules of Civil Procedure: 1938-1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 448 (1958) (footnote omitted); see also Subrin, *supra* note 17, at 977 n.393 (providing examples of Clark's reformist zeal).

170. Professor Subrin maintains that Clark "made an art form of procedural formlessness." Subrin, *supra* note 17, at 992.

171. A number of early critics of the Federal Rules of Civil Procedure expressed fears that the framers of the Rules had carried their commitment to simplicity and flexibility beyond the point of practicality. A prominent critic, Professor O.L. McCaskill, complained, for example, that "[t]he problem of simplifying procedure is more than a problem of elimination. Pleadings may be made so simple, in the interest of the pleader and his client, that they cease to serve any useful purpose." McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 621 (1934). He feared that "flexibility may be carried to such an extreme that our procedural machine will have no stability." *Id.* at 620. For a present-day defense on pragmatic grounds of the principles of generalism and flexibility in rulemaking, see Carrington, *Making Rules To Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2079-85 (1989).

Aesthetic value. It is not surprising that the Code and Federal Rules reformers, having sometimes taken an aesthetic attitude toward procedure, also sometimes would make aesthetic value judgments about procedure. Simplicity stands out as the single most venerated aesthetic quality; both the Code and Federal Rules reformers valued simplicity as a procedural goal despite divergent views on how to attain it.

Unfortunately, it is difficult to sort out the reformers' aesthetic value judgments in a completely clearcut way. Reformers did not label or identify certain value judgments as aesthetic. As Kuhn points out in the scientific context, aesthetic arguments are "rarely made explicit" — a new theory is simply "said to be 'neater,' 'more suitable,' or 'simpler' than the old."¹⁷² In addition, value statements can have multiple meanings. One can, for example, value procedural simplicity not only because it renders enforcement of substantive law more efficient but also because it pleases one's aesthetic sensibilities. Even the reformers themselves likely would have been unable to unravel and identify each of the coexisting reasons underlying their value judgments. I therefore propose simply to demonstrate how the values articulated by the reformers match aesthetic categories.¹⁷³

Field and his associates balked at the needless technicalities spawned by common law procedure and sought a procedural system that would facilitate the simple and inexpensive application of law. Thus, pleading was to be "in ordinary and concise language, without repetition."¹⁷⁴ This reduced the amount of required documentation, with all trials to be based on testimony in open court.¹⁷⁵

For the Rules reformers, simplicity was the centerpiece of the new federal procedure.¹⁷⁶ Their criticisms of preexisting procedural systems reflect the reformers' preoccupation with attaining the simplest

172. T. KUHN, *supra* note 7, at 155.

173. For this purpose, I use Monroe Beardsley's formula for identifying statements of aesthetic value and apply the principles underlying his Canon of Unity. See *supra* text accompanying notes 33-46.

174. 1848 N.Y. Laws 497, 521-23, §§ 120(2), 128(2), 131.

175. See 1848 REPORT, *supra* note 127, at 177, 244; 1 FIELD SPEECHES, *supra* note 124, at 227, 232, 260.

176. Simplicity had also been a major theme in nineteenth-century procedural reform in England. The Judicature Acts of 1873 and 1875 consolidated English courts into one Supreme Court of Judicature and simplified pleading, in effect abolishing old forms of action. Joinder rules were simplified and liberalized in an attempt to eliminate multiplicity of suits. See C. HEPBURN, *supra* note 14, at 182-85 (Judicature Acts), 193-94 (pleading simplification), 202-04 (joinder). The direction taken by the English, particularly their emphasis on simplicity, was seen as worthy of emulation by the Federal Rules reformers. See, e.g., T. SHELTON, *supra* note 134, at 58-62, 256; Pound, *supra* note 117, at 284-86.

possible procedure, free of technicality and detail.¹⁷⁷ Pound, for example, decried "the lavish granting of new trials"¹⁷⁸ and "too much detail of procedure" in appellate practice, making it "too elaborate."¹⁷⁹ His ideal "modern practice act" contained only "the general principles of practice" — details were left to rules of court.¹⁸⁰ In fact, in Pound's view, "as between arbitrary action of the law in nearly all cases, because of the complexity of procedure, and arbitrary action of the judge in some cases, the latter would be preferable."¹⁸¹

Shelton also abhorred procedural complexity. His campaign for the Enabling Act had as its ultimate goal "a simple, correlated, scientific system of rules of procedure and practice, in lieu of the present complicated so-called 'federal practice.'"¹⁸² Shelton admired the straightforward, streamlined practices of business and commerce and thought legal procedure should emulate them.¹⁸³

Clark, too, valued simplicity. This is particularly striking in his approach to pleading. Clark criticized common law pleading as "a curious mixture of the simple and the complex" and believed that the best Code reform preserved "the good points of the older pleading . . . in the simple and uncomplicated form of allegation and defense."¹⁸⁴ In Clark's view, "the simple provisions for stating the case in the com-

177. Late nineteenth-century critics of the New York Code of Civil Procedure, called the Throop Code, presaged the Federal Rules reformers' emphasis on simplicity. The Throop Code was long (3441 provisions by 1897) and contained substantive and procedural provisions side by side. See Subrin, *supra* note 17, at 940-41. Critics attacked the Throop Code for being "too minute and technical, and lack[ing] elasticity and adaptability." *Report of the Committee on Code Revision*, 22 N.Y. ST. B.A. REP. 170, 175 (1899), quoted in Subrin, *supra* note 17, at 940 n.183. A further criticism sounded an unmistakably aesthetic chord: the Throop Code was seen as flawed because of its "patent lack of arrangement and symmetry." President's Address by J. Newton Fiero (Jan. 18, 1893), reprinted in 16 N.Y. ST. B.A. REP. 48, 50 (Jan. 18, 1893), quoted in Subrin, *supra* note 17, at 941 n.188.

178. Pound, *supra* note 117, at 288.

179. 5 R. POUND, JURISPRUDENCE § 148, at 651 (1959).

180. Pound, *supra* note 117, at 287.

181. Pound, *The Etiquette of Justice*, *supra* note 118, at 249.

182. Shelton, *Campaign for Modernizing Procedure*, 7 A.B.A. J. 165, 166 (1921); see also Subrin, *supra* note 17, at 958-59 (procedural simplicity argument was voiced by many supporters of the Enabling Act).

183. Shelton, *An Efficient Judicial System*, address given to Miss. Bar Assn., May 25, 1915, reprinted in *Simplification of Judicial Procedure: Hearings on S. Res. 522 Before the Subcomm. of the Sen. Comm. on the Judiciary*, 64th Cong., 1st Sess. 74-75 (1915). Indeed, Shelton once expressed his fear that procedural technicalities were "making Bolsheviks in this country" by undermining public respect for the legal system. *Procedure in the Federal Courts: Hearings on H.R. 2377 and H.R. 90 Before the House Comm. on the Judiciary*, 67th Cong., 2d Sess. 28 (1922). Shelton admired "[t]he English judge [who] brushes aside senseless technicalities in the same spirit he would a house fly." Shelton, *The Drama of English Procedure*, 17 VA. L. REV. 215, 252 (1931).

184. Clark, *The Last Phase*, *supra* note 142, at 977.

plaint . . . represent about the best there is in pleading today.”¹⁸⁵ He favored joining all matters in a single action not only because it would save time and money for court and litigants, but also because it would simplify and reduce court litigation records.¹⁸⁶ The latter goal seems at once instrumental — fewer, simpler records may enhance efficiency — and noninstrumental — even if more detailed or voluminous records are sometimes helpful, streamlining reduces clutter. Joinder was, in aesthetic terms, neater, simpler, and more elegant.

Seeking simplicity in procedure invokes aesthetic unity. Unity is the most universally recognized criterion for analyzing aesthetic form in works of art. When an art object is unified, it is “simple” in the sense that it is of one piece and contains nothing superfluous.¹⁸⁷ In science, too, the search for simplicity is an appeal to the aesthetic value of unity: nowhere is this more apparent than in Einstein’s drive to generalize, and thereby to unify, apparently divergent fields of physics.¹⁸⁸

Recall that unity has two components: *completeness* (an object’s needing nothing outside itself) and *coherence* (how the parts of an object fit together).¹⁸⁹ Coherence in turn may be based on at least three principles: *focus* (the dominant pattern or compositional scheme), *balance* or *equilibrium* (the connection between parts of a whole), and *harmony* (similarities among parts of a design). A close examination of the reformers’ quest for simplicity demonstrates that completeness and coherence were central to the reformers’ vision of a simple, unified procedural system.

Completeness is an attractive feature of procedure because, in the words of one reformer, “it represents the difference between a single and permanent surgical operation as compared to chronic physicking.”¹⁹⁰ For Field, a desire for procedural completeness was part of a vision of a procedural code accompanied by a coordinated substantive code.¹⁹¹ For the Federal Rules reformers, the same desire led to an essentially self-completing Code — general and elastic principles allowed the judiciary to fill in any missing details.¹⁹² The drive for com-

185. Clark, *The Challenge*, *supra* note 138, at 456.

186. Clark, *The Last Phase*, *supra* note 142, at 977.

187. See Hospers, *supra* note 21, at 43.

188. See G. HOLTON, *supra* note 2, at 86-87.

189. These definitions are based on Monroe Beardsley’s categorization of statement of aesthetic value. See *supra* text accompanying notes 37-38.

190. Clark, *The Last Phase*, *supra* note 142, at 977.

191. C. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 194-96* (1981).

192. See, e.g., Clark & Moore, *supra* note 121, at 1323; Pound, *supra* note 117, at 413.

pleteness led Dean Wigmore to complain that the drafters of the Federal Rules had failed to place all existing federal practice rules into a single compilation, observing that "[t]his Code will fail in an important purpose if it does not seek to be complete in itself."¹⁹³ Wigmore's complaint seems motivated at least as much by an aesthetic concern for the shape the Rules would take as by a desire for efficiency.

The reformers also valued completeness in another sense: they sought a system that would provide a complete mechanism for resolving disputes. Having decided that law and equity should be merged, both Field and the Rules reformers were drawn to equity practices which permitted complete resolution of a controversy without regard to substantive law, the number of parties, or the nature and number of issues. The Field Code abandoned the technicalities of the writ system and allowed parties to plead simply and in ordinary language. Parties could amend their pleadings and were permitted to join multiple parties, causes of action, and defenses in a single suit, thus maximizing the chance of complete resolution of a controversy.¹⁹⁴ The Federal Rules reformers carried the completeness ideal even further. Opportunities for joinder of parties and claims were increased,¹⁹⁵ amendment of

193. Wigmore, *A Critique of the Federal Court Rules Draft — Three Larger Aspects of the Work Which Require Further Consideration*, 22 A.B.A. J. 811, 812 (1936).

194. See 1848 N.Y. Laws 379, §§ 62 (elimination of forms of action); 97-98 (joinder of parties); 120(2), 128(2), 131 (simple pleading); 129 (joinder of defenses); 143 (joinder of causes of action). Professor Bone has noted a similar drive toward completeness in the work of John Norton Pomeroy, a prominent procedure and equity scholar of the late nineteenth century. Pomeroy advocated the expansion of equitable "multiplicity-of-suits" jurisdiction, which allowed consolidated treatment of numerous, otherwise separate, legal actions. See Bone, *supra* note 16, at 29-39. Pomeroy justified the use of equity jurisdiction in certain types of cases "not only because of the availability of injunctive or other equitable forms of relief, but also, and more importantly, because of the power of equity courts to consolidate all the separate law actions and render a decree ideally suited to the dispute as a whole." *Id.* at 34 (citation omitted). In his analysis of Pomeroy's work, Professor Bone provides powerful evidence that Pomeroy viewed equity procedure aesthetically, in that he was interested more in form than in practical consequences. Pomeroy also sought the aesthetic qualities of elegance and simplicity in an ideal procedural system. With respect to Pomeroy's justification of equity jurisdiction, Professor Bone notes:

Although Pomeroy focused on remedy, he did not take a pragmatic approach to evaluating remedial quality. He assessed the quality of the remedy by reference to its formal structure, not its practical consequences. . . . In other words, equity jurisdiction was desirable whenever joining together all the separate law pieces made it possible to reduce the union of partial legal remedies to a more elegant and simpler unitary form, one that perfectly fit the ideal legal structure of the whole dispute.

Id. (citations omitted).

195. See, e.g., FED. R. CIV. P. 18, 19, 23 (dealing with joinder of claims, joinder of parties, and class actions, respectively). Clark extolled the virtues of the new rules:

The rules providing for the abrogation of technical forms, and for free amendment, the simple provisions for stating the case in the complaint, the abolition of demurrers and pleas, the explicit provisions as to the answer, with provisions for the filing of as many defenses in the alternative or regardless of consistency as the defendant has — all these and the other accompanying rules represent about the best there is in pleading today.

Clark, *The Challenge*, *supra* note 138, at 456.

pleadings was liberalized,¹⁹⁶ and broad discovery was made central to a new notice pleading system.¹⁹⁷ These reforms were pragmatic, to be sure, but they were also aesthetic, making procedure neater, more streamlined, and more elegant.

The reformers sought unity in a procedural system not only through completeness but also through coherence. Pound's view that "form is . . . the substance of adjective law"¹⁹⁸ may be ascribed to each of the reformers under scrutiny, for each visualized a set of procedural rules that had a certain shape and design.

A reformer's concept of the focus, pattern or compositional structure of a set of procedural rules can reflect a desire for coherence. The dominant compositional scheme or focus of the Field Code may well be its attention to detail and definition,¹⁹⁹ a structure reflecting Field's view that procedural rules should be tailored to fashion remedies to protect substantive rights.²⁰⁰ He visualized and constructed a set of rules based on careful definitions: for Field, overly flexible rules were no rules at all.²⁰¹ Field could not abide expansive, general code provisions for a number of reasons, among them an aversion to disorder and confusion.²⁰² His aesthetic sense of what a properly formulated procedural system should look like resulted in a code that was simple and elegant, not in some minimalist sense, but due to its circumscribed, constrained quality. "Unity of design and uniformity of expression" were important to Field,²⁰³ and both are reflected in the structure of his code.

Field also pursued balance and harmony — other aspects of coherence — when he sought to harmonize procedural forms through the merger of law and equity. Separate courts for law and equity, each with its own procedures, seemed wasteful, disorderly, and confus-

196. See, e.g., FED. R. CIV. P. 13(f), 15 (dealing with amendment of counterclaims and amendment of pleadings, respectively).

197. See, e.g., FED. R. CIV. P. 26-37.

198. Pound, *Some Principles*, *supra* note 118, at 389. It should be noted that coherence does not require simplicity; a complex work that is well structured may be coherent. However, the Code and Federal Rules reformers seemed to seek coherence through simplification and simplicity.

199. The Field Code was criticized as narrow and formalistic because of its detailed nature. See, e.g., C. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 34 (1928); Pound, *Some Principles*, *supra* note 118, at 403.

200. For a discussion of the right-remedy-procedure hierarchy that characterized nineteenth-century procedural thinking, see Bone, *supra* note 16, at 9-18.

201. See 1 FIELD SPEECHES, *supra* note 124, at 330-31, 349, 354; Field, *Mr. Field on the Codes*, 7 ALB. L.J. 193, 196 (1873).

202. See Subrin, *supra* note 17, at 934-35 & n.141.

203. 1 FIELD SPEECHES, *supra* note 124, at 363.

ing.²⁰⁴ A single set of procedural rules could bring order and predictability to the enforcement of substantive rights.²⁰⁵ The procedural choices that Field and the other reformers made in drafting a single code for the merged system reflect a desire to balance legal and equitable procedures. Equity practice influenced the Field Code's pleading provisions, which eliminated the common law's search for a single issue, and its expansion of a litigant's ability to add parties and issues to a single suit.²⁰⁶

The Federal Rules reformers also valued coherence. They envisioned a lean and general procedure: Pound favored a "systematic and scientific" procedure based on general principles,²⁰⁷ Shelton wrote of the need to simplify procedure,²⁰⁸ and Clark praised simple and uncomplicated procedural forms, particularly in pleading.²⁰⁹ Edgar Tolman, secretary of the Federal Rules Advisory Committee for which Clark served as Reporter, captured the prevailing sentiment when he advised that an ideal set of procedural rules should avoid "the faults of our rigid, modern statutes, the best of which contain hundreds of sections, and the worst of which contain thousands of sections dealing with hundreds of thousands of details."²¹⁰ Instead, Tolman urged, drafters of procedural rules should "[e]liminate every requirement except the irreducible minimum absolutely necessary to point out the plain and straight path from the institution of a suit to the final judgment."²¹¹ Along the same lines, Dean Wigmore criticized a preliminary draft of the Federal Rules for failing to separate lengthy paragraphs and number them.²¹²

The Rules reformers sought coherence as well in a single procedure for cases formerly relegated to either law or equity. Like Field,

204. See 1848 REPORT, *supra* note 127, at 73-75; see also 1 FIELD SPEECHES, *supra* note 124, at 236-37 (criticizing the common law for obscuring facts and legal issues).

205. Some nineteenth-century jurists viewed the elimination of the distinction between law and equity and the abolition of forms of action as part of the evolution of the law from a primitive to a more civilized form. Under a merged system, judges could fashion remedies to vindicate ideal substantive rights. See Bone, *supra* note 16, at 18-26.

206. See 1848 N.Y. Laws 379, §§ 62 (elimination of separate forms of action); 120(2), 128(2), 131 (pleading provisions); 97-98, 129, 143 (joinder provisions). The Field Code did not always adopt equity practice in toto; for example, it required that the pleader use "concise language, without repetition," in contrast to equity's toleration of rambling, repetitive pleading. 1848 N.Y. Laws 497, § 120(2); see also Bone, *supra* note 16, at 26 n.62.

207. Pound, *Some Principles*, *supra* note 118, at 388.

208. See Shelton, *Uniform Judicial Procedure Will Follow Simplification of Federal Procedure*, 76 CENT. L.J. 207 (1913).

209. See, e.g., Clark, *The Last Phase*, *supra* note 142, at 977.

210. Tolman, *Historical Beginnings of Procedural Reform Movement in This Country — Principles to Be Observed in Making Rules*, 22 A.B.A. J. 783, 786 (1936).

211. *Id.*

212. Wigmore, *supra* note 193, at 812.

Pound complained about "the obsolete Chinese wall between law and equity."²¹³ Clark also took up the banner for merger, stating that "as soon as you get away from the history of the struggle between the Chancellor and the Lord Chief Justice in England, I see no possible justification for a division between law and equity."²¹⁴ In fashioning the merged system's procedure, the drafters of the Rules did not seek to combine and harmonize elements of both law and equity procedure, as Field had done in his code. Rather, the Rules reformers favored equity as a harmonizing mechanism. The Federal Equity Rules of 1912 were seen as "the substantial model for the new Federal procedure of the future."²¹⁵ The equity rules were admired, in a somewhat detached manner suggestive of aesthetic appreciation, as the embodiment of "the best of modern reform procedure."²¹⁶

The pervasive attraction of simplicity for the Code and Federal Rules reformers resulted in procedural systems that emphasized, in varying ways, completeness and coherence. Simpler was always better; the reasons why were often not articulated.²¹⁷ Of course, the reformers did not always mean the same thing by "simple." Field, for example, sought to simplify procedure through his code and yet, several decades later, Clark criticized the Field Code for lacking the flexibility he thought a simple procedural system should possess.²¹⁸ Simplification was not a code word for a designated set of reforms but a more general aesthetic goal. Simplicity came to be desirable for its own sake.

B. Modern Reformers

Just as the Federal Rules reformers, bent on simplifying procedure, criticized earlier simplification efforts such as the Field Code,²¹⁹ so today some critics find modern procedure too complicated and seek

213. Pound, *supra* note 117, at 287.

214. Clark, *Fundamental Changes*, *supra* note 138, at 560.

215. Clark & Moore, *supra* note 121, at 435.

216. *Id.* at 394. Clark and Moore further noted that, by extending the scope and applicability of the equity rules, "the necessary major element" of their reform effort would be "secured." *Id.*

217. Aesthetics is only one reason among many for the attraction of simplicity. The code and Federal Rules reformers believed that simple rules were desirable because they were efficient and scientific. See *supra* text accompanying notes 122-41. In addition, rules deemed "simple" because of their open-ended and general nature confer power on the coterie of experts who draft them. Such rules need interpretation and it is the drafters, both as consultants and as future members of the bench, who are likely to be called upon to provide such interpretation. See *supra* note 13; Subrin, *supra* note 17, at 968-69.

218. See C. CLARK, *supra* note 199, at 34-35.

219. See *supra* text accompanying notes 177-86.

yet simpler solutions. These critics always have procedural alternatives in mind which would "work" better: their agendas are practical and goal-oriented. Often, critics draw suggested alternatives from comparative studies of procedure, from a system or systems seemingly less mired in the complexity characteristic of American procedure. Sometimes, the alternatives they propose take the form of less formalistic methods for processing or resolving disputes. Lewis Solomon and William Richards, for example, analyze Kpelle (Liberian), Cuban, and Chinese methods of conflict resolution and use their analysis as the basis of proposals for procedural change.²²⁰ Simplification is first on their list of recommendations. Simplification and clarification could, they argue, permit individuals to proceed to conflict resolution without lawyers or, even if lawyers were still necessary, would help those attorneys "who are often confused by complex court procedures."²²¹

Many others also place simplification at the center of their reform agendas. In the section that follows, I consider a number of reformers whose platforms rest, at least in part, on comparisons with the procedural systems of other countries. The reformers do not necessarily share a common goal or ideology. For example, Warren Burger measures current procedures against the standards set in 1906 by Roscoe Pound. Derek Bok, on the other hand, takes a broader view, assessing the role of law in an increasingly complicated America. John Langbein and Albert Alschuler, both admirers of German procedure, draw somewhat different conclusions about how that procedure should influence our own. What unites these reformers, and the reason I have singled them out, is their attraction to simplicity and simplification: for them, it seems, simpler procedures are at once more effective and more aesthetically pleasing.

1. *The Japanese Model*

In 1976, at a conference commemorating Roscoe Pound's 1906 address to the American Bar Association,²²² several participants saw simplification as central to procedural reform.²²³ Simon Rifkind, for

220. Solomon & Richards, *Towards a New Mode of Conflict Resolution in Civil Matters*, 27 DE PAUL L. REV. 1 (1977).

221. *Id.* at 14.

222. The conference was designated the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, after the title of Pound's address. See Pound, *supra* note 117. The conference proceedings are reported at 70 F.R.D. 79 (1976).

223. Of course, not all the Pound conferees sought, or even mentioned, simplification. In fact, a few participants seemed, if not suspicious, at least cautious about oversimplifying trial procedure in an attempt to make it more orderly. Judge Leon Higginbotham, for example, warned that "order is not an absolute" and that reforms which threaten to diminish human rights, even if promoting greater procedural efficiency, should be scrutinized critically. See Hig-

example, urged reform "in the direction of simplification of the law" not only as a way of easing the burden on the courts but also as a mechanism for rendering the law more certain and predictable.²²⁴ Others criticized the courts for not taking sufficient steps to simplify procedures.²²⁵ Much attention was devoted to alternate streamlined methods for processing and resolving disputes, from the institution of simpler, more "mechanical" rules which would allow clerks or other nonjudicial personnel to resolve disputes,²²⁶ to adopting the British practice of handling corporate takeover disputes,²²⁷ to the use of ombudsmen and arbitration.²²⁸

Prominent among the participants at the 1976 Pound Conference was then-Chief Justice Warren Burger, an outspoken critic of modern trial practice who has encouraged a variety of reforms aimed at increasing procedural efficiency. In an address to the conference, he praised the Federal Rules of Civil Procedure as "a major step toward a pervasive simplification of procedure" and allowed that "major advances" had been made since Roscoe Pound's time to simplify both trial and appellate procedure.²²⁹ Nevertheless, Justice Burger lamented the misuse and overuse of pretrial procedures, and called for reform in this area. He also urged consideration of new, simpler concepts for the resolution of minor disputes and noted with approval the Japanese tradition of informal, private dispute processing as an alternative to litigation in some cases.²³⁰ Pointing out that Japan has fewer lawyers per capita than the United States, Burger attributed the relative absence of formal litigation in Japan to its history of resolving disputes informally "without lawyers, judges and the attendant expense and delays."²³¹

Another advocate of simplification is Derek Bok, President of Harvard University. In his 1981-1982 report to Harvard's Board of

ginbotham, *The Priority of Human Rights in Court Reform*, 70 F.R.D. 79, 154 (1976). Another conference participant, Professor Frank Sander, explored a variety of alternatives to litigation but never suggested that any alternative was superior to adjudication because simpler. See Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111 (1976).

224. See Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 79, 110 (1976).

225. See Levi, *The Business of Courts: A Summary and a Sense of Perspective*, 70 F.R.D. 79, 215 (1976) (summarizing the views of conference participants).

226. See *id.* at 217-18.

227. See *id.* at 218.

228. See Sander, *supra* note 223.

229. Burger, *Agenda for 2000 A.D. — A Need for Systematic Anticipation*, 70 F.R.D. 79, 95 (1976).

230. *Id.* at 93-96.

231. *Id.* at 94.

Overseers,²³² Bok was preoccupied with the complexity of American life, particularly when it involves matters legal. He commented on the "complexity" of litigation,²³³ the "elaborateness" of American laws,²³⁴ and the "complexity" and intricacy of American procedures.²³⁵ Bok's reform agenda centers on simplifying rules and procedures in tandem with greater access for the poor and middle class to the legal system.²³⁶ Like Justice Burger, Bok is intrigued by comparisons with Japan: the United States has 35,000 lawyers graduating per year compared with under 15,000 total for Japan, he notes, while Japan graduates thirty percent more engineers than the United States.²³⁷

The attraction of both Burger and Bok to Japanese procedure is puzzling when one considers the reality of Japan's legal culture. In Japan, there are, in fact, many fewer lawyers per members of the population at large than in the United States, but this is a function of deliberate governmental design rather than the result of a simpler, more pristine society. Although approximately 30,000 law graduates take the Japanese equivalent of the bar exam each year, less than 500, or about two percent, of all applicants pass.²³⁸ The truth is that the per capita number of those who take the bar exam is higher in Japan than in the United States,²³⁹ suggesting a picture quite different from Bok's implied image of a population drawn by virtue of superior sensibilities to the more productive field of engineering.

The nonlitigiousness of the Japanese is also largely a myth. The governmentally imposed lawyer shortage, crowded dockets, notoriously slow case progress, and procedural hurdles to effective lawsuits²⁴⁰ all make litigation in Japan a daunting enterprise. This does

232. See Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38. This report was excerpted and published as Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983). Citations herein are to the latter publication.

233. Bok, *supra* note 232, at 571.

234. *Id.* at 574.

235. *Id.* at 574-75. Bok also observes that "[t]he roots of our predicament . . . are more complex than popular impressions would allow." *Id.* at 575.

236. Bok proposes the following: "An effective program will require not only multiple efforts but a mixture that involves attempts to simplify rules and procedures as well as measures that give greater access to the poor and middle class. Access without simplification will be wasteful and expensive; simplification without access will be unjust." *Id.* at 579.

237. *Id.* at 573-74.

238. Haley, *Luck, Law, Culture and Trade: The Intractability of United States-Japan Trade Conflict*, 22 CORNELL INTL. L.J. 403, 421 (1989). See generally Rabinowitz, *The Historical Development of the Japanese Bar*, 70 HARV. L. REV. 61 (1956).

239. See Ramseyer, *Japan's Myth of Non-Litigiousness*, Natl. L.J., July 4, 1983, at 36, col. 1; see also Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 3 UCLA L. REV. 4, 57-59 (1983) (small number of lawyers in Japan reflects lack of professional opportunities).

240. Ramseyer, *supra* note 239, at 36, cols. 1-3; see also Zaloom, *Dispute Resolution in Japan*,

not mean that the Japanese by nature shun litigation nor that American-style lawsuits do not provide an attractive alternative to Japanese dispute resolution in many cases.²⁴¹ In fact, in cases where foreign, rather than Japanese, courts are an available forum, Japanese plaintiffs have demonstrated a greater than usual willingness to sue.²⁴²

The question, then, is why Burger and Bok insist on a mythical version of a Japan where life is simpler and saner and legal procedures less complicated. The answer rests in part on instrumental bases: the system may be more effective, for example, in resolving minor disputes. But another part of the answer may lie in reformist zeal. The aesthetic goal of simplicity, of elegance in the design of a procedural system, is an attractive foundation on which to build a reform program. Such an aesthetic vision, even if a myth, is preferable to the task of sorting out the reality of another living, breathing, complex human society. Like earlier procedural reformers who often used simplification to justify their reform agenda,²⁴³ these modern reformers rely on the lure of simplicity to enhance the changes they propose.

2. *The German Model*

Professor John Langbein looks to West Germany as a model for reforming American civil and criminal procedure. Time and again, Langbein has contrasted the simplicity, elegance, and efficiency of German procedure with the complexity, cumbersomeness, and inefficiency of procedure in the United States.²⁴⁴ In criminal cases, Langbein identifies the complexity of full-scale jury trial as the reason for pervasive plea bargaining in the United States; German trial proce-

L.A. Daily J., Sept. 9, 1983 at § 3, col. 1. Cf. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 311 (1984) (discussing difficulties in making cross-cultural comparisons of efficiency).

241. A more telling focus than dispute resolution might be rights vindication; that is, government controls on lawyers, courts, and procedures may reduce or simplify litigation but leave Japanese citizens without effective means to secure and enforce rights. See Ramseyer, *supra* note 239, at 36, col. 3.

242. See, e.g., *Japanese Aversion to Filing Lawsuits is Declining*, Chi. Daily L. Bull., Aug. 29, 1985, at 18, col. 4 (discussing lawsuits in U.S. courts by families of Japanese victims in Korean Airlines case). See also Haley, *The Myth of the Reluctant Litigant*, in LAW AND THE LEGAL PROCESS IN JAPAN 719-33 (D. Henderson & J. Haley eds. 1978) (arguing that prevailing notions about the reluctance of the Japanese to litigate are inaccurate); Galanter, *supra* note 239, at 31-32 (describing the moral intensity of group litigation in Japan).

243. See *supra* note 169.

244. See, e.g., Langbein, *Trashing "The German Advantage,"* 82 NW. U. L. REV. 763 (1988); Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) [hereinafter Langbein, *The German Advantage*]; Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979) [hereinafter Langbein, *Plea Bargaining*]; see also Langbein, *Comparative Civil Procedure and the Style of Complex Contracts*, 35 AM. J. COMP. L. 381, 386 (1987) (criticizing inefficiency of American procedure).

ture, by contrast, "has been kept uncomplicated and rapid"²⁴⁵ so that every case of imprisonable crime can be tried, making plea bargaining unnecessary.²⁴⁶

In civil cases, Langbein characterizes American procedure as expensive, protracted and unpredictable and contrasts the "tone" of German and American civil proceedings:

Countless novels, movies, plays, and broadcast serials attest to the dramatic potential of the Anglo-American trial. The contest between opposing counsel; the potential for surprise witnesses who cannot be rebutted in time; the tricks of adversary examination and cross-examination; the concentration of proof-taking and verdict into a single, continuous proceeding; the unpredictability of juries and the mysterious opacity of their conclusory verdicts — these attributes of the Anglo-American trial make for good theatre. German civil proceedings have the tone not of the theatre, but of a routine business meeting — serious rather than tense. When the court inquires and directs, it sets no stage for advocates to perform. The forensic skills of counsel can wrest no material advantage, and the appearance of a surprise witness would simply lead to the scheduling of a further hearing. In a system that cannot distinguish between dress rehearsal and opening night, there is scant occasion for stage fright.²⁴⁷

Langbein finds the separation of pretrial and trial proceedings in American procedure particularly irksome, since it requires that parties conduct discovery for the entire case;²⁴⁸ it also compels witnesses to tell their stories at least twice and allows for adversary distortions of the stories witnesses tell.²⁴⁹ He proffers the German system as a preferable alternative because it is simpler, neater and more streamlined: the judge alone "digs for facts" and controls their presentation over a series of hearings rather than in a single, continuous trial.²⁵⁰

Albert Alschuler also draws on West German procedure to fashion procedural reforms, but not in the same way as Langbein. Like Langbein, Alschuler abhors the complexity of American trial procedures — he refers to them as "the world's most extensive collection of

245. See Langbein, *Plea Bargaining*, *supra* note 244, at 206.

246. *Id.* at 209.

247. Langbein, *The German Advantage*, *supra* note 244, at 831. Langbein's use of this theatrical metaphor is interesting from an aesthetic point of view, not because it draws its metaphorical material from the arts, but because it suggests a more detached view of procedure and its impact. The appreciation of procedural "tone" is at least one step removed from a practical instrumental approach to procedure. However, Langbein continues in a much more practical vein as he elaborates on his thesis.

248. *Id.* at 831.

249. *Id.* at 833-34.

250. *Id.* at 826-32.

cumbersome procedures”²⁵¹ and advocates a simplified form of adjudication.²⁵² Alschuler finds the American jury trial especially distressing as a source of complex procedures designed to make the jury system effective.²⁵³ He has devised an alternative system, unlike Langbein drawing only in part from the German model, designed to simplify adjudication while avoiding the dangers of extensive judicial oversight.²⁵⁴ The proposed simplified system has two tiers: “first instance” trials following limited discovery, with the judge, not the lawyers, examining witnesses and controlling the order of proof; and “second instance” trials, using procedures in effect at present, for parties dissatisfied with the results of the first-instance trial.²⁵⁵ Cost-shifting offer of settlement rules would operate at both first-instance and second-instance proceedings.²⁵⁶

Some commentators take issue with Langbein’s portrayal of the German system;²⁵⁷ a few of their criticisms apply tangentially to Alschuler’s portrayal as well.²⁵⁸ One critic suggests that Langbein idealizes German procedure and compares it to a caricature of American procedure.²⁵⁹ It is true that Langbein presents a somewhat stylized view of German procedure; his preoccupation with its shape and tone suggest an underlying aesthetic attitude toward the system and its virtues. To the extent that Alschuler embraces Langbein’s description of the German system, his approach too is partly aesthetic. Yet, Langbein has described the German system as he sees it. If the Germany he pictures is idealized, one explanation is that he is building a reform platform on the German model. Like others before him, he is

251. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1858-59 (1986).

252. *Id.* at 1845-54.

253. *Id.* at 1824; see also Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 991-93, 999-1002, 1016-20 (1983) (describing features of the American jury system). Alschuler also fears that the current emphasis on “managerial judging” to alleviate procedural complexity may sometimes encourage “hasty judgment, . . . failure to afford an adequate opportunity to be heard, . . . partiality at trial, and . . . undue pressure to settle . . .” Alschuler, *supra* note 251, at 1836.

254. Alschuler, *supra* note 251, at 1840-50.

255. *Id.* at 1845-51.

256. *Id.* at 1852.

257. See Allen, Köck, Riechenberg & Rosen, *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988).

258. Although Alschuler does not embrace Langbein’s vision uncritically, see, e.g., Alschuler, *supra* note 251, at 1842-45, he does accept without question Langbein’s view regarding the superior efficiency of the German practice of serial evidentiary hearings rather than separate pretrial and trial proceedings. *Id.* at 1841.

259. Allen, *Idealization and Caricature in Comparative Scholarship*, 82 NW. U. L. REV. 785 (1988).

searching for a way out of the intricate web of American procedure and seeking refuge in an almost abstract version of a simpler, more efficient German system — a system with “the tone not of the theatre, but of a routine business meeting.”²⁶⁰ No wonder that the aesthetically pleasing features of the German system — order, control, and neatness — are paramount in Langbein’s work: he has a reform function to fulfill and admission of the complexity and disorder that attend human enterprise might be taken as weakness.

CONCLUSION

Like their forebears, modern reformers do not treat simplicity as an exclusively aesthetic goal, nor do they mean the same thing by “simple.”²⁶¹ Yet the pervasiveness of references to simplicity, and the at least occasional discrepancy between modern procedural visions and reality, suggest that these reformers sometimes tend toward simplicity and simplification because they find it more aesthetically pleasing; in turn, this feeling of “rightness” inspires them to adhere tenaciously to their reform proposals.²⁶² To say that any of the reformers has taken an aesthetic attitude toward procedure is admittedly speculative; their articulated goals are pragmatic and their statements carefully constructed. The attitudinal hints that one can find in the writings and speeches of, for example, the Federal Rules reformers are generally absent here.²⁶³ It is remarkable, however, how often simplicity appears as a common thread linking otherwise unrelated reform agendas: that simpler is better is taken, more or less, as an item of faith. The power of this idea is demonstrated in a recent article, in which a writer who develops a set of rather complex jurisdictional principles to guide the choice of process in a given dispute feels compelled to justify his reform as “simple”: “[T]he complexity of the ap-

260. Langbein, *The German Advantage*, *supra* note 244, at 831.

261. *See supra* text accompanying note 218.

262. *Cf. supra* text accompanying notes 8-10 (in science, aesthetic considerations increase tenacity of supporters of new paradigm).

263. *But see supra* note 247 (Langbein’s theatrical metaphor may suggest aesthetic attitude). For a striking example of an aesthetic attitude toward procedure, see M. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986). Professor Damaška is not a reformer but a comparative law scholar. In this book, he searches for a typology for comparing adversarial and inquisitorial systems and develops an approach detached from “contingencies of history.” *Id.* at 5. Using many analogies from science and art, Damaška chooses to construct “pure styles” of procedure rather than to examine individual systems. His rationale has the detachment characteristic of an aesthetic attitude: “one must realize that explorations of individuality become possible only after one has first obtained conceptual instruments with which to see and discuss individuality in terms of generic notions.” *Id.* at 242; *see also* Markovits, *Playing the Opposites Game: On Mirjan Damaška’s THE FACES OF JUSTICE AND STATE AUTHORITY* (Book Review), 41 *STAN. L. REV.* 1313 (1989) (praising Damaška’s analysis for the aesthetic pleasure it imparts but criticizing its failure to capture some of the complex functions of procedural systems).

proach here," he argues, "derives from its simplicity."²⁶⁴

The lure of simplicity, in the guise of simplification, is understandable. Where central concerns are overcrowded dockets, delays, and inefficiency, it is tempting to seek solutions which shed details and neaten up procedural pathways, which sweep clean and eliminate clutter. To be sure, simplicity may lead to more rational procedures, but not inevitably. Simplicity is much more likely to lead to aesthetically pleasing procedural rules. Unlike a work of art, however, procedure is not meant to be placed on a shelf and admired. And, unlike science, procedure (like law in general) does not describe or manipulate the inherently orderly natural universe that inspired Einstein. Instead, procedure attempts to shape a complex and disorderly world of human interactions. It should not be entirely surprising that procedures made simple through minimal structure and definition may be unable, by themselves, to bring order to the transactions they govern.

The very simplicity that gives a procedure its aesthetic value in the abstract can contribute to its downfall in concrete application. Discovery under the Federal Rules of Civil Procedure, for example, was part of the Federal Rules reformers' larger simplification efforts. "Wide open" discovery, it was argued, could help eliminate procedural gamesmanship and put to rout the "sporting theory of justice" denounced by Roscoe Pound.²⁶⁵ Simpler was better: the discovery rules are largely open textured and general, meant to provide just enough structure to allow an enlightened bench and bar to fill in gaps as needed. Today, however, discovery abuse, whether or not of the dimensions sometimes claimed,²⁶⁶ is notorious and the source of many of the complicated procedural tangles which vex modern jurists. Perhaps a less simple, more detailed rules scheme — setting limits, specifying discovery orders, imposing nondiscretionary sanctions — would be preferable. Simplicity cannot always be relied upon to get the job done.²⁶⁷

264. Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles For Process Choice*, 1984 WIS. L. REV. 893, 1025.

265. Pound, *supra* note 117, at 281.

266. See, e.g., *Judges Give Delay Causes: Discovery Abuse Tops List*, A.B.A. J., July 1, 1988, at 29. But see Trubeck, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89-90 (1983) (empirical study revealed relatively little discovery in ordinary lawsuits); see also Hazard, *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2243-44 (1989) ("Liberal discovery is a product of the citizen-consumer orientation of public policy in the last fifty years, not the misguided predilections of the committee that drafted the Federal Rules.").

267. In the case of Federal Rule of Civil Procedure 11, the original framers' goal of simplicity led to a rule that required substantial judicial amendment, resulting in unpredictability of outcome. See Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1941-43 (1989). As amended in 1983, Rule 11, though simple in a

Of course, reforms undertaken in the name of simplicity sometimes succeed. The "notice pleading" system of the Federal Rules was, in fact, simpler than its common law and code predecessors and that simplicity produced some beneficial effects. Not only did a generalized, nontechnical pleading system save the time and money previously spent distinguishing among facts, ultimate facts, evidence, and law,²⁶⁸ it also allowed for new legal theories to be formulated without the constraints of preexisting legal categories.²⁶⁹ Ironically, however, the absence of constraints and categories in the pleading rules — their simple, streamlined shape²⁷⁰ — has ultimately made practice under them surprisingly complex. Local rules,²⁷¹ standing orders, referral to masters and magistrates,²⁷² and judicial discretion to impose sanctions for abuse of the rules²⁷³ have all become part of the pleading package.²⁷⁴

Reformers may need a vision to propel them forward, to buoy them up when support for their reforms is not immediately forthcoming. Aesthetic goals can fill such a need. The history of scientific, political and social reforms proves that proposition.²⁷⁵ In addition,

formal sense, did not have simplicity of implementation as a stated goal; it was anticipated that judges would need to use their discretion and tailor different sanctions to meet the needs of different cases. *Id.* at 1936-37, 1943.

Rule 11 illustrates one respect in which simplicity plays a different role in procedural reform than it does in science. Simple scientific rules and formulas exist against an elaborate definitional background where basic units of measurement — the cell, the atom and so forth — are commonly understood and form the basis of future developments. The simplicity of Einstein's theory of relativity derives from its ability to unite the complex strands of prior scientific thought into a single, harmonious construct. In procedure, however, the units of measurement have not always remained constant. Many basic concepts — claims, causes of action, facts, notice, sanctions — have been left deliberately general in the interest of simplicity and have shifted in meaning and importance over time. Procedural reforms thus cannot be expected to reflect an order that does not exist nor to organize and harmonize a universe of parts that are themselves not clearly defined.

268. See Subrin, *supra* note 123, at 338-39.

269. See Hazard, *supra* note 266, at 2246.

270. See *supra* notes 184-86 and accompanying text.

271. See Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989).

272. See Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989).

273. See Burbank, *supra* note 267, at 1941-43.

274. This has led some commentators to question the wisdom of future reforms based on "simpler is better" as an article of faith. See, e.g., Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716-17 & n.172 (1988) (urging recognition of the limitations of broad, generalized rules); Kaplan, *supra* note 13, at 2126-27, (posing questions in need of further study regarding differentiated modes of procedure); Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2211-12 (1989) (proposing different procedural tracks for different kinds of cases); Subrin, *supra* note 271, at 2048-51 (demonstrating that case-specific rules already exist).

275. See *supra* notes 8-11 and accompanying text.

aesthetic goals are worthy ones, capturing the best of human aspirations and potential.²⁷⁶ Where procedural reform is concerned, however, becoming preoccupied by aesthetic sensibilities may cause one to be tricked into thinking that the shape of a rule alters the shape of the human transaction it is meant to control or facilitate, rather than vice versa. An aesthetic perception of or attitude toward procedure can make it an end in itself, divorced from the substantive world in which the effects of procedure are realized. An early critic of the Enabling Act described this phenomenon in a salient metaphor: "If a group of mariners tired of studying their complicated charts should decide to throw them away and adopt more simple maps, they would not thereby do away with the air and water currents through which they must pass, or the icebergs or the reefs in their course."²⁷⁷

While aesthetic sensibilities and goals need not be absent from the process of procedural reform — indeed, they have been at least partly responsible for important procedural advances — they need to be appropriately contained. Experience teaches that simpler is not always better. Complexity will not vanish in the face of simple rules; it will just go elsewhere, necessitating steps that may be at odds with the original streamlined system.²⁷⁸

Recognizing both that aesthetic factors are present in procedural reform and that their role must be limited is a useful first step in ensuring that aesthetic goals do not blind reformers to the social, political, and institutional effects of the changes they propose.²⁷⁹ Simplicity is not bad. In law, as in science and other fields, the rhetoric of simplicity has propelled, and may continue to propel, positive change. But its limitations must be recognized and other visions pursued. In particular, the reality of the universe within which procedure operates deserves attention. Based on what we know and can discover,²⁸⁰ there

276. See *supra* notes 97-100 and accompanying text.

277. Hall, *Uniform Law Procedure in Federal Courts*, 33 W. VA. L.Q. 131, 134 (1927). Interest in Connor Hall's critical perspective was inspired by Stephen Subrin. See Subrin, *supra* note 17, at 994-95; see also Burbank, *supra* note 267, at 1941 n.89.

278. Professor Subrin has noted that simple, general rules almost inevitably engender specific ones. He points to both the elaborate additions to the Field Code and the proliferation of local rules under the Federal Rules of Civil Procedure as examples of this phenomenon. See Subrin, *supra* note 271, at 2045-46.

279. There are other aesthetic preferences besides simplicity and, as in art, prevailing notions of what is pleasing can change over time. In fact, a whole set of aesthetic values is invoked by the concept of complexity. In art, these include richness and depth of design, the incorporation of diverse materials, and variety of significance in line and shape. See *supra* notes 39-45 and accompanying text. Applied to the procedural realm, such notions could provide an alternative or additional aesthetic impetus for reforms to come.

280. The need for empirical research on procedure has long been recognized but has remained largely unmet. See, e.g., Burbank, *Introduction: "Plus Ça Change. . ."*, 21 U. MICH. J.L. REF. 509, 512 (1988); Burbank, *supra* note 267, at 1939-40; Galanter, *The Federal Rules and*

may emerge a new aesthetic vision that, while not totally abandoning simplicity, recognizes and values the complexity, difference and particularity inherent in today's world. This new vision may form the basis of a new rhetoric of procedural reform which, in turn, may prompt fresh, as yet untried structures and ideas for procedural change.

the Quality of Settlements: A Comment on Rosenberg's, The Federal Rules of Civil Procedure in Action, 137 U. PA. L. REV. 2231, 2235-36 (1989).