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Abe C. Hester

*Executive Articles Editor, Washington University Jurisprudence Review; J.D. Candidate, Washington University School of Law, Class of 2021. B.A. in Political Science & Integrative Studies from the University of North Texas, Class of 2018*

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# AMERICAN LAW AS ART: AN AESTHETIC JUDGMENT

ABE C. HESTER\*

## ABSTRACT

*If legal documents are literature, and all art can be assessed via aesthetic theories, what insights can aesthetic theory grant us about increasing access to United States Code? That question is what this Note seeks to address. This Note begins by explaining the foundations of aesthetic theory, explaining the origins of the term, and contrasting two early approaches to aesthetics developed by Alexander Baumgarten and Immanuel Kant, respectively. Then, after arguing that legal codes are a form of legal literature, the Note uses Dennis Dutton's aesthetic universals and Kant's aesthetic principles to develop a framework for judging a legal code as an artwork. Finally, the Note compares United States Code with the United States Constitution to try and discern why the latter is more appreciated than the form, with the hope that such an interrogation can help us reformat United States Code into a more accessible, and ultimately more interesting, legal work.*

## INTRODUCTION

This paper critiques the aesthetic appearance of United States Code through the lenses of Immanuel Kant's *Critique of Judgement* and Dennis Dutton's universal signatures in human aesthetics.<sup>1</sup> It will explore the broader implications of Humean, Kantian, and other modern and postmodern aesthetic theories on how we view codified law and what that means for legislators seeking to increase accessibility to the law.<sup>2</sup> Finally, The paper will compare and contrast United States Code with the

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\* Executive Articles Editor, *Washington University Jurisprudence Review*; J.D. Candidate, Washington University School of Law, Class of 2021. B.A. in Political Science & Integrative Studies from the University of North Texas, Class of 2018. A quick thanks to Sam Blankenship, Galen Knowles, and Luke Tepen for their help with this Note.

1. Dennis Dutton, *Aesthetic Universals*, in *THE ROUTLEDGE COMPANION TO AESTHETICS* 203 (Berys Gaut & Dominic Lopes eds., 2nd ed. 2001).

2. DAVID HUME, *ESSAYS MORAL, POLITICAL, LITERARY* (Eugene F. Miller ed., Liberty Fund rev. ed. 1987); IMMANUEL KANT, *CRITIQUE OF JUDGEMENT* (Werner S. Pluhar trans., Hackett Pub. ed. 1987). See, e.g., WLADYSLAW TATARKIEWICZ, *A HISTORY OF SIX IDEAS: AN ESSAY IN AESTHETICS* (1980); GREGORY LOEWEN, *AESTHETIC SUBJECTIVITY* (2011).

Constitution of the United States to discern if aesthetic reform may be a plausible means to increase legal accessibility in the United States, a pressing concern during a period of continued mass incarceration.

Few have used aesthetic theory to make judgments on authoritative, binding law. Adam Gearey's *Law and Aesthetics* approaches the topic broadly, relying on "Nietzchean imperatives" and arguing primarily that we must adopt a more creative approach to lawmaking, seeking to boldly develop a theory that will "repair the ruptures of thought."<sup>3</sup> Gearey's theory serves as a foundation for the more pointed argument made herein: the use of a consistent system of aesthetic judgment explains why certain legal documents or codes are generally more appreciated and accessible than others.<sup>4</sup> Published the same year as Gearey, University of Colorado School of Law Professor Pierre Schlag developed his own theory of aesthetics of American Law, relying on descriptive rather than normative theories of aesthetics that explicitly rejected "[the] idealization of aesthetics and . . . romanticization of law."<sup>5</sup> His approach stands opposite to the one taken by this paper. His theoretical categories of "the aesthetic of the grid," "the energy aesthetic," "perspectivism" and "the dissociative aesthetic" do, however, serve as useful tools when exploring how to recraft the American code of law in a manner which better emulates aesthetic universals.<sup>6</sup> Other authors<sup>7</sup> have undertaken the provides a unique practical application of aesthetic theory to solve the problem of American law's inaccessibility.<sup>8</sup> By assessing the aesthetic value of United States Code and the Constitution with clear aesthetic criteria, it is feasible to instrumentalize their positive aesthetic attributes and scrutinize their negatives to transform how we present United States Code to the American public.

3. ADAM GEAREY, *LAW AND AESTHETICS* (2001).

4. For example, the Constitution is often praised as a work of genius whereas much of Congress' work is viewed as messy or difficult to understand. Eric Lane & Michael Oreskes, *Excerpt from the Genius of America: How the Constitution Saved Our Country and Why It Can Again*, HUFFINGTON POST (Dec. 6, 2007, 12:06 AM), [https://www.huffpost.com/entry/excerpt-from-the-genius-o\\_b\\_75561](https://www.huffpost.com/entry/excerpt-from-the-genius-o_b_75561) [<https://perma.cc/44S4-7B29>]; Olga Khazan, *Why People Find Obamacare So Confusing*, ATLANTIC (Jan. 2, 2014), <https://www.theatlantic.com/health/archive/2014/01/why-people-find-obamacare-so-confusing/282747/> [<https://perma.cc/ZG5D-FXVL>].

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

6. *Id.*

7. See, e.g., DESMOND MANDERSON, *SONGS WITHOUT MUSIC: AESTHETIC DIMENSIONS OF LAW AND JUSTICE* (2000); LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW (Costas Douzinas & Lynda Nead eds., 1999); LAW AND AESTHETICS (Roberta Kevelson ed., 1992).

8. See, e.g., Neil Rose, *Making the Law Accessible for All*, GUARDIAN (May 25, 2010), <https://www.theguardian.com/law/2010/may/25/public-legal-education-rights> [<https://perma.cc/2XJU-2A6B>]; 'Our Justice System Has Become Inaccessible to Millions of Poor People,' Says Dean Martha Minow, HARV. L. TODAY (Oct. 29, 2014), <https://today.law.harvard.edu/justice-system-become-inaccessible-millions-poor-people-says-dean-martha-minow/> [<https://perma.cc/4CDK-92TW>].

## I. WHAT IS AESTHETICS?

To begin an aesthetic criticism of American legal documents, two antecedent questions must be resolved: whether such documents are art at all and how we can assess art. The word “aesthetic” has taken on a colloquial meaning: something “aesthetic” is “designed to give pleasure.”<sup>9</sup> Adopted by internet denizens, hip journalists, and underground music fans, the term has evolved beyond its strict academic origins. In popular usage, the term simply means something is “artistic” or, alternatively, “pleasing in appearance.”<sup>10</sup>

The term’s modern usage is suggestive of its origins. From the Greek *αἰσθητικός* (*aisthetikos*), this word originally conveyed only that something was “of or for perception by the senses or perceptive.”<sup>11</sup> Modern aesthetics tends to be more generally understood as something capable of appreciation. It is clear why contemporary journalism has latched onto the term. To be aesthetic is to be pleasing to the senses. To be pleasing to the senses is to be beautiful. Beautiful music, literature, and art occupy special places in

9. See, e.g., Soliel Ho, *What Is Spoopy? Your Guide to the Internet’s Favorite Halloween Aesthetic*, S.F. CHRON (Oct. 26, 2019, 1:28 PM), <https://www.sfchronicle.com/culture/article/What-is-spoopy-Your-guide-to-the-internet-s-14562973.php> [<https://perma.cc/FY9M-RS58>].

10. See, e.g., *r/aesthetic*, REDDIT, <https://www.reddit.com/r/aesthetic/> [<https://perma.cc/7BFR-8N33>]; Andrea Crowley, *15 Cozy Bedrooms that Nail the Farmhouse Aesthetic*, YAHOO LIFESTYLE (Oct. 24, 2019), <https://www.yahoo.com/lifestyle/15-cozy-bedrooms-nail-farmhouse-144335879.html> [<https://perma.cc/EHA7-3FFC>]; EYM, *CHILL VIBES | Chill & Aesthetic Music Playlist*, YOUTUBE (Jun. 22, 2017), <https://www.youtube.com/watch?v=oJnF5VxTO5g> [<https://perma.cc/UP2T-R4QX>]; Joshua Edmunds, *Meme Music: An Abridged History of Vaporwave*, DAILY TARGUM (Oct. 4, 2019, 12:09 AM), <https://www.dailytargum.com/article/2019/10/the-history-of-vaporwave> [<https://perma.cc/3B9L-KBTE>]; Chris Richards, *I Was Wrong About Young Thug*, THE WASH. POST (Oct. 23, 2019, 3:20 PM), [https://www.washingtonpost.com/lifestyle/style/i-was-wrong-about-young-thug/2019/10/23/87e88fbc-f5b7-11e9-ad8b-85e2aa00b5ce\\_story.html](https://www.washingtonpost.com/lifestyle/style/i-was-wrong-about-young-thug/2019/10/23/87e88fbc-f5b7-11e9-ad8b-85e2aa00b5ce_story.html) [<https://perma.cc/3XNC-FLAY>] (“Young Thug is taking his victory lap . . . Five years ago, the Atlanta native was positioning himself as the most vivid expressionist rap had ever heard, a virtuoso with bold *aesthetic* strategies and bottomless ingenuity.” (emphasis added)); James Parker, *Neil Young’s Boring, Prophetic Message to Readers*, ATLANTIC (Sept. 28, 2019), <https://www.theatlantic.com/entertainment/archive/2019/09/neil-young-feel-music-evolved-and-half-assed/599044/> [<https://perma.cc/LVT2-EV55>] (“Young, on the other hand, writes books like he makes records with his on-off band Crazy Horse—which is to say, according to a highly evolved and very disciplined *aesthetic* of half-assedness.” (emphasis added)); Anne Midgette, *Neglected Visionary Agnes Denes Altered Our Landscape with Her Art*, WASH. POST (Oct. 24, 2019, 11:00 AM), [https://www.washingtonpost.com/entertainment/museums/neglected-visionary-agnes-denes-altered-our-landscape-with-her-art-at-88-shes-finally-getting-her-due/2019/10/24/19577434-f4d4-11e9-ad8b-85e2aa00b5ce\\_story.html](https://www.washingtonpost.com/entertainment/museums/neglected-visionary-agnes-denes-altered-our-landscape-with-her-art-at-88-shes-finally-getting-her-due/2019/10/24/19577434-f4d4-11e9-ad8b-85e2aa00b5ce_story.html) [<https://perma.cc/A43W-HQRW>] (“The result is too complex to be easily described; but it’s undeniably beautiful, and it shows something about the ways in which humans construct systems of knowledge and the way that knowledge itself can become an *aesthetic* creation.” (emphasis added)); *Aesthetic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/aesthetic> [<https://perma.cc/XGC5-JEKS>].

11. *Aesthetic*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/aesthetic> [<https://perma.cc/GP9Y-M4CX>].

American culture. Art journalists and tastemakers seek to both find and determine what others should spend their limited time perceiving. Our senses are finite; therefore, we should maximize our time perceiving things that are the most pleasing. While this definition seems to be the most consistently used throughout history, philosophers, as with all things, sought to interrogate the *why* of aesthetic pleasure. Two distinct philosophical derivative definitions developed between the eighteenth and nineteenth centuries.

German poet Alexander Baumgarten defined aesthetics as “criticism of taste.”<sup>12</sup> Credited with giving the philosophical discipline its name in 1735, Baumgarten broke from tradition and argued that artwork is more than a medium—a piece of art is “a locus of perfection in its own right.”<sup>13</sup> He argued that what makes something aesthetic is that perception of the object leads to a rich and imagery-intensive clarity rather than an analytic one.<sup>14</sup> He sought to sever aesthetic appreciation from the other form of sense appreciation: one which only provides objective clarity.<sup>15</sup> Unlike an analytical appreciation of a work which would only value an object’s comprehensibility, aesthetic appreciation focuses on valuing representations which result in feelings of “liveliness . . . brightness or splendor.”<sup>16</sup> To judge the aesthetic quality of something, we must consider not only its intuitive perfections and imperfections but the symbolic as well. Perfection must be perceived by the senses rather than purely through intellect.<sup>17</sup> Finally, he argues that aesthetic-sense-based judgement exists as a parallel, rather than as a counter, to logical analysis and that the goal of

12. ALEXANDER BAUMGARTEN, *MEDITATIONES PHILOSOPHICAE DE NONNULLIS AD POEMA PERTINENTIBUS* §§ 116–117 (Wayback Machine 2010) (1735), <https://web.archive.org/web/20101005090921/http://modernsource.daphnet.org/texts/Baumgarten/BauMPh> [<https://perma.cc/E4MC-UW8E>] (“[L]et them therefore be νοητά the know Philosophers, in order in his thoughts, in this manner, on the one side in the question put to them no fortunes, or very few of the special rules to be observed. The outermost parts of do not cares for the things, which are of sound is that of articulate, to that extent, for they belong to the αἰσθητά. Of these not have a more sensitive, submitting to the account is held, on the one side the aesthetics of the part of the question put to them it would be longer, than of logic. Now, when this can be done completely and incompletely, that would teach rhetorical general knowledge of imperfect representations of sensory setting after it Poetry general knowledge about the complete setting displays sensitive kind ledge of the faculty of a higher object of the Logic; αἰσθητά, ἐπιστήμης αἰσθητικῆς or aesthetic”); ALEXANDER BAUMGARTEN, *AESTHETICA*, § 1 (1750) (“Aesthetics (the theory of the liberal arts, the logic of the lower capacities of cognition [gnoseologia inferior], the art of thinking beautifully, the art of the analogon rationis) is the science of sensible cognition.”); see also *18th Century German Aesthetics*, STAN. ENCYCLOPEDIA PHIL. (Jan. 16, 2007), <https://plato.stanford.edu/entries/aesthetics-18th-german/#BauMeiAesAnaRatCog> [<https://perma.cc/E2PZ-LGD7>].

13. *18th Century German Aesthetics*, *supra* note 12.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

aesthetics must be the “perfection of sensible cognition . . . [to find beauty] such that . . . ugliness [can] be avoided.”<sup>18</sup> Baumgarten died before ever finishing his *magnum opus*, but his enumeration of the perfections<sup>19</sup> suggests that he sought to develop an objective system of aesthetic criticism.

Immanuel Kant provided the other relevant definition of aesthetics in the same period as Baumgarten. Kant defined aesthetics as of or pertaining to the *appreciation* of the beautiful.<sup>20</sup> Contrary to Baumgarten, who sought to develop an objective system of aesthetics, Kant largely focuses on our subjective experience of perception. Kant outlines four kinds of “aesthetic reflective judgements,” arguing that “the feeling of pleasure an object [grants] must be classed with either the *agreeable* . . . the *beautiful* . . . the *sublime*, or the (absolutely) *good*.”<sup>21</sup>

To be *agreeable*, an existent must simply be associated with positive sensation. It is based on mere enjoyment and “[does not contribute to culture].”<sup>22</sup> To be *good*, a thing must elicit a powerful moral feeling or be

18. BAUMGARTEN, *AESTHETICA*, *supra* note 12.

19. *Id.* at §22 (“*ubertas . . . magnitudo . . . veritas . . . claritas . . . certitudo et vita cognitionis*”).

20. KANT, *supra* note 2, at xlix, 214, 175, 44 (“The antinomy I have set forth and settled here is based on the concept of taste in the proper sense, i.e., as an aesthetic power of judgment that merely reflects; and I reconciled the two seemingly conflicting principles [by showing] that *they may both be true*, and that is all we need. If, on the other hand, we assumed, as some do, that the basis determining taste is *agreeableness* (because the presentation underlying a judgment of taste is singular), or, as others would have it, that it is the principle of *perfection* (because the judgment is universally valid), with the definition of taste formulated accordingly, then the result would be an antinomy that we could not possibly settle except by showing that the two opposed (but opposed [as contraries,] not as mere contradictories) *propositions are both false*; and that would prove the concept underlying both of them to be self-contradictory. So, we see that the elimination of the antinomy of aesthetic judgment proceeds along lines similar to the solution of the antinomies of pure theoretical reason in the *Critique [of Pure Reason]*, and we see here too—as well as in the *Critique of Practical Reason*—that the antinomies compel us against our will to look beyond the sensible to the supersensible as the point [where] all our a priori powers are reconciled, since that is the only alternative left to us for bringing reason into harmony with itself”) (“[E]very art presupposes rules, which serve as the foundation on which a product, if it is to be called artistic, is thought of as possible in the first place. On the other hand, the concept of fine art does not permit a judgment about the beauty of its product to be derived from any rule whatsoever that has a *concept* as its determining basis, i.e., the judgment must not be based on a concept of the way in which the product is possible. Hence fine art cannot itself devise the rule by which it is to bring about its product. Since, however, a product can never be called art unless it is preceded by a rule, it must be nature in the subject (and through the attunement of his powers) that gives the rule to art; in other words, fine art is possible only as the product of genius . . .”) (“[A] judgment of taste is not a cognitive judgment and so is not a logical judgment but an aesthetic one, by which we mean a judgment whose determining basis *cannot be other than subjective* . . .”).

21. *Id.* at 126.

22. *Id.* (“The *agreeable*, as an incentive for desires, is *always of the same kind*, wherever it may come from and however different in kind may be the presentation (of sense, and of sensation regarded objectively). That is why what matters in judging its influence on the mind is *only the number of stimuli* (simultaneous and successive), and, as it were, only the mass of the agreeable sensation, so that this sensation can be made intelligible only through its quantity.” (emphasis added)).

of a law that “obligates absolutely.”<sup>23</sup> To be *beautiful*, an artifact must be the near opposite of something merely *agreeable*. It must have an intelligible quality that “contributes to culture, [and] teaches us . . . to be mindful . . . and purpose[ful] in the feeling of pleasure.”<sup>24</sup> Finally, to be *sublime*, something must be relatively beautiful or appreciable based on a *community of interest*: this means it must have some quality reflected in nature that brings it near universal appreciation.<sup>25</sup>

For Kant, even universality takes on an oxymoronically subjective tone: “we are compelled,” he argued, “to subjectively *think* nature itself in its totality as the exhibition of something supersensible without our being able to bring this exhibition about *objectively*.”<sup>26</sup> Beauty and sublimity are, respectively, ways to describe what we judge by our senses as pleasing in accordance with our general interests and that which we like “directly” despite the interest of our senses.<sup>27</sup> This seemingly contradictory understanding comes from the Kantian notion that underlying everything there is an “ought,” which is represented by a *sensus communis*, or a community of taste.<sup>28</sup> Although Kant’s aesthetic is subjective, underneath it

23. *Id.* at 126–27 (“[A thing that is good] is distinguished above all by its modality a necessity that rests on a priori concepts and contains not just a *claim* but also a *command* that everyone approve. Actually, the absolutely good belongs not to aesthetic but to pure intellectual judgment; by the same token, we attribute it to freedom rather than to nature, and in a determinative rather than in a merely reflective judgment. But the *determinability of the subject* by this idea—the determinability, indeed, of a subject who can sense within himself, as a *modification of his state*, *obstacles* in sensibility, but at the same time his superiority to sensibility in overcoming these obstacles, which determinability is moral feeling—is nevertheless akin to the aesthetic power of judgment and its *formal conditions* inasmuch as it allows us to present the lawfulness of an act done from duty as aesthetic also, i.e., as sublime or for that matter beautiful, without any loss in the feeling’s purity, while such a loss would be unavoidable if we sought to bring the feeling into a natural connection with the feeling of the agreeable . . .”).

24. *Id.* at 126.

25. KANT, *supra* note 2, at 126 (“The *sublime* consists merely in a *relation*, for here we judge the sensible [element] in the presentation of nature to be suitable for a possible supersensible use.”).

26. *Id.* at 128.

27. *Id.*

28. *Id.* at 159–160 (“We often call the power of judgment a sense, when what we notice is not so much its reflection as merely its result. We then speak of a sense of truth, a sense of decency, of justice, etc. We do this even though we know, or at least properly ought to know, that a sense cannot contain these concepts, let alone have the slightest capacity to pronounce universal rules, but that a conception of truth, propriety, beauty, or justice could never enter our thoughts if we were not able to rise above the senses to higher cognitive powers. [This] *common human understanding*, which is merely man’s sound ([but] not yet cultivated) understanding, is regarded as the very least that we are entitled to expect from anyone who lays claim to the name of human being; and this is also why it enjoys the unfortunate honor of being called common sense (*sensus communis*), and this, indeed, in such a way that the word common (not merely in our language, where it is actually ambiguous, but in various others as well) means the same as *vulgar*—i.e., something found everywhere, the possession of which involves no merit or superiority whatever. Instead, we must [here] take *sensus communis* to mean the idea of a sense *shared* [by all of us], i.e., a power to judge that in reflecting takes account (a priori), in our thought, of everyone else’s way of presenting [something], in order *as it were* to compare our own judgment with human reason in general and thus escape the illusion that arises from the ease of mistaking subjective

all he still finds that we have a drive towards universal beauty or sublimity. Rather than try and delineate what exactly universals are, as Baumgarten did, Kant leaves this determination to nature.<sup>29</sup>

Summarizing: Baumgarten sought to distill taste into categories to perfect our aesthetic criticism and understanding. Alternatively, Kant believed that aesthetic judgements were born of natural perfection, and we should therefore try to understand *why* we have such intuitions.

Both aesthetic approaches remain pervasive because of their utility in explaining art's chronic question: why is one thing valued more than another thing?

## II. LAW AS ART

Modern aesthetics has subsumed both aforementioned definitions of aesthetics and tries to grapple with both the normative and descriptive questions of art. Modern aesthetic theory tries attempts to define *what art is* and *what makes a piece of art good*, establishing both of these criteria is key to fundamentally changing our approach to legal access.

Professor Robert Ferguson argues in *The Judicial Opinion as Literary Genre* that judicial writing is “a distinct literary genre within the larger [American] civic literature.”<sup>30</sup> Ferguson focused on appellate judicial opinions, which are a necessary consequence of American legal codes which are often open to interpretation.<sup>31</sup> While legal opinions are clearly distinct from statutory schemes, his interest in expanding American “civic literature” opens the possibility of treating any written civic work as a form of art.<sup>32</sup> Additionally, he comments on the utility derived from treating the law as literary art, arguing that law too can be assessed via “method, theme, and approach,” like any other piece of literature.<sup>33</sup> Professor Gearey's article argues similarly that law can be appreciated and treated much like other literary art in that “law [is] inseparable from other disciplines, or other contexts.”<sup>34</sup>

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and private conditions for objective ones, an illusion that would have a prejudicial influence on the judgment.”).

29. For clarity, this is my assessment of Kant, not his explicit commentary on Baumgarten.

30. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 202 (1990).

31. The necessity here comes from ambiguity: any ambiguous legal term must at some point be given consequence by a learned judge or justice.

32. Ferguson, *supra* note 30, at 202.

33. *Id.* at 201.

34. Ann Mumford, *Law and Aesthetics*, 29 J.L. & SOC'Y 3, 528 (2002) (citing ADAM GEAREY, LAW AND AESTHETIC 8 (2001)).

The above authors make the point that it is arbitrary to sever the law from the realm of aesthetic criticism. This point is legitimate because art is defined as “works produced by human creative skill and imagination.”<sup>35</sup> Statutory codes are clearly works produced by human skill and imagination. Although many laws are borne out of the basic principle that harm to others ought to be avoided, legislators often labor over how to extend such a basic principle into complex areas of modern society dealing with things like securities fraud, identity theft, or extortion by public officers.<sup>36</sup> This creative process results in complicated statutory schemes that are commonplace in a global legal landscape. Furthermore, the means to reaching the legislative enactment often involves impressive displays of oration, negotiation, and readings of popular children’s books, all eternalized in legislative history.<sup>37</sup>

This artistic process, and the artifacts it creates, are at least in form similar to teams of writers coming together to make literature, producers and directors coming together to create films, and musicians coming together to create music. The practical nature of statutes and other legal works does not dilute the creative value or use of creativity in their production. United States Code, as the official compilation of the fifty-three titles of United States statutory law, is—by extension—necessarily a collection of artifacts and is, itself, a work of art.

Some statutes, like some works of art, are derivatives of others and accordingly considered less creative. Regardless, bad art is still art. While art that fully imitates another piece of art is plagiarism, such plagiarisms are still pieces of art, albeit art which should be qualified as inexact examples of a good thing. Accordingly, the artistic quality of some object should not be used to determine its status or categorization as a piece of art. Simply put, if something was not art in the first place, adjudging its artistic value as bad or good would be impossible.

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35. *Art*, OXFORD DICTIONARY, <https://www.lexico.com/en/definition/art>.

36. *See, e.g.*, JONATHAN BARON, CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 197–213 (D.M. Messick & A.E. Tenbrunsel eds., 1996); 18 U.S.C. §§ 1028, 872, 1348; Ryan Grim, *The Actual Laws Trump Has Broken, Just With The Ukraine and China Affairs, Could Land Him 10 Years In Prison*, INTERCEPT (Oct. 10, 2019), <https://theintercept.com/2019/10/10/trump-crimes-law/> [<https://perma.cc/T4DF-F5X2>]; Washington Post, *LeBron James: Daryl Morey’s Tweet Supporting Hong Kong Protests Was ‘Misinformed’*, YOUTUBE (Oct. 15, 2019), <https://www.youtube.com/watch?v=c8IRtcw0HOQ> [<https://perma.cc/GB7U-E7GJ>] (“Whether that harm be financial, physical, or spiritual.”).

37. Senator Cory Booker, *Cory Booker Speaks on Senate Floor about GOP Health Care Repeal Plan*, YOUTUBE (July 28, 2017), [https://www.youtube.com/watch?v=pMQ\\_vm5nM60](https://www.youtube.com/watch?v=pMQ_vm5nM60) [<https://perma.cc/JC5Y-BH4D>]; WWLP–22News, *House-Senate Conference Committees Negotiate 10 Bills*, YOUTUBE (July 23, 2018), [https://www.youtube.com/watch?v=pjP35UAob\\_U](https://www.youtube.com/watch?v=pjP35UAob_U) [<https://perma.cc/C2JG-5NHN>]; Associated Press, *Raw: Sen. Cruz Reads “Green Eggs and Ham”*, YOUTUBE (Sept. 24, 2013), <https://www.youtube.com/watch?v=0HJuaQL3KRI> [<https://perma.cc/TE88-CZNE>].

Even critics of the romanticized or traditional aesthetic approach to legal criticism (such as Professor Pierre Schlag) still maintain that value exists in assessing the aesthetic merits of legal works.<sup>38</sup> Schlag fears that the use of traditional aesthetics will “subordinate” aesthetics to the law, doing the discipline symbolic violence.<sup>39</sup> Schlag argues instead that aesthetic judgement of legal works requires a novel approach:

[T]o suggest . . . that law is an aesthetic enterprise can . . . seem cavalier, ethically obtuse, even cruel. We are confronted with the disturbing possibility that law paints its order of pain and death on human beings with no more ethical warrant or rational grounding than an artist who applies paint to canvas . . . I . . . affirm - these ethical concerns and moral judgments here . . . . [T]he notion of aesthetics I . . . invoke is neither confined to the realm of art nor preoccupied with questions of beauty. Mine is a broader and more permissive, though also less conventional, conception of aesthetics.<sup>40</sup>

Regardless of the method, he argues that “legal aesthetics are important because they help constitute law and its possibilities in different ways . . . [t]o be under the sway of an aesthetic is . . . to perceive law in a certain way . . . to encounter certain tasks and perform certain kinds of actions.”<sup>41</sup> Schlag’s method, providing a new form of aesthetics not “preoccupied with questions of beauty,”<sup>42</sup> is too removed from popular conceptions of aesthetic value to breach the fortress of academia. Miring aesthetic theory in the academic makes it impossible to develop policies that can increase accessibility to those most affected by the law. Instrumentalizing aesthetic judgements allows us to reimagine our code of laws as not only an artifact, but also an art that occupies an important romantic place in the popular consciousness.<sup>43</sup>

### III. WHAT MAKES ARTWORK GOOD?

Even after developing a basic understanding of aesthetic theory, analyzing legal documents in this novel manner requires a foundation providing a basis upon which to assess artistic value. The question of what

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38. Schlag, *supra* note 5, at 1049–50.

39. *Id.* at 1051.

40. *Id.* at 1050.

41. *Id.* at 1117.

42. *Id.* at 1050.

43. As opposed to the place in popular consciousness that U.S. Code currently occupies: a difficult to understand and often anachronistic tome written for the use of lawyers and impossible to approach by lay persons.

art is *good* art continues to cause heated debate since Baumgarten and Kant first bifurcated academic aesthetics in the eighteenth century. The question is admittedly a difficult one, but in this paper two methods shall be utilized and contrasted: analysis of United States Code via Kant's four aesthetic, reflective judgements and Dutton's six aesthetic universal signatures.<sup>44</sup>

Denis Dutton was an American Philosopher of art who served as a Professor of Philosophy at the University of Canterbury in New Zealand. Dutton wrote extensively on aesthetic judgement and authenticity in art, coining the nominal/expressive authenticity dichotomy.<sup>45</sup> Additionally, he believed and wrote extensively that artistic appreciation was not subjective or culturally learned but instead developed via a host of evolutionary adaptations.<sup>46</sup>

Unlike Dutton, Kant considered art beautiful if it could express aesthetic ideas.<sup>47</sup> Appreciating a piece of fine art, Kant argued, would evoke the same feelings as looking at nature.<sup>48</sup> Kant explained that fine and aesthetic art is art that "is one whose standard is the reflective power of judgment rather than sensation proper."<sup>49</sup> Essentially, the aesthetic qualities of something are those that provoke reflection upon the inexplicable and irrational feelings we typically associate with art and beauty. According to Kant, the kinds of aesthetic ideas represented in an artwork relate to the four aesthetic, reflective judgements which are comfortably settled in the subjective response of a person to artwork.<sup>50</sup>

Dutton, in contrast to Kant, but much like Baumgarten, sought to find universality and objectivity in aesthetic judgement and human responses to artwork.<sup>51</sup> Dutton enumerated aesthetic universals—in the tradition of Baumgarten's *Aesthetika*—which deliver a framework for aesthetic criticism less tied to the individual subject.<sup>52</sup> Dutton's six universal aesthetic

44. Dutton's six aesthetic universals function similarly to Baumgarten's perfections and will serve as an extension of Baumgarten's thought for this paper's purposes since Baumgarten's work was never completed.

45. Ray Sawhill, *The Gleeful Contrarian*, SALON (Nov. 3, 2000), <https://web.archive.org/web/20080307112136/http://archive.salon.com/tech/view/2000/11/03/dutton/index.html> [<https://perma.cc/N44L-R542>]; DENISDUTTON.COM, <http://www.denisdutton.com/> [<https://perma.cc/25LM-8R9B>].

46. DENISDUTTON.COM, *supra* note 45.

47. KANT, *supra* note 2, at 55–56.

48. *Id.* at 145–181.

49. *Id.* at 173.

50. *Id.*

51. See Denis Dutton, *Aesthetics and Evolutionary Psychology*, in THE OXFORD HANDBOOK FOR AESTHETICS (Jerrold Levinson ed., 2003), [http://www.denisdutton.com/aesthetics\\_&\\_evolutionary\\_psychology.htm](http://www.denisdutton.com/aesthetics_&_evolutionary_psychology.htm) [<https://perma.cc/EGJ5-4YCV>].

52. See Denis Dutton, *Aesthetic Universals*, in THE ROUTLEDGE COMPANION TO AESTHETICS 203–15 (Berys Gaut & Dominic Lopes eds., 2nd ed. 2001), <http://www.denisdutton.com/universals.htm>

signatures are *expertise (or virtuosity)*, *non-utilitarian pleasure*, *style*, *criticism*, *imitation*, and “*special*” *focus*.<sup>53</sup>

*Expertise* to Dutton is very similar to Kant’s notion of genius. Dutton described expertise as “[t]he [facet of the] manufacture of the art object or execution of the artistic performance [that] requires the exercise of a specialized skill. This skill may be learned . . . Technical artistic skills are noticed in societies worldwide and are generally admired.”<sup>54</sup> In other words, Dutton argues that humans have some subliminal appreciation for highly skilled work and this affects how we appreciate art: the higher the perceived skill expression, the higher the appreciation of the art.

*Non-Utilitarian pleasure* is similar to the idea (still persistent in contemporary pop art criticism) that art for art’s sake is valuable beyond whatever practical benefit it may provide. Dutton explained this facet as the “art object . . . viewed as a source of pleasure in itself, rather than as a practical tool or source of knowledge. The embodiment of the artwork may be in some respects useful: a tool (e.g. a shield or a knife) or a means to transmit information (e.g. a sacred poem). Aspects of the embodiment, however, give pleasure in experience aside from these practical or information/communication considerations.”<sup>55</sup> The *non-utilitarian pleasure* of an ornate pistol, for example, would derive from the attractive gold inlaid in its handle and not its capability to shoot and to kill.<sup>56</sup>

*Style* is the recognizable strands that connect seemingly disparate works of art within the limits of their genre or medium. Dutton described *style* as the aspect of “[a]rt and performances, including fictional or poetic narratives, [that relate to] recognizable styles, according to rules of form and composition.” This external aspect to works of art is spectacularly important from a cultural perspective. *Style* is what can be taught by art experts to their pupils. To critics, it is the most recognizable aspect of a piece of art . . . Something too confined by the norms of the rules of its style is viewed as derivative; something completely severed from its stylistic framework is unrecognizable. Recognizing and working within the boundaries of style is an important skill for artists and crucial to Dutton’s method of aesthetic critique.

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[<https://perma.cc/Y2KA-8HRB>]. It should be clear that although Dutton argues that there is universality in *why* we find some art more pleasing than other works, he does not orient himself as a communitarian. Instead, he believes that culture has a negligible impact on what artwork is found beautiful by the community and our appreciation can be explained by our biology.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

*Criticism* may well be rephrased as the ability of a piece to be criticized. A piece of art that can be criticized in a language recognizably related to the form of art it represents allows the diffusion of its value among a cultural group and, more broadly, humanity as a whole. Artifacts completely foreign or novel, although intriguing due to their ability to reflect other facets of Dutton's critique, fail to materialize benefits derived from being part of the system of a culture's critical language. Simply put, Dutton outlined this criterion as representing the "indigenous critical language of judgment and appreciation, simple or elaborate that is applied to arts."<sup>57</sup> His examples "include the shop talk of art producers or evaluative discourse of critics and audiences."<sup>58</sup>

*Imitation* is close to the Kantian *sublime*, the part of the artifact that reflects an aspect of the real or imaginary world. Dutton finds imitation in art that can be found in "widely varying degrees of naturalism, art objects, including sculptures, paintings, and oral narratives, represent[ing] . . . real and imaginary experience of the world."<sup>59</sup> These calls to nature and idealism, Kant and Dutton would agree, hold a special place in the human fascination with art. Dutton takes it further than Kant, however, finding that this *imitation* is something innately and fundamentally human. He argued that:

The differences between naturalistic representation, highly stylized representation, and nonimitative symbolism is generally understood by artists and their audiences. (Blueprints, newspaper stories, pictures, passport photographs, and road maps are equally imitations or representations. While imitation is important to much art—notable exceptions being abstract painting and music—its significance extends into all areas of human intellectual life.)<sup>60</sup>

The final, and most unique, aspect of Dutton's analysis relates to the idea that art with universal appeal must also occupy a *special focus*. An artwork must be, or be perceived to be, distinct from the day-to-day objects that permeate the cultural landscape. In the same way that gems are worth more when scarce, an artwork that is difficult to blur into the mundane fascinates humans more than one that feels ordinary. Dutton outlines this idea by highlighting that "works of art and artistic performances are frequently bracketed off from ordinary life, made a special and dramatic focus of

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

experience.”<sup>61</sup> Dutton qualifies “while there are plenty of mundane artistic objects and performances (such as decorated parts of Baule looms, or communal singing done to pass the time while mending fishing nets)” that “every known culture has special art works or performances which involve, what Ellen Dissanayake calls, ‘making special.’”<sup>62</sup> In essence, some of “these [artistic] objects or performance occasions are imbued with intense emotion and sense of community” that mundane artwork is not.<sup>63</sup>

Unlike Kant, who derived his theory using reason alone, Dutton built his theory on a comparative analysis of historical and contemporary cultural approaches to art.<sup>64</sup> Dutton argues that “art itself is a cultural universal” and “there are no known human cultures in which there cannot be found some form of what we might reasonably term aesthetic or artistic interest. . . or artifact production . . . .”<sup>65</sup> Dutton criticized generally the lack of belief reflected in Kant’s *Critique of Judgment*,<sup>66</sup> arguing that a necessary implication of Kant’s concept of *sensus communis* was a demand for universality. This demand goes beyond the purely logical idea that aesthetic appreciation of beauty relies on an individual’s demand of “universal agreement from the rest of mankind” for their own taste.<sup>67</sup>

Although it is possible that a latter-day Kant would have come to conclusions similar to Dutton’s if he had shared a similar interest in modern social science, Dutton’s heavy reliance on psychology and anthropology explains why he sought to distinguish himself from subjective or rationalist aesthetic thinkers.

Unlike Kant, who believed that the subjective value of something comes from static criteria that reflect his four aesthetic principles, Dutton attaches external factors to aesthetic critique, all the while insisting upon their universality. For example, he points out that novelty *is* a controlling factor in how humans perceive works of art, opining that “the tenth mouthful of an interesting and delicious food will not be as piquant as the first” and “ten Vivaldi concertos in a row may well prove tedious.”<sup>68</sup> Therefore, Dutton’s framework may serve as a better foundation to criticize and improve upon

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61. *Id.*

62. *Id.*

63. *Id.* (citing ELLEN DISSANAYAKE, *HOMO AESTHETICUS: WHERE ART COMES FROM AND WHY* (University of Washington Press 1997)).

64. Dutton, *Aesthetic Universals*, *supra* note 52.

65. *Id.* (finding that the view that art is a fundamental part of human activity goes all the way back to Aristotle).

66. Dutton, *supra* note 52 (citing DAVID HUME, *Of the Standard of Taste*, in *ESSAYS MORAL, POLITICAL, LITERARY* (E. Miller ed., 1987) (1757)).

67. Dutton, *supra* note 52 (citing IMMANUEL KANT, *Critique of Judgment* §§ 49, 314 (W. Pluhar trans., Hackett Publ. Co. 1987) (1790)).

68. Dutton, *supra* note 52.

an artifact than Kant's. As with many things in the law, however, it is necessary to approach a problem with a toolkit built from many different canons rather than arbitrarily relying upon one.<sup>69</sup> A multiplicity of methods will grant greater surety that the settled conclusion is the best one. Therefore, this paper will rely on both below.

#### IV. KANT'S FOUR AESTHETIC PRINCIPLES APPLIED TO U.S. LEGAL DOCUMENTS

While Kant's aesthetic principles lack the straightforward method of Dutton's universals, it is not impossible to view United States Code and other legal artifacts through a Kantian lens. To provide clarity, the United States Constitution will be used as a control in this analysis, given its established place in American jurisprudence.<sup>70</sup>

Kant's first principle, agreeableness, is distinct from his other principles by not being a distinctive feature of "fine art."<sup>71</sup> Agreeableness is more reflective of base responses in the human mind than the other principles. The more sensory responses generated by a thing, the more agreeable it is. Although Kant may not have approached sensory response in the same way that modern science does, it is useful to understand that sensory responses are typically categorized by the sense that triggers them: sight, taste, touch, aural, and smell. Therefore, the basic question is, what kind of sensory responses does United States Code trigger?

Theoretically, United States Code and the Constitution trigger similar sets of sensory responses, as they are both physical texts. Both trigger the visual response of seeing leather bound pages; the tactile response of running fingers against (often) aged, thick sheets of paper; the aural response of hearing the oomph of slamming a book shut; the smell of old libraries or hip bookstores; and both probably taste terrible.

69. See, e.g., CONGRESSIONAL RESEARCH SERVICES, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2008).

70. Jeffrey Toobin, *Our Broken Constitution*, NEW YORKER (Dec. 2, 2013), <https://www.newyorker.com/magazine/2013/12/09/our-broken-constitution> [<https://perma.cc/6CK2-UH9M>] ("Obama, who taught constitutional law for more than a decade at the University of Chicago Law School, wrote, 'The outlines of Madison's constitutional architecture are so familiar that even schoolchildren can recite them: not only rule of law and representative government, not just a bill of rights, but also the separation of the national government into three coequal branches, a bicameral Congress, and a concept of federalism that preserved authority in state governments, all of it designed to diffuse power, check factions, balance interests, and prevent tyranny by either the few or the many.' . . . Most politicians consider the validity of the Constitution off limits as a subject for debate. The Constitution, and the structure of government that it established, provides the backdrop, but never the subject, for every controversy.").

71. Paul Guyer, *Kant's Conception of Fine Art*, 52 J. AESTHETICS & ART CRITICISM 275, 277 (1994).

In practice, however, most people will likely never see, much less interact with, a physical copy of United States Code. The annotated version, available on Amazon and published by West, is priced at \$1,735.<sup>72</sup> Individual volumes of the fifty-three titles are available from the United States Government Bookstore for \$159 each.<sup>73</sup> The Constitution, by contrast, is available in its entirety on Amazon for \$6.95.<sup>74</sup> The Government Bookstore has the Declaration of Independence and Constitution bundled for \$1.50, and the analysis and interpretation of both documents is available for \$36.<sup>75</sup>

All that is to say: the Constitution is an easily accessible document (often given away for free by advocacy organizations, student groups, schools, and other civic-minded organizations) whereas United States Code is often accessed most often in its digital form due to price, unwieldiness, and difficulty to obtain.<sup>76</sup> The agreeableness of the Constitution, from a sensory response's by-the-second perspective, is dramatically higher than that of United States Code. Even the digital version of the Constitution is likely more agreeable, because many online reproductions include images of the original constitution adding variety in font, background color, etc., that the digital form of United States Code fails to offer.<sup>77</sup> This issue of inaccessibility reflects both questions of artistic value and systemic fissures in openness of the law in the United States. Art is intentionally created and instrumentalized. The fact that the Framers and ongoing architects of the

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72. *United States Code Annotated*, AMAZON, [https://www.amazon.com/United-States-Code-Annotated-Group/dp/9992415150/ref=olp\\_product\\_details?\\_encoding=UTF8&me=](https://www.amazon.com/United-States-Code-Annotated-Group/dp/9992415150/ref=olp_product_details?_encoding=UTF8&me=) [<https://perma.cc/N663-5ZMU>] (before shipping and tax).

73. E.g., *United States Code, 2012 Edition, Supplement 5, Volume 1, Title 1, General Provisions to Title 10, Armed Forces, January 3, 2013, to January 12, 2018*, U.S. GOV'T BOOKSTORE, <https://bookstore.gpo.gov/products/united-states-code-2012-edition-supplement-5-volume-1-title-1-general-provisions-title-10> [<https://perma.cc/4EE5-YH2L>].

74. *The Constitution and the Declaration of Independence: The Constitution of the United States of America*, AMAZON, [https://www.amazon.com/Constitution-Declaration-Independence-United-America/dp/1535031638/ref=sr\\_1\\_1\\_sspa?crd=OYLUN6FH7WED](https://www.amazon.com/Constitution-Declaration-Independence-United-America/dp/1535031638/ref=sr_1_1_sspa?crd=OYLUN6FH7WED) [<https://perma.cc/MN9Z-QBH9>].

75. *Declaration of Independence and Constitution of the United States*, U.S. GOVERNMENT BOOKSTORE, <https://bookstore.gpo.gov/products/declaration-independence-and-constitution-united-states> [<https://perma.cc/ST4M-J363>]; *2018 Supplement to the Constitution of the United States of America Analysis and Interpretation*, U.S. GOV'T BOOKSTORE, <https://bookstore.gpo.gov/products/2018-supplement-constitution-us-america-analysis-and-interpretation> [<https://perma.cc/MN9Z-QBH9>].

76. Even law libraries that have United States Code in their reference section are inaccessible due to not being open to the general public.

77. Unlike the many apps and independent publishers that have replicated the Constitution in many formats, the two most accessible forms of U.S. Code are both online, and both rather cumbersome to access. *United States Code*, OFF. L. REVISION COUNS., <https://uscode.house.gov/> [<https://perma.cc/8TQY-XNUL>] (the official source); *U.S. Code: Table of Contents*, LEGAL INFO. INST., <https://www.law.cornell.edu/uscode/text> [<https://perma.cc/K4MU-2TLT>] (the Cornell Law School Legal Information Institute version).

Constitution sought and continue to seek to make the Constitution universally revered and accessible speaks by analogy to the weak efforts to develop a more agreeable United States Code. The practice of giving even children physical versions of the Constitution assures that the tactile, retentive, and other sensory benefits of ensuring the Constitution is an agreeable piece of art are amplified and continue to increase constitutional literacy. The same cannot be said about United States Code.<sup>78</sup>

As Kant puts it, however, being agreeable is not necessarily better.<sup>79</sup> “All free art is ‘aesthetic,’” but only that which elicits a response by one’s higher cognitive faculties (reason) is *fine* art.<sup>80</sup> So while United States Code may fail on being generally agreeable due to its inaccessibility, it may all the while be a *finer* piece of art than the Constitution. To determine whether it is *fine*, we look to the remaining three principles: goodness, beauty, and sublimity.<sup>81</sup>

To be *good* something must “obligate absolutely.”<sup>82</sup> An artifact that is good “is distinguished . . . by a necessity . . . but also a command that everyone approve” of what it suggests or puts forth.<sup>83</sup> A symbol of the morally good, upon interaction, triggers a reasoned or “pure intellectual” response demanding conformity to the artifact’s higher strictures.<sup>84</sup> While there is less clarity here than with the mechanical understanding granted from sensory responses, the American legal system has, nearly since its conception, recognized that codified law does not “obligate absolutely.”<sup>85</sup> Challenging the law and testing whether or not statutes enacted by Congress pass constitutional muster is a necessary facet of the balance of powers between the judicial and the legislative branches of the United States government.<sup>86</sup> United States Code, therefore, causes Americans to feel obligated to follow the law only insofar as that law does not seem unconstitutional.<sup>87</sup> Additionally, the general idea that many American laws may be unethical (e.g., marijuana criminalization) suggests that many of those who interact with United States Code as an artifact reject,

78. I acknowledge that it may be more difficult with something as large as the Code.

79. Guyer, *supra* note 71.

80. *Id.*

81. *Id.*

82. KANT, *supra* note 2, at 126.

83. *Id.* at 126–27.

84. *Id.*

85. *Id.*

86. See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1806); *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

87. Or it may simply not have any weight or effect on the average American.

intellectually, that United States Code is representative of moral or ethical correctness.<sup>88</sup>

By contrast, the Constitution, although amendable and open to interpretation, is still considered both the final word on legality, obligating lawmakers and citizens of the United States to follow its words absolutely and is viewed as an example of goodness in and of itself.<sup>89</sup> The Constitution has cemented its place as an example of good governance and an ethical framework throughout the modern and post-modern era.<sup>90</sup> The United States Code, while mimicked in part by other countries, does not receive this same universal acclaim. Furthermore, many statutes in United States Code are frequently ridiculed or condemned by both American citizens and foreign nations as both immoral and anachronistic. Therefore, in terms of eliciting an intellectual response of moral obligation, United States Code fails miserably, partly due to its perceived inferiority to the Constitution, but also simply because of the imperfect state of American statutes; the average person is just as likely to have an interest in challenging the law as they are to follow it.<sup>91</sup>

While United States Code is neither *good* nor *agreeable* when compared to the Constitution under a Kantian perspective, it may still exemplify ideas of beauty in the minds of reasoning onlookers.<sup>92</sup> To better assess this, Kant's beauty can be broken down into three criteria: first, does the artifact contribute to culture?; second, does the artifact encourage mindfulness?; and finally, does the artifact promote reflection upon the purposefulness of the feeling of pleasure it grants?<sup>93</sup>

For the first criterion, the answer is a measured yes. United States Code contributes rather heavily to American culture in a direct, though not always positive way. United States Code codifies many federal initiatives which

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88. Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [<https://perma.cc/6G6N-JLEG>].

89. Toobin, *supra* note 70 (“[E]veryone loves the Constitution. ‘Conservative or liberal, we are all constitutionalists,’ Barack Obama wrote, in ‘The Audacity of Hope.’ Ted Cruz, the junior senator from Texas, who emerged as a principal antagonist of the President’s during the government shutdown, has often said much the same thing.”).

90. Lawrence W. Beer, *Constitutionalism in Asia: Asian Views of the American Influence*, 1988 MD. SERIES CONTEMP. ASIAN STUD. 1, 25 (1979).

91. Mary Emily O’Hara, *New Poll Finds Majority of Americans Have Smoked Marijuana*, NBC NEWS (Apr. 17, 2017, 5:57 PM), <https://www.nbcnews.com/news/us-news/new-poll-finds-majority-americans-have-smoked-pot-n747476> [<https://perma.cc/DBU6-EZT7>]; Geoffrey Skelley, *Trump’s Law and Order Message Isn’t Resonating With Most Americans*, FIVETHIRTYEIGHT (Sep. 4, 2020, 6:00 AM), <https://fivethirtyeight.com/features/trumps-law-and-order-message-isnt-resonating-with-most-americans/> [<https://perma.cc/K3UD-RAEU>].

92. KANT, *supra* note 2, at 126.

93. *Id.*

strive to address issues Americans face for the better and reflects attempts by lawmakers to create a certain level of societal and cultural consistency through law that rarely happens organically (due to the differing goals and priorities of the many state governments).<sup>94</sup> Additionally, without the draconian and unjust laws that the United States Code enshrined, major instantiations of American protest culture (captured through music and visual art) would never have developed.<sup>95</sup> Therefore, in terms of raw cultural impact, United States Code has a profound element of beauty underlying it. Essentially, United States Code is a vessel of pressure on the American cultural consciousness because of what it represents and how it is enforced. In terms of purely legal cultural change, however, it is rivalled by other more impactful documents and codes. However, it is difficult to argue that even the Constitution is more “beautiful” in this sense to an American when considering that not many other works can affect what Americans can legally view on our televisions, officially recognize our heroes’ births as holidays, or determine what kinds of drugs we can use.<sup>96</sup>

The remaining two criteria are not exemplified by United States Code. Due to the Code’s inaccessibility, it is often misunderstood, and a misunderstood legal code does not encourage mindfulness in its onlookers. Although attorneys, lawmakers, and judges may have to be particularly mindful when approaching United States Code due their vocational responsibility to both interpret and apply it, the Code’s lack of broader community impact means it is outmatched by the Constitution and other more broadly accessible legal works in ability to encourage mindfulness in a Kantian sense. At the same time, the art of constitutional interpretation is one that has birthed books, opinion articles, and entire specialty areas in the law despite its comparatively brief length. This means the Constitution has elicited far more mindfulness than United States Code especially given its significantly shorter length.

Kant’s final principle here asks if United States Code,—despite being disagreeable, not good, and lacking in beauty, is nonetheless sublime. The answer is unclear, but using the Constitution as a benchmark, the answer is likely no. To be sublime, the Code must reflect something in nature that

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94. See, e.g., Chesa Boudin, Trevor Stutz, & Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL. R. 149 (2014).

95. See, e.g., Felix Contreras, *Arizona Law Inspires Latin Protest Music*, NPR (Aug. 17, 2010, 1:05 PM), <https://www.npr.org/sections/latino/2010/08/17/129254506/arizona-law-inspires-latin-protest-music> [https://perma.cc/HP52-C37Z].

96. See, e.g., 5 U.S.C. § 6103 (codifying, among other dates, the birthdays of Martin Luther King, Jr. and George Washington as legal holidays); 21 U.S.C. §802 (outlining which chemical substances are controlled substances by law).

causes near universal appreciation.<sup>97</sup> United States Code does seem to draw upon something natural from the societal experience. Since the Babylonian Empire, most nations have made some attempt to codify their laws.<sup>98</sup> Even children without a working concept of legality or ethics begin to construct a basic understanding of right, wrong, fairness, blameworthiness, and punishment.<sup>99</sup> Organizing society through a system of legal order is a fundamental and persistent feature of social organization.<sup>100</sup>

United States Code, however, is evocative of something more specific than the fundamental underpinnings of society: the dysfunctional, cruel, and often deadly American criminal justice system.<sup>101</sup> The call for justice (particularly criminal) reform in the United States is not new and is something that both the American political left and right agree upon.<sup>102</sup> To

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97. KANT, *supra* note 2, at 99–101.

98. See, e.g., Chilperic Edwards, THE HAMMURABI CODE AND THE SINAITIC LEGISLATION (1904) (one of the first known codification of laws created in 1754 BC); *The Code of the Nesiim*, c. 1650–1500 BCE, FORDHAM U. ANCIENT HIST. SOURCEBOOK, <https://sourcebooks.fordham.edu/ancient/1650nesilim.asp> [<https://perma.cc/H6WG-HW9W>]; David F. Forte, *Islamic Law: The Impact of Joseph Schacht*, 1 LOYOLA L.A. INT'L & COMPAR. L. REV. 2, 2–36 (1978); *The French Civil Code or Code Civil, 21 March, 1804: An Overview*, NAPOLEON.ORG, <https://www.napoleon.org/en/history-of-the-two-empires/articles/the-french-civil-code-or-code-civil-21-march-1804-an-overview/> [<https://perma.cc/WDX2-FPBY>].

99. See Alex Shaw, Natalia Montinari, Marco Piovesan, Kristina R. Olson, Francesca Gino, & Michael I. Norton, *Children Develop a Veil of Fairness*, 143 J. EXPERIMENTAL PSYCH. 363, 363–75 (2014).

100. See, e.g., PHILIP S. KHOURY & JOSEPH KOSTINER, TRIBES AND STATE FORMATION IN THE MIDDLE EAST (1990); PETER F. GUARDINO, PEASANTS, POLITICS, AND THE FORMATION OF MEXICO'S NATIONAL STATE: GUERRERO, 1800–1857 (1996); GEORGE MOUSOURAKIS, A LEGAL HISTORY OF ROME (2007).

101. See, e.g., *Dysfunctional Justice: What's Wrong with the U.S. Legal System*, KNOWLEDGE@WHARTON (July 7, 2019), <https://knowledge.wharton.upenn.edu/article/dysfunctional-justice-whats-wrong-with-the-us-legal-system/> [<https://perma.cc/9693-MHL2>]; Brian Kinnaird, *The Criminal Justice System is Broken and Can't be Fixed*, PSYCH. TODAY (Dec 12, 2018), <https://www.psychologytoday.com/us/blog/the-hero-in-you/201812/the-criminal-justice-system-is-broken-and-cant-be-fixed> [<https://perma.cc/GY3Y-28VG>].

102. See, e.g., Conrad Black, *Long Overdue, Overhaul of the U.S. Criminal Justice System May Have Begun*, NAT'L REV. (May 29, 2018, 12:28 PM), <https://www.nationalreview.com/2018/05/us-criminal-justice-overhaul-overdue/> [<https://perma.cc/2UN9-X6J4>]; Tyler Kendall, *What's Wrong with America's Criminal Justice System?*, CBS NEWS (Aug. 2, 2019, 7:03 PM), <https://www.cbsnews.com/news/american-criminal-justice-system-reform-questions-rachel-barkow-2019-08-02/> [<https://perma.cc/E7FP-DTMH>]; Craig DeRoche, *A Failing Criminal Justice System*, N.Y. TIMES (Mar. 12, 2012), <https://www.nytimes.com/roomfordebate/2012/03/12/young-black-and-male-in-america/a-failing-criminal-justice-system> [<https://perma.cc/2SGX-6E4G>]; *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, AM. CIV. LIBERTIES UNION (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<https://perma.cc/5BHX-M3S4>]; Vera Staff, *Overwhelming Majority of Americans Support Criminal Justice Reform, New Poll Finds*, VERA INST. JUST. (Jan. 25, 2018), <https://www.vera.org/blog/overwhelming-majority-of-americans-support-criminal-justice-reform-new-poll-finds> [<https://perma.cc/Z2CM-6QBB>]; Lydia Wheeler, *Poll: 3/4 of Americans Support Criminal Justice Reform*, HILL (Jan. 25, 2018, 11:54 AM), <https://thehill.com/regulation/370692-poll-3-4-of-americans-support-criminal-justice-reform> [<https://perma.cc/HS4L-6W85>]; Kate Wheeling, *Over a*

fulfill Kant’s vision of sublimity, an artifact must manifest a physical representation of something brilliant (for example: a painting of “Jupiter’s eagle with the lightning in its claws” represents a “logical attribute” of the “mighty king of heaven”) whereas the United States Code is more likely to be viewed as a representation of the pervasive unfairness perceived by many Americans when they think in depth about the American justice system.<sup>103</sup> By having the reputation of being unapproachable, inaccessible, and unfair, United States Code fails to foster community appreciation, thereby falling short of sublimity by a considerable margin. Contrasting the Constitution, the general reverence displayed toward that artifact exemplifies how a legal document can fully exemplify sublimity—constitutional rights, often understood to be forms of fundamental fairness in the United States, are evoked by most Americans upon viewing the Constitution. This community appreciation is tied inextricably with the Constitution’s codification of Enlightenment ideals, which is not that far from Kant’s attribution of sublimity to an image of Jupiter’s peacock for effectively representing “statel[iness]”.<sup>104</sup>

Kant’s *Critique of Judgement* provides an interesting, albeit impractical approach to applying aesthetics to a legal work such as the Code. The centrality of the individual’s subjective appreciation of an artifact (despite some reliance on community appreciation) stymies efforts to instrumentalize Kant’s aesthetic principles for legal reform efforts.

#### V. DUTTON’S SIX AESTHETIC UNIVERSALS APPLIED TO U.S. LEGAL DOCUMENTS

Dutton’s six aesthetic universals based on cultural psychology and developed with the goal to outline an objective approach to aesthetic understanding does not fail the instrumentalization test like Kant’s. As above, United States Code will be contrasted with the Constitution, both as a control and to highlight the differences in Kant and Dutton’s approaches when applied.

Dutton’s first universal is expertise or virtuosity. Expertise is recognized in “all technical areas of human activity . . . from cooking to

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*Quarter of Americans Believe Their Local Justice System Is Unfair*, PAC. STANDARD (Feb. 13, 2018), <https://psmag.com/social-justice/over-a-quarter-of-americans-believe-their-local-justice-system-is-unfair> [<https://perma.cc/9KEX-M33T>] (citing a MacArthur Foundation poll).

103. KANT, *supra* note 2, at 183 (describing, for example, a painting of “Jupiter’s eagle with the lightning in its claws” as representing a “logical attribute” of the “mighty king of heaven”).

104. David Peddle, *Puritanism, Enlightenment and the U.S. Constitution*, MEM’L U. RSCH. REPOSITORY (Dec. 1, 1998), <https://research.library.mun.ca/258/> [<https://perma.cc/MJZ4-MDST>]; KANT, *supra* note 2, at 102.

public oratory to marksmanship” and other disciplines not traditionally viewed as art.<sup>105</sup> The observation that humans commonly appreciate technicality and expertise is useful because it ends the severance between why we like art and why we like anything else. This helps to clarify what “signal characteristics” of United States Code (or other legal works) must be changed to increase appreciation of such works.<sup>106</sup>

United States Code represents varying degrees of expertise. There is no doubt that some statutes are better written than others, that some regulations are frustratingly ambiguous, and that some laws are so poorly conceived as to be totally immoral. How then should we assess the expertise of United States Code as a single artifact? It seems that the only practical assessment is by considering whether the thing that makes United States Code separate from its many statutes is particularly virtuosic. That is, does the way United States Code organizes the many, often disparate, statutes within it represent the expertise of the Office of the Law Revision Counsel (“OLRC”) in a manner deserving universal or objective praise?<sup>107</sup>

According to the OLRC, the purpose of United States Code is “to develop and keep current an official and positive codification of the laws of the United States.”<sup>108</sup> United States Code is not the primary source of American law, but is instead a representation of the permanent law of the United States with the twenty-seven titles enacted into positive law receiving the status of “legal evidence,” much like the United States Statutes at Large.<sup>109</sup> To become positive law, a Statute at Large is restated in a clearer and better organized manner, and any obsolete portions are removed.<sup>110</sup> This means the primary goal of the OLRC is to better clarify and reformat existing law, as well as to make it more accessible in terms of linguistic clarity, readability, and online availability. Considering that since 1974 only twenty-seven of the fifty-four (or fifty-three, not counting the reserved Title Fifty-Three) titles have been codified as positive law, the task seems daunting to an outsider. Under Dutton’s criteria of expertise, it is clear that United States Code stands for the expertise of those undertaking the project of codification, and therefore the Code as a work of art exemplifies this

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105. Dutton, *Aesthetic Universals*, *supra* note 52.

106. *Id.*

107. *About United States Code and This Website*, OFF. L. REVISION COUNS., <https://uscode.house.gov/> [<https://perma.cc/7TCE-LD7C>] (“United States Code is prepared and published by the Office of the Law Revision Counsel (“OLRC”) of the U.S. House of Representatives pursuant to 2 U.S.C. 285(b).”).

108. *Id.* (citing 2 U.S.C. § 285(a)).

109. *Id.*

110. *Positive Law Codification*, OFF. L. REVISION COUNS., <https://uscode.house.gov/codification/legislation.shtml;jsessionid=1932557B6D0A48BF863B96B458243944> [<https://perma.cc/JPV3-X5QF>].

expertise, despite misgivings about the specific content within. The skill required to revise the often archaic language and poor organization of Statutes at Large highlight the technicality of the Counselors who have undertaken such a task and suggest that they have “a knack for” statutory construction and revision that other officials lack.<sup>111</sup>

The Constitution, of course, is often praised for being expertly drafted. An author for the BBC referred to it as “a superb example of Enlightenment philosophy in pragmatic form . . . [and] elegantly written and succinct.”<sup>112</sup> The author of that same article mentions, however, that reverence for the Constitution exists in spite of its flaws because it symbolizes “a national ideal.”<sup>113</sup> The Constitution, therefore, may very well be considered less representative of Dutton’s expertise—while the technical skill required by the Counselors who undertake the codification of Statutes at Large is manifest, our ability to assess the Constitution’s technicality as Americans may be too clouded by our cultural bias to offer an objective reading of the document as a work of art.

Dutton’s next universal, non-utilitarian pleasure, is similar to Kant’s *beauty*. Does the artifact grant pleasure beyond its benefits as a practical tool or source of knowledge? United States Code does not seem to embody this idea of aesthetic pleasure for its own sake. Much of this analysis would be the same as when analyzing the sensory pleasure of the Code or when considering its beauty. By failing to be accessible, and by failing to have some additional cultural purpose beyond codifying the law, it fails to evoke non-utilitarian pleasure. The reverence for the Constitution, both as embodiment of a national ideal and as a succinct emblem of American values, does evoke this universal. The Constitution has a following greater than any other piece of American law. Portions of it have been turned into memorabilia, tattoos, and other forms of identity expression.

Dutton’s next question is one of style. Is United States Code formed according to “rules of form and composition?”<sup>114</sup> Within the limited class of persons who have worked on United States Code (only four Counselors have been appointed since 1974)<sup>115</sup> there is clearly some sense of recognized rules of form. Dutton highlights that style “may derive from a culture, or a family, or be the invention of an individual” and may “involve borrowing

111. *Id.*

112. Michael Goldfarb, *Written or Unwritten – Is There a Perfect Constitution?*, BBC (Feb. 17, 2011), <https://www.bbc.com/news/world-us-canada-12482351> [<https://perma.cc/UL3P-X3YH>].

113. *Id.*

114. Dutton, *Aesthetic Universals*, *supra* note 52.

115. Office of the Historian, *Office of Law Revision Counsel*, HISTORY.HOUSE.GOV, <https://history.house.gov/People/Appointed-Officials/Law-Revision-Counsel/> [<https://perma.cc/2EGS-65TC>].

and sudden alteration [or] slow changes.”<sup>116</sup> Stylistic consistency among the four Counselors of the OLC is enough for this artistic feature to be recognizable in the Code. Although questions of whether a style exists may be different from questions of the attractiveness of a style, the recognition of a style is important because it is the foundation of uniform revision of an art form. By understanding that each new Counselor creates their own simulacrum of the ideal Code, future Counselors can try to adjust the style of the Code to better appeal to the American populace.

In a broader sense, United States Code and the Constitution both represent the larger artform of legal construction. As legal documents, both occupy a style<sup>117</sup> distinct from traditional literature. Distilling the positives and negatives of legal style is the first step to amplifying the positive attributes of artifacts within the category. Regardless, this universal is well-fulfilled by both documents which increases the ability of future artists to participate in their revision.

Next, Dutton considers the importance of the existence of a mode or tradition of criticism in the aesthetic value of an art piece. If United States Code is capable of being criticized utilizing a well recognized “critical vocabulary,” then it is easier for it to be appreciated and rejected—something necessary for developing community appreciation.<sup>118</sup> This is true for two reasons: first, without an intelligible, critical discourse about an artifact it loses an important connection to the intrinsic human need to rationally judge activity; and, second, without criteria for “excellence, mediocrity, competence/incompetency, and for failure” it is nearly impossible to discern the value of an artifact.<sup>119</sup>

The OLC states that the purpose of restating Statutes at Large into United States Code is to better conform the existing law along criteria such as: improved organizational structure, relevancy, clarity, consistency, technical correctness, and conformity with congressional intent.<sup>120</sup> Therefore, if a Statute at Large is entered into positive law and fails to be organizationally clear and technically correct, or happens to be out of step with congressional intent, United States Code is failing its purpose (which speaks to its role as an artifact). The OLC via its mandate has created an intelligible critical language for United States Code, meaning that the Code

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116. Dutton, *Aesthetic Universals*, *supra* note 52.

117. Whether that is good or bad is a distinct question—legal writing is often criticized for its heavy reliance on jargon, redundancy, etc., (this note notwithstanding), and both very well may be good examples of a bad form of writing.

118. Dutton, *Aesthetic Universals*, *supra* note 52.

119. *Id.*

120. *About the Office; Contact Information*, OFF. L. REVISION COUNS., [https://uscode.house.gov/about\\_office.xhtml](https://uscode.house.gov/about_office.xhtml) [<https://perma.cc/7TCE-LD7C>].

conforms to this aspect of Dutton's aesthetic universalism. The Constitution seems lacking in this aspect. Partially because of the American attitude against criticizing much of the document, there seems to be an absence of critical language about the document specifically. However, constitutions generally, and legal documents more broadly, have a robust parlance associated with their criticism that the Constitution and the Code comfortably fit within. Like the criteria used by the OLRC, many legal documents are scrutinized because of their ambiguity, relevancy, understandability, and more. When combined with an analysis of stylistic consistency, it is easy to see where aesthetic criticism can be used to improve the Code by scrutinizing its failings and reforming it in line with the positive attributes of its style.

Dutton's next universal is imitation. An "art object . . . represent[s] or imitate[s] real or imaginary experience[s] of the world."<sup>121</sup> How well an imitation represents its principle is typically how we assess its value.<sup>122</sup> Humans rationally connect representations with the objects thereby imitated, and Dutton argues that the significance of imitation "extends into all areas [of] human intellectual life."<sup>123</sup> United States Code is essentially an imitation of the Statutes at Large. By revising the Statutes into positive law, United States Code becomes a better version of the statutes. Since onlookers can assess United States Code against the original Statutes at Large, it is possible to assess the representational value of the Code against its source material. Therefore, despite the Code not being an imitation of a real or imaginary "experience of the world" in a colloquial sense, it is still a successful imitation of *something*.<sup>124</sup> United States Code not only exhibits this important universal artistic feature, but it does so exceptionally well. Even when compared to the Constitution, it would be hard to suggest it might better represent American statutory law. The Constitution, as mentioned before, is essentially a successful distillation of Enlightenment thought, and carries much of its aesthetic value from its ability to be a catalyst for that era of western political philosophy. The Code, however, is a continued project in improvement and imitation, something the Constitution cannot claim to be.

Finally, Dutton determined that art is more aesthetically pleasing when it has a "special" focus. This seems to be the Code's greatest failing and why it is so inaccessible. To be "special" something must be bracketed off from ordinary life. Artifacts are "often imbued with intense emotion and

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121. *Id.*

122. Realism does not always positively correlate with appreciation. *Id.*

123. *Id.*

124. Dutton, *Aesthetic Universals*, *supra* note 52.

sense of community.”<sup>125</sup> This is a characteristic of aesthetic universalism that is near universally recognized in the Constitution. The Constitution is so tied to the American national identity that American military services members must swear to defend the Constitution.<sup>126</sup> Not only is the Code denied the same respect in the oath of enlistment, but the general laws of the United States are likewise denied such treatment. This intense emotional and cultural investment in the Constitution means that Americans not only find it hard to criticize the document, but often simply refuse to do so. This in turn bleeds into how actively Americans attempt to understand and access the document. The extreme feeling of banality (or disregard) displayed toward the Code by the general public and its association with the perceived failings of our legal system combine to remove it from such a special place.

## VI. CONCLUSION

This special place problem is the one most critical to address if there is any hope of making the Code into the kind of artifact that Americans will want to seek out. This, and many of the issues presented in the Kantian perspective, are intrinsically linked to cultural perspectives on United States Code. Because the Code is considered a normal, uninteresting part of the American experience, people have not made the same strides to access and understand it that they have the Constitution. The Code will still be viewed as occupying a place in society that only lawyers or legislators ought to access even if it is made more pleasing to the senses through improvements to its website or physical layout; made easier to understand (better font choices or clearer language); and is better developed stylistically. As a niche piece of legal art and a continuing project, it can be considered the apogee of codification, but this does not help the broader American public.

The best possible outcome would be to use this recognition of its major aesthetic failing to initiate a shift in how American civic education is done. By teaching that United States Code is as special alongside the Constitution and discussing it in similarly reverential terms, Americans may be more likely to seek it out. This effort naturally ought to begin with the youngest Americans, because the same system that can successfully inculcate within them an interest in the Constitution can do the same for United States Code.

This is also a necessary first step to resolving major issues of legal literacy in the United States. The Code and how it is enforced more immediately impacts the daily lives of Americans than the Constitution, but

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125. *Id.*

126. United States Army, *Oath of Enlistment*, ARMY.MIL., <https://www.army.mil/values/oath.html> [<https://perma.cc/WXJ2-ELKH>].

it is rare that anyone, (excluding lawyers and judges) ever pour through any part of United States Code.

Finally, practical reforms in the Code's presentation can help with the lesser issues of providing non-utilitarian pleasure, increasing the sensory value, etc. The website United States Code is hosted on, for example, is antiquated, awkward, and difficult to navigate, especially when compared to other archival sites or legal search engines. For example, developing an easy-to-browse, free mobile app would help Americans access the Code in a manner much less daunting than wandering through a law library or Boolean searching through the Code website. Quick and comfortable access is key to helping Americans navigate their day-to-day interactions with federal law. Educational games or examples of how the law is applied, such as those present in the Restatements of common law or textbooks, make it easier to understand complicated statutes, even for children.

These changes and others are of course easier proposed than implemented. United States Code, unlike the Constitution, is a daunting collection of statutes that will never be relevant to any but a specific niche of American commerce, or the criminally accused. The practical benefit to any American may feel disproportionate with the difficulty, especially when lawyers and legislators have a vested interest in gatekeeping the law for the sake of their own pocketbooks. Simply convincing the legislature to expand the OLRC for the sake of increasing legal literacy may be an insurmountable task.

Aesthetic facelifts are also largely subjective even when based on a weave of objective criteria and may not provide universal answers. That said, the task is still one worth encouraging, and hopefully one day, undertaking. The people most reliant on proper understanding of the law are often indigent. Taking a novel approach to reforming the law is not only a worthwhile risk, but also one necessary if we are ever going to encourage an increase in legal literacy.