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<Article>

## Beauty: A *Lingua Franca* for Environmental Law?

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### **Abstract:**

This article investigates whether beauty can be a global language to inform environmental governance, such as by providing shared values and collaborative approaches across and within different cultures. Because art mediates how many people experience environmental aesthetics, such as through photography and music, this enquiry extends to the arts. As is the case for other aesthetic values, beauty is ultimately about relationships and ways of knowing our environment, and the law can best engage with such values through interpretive guidance and process participatory decision making. Prescriptive codification of beauty 'standards' is generally not a realistic goal for lawmakers. The article enriches our understanding of how aesthetics can contribute to human beings' emotional empathy and ethical commitment to environmental stewardship, but also identifies some conceptual and methodological difficulties that militate against beauty being a lingua franca for environmental law.

**Keywords:** Aesthetics; Art; Beauty; Environmental law; Language; Nature

### 1. THE ENQUIRY

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This article is inspired by and draws on the discussions at the workshop on 'Environmental Aesthetics: Beauty and Decision-Making', held at The Dickson Poon School of Law, King's College London (UK), on 28 Nov. 2017.

Can beauty contribute to a global language for environmental law? Scholars of transnational environmental law have generally overlooked this question; perhaps because of apprehensions about the frivolity of such an inquiry, the difficulty of articulating beauty as a legal standard, or concerns about the degree to which aesthetic values such as beauty are subjective and often imbued with sexist, racist, colonialist, and class-privileged ideas. It is our contention that whilst these concerns are legitimate, beauty nevertheless is a vital element in the pervasive human desire for aesthetic experiences in nature, and it must be reckoned with in environmental governance. Beauty may be a matter of cultural relativism but the law should help forge socially defensible judgements about beauty in environmental decisions through informed, participatory processes. Concomitantly, through its capacity to engage people's emotional commitments to environmental causes, beauty can strengthen social action and political willingness to legislate.

An underlying assumption of this article is the value of a *lingua franca* for environmental law. Given that environmental impacts often have transnational or regional dimensions, we need a common understanding of relevant issues and solutions across societies and jurisdictions, and this depends upon shared terminology. The 2015 United Nations' Sustainable Development Goals (SDGs) evoke this ideal,<sup>1</sup> but it runs through the history of environmental law. The 1972 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention (WHC))<sup>2</sup> emphasizes protection of natural and cultural heritage of 'outstanding universal value',<sup>3</sup> which necessarily acknowledges such a value can be shared by humanity across different cultures and histories. In short, finding common ground contributes to more effective environmental governance, such as by lessening costly disputes and motivating collective efforts. On beauty specifically, evolutionary psychology suggests that humankind has some shared aesthetic preferences, as in landscape features and animal characteristics, which could provide the kernel to a global language of natural beauty.<sup>4</sup> Concomitantly, that literature suggests humankind possesses a

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<sup>1</sup> See <http://www.un.org/sustainabledevelopment/sustainable-development-goals>.

<sup>2</sup> Paris (France), 16 Nov. 1972, in force 17 Dec. 1975, available at: <http://whc.unesco.org/en/conventiontext>.

<sup>3</sup> *Ibid.*, Art. 2.

<sup>4</sup> R.O. Prum, *The Evolution of Beauty* (Doubleday, 2017).

shared capacity for moral judgements, which could be further building blocks to a shared aesthetics that values nature beyond its material benefits.<sup>5</sup>

Legal philosopher John Finnis, a defender of natural law theory, defined a set of seven basic 'goods' that bring value to human lives that the law should protect and nurture, with these basic goods offering reasons for why we do things. One of these basic goods is the opportunity for aesthetic experiences, and experiencing beauty specifically, which bring pleasure and value to our lives beyond basic living needs.<sup>6</sup> Environmental law, however, remains hindered by an incomplete language to meet this goal, despite progress made through the discourses of 'sustainable development', 'intergenerational equity', 'common heritage of humankind', and other meta-norms. These discourses have helped build some common ground, but gaps and weaknesses remain because of vague or inconsistent terminology, the presence of rival concepts and, crucially, the habitual reliance on scientific and economic methodologies that can fail to elicit deep emotional commitment to the issues. This problem is not unique to environmental law, as other fields of governance such as international human rights are permeated by different languages that reflect rival values or perspectives. However, exploring the wider significance of this issue in other legal fields and comparing them to environmental law is beyond the scope of our article.

Beauty is a subset of the wider domain of aesthetic values, and commentators have long identified it as the most enduring and significant aesthetic value, especially concerning the natural environment.<sup>7</sup> Much of the ensuing discussion about beauty is thus framed by the broader scholarly debates about aesthetics. As a noun, aesthetics relates to the philosophy of the interpretation of art and nature. As an adjective, and in the vernacular, it describes human perception and emotional responses to such phenomena.<sup>8</sup> All individuals have the capacity for aesthetic judgements. Could it thus be concluded that a Nigerian and German, for example, can similarly admire a beautiful roaring waterfall or an exquisite bird of paradise despite not understanding one another's tongue, and that this mutual affection might translate into demands for stronger legal protection? Such a concept would be too simplistic because judgements about beauty (and other aesthetic values) are culturally mediated and function alongside

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<sup>5</sup> M. Hauser, *Moral Minds: The Nature of Right and Wrong* (Harper, 2007).

<sup>6</sup> J. Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2011), pp. 87-8.

<sup>7</sup> See, e.g., G. Santayana, *The Sense of Beauty: Being the Outline of Aesthetic Theory* (Dover Publications, 1955); P. Guyer, *Values of Beauty: Historical Essays on Aesthetics* (Cambridge University Press, 2005).

<sup>8</sup> For an introduction, see J.W. Manns, *Philosophy and Aesthetics* (Routledge, 2016).

competing values such as science and economics. Yet, we argue it is possible for beauty to play a larger role in environmental governance in certain circumstances, especially with community-based arts and allied institutional reforms that foster public participation.

Beauty is the most commonly distilled aesthetic value in environmental law because it is considered a positive value through which to protect and nurture our environment. The World Heritage Convention, to illustrate, safeguards 'areas of outstanding universal value from the point of view of ... natural beauty',<sup>9</sup> and the United Kingdom's (UK) National Parks and Access to the Countryside Act 1949 was established 'for the purpose of preserving and enhancing the natural beauty'.<sup>10</sup> Our surroundings can also evoke the alter ego of beauty, namely the 'ugly', such as industrial blight and unsympathetic architecture. Hence, aesthetic values across wild and human-modified environments are diverse and affiliated to our varied emotional portfolio. This article focuses on beauty not only because of its explicit affirmation in environmental law but also due to its powerful hold in human culture and psychology. Beauty is valorized in many realms of our lives, including romantic courtship, fashion, housing design, and recreational pursuits from a sunset beach stroll to an art gallery visit.<sup>11</sup>

Given that economic and scientific dogma often dominate environmental governance, it should not be a surprise that most environmental lawyers ignore natural beauty, along with other aesthetic values. Exceptions to this indifference include John Costonis, whose *Icons and Aliens: Law, Aesthetics and Environmental Change*<sup>12</sup> investigated aesthetics in urban development regulation in the United States (US), and Tim Bonyhady's *The Colonial Earth*,<sup>13</sup> which examined artistic portrayals of the Australian landscape in the emergence of its environmental laws. Andreas Philippopoulos-Mihalopoulos touches on aesthetics in his extensive writings including in his *Spatial Justice: Body, Lawscape, Atmosphere*.<sup>14</sup> Cultural heritage law scholarship also sometimes engages strongly with aesthetics, such as Ben Boer's work.<sup>15</sup> The occasional journal article ventures into this subject, such as Alice Palmer's analysis of aesthetic criteria in World Heritage Convention

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<sup>9</sup> N. 2 above, Art. 2.

<sup>10</sup> 1949, c. 97, 12-14 Geo 6, s. 5(1).

<sup>11</sup> R. Plum, *The Evolution of Beauty: How Darwin's Forgotten Theory of Mate Choice Shapes the Animal World – and Us* (Doubleday, 2017); A. Marwick, *A History of Human Beauty* (Bloomsbury, 2007).

<sup>12</sup> J. Costonis, *Icons and Aliens: Law, Aesthetics and Environmental Change* (University of Illinois Press, 1999).

<sup>13</sup> T. Bonyhady's *The Colonial Earth* (Melbourne University Press, 1999).

<sup>14</sup> A. Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Routledge, 2015).

<sup>15</sup> B. Boer & G. Wiffen, *Heritage Law in Australia* (Oxford University Press, 2006).

decision-making,<sup>16</sup> and Afshin Akhtar-Khavari's interpretation of Edvard Munch's *The Scream* as an exemplar of our primeval fear of nature's darker forces.<sup>17</sup> The absence, however, of more literature in this field betrays the sentiment felt by many that aesthetic values, especially beauty, are, at best, marginal considerations and, at worst, superficial criteria unable to match the 'objectivity' and 'rigour' of science or economics.

Beauty, we believe to the contrary, provides an important modality or process of building relationships with nature. Aesthetic values matter for their potential to foster less materialistic environmental relationships, to elicit new insights into natural values and impacts, and to generate ethical constraints to human environmental behaviour. Artists can creatively represent environmental values and impacts that may be imperceptible or marginalized. In *Slow Violence*, Rob Nixon encourages artists to deploy 'their imaginative ability and worldly ardour to help amplify the media-marginalized causes of the environmentally dispossessed'.<sup>18</sup> Similarly, Benjamin J. Richardson in *Time and Environmental Law* believes 'artistic gestures [can] vividly arouse' public awareness of 'our strained relationships with nature that need repair'.<sup>19</sup> Of course, aesthetics with or without artistic intervention cannot comprehensively underpin all environmental governance, not only since it needs other inputs such as scientific knowledge (for example, to understand how to mitigate climate change) but also because aesthetic values themselves elicit conceptual and methodological difficulties.

This article is equally attentive to evaluating the obstacles to incorporation of beauty (and, potentially, other aesthetic values) into environmental law. These obstacles principally include: (1) limitations in the type of information that beauty can convey in environmental decision making, such as for nature conservation or pollution control; (2) difficulties of codifying beauty into workable legal standards, such as in deciding where to locate wind farms, and furthermore the problems of anthropocentric biases that can result in a legal bifurcation of nature into 'special' and 'ordinary' beauty categories; and (3) whether and how beauty can be reconciled with other, non-aesthetic values, notably scientific and economic

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<sup>16</sup> A. Palmer, 'Legal Dimensions to Valuing Aesthetics in World Heritage Decisions' (2017) 26(5) (2017) *Social and Legal Studies*, pp. 581-604.

<sup>17</sup> A. Akhtar-Khavari, 'Fear and Ecological (in)Justice in Edvard Munch's *The Scream of Nature*' (2015) 6(2) *Nordic Journal of Law and Social Research*, <http://jlsr.tors.ku.dk/issues/nnjlsr-06>.

<sup>18</sup> R. Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press, 2011), p. 5.

<sup>19</sup> B.J. Richardson, *Time and Environmental Law: Telling Nature's Time* (Cambridge University Press, 2017), p. 6.

values, in environmental governance. Thus, our enquiry into the role of beauty in environmental law considers both the opportunities and obstacles.

Devoted to mapping 'big picture' themes and highlighting examples, this article spans five parts. The next examines key theories of environmental aesthetics, and beauty specifically. Part 3 evaluates existing legal recognition of aesthetic values, focusing on beauty, and canvasses several jurisdictions to illustrate broad patterns.<sup>20</sup> Thereafter, Part 4 evaluates opportunities and obstacles for using beauty in environmental law. The article concludes in Part 5 with advice about the future legal status of beauty.

## 2. CONCEPTUALIZING BEAUTY IN ENVIRONMENTAL AESTHETICS

To understand how beauty has been conceptualized, we must first delve into its wider framing in the literature on environmental aesthetics. This part highlights the relevance of beauty in a range of environmental decision-making contexts, and traces the efforts of scholars and artists to define beauty and to delineate its social purposes.

Environmental aesthetics are ways of knowing and being immersed in our surroundings, observed Gregory Bateson, one of the great 20<sup>th</sup>-century anthropologists.<sup>21</sup> His aesthetically conceived ecology postulated that ecosystems are informational and communicating systems, like a mind, rather than just flows of material and energy. To think ecologically, we must recognize ourselves as embedded in that system, argued Bateson. Yet, in our urban demography and globalizing world, this aspiration is not easily realized. The expanding spatial and temporal scales of phenomena such as the impacts of global warming or marine plastic pollution, which can manifest far from the environs we inhabit, obscure our awareness of the aesthetics of environmental change. The arts, however, can help enrich how we experience that aesthetically conceived ecology, even on a planetary scale. NASA's earliest photographs of Earth – most famously, the iconic *Blue Marble* taken in December 1972 by the Apollo 17 crew – helped boost the emerging global environmental movement.<sup>22</sup> Over the past half-century, environmental-focused visual art and music has flourished into diverse genres including social activist strands tackling climate change and other sustainability

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<sup>20</sup> Given the expertise of the authors, these examples are largely from common law jurisdictions.

<sup>21</sup> G. Bateson, *Steps to an Ecology of Mind* (University of Chicago Press, 1972).

<sup>22</sup> R. Kelsey, 'Reverse Shot: Earthrise and Blue Marble in the American Imagination', in E.H. Jazairy (ed.), *Scales of the Earth* (Harvard University Press, 2011), <insert full chapter page span before page pinpoint>, at 10, 12.

concerns.<sup>23</sup> Environmental aesthetics, in other words, are experienced through cultural lenses, often intermediated through the arts and linked to other social processes including the law itself.

The importance of environmental aesthetics to our emotional affinity with nature is recognized by major international environmental organizations. The International Union for Conservation of Nature (IUCN) affirms in its founding 1948 Statute that: 'natural beauty is one of the sources of inspiration of spiritual life, and the necessary framework for the needs of recreation'.<sup>24</sup> In 1962, UNESCO declared that protecting nature's beauty was 'necessary to the life of men (sic) for whom they represent a powerful, physical, moral and spiritual regenerating influence, while at the same time contributing to the artistic and cultural life of peoples'.<sup>25</sup> Similarly, the 2008 operational guidelines for the World Heritage List refer to 'cultural landscapes' that 'are illustrative of the evolution of human society and settlement over time'.<sup>26</sup> Yet, we must also acknowledge the reciprocity of this relationship, namely how aesthetics can motivate humans to feed nature's wellbeing, perhaps by fostering less materialistic relationships and instilling ethical constraints on human behaviours or decisions. Closer to a less anthropocentric stance, the Earth Charter of 2000 declares 'the protection of Earth's ... beauty is a sacred trust' and calls on signatories to 'secure Earth's bounty and beauty for present and future generations'.<sup>27</sup>

Yet, different people do not experience beauty or other aesthetic qualities identically, which may have implications for the development of a *lingua franca* based on such concepts. To illustrate, the famous Mount Fuji astonishes tourists as beautiful scenery but those who practice Shintoism may be drawn more to a different aesthetic trait associated with its spiritual significance.<sup>28</sup> A similar dyadic

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<sup>23</sup> M. Miles, 'Representing Nature: Art and Climate Change' (2010) 17(1) *Cultural Geographies*, pp. 19-35.

<sup>24</sup> Statute of the International Union for the Conservation of Nature and Natural Resources (IUCN), Oct. 1948, Preamble, available at: [https://www.iucn.org/sites/dev/files/iucn\\_statutes\\_and\\_regulations\\_january\\_2018\\_final-master\\_file.pdf](https://www.iucn.org/sites/dev/files/iucn_statutes_and_regulations_january_2018_final-master_file.pdf).

<sup>25</sup> UNESCO, *Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites*, 11 Dec. 1962, Preamble, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13067&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13067&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>26</sup> *Guidelines on the Inscription of Specific Types of Properties on the World Heritage List*, World Heritage Centre 08/01, Jan. 2008, available at: <http://whc.unesco.org/archive/opguide05-annex3-en.pdf>. The notion of 'cultural landscapes' is recognised in World Heritage listing criteria since 1992.

<sup>27</sup> Preamble and Principle 1.4, available at: <http://earthcharter.org/discover/the-earth-charter>.

<sup>28</sup> UNESCO, 'Fujisan, Sacred Place and Source of Artistic Inspiration' (UNESCO, 2013), available at: <http://whc.unesco.org/en/list/1418>.



interpretation infuses landscapes occupied by Indigenous peoples: what might be a beautiful, unpeopled 'wilderness' to a foreigner is a cultural landscape to its Aboriginal custodians.<sup>29</sup> In a 2017 decision of the Supreme Court of Canada, citizens of the Ktunaxa Nation objected to the grant of planning permission for a ski resort, on the basis that the development would drive out Grizzly Bear Spirit, a principal spirit within the Ktunaxa belief system.<sup>30</sup> More frequently encountered aesthetic divergences relate to artistic taste: admirers of Rembrandt's *The Night Watch* may be repulsed by Marcel Duchamp's equally iconic urinal.<sup>31</sup> Modern architecture is often similarly controversial: the Centre Pompidou in Paris (France) and the BT Tower in London (UK) are abhorred and admired in equal measure.<sup>32</sup>

In contrast to the foregoing efforts to understand beauty through a socio-cultural lens, some philosophers of aesthetics have sought to distill the elements of beauty through formalistic models. Their aim is not to study how human beings empirically perceive works of art or natural landscapes but to delineate normatively how they *ought* to. In the 18<sup>th</sup> century, William Hogarth postulated that beauty correlates with principles that include uniformity, simplicity and variety.<sup>33</sup> Taking a physiological approach, Edmund Burke defined beauty through one's emotional reactions, such as pleasurable feelings of tranquillity and euphoria, which he contrasted to the discomfort of sublimity, such as the awe felt by witnessing powerful natural forces.<sup>34</sup> Immanuel Kant focuses on having the correct attitude, namely that appreciation of beauty requires separating aesthetic value from any interest in the object as a means of fulfilling some utilitarian end.<sup>35</sup> Non-Western cultures have also explored the philosophy of aesthetics. Islamic theologians associate beauty with three structural components – order, wisdom and harmony – as expressed most eloquently in irrigated gardens.<sup>36</sup> In East Asia,

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<sup>29</sup> D. Bird Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996).

<sup>30</sup> *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54

<sup>31</sup> M. Duchamp, *Fountain*, 1917; V. van Gogh, *Irises*, 1889.

<sup>32</sup> A. Lange, 'Seven Leading Architects Defend the World's Most Hated Buildings', *The New York Times (Style Magazine)*, 5 June 2015, available at: <https://www.nytimes.com/interactive/2015/06/05/t-magazine/architects-libeskind-zaha-hadid-sellldorf-norman-foster.html>.

<sup>33</sup> W. Hogarth, *The Analysis of Beauty: Written with a View of Fixing the Fluctuating Ideas of Taste* (W. Strahan, 1772).

<sup>34</sup> E. Burke, *Philosophical Inquiry into the Origin of Ours Ideas of the Sublime and Beautiful*, P. Guyer (ed.), (1757 original, Oxford University Press, 2015).

<sup>35</sup> I. Kant, *Critique of the Power of Judgment*, P. Guyer & E. Matthews (trans.) [original 1790, Cambridge University Press, 2000].

<sup>36</sup> E.C. Clark, 'The Islamic Garden: History, Symbolism, and the Qur'an', in V.J. Comell (ed.), *Voices of Islam* (Greenwood Publishing, 2006), chapter 11.

some traditional philosophy emphasizes the oneness between nature and culture, such as the sacredness of landscapes (Shintoism) and spiritual freedom when journeying through them (Daoism).<sup>37</sup>

Theories about environmental aesthetics specifically have surged recently, focusing on what and how to evaluate aesthetic values in the world at large, from rugged wilderness to urban environments. Three distinct themes exist in the literature. One is Arnold Berleant's call for an 'aesthetics of engagement', which stresses a participatory and intimate experience with the subject matter as the best way to appreciate its aesthetic values.<sup>38</sup> Although his approach helpfully supports greater public participation in direct sensory engagement with our natural surroundings, and cultivation of place-based cultural affiliations, the emphasis on *personal* engagement implies that what and how we aesthetically appreciate nature is just subjective taste; we thus might have no guidance to differentiate between serious and trivial aesthetic judgements. A second, alternate idea is the 'cognitive' model, pioneered by Allen Carlson, who asserts that proper aesthetic appreciation depends on a scientific understanding of natural phenomena derived from botany, biology, ecology, and cognate disciplines.<sup>39</sup> Science, contends Carlson, steers the viewer to the points of aesthetic significance, such as botanical knowledge that allows the viewer to fully enjoy floristic patterns and colours. But Emily Brady argues that the cognitive model excludes common emotional responses to natural beauty: like observing a golden sunset or thunderous waterfall, for which one does not need any scientific expertise to appreciate.<sup>40</sup>

A third understanding of environmental aesthetics are the critical, politically-charged perspectives that advocate interpretation of aesthetic values that contribute to social change such as better environmental policies. Activist scholars such as Alan Braddock and T.J. Demos champion social justice and ecological sustainability as vital criteria for how we should view nature's aesthetics and their depiction through artistic practices.<sup>41</sup> This stance also is critical of the privileging of Western constructions of 'nature' in eco-aesthetics, which can also marginalize the 'Other' such as Aboriginal cultural values.

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<sup>37</sup> J. Ramsay, *The Aesthetic Value of Landscapes: Background and Assessment Guide* (ICOMOS-IFLA International Scientific Committee on Cultural Landscapes, 2015), pp. 7-9.

<sup>38</sup> A. Berleant, *Living in the Landscape: Toward an Aesthetics of Environment* (University Press of Kansas, 1997).

<sup>39</sup> A. Carlson, *Aesthetics and the Environment: The Appreciation of Nature, Art and Architecture* (Routledge, 2000).

<sup>40</sup> E. Brady, *Aesthetics of the Natural Environment* (Edinburgh University Press, 2003), pp. 369-70.

<sup>41</sup> A.C. Braddock, 'Ecocritical Art History' (2009) 23(2) *American Art*, pp. 24-8, at 26.

Environmental aesthetics, explains Demos, must thus be a way to ‘decolonize nature’ and forge a more egalitarian world.<sup>42</sup>

The role of the arts in mediating our experience of natural aesthetics has a long history. In our urban demography, we often aesthetically engage with nature vicariously rather than directly – through David Attenborough-narrated films, lavish coffee-table books or soothing nature sounds CDs. Artistic interpretations of natural beauty through visual art and music have also been conceptualized in the literature around certain artistic conventions and theoretical positions. In the Western world, the Romantic era during the 18<sup>th</sup> and 19<sup>th</sup> centuries helped render a more benign view of nature through several pictorial styles.<sup>43</sup> The ‘picturesque’ iconography evoked gorgeous panoramas such as majestic snow-capped mountains, while the ‘sublime’ exalted nature’s wildest, untamed tendencies such as stormy seas or deep canyons. Another seminal style is the ‘pastoral’ landscape, dotted with manicured gardens and pastures adorned with peaceful livestock.

With the surge in activist eco-art in the late 20<sup>th</sup> century, researchers have also enquired into the appropriate *purpose* of aesthetic experiences. Beginning in the 1960s, the Land Art movement (also known as Earth Art) resisted the commodification of art by abandoning museums and galleries to create monumental landscape projects, such as Robert Smithson's iconic *Spiral Jetty* (1970) carved into a Utah lake.<sup>44</sup> In recent decades eco-art has occupied other public spaces to forge new narratives about global environmental challenges such as climate change and air pollution, as evident in the work of the Climart group.<sup>45</sup> Music is also increasingly used to explore natural aesthetics, for reasons that range from cultivating a ‘sense of place’ (via nature soundscape recordings) to musical compositions that aid in social awareness for the environment.<sup>46</sup> T.J. Demos, one leading voice here, has advocated the arts to forge creative and critical insights that challenge the political orthodoxy of neoliberal globalization and to foster solutions to the planetary environmental crisis.<sup>47</sup> Further, many environmental organizations use beauty to generate public support for their causes, from saving whales to wilderness, as exemplified in the next part.

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<sup>42</sup> T.J. Demos, *Decolonizing Nature* (Sternberg Press, 2016).

<sup>43</sup> C. Casalggi & P. Fermanis, *Romanticism: A Literary and Cultural History* (Routledge, 2012), pp. 119-20.

<sup>44</sup> B. Tufnell, *Land Art* (Tate, 2006).

<sup>45</sup> See at: <http://www.climart.info>.

<sup>46</sup> A.S. Allen & K. Dawe (eds), *Current Directions in Musicology: Music, Culture, Nature* (Routledge, 2015).

<sup>47</sup> T.J. Demos, *Decolonizing Nature: Contemporary Art and the Politics of Ecology* (Sternberg Press, 2016).

The aesthetics of beauty have also been intensely investigated with regard to human beings themselves, which illustrates how strongly beauty is culturally mediated. Much literature has sought to empirically validate some universal indicia of beauty across different cultures, of which one identified criterion is facial symmetry.<sup>48</sup> But other evidence shows sexist and racist influences. Patriarchal cultures have imposed cruel stereotypes of beauty, such as the practice of foot-binding young girls in pre-communist China and corset wearing in Victorian Britain.<sup>49</sup> Naomi Wolf's *The Beauty Myth* argued that idealistic social standards of physical beauty persist because of commercial influences through the 'beauty industry'.<sup>50</sup> Racism also influences perception of human beauty; one abhorrent example being the Nazi regime's attempts to breed an Aryan master race. Thus, whilst humankind has a shared interest in beauty, its appreciation may be more influenced by cultural context than by the innate qualities of objects.

In addition to philosophical enquiries into appreciation of beauty and environmental aesthetics, researchers have investigated their influence on human environmental attitudes, well-being and behaviour. Studies in environmental psychology highlight how aesthetic stimuli, such as beautiful colours, complexity and fragrance, may reduce personal stress. The Health Council of the Netherlands found positive associations for the health of people living near attractive greenery.<sup>51</sup> Research has found psychological benefits associated with a variety of environmental experiences, including visiting city parks,<sup>52</sup> urban gardens,<sup>53</sup> and wildernesses.<sup>54</sup> By contrast, unattractive built environments can overload inhabitants with demanding, stressful, or mundane features. The relevance of such research for our enquiry is that by linking environmental beauty to human benefits we can build a stronger political case for an aesthetics-based environmental law.

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<sup>48</sup> E.g., K. Grammer & R. Thornhill, 'Human (*Homo Sapiens*) Facial Attractiveness and Sexual Selection: The Role of Symmetry and Averageness' (1994) 108(3) *Journal of Comparative Psychology*, pp. 233-42.

<sup>49</sup> L. Frost, "'Doing Looks": Women, Appearance and Mental Health', in J. Arthurs & J. Grimshaw (eds), *Women's Bodies: Cultural Representations and Identity* (Bloomsbury, 1999), pp. 117-36, at 119.

<sup>50</sup> N. Wolf, *The Beauty Myth* (Chatto and Windus, 1990).

<sup>51</sup> Health Council of the Netherlands, *Nature and Health: The Influence of Nature on Social, Psychological and Physical Well-Being* (Health Council of the Netherlands and Dutch Advisory Council for Research on Spatial Planning, 2004).

<sup>52</sup> R.A. Fuller, et al., 'Psychological Benefits of Greenspace Increase with Biodiversity' (2007) 3(4) *Biology Letters*, p. 390 <confirm full page span>.

<sup>53</sup> N. Dunnett & M. Qasim, 'Perceived Benefits to Human Well-being of Urban Gardens' (2000) 10 *HortTechnology*, pp. 40-5.

<sup>54</sup> S. Kaplan & J.F. Talbot, 'Psychological Benefits of a Wilderness Experience', in J. Altman & J.F. Wohlwill (eds), *Behavior and the Natural Environment* (Plenum, 1983), pp. 163-203.

Also relevant here is social psychology research into how aesthetic values can contribute to pro-environmental behaviour, as explored in Section 4.1 of this article.

The foregoing discussion leads to several conclusions about beauty for environmental governance. Firstly, it is an important social value but significant debate persists about the appropriate normative criteria for evaluating beauty in environmental contexts. Secondly, interpretation of beauty is culturally mediated, especially through art, which itself is subject to theoretical contestation and, thirdly, aesthetic values including beauty can be deployed for utilitarian purposes, from personal therapeutic benefits to political activism. The next part considers how notions of beauty, and sometimes aesthetics more generally, have informed legal governance as a precursor to understanding the areas where further work is needed in Part 4 in order to elevate beauty to a more substantial pillar of environmental governance.

### 3. LEGAL CONTEXT

#### 3.1. *Mapping Patterns of Interaction*

The law does not stand 'outside' beauty or other aesthetic values but partakes in shaping their enunciation and meaning. These values feature in many contexts governed by environmental law. Proposals to establish wind turbine farms have strained land use approval processes across Europe and North America because of community uproar over anticipated visual and acoustic impacts.<sup>55</sup> Perceptions of scenic beauty frequently drive the establishment of national parks even while Indigenous peoples may associate such areas with their ancestral cultural heritage. Indeed, conservation management in Australia and Sweden, among many jurisdictions, is increasingly intertwined with the aesthetic values of Indigenous peoples,<sup>56</sup> whose importance is acknowledged in the United Nations Declaration on the Rights of Indigenous Peoples,<sup>57</sup> whereby: 'Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their

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<sup>55</sup> S.L. Martin, 'Wind Farms and NIMBYs: Generating Conflict, Reducing Litigation' (2009-2010) 20 *Fordham Environmental Law Review*, pp. 427-68.

<sup>56</sup> M. Adams, 'Beyond Yellowstone? Conservation and Indigenous Rights in Australia and Sweden', in G. Cant, A. Goodall & J. Inns (eds), *Discourses and Silences: Indigenous Peoples, Risks and Resistance* (University of Canterbury, New Zealand, 2005), pp. 127-38.

<sup>57</sup> New York, NY (US), 13 Sept. 2007, available at: [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

traditional ... lands'.<sup>58</sup> Another context is ecological restoration, where regulators must consider future aesthetic values. A challenge found in restoration projects in Scotland and the Netherlands is that some stakeholders find the change toward an 'untamed' nature less beautiful than their former bucolic surroundings.<sup>59</sup> In post-mining rehabilitation, aesthetic values also matter greatly for future land uses and improving the appearance of the landscape, as evident in South Africa's mining industry.<sup>60</sup>

Nonetheless, while aesthetic values including beauty inform many environmental governance contexts, this does not mean that such values are priorities for lawmakers. Instead, scientific and economic precepts dominate environmental regulation for reasons that range from their seeming objectivity and precision in setting legal standards, to the political influence of those who promote such disciplines. Any cursory check of environmental legislation reveals so: Australia's lodestar Environment Protection and Biodiversity Conservation Act 1999 (Cth) refers to 'aesthetics' just once (and contains no references to 'beauty') but has 29 entries for 'economics' and 223 for 'science' or 'scientific'. Similarly, listings of threatened species commonly reflects scientific advice on their conservation status rather than their charm or inherent value, while pollution standards generally are based on scientific evidence of potential hazards and the economic costs of alleviating them. Concomitantly, the language of 'beauty' itself is increasingly missing from environmental governance beyond hortatory statements, as researchers have found in the evolution of British landscape planning legislation.<sup>61</sup> The seeming arbitrariness of aesthetic values also frustrates courts where community opinion expects the law to reflect intelligible standards: as one US judge bemoaned, 'aesthetic considerations are fraught with subjectivity. One man's pleasure may be another man's perturbation. ... Judicial forage into such a nebulous area would be chaotic'.<sup>62</sup>

To make sense of these disparate permutations, we can delineate several distinctive ways in which beauty as an aesthetic value interacts with environmental law, namely as: (1) a 'resource' for advocates of stronger law; (2) a

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<sup>58</sup> *Ibid.*, Art. 25.

<sup>59</sup> J. Prior & E. Brady, 'Environmental Aesthetics and Rewilding' (2017) 26(1) *Environmental Values*, pp. 31-51.

<sup>60</sup> D. Limpitlaw & A. Briel, 'Post-mining Land Use Opportunities in Developing Countries: A Review' (2014) 114(11) *Journal of the Southern African Institute of Mining and Metallurgy*, pp. 899-903.

<sup>61</sup> P. Selman & C. Swanwick, 'On the Meaning of Natural Beauty in Landscape Legislation' (2010) 35(1) *Landscape Research*, pp. 3-26.

<sup>62</sup> *Ness v. Albert*, 665 S.W. 2d 1 at 4 (1983).

substantive element of legal doctrine such as rules or standards that prescribe aesthetic criteria; (3) an expression of state sovereignty over nature, and thus access to environments for conservation or development purposes; and (4) an attribute of institutionalized processes including courts and public inquiries that deal with environmental law.

### 3.2. *Beauty as an Advocacy Gesture*

Proponents of better environmental laws frequently deploy aesthetic criteria, especially beauty, in nature conservation campaigns, to attract political support and community donations. Even the world's first national park, established at Yellowstone (US) in 1872, owes partly to the painter Thomas Moran and photographer William Henry Jackson, whose enticing images of it helped win US Congressional support.<sup>63</sup> They established a precedent, with depictions of scenic wilderness and charismatic wildlife often in the communications of contemporary environmental groups. Environmental advocates may also invoke 'negative' aesthetics, such as images of unsightly deforestation or pollution, for similar purposes. Greenpeace's on-going campaign to save whales uses evocative footage to solicit public empathy for their plight.<sup>64</sup> In Australia, campaigns to stop dams and forestry have relied heavily on sensuous imagery of threatened 'pristine wilderness', such as Peter Dombrovskis' photographs of Tasmania's Franklin River at risk of a proposed hydro-power development in the early 1980s.<sup>65</sup> One consequence is that areas or species that benefit from such tactics may leave 'ordinary' (unbeautiful) nature without commensurate legal protection. Another consequence is social; unsightly development may be shifted to areas occupied by less affluent communities. Equally, the discourse of exalted 'wilderness' values may exclude their human history.

Some of these tensions are evident in current controversies over wind energy projects with local communities are fearful of the noise or visual impacts of turbines in their vicinity which might render their environs less 'beautiful'.<sup>66</sup> Yet, climate-conscious activists usually advocate wind farms as a source of renewable

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<sup>63</sup> N. Storchlic, 'We Have a Painter to Thank for Yellowstone', *National Geographic Magazine*, Apr. 2016, available at: <http://www.nationalgeographic.com/magazine/2016/05/explore-thomas-moran-yellowstone-paintings>.

<sup>64</sup> A. Kalland, *Unveiling the Whale: Discourses on Whales and Whaling* (Berghahn Books, 2009), p. 42.

<sup>65</sup> T. Bonyhady, 'No Dams: The Art of Olegas Truchanas and Peter Dombrovskis,' in R. Butler (ed.), *The Europeans: Émigré Artists in Australia 1930 - 1960* (National Gallery of Australia, 1990), pp. 236-53.

<sup>66</sup> J. Good, 'The Aesthetics of Wind Energy' (2006) 13(1) *Human Ecology Forum*, pp. 76-89.

energy, and welcome legislation to fast-track project approvals, as adopted in Ontario (Canada), through the Green Energy Act 2009, for instance.<sup>67</sup> Conversely, some jurisdictions, such as the state of Victoria (Australia), have given greater weight to the aesthetic concerns of impacted local communities.<sup>68</sup> Difficult issues thus arise over the distribution of the aesthetic, ecological, and economic costs and benefits of wind turbines. We address the problem of how to weigh aesthetic values with other policy criteria proposed for environmental law in the next part.

### **3.3. *Beauty in Environmental Law Doctrine***

We now turn to investigate how environmental law doctrine specifically embraces beauty in its rules, standards, and adjudicative practice. The contexts include landscape management, biodiversity conservation, ecological restoration, and pollution control. The law may direct regulators to protect areas of extraordinary natural beauty, to curb unsightly developments or to remediate malodorous pollution that can impair beauty. Statutory references to aesthetic standards are typically cursory, and often framed around general legislative goals rather than practical regulatory standards. For instance, the UK's Countryside and Rights of Way Act 2000 provides for the designation of 'areas of outstanding natural beauty' (AONB) but does not define 'natural beauty'.<sup>69</sup> This task thus shifts to supplementary policy guidance as developed through public consultation, with the result of which is that natural beauty is predominantly defined with reference to the 'character' of the landscape as evident in hedge rows, mature trees, archaeological ruins, topography, and so on.<sup>70</sup> As of December 2017, there are 46 AONB in the UK, covering about 20% of its land.<sup>71</sup> In the US, the Antiquities Act 1906 enables the President to create, by proclamation, national monuments from federal lands to safeguard notable cultural and natural features.<sup>72</sup> While this statute does not explicitly authorize protection of lands for their scenic beauty or other aesthetic attributes, its implementation has extended to such goals.<sup>73</sup> Other

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<sup>67</sup> S.O. 2009, c. 12, Sched. A.

<sup>68</sup> E. de Wit & A. Guild, 'Winds of Change: Wind Farm Amendments to Victorian Planning Schemes' (Norton Rose Fulbright, 17 Mar. 2011), available at: <http://www.nortonrosefulbright.com/knowledge/publications/35896/winds-of-change-wind-farm-amendments-to-victorian-planning-schemes>.

<sup>69</sup> 2000, c. 37, ss. 82-93.

<sup>70</sup> Selman & Swanwick, n. 61, above, pp. 13-5.

<sup>71</sup> Statistics from Landscapes for Life are available at: <http://www.landscapesforlife.org.uk>.

<sup>72</sup> Pub. L. 59-209, 34 Stat. 225.

<sup>73</sup> See further, C.A. Klein, 'Preserving Monumental Landscapes Under the Antiquities Act' (2002) 87 *Cornell Law Review*, pp. 1333-404.



related US legislation which *does* explicitly identify aesthetic criteria for protecting federal public lands include the Wilderness Act 1964<sup>74</sup> and the Federal Land Policy and Management Act 1976,<sup>75</sup> both of which refer to ‘scenic’ values as goals for protection. Aesthetic values of individual species can also solicit legal protection. The US Bald Eagle Protection Act 1940 protects a creature that has been the country’s national emblem since 1782,<sup>76</sup> while the Endangered Species Act 1973 protects threatened species for reasons that include the preservation of their ‘esthetic....value to the Nation and its people’.<sup>77</sup>

Another example is environmental legislation that acknowledges aesthetic values such as beauty but without using such values as criteria for decision making. For instance, New Zealand’s Te Urewera Act 2014, which gives legal personhood and protection to about 212,000 hectares of a former national park, describes the reconstituted sanctuary as ‘ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with ... remote beauty’.<sup>78</sup> No part of this legislation turns on specific criteria of beauty, and the legislation itself primarily addresses Maori grievances rather than safeguarding natural beauty.

Another way in which legislation can acknowledge environmental aesthetics is by regulating activities that might infringe them. The Minnesota Environmental Rights Act 1971 provides for civil remedies to protect ‘natural resources’, which it defines to include ‘scenic and esthetic resources’.<sup>79</sup> It has been left to the courts however, ‘to define authoritative criteria for the evaluation’ of such aesthetic values.<sup>80</sup> Legislation obliging environmental restoration, such as of former mines and brownfield sites, also commonly includes aesthetic criteria: Ontario’s Mining Act stipulates that ‘aesthetics are ... [an] important’ objective when planning rehabilitation of former open pit mines.<sup>81</sup> In practice, aesthetic criteria are applied in rehabilitating Ontario’s numerous abandoned pits and

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<sup>74</sup> Pub. L. 88-577, 78 Stat. 890.

<sup>75</sup> 43 USC, ss. 1701-1784.

<sup>76</sup> The Act was later amended to include another species, and is now known as the Bald and Golden Eagle Protection Act, 16 USC 668-668c.

<sup>77</sup> Pub. L. No. 93-205, 87 Stat. 884, 16 USC s. 1531(a)(3).

<sup>78</sup> Public Act 2014, No. 51, s. 3(1).

<sup>79</sup> Minnesota Statutes (1990) ss. 116B.02, subdivision 4.

<sup>80</sup> T. Murphy, ‘Environmental Law: Protection of Scenic and Aesthetic Resources Under the Minnesota Environmental Rights Act—State ex rel. Drabik v. Martz, 451 N.W.2d 893 (Minn. 1990)’ (1991) 17(4) *William Mitchell Law Review*, pp. 1190-214, at 1192.

<sup>81</sup> Mining Act, R.S.O. 1990, c. M.14, Ontario Regulation 240/00, cl. 19.

quarries, with one stakeholder observing in 2008 that ‘the main objective of the work is to the sits safer, more productive, and more aesthetically appealing’.<sup>82</sup>

Protection of beauty also features in the adjudication of disputes. The tort of private nuisance, for example, protects a property owner’s use and enjoyment of her land and requires courts to balance aesthetic considerations, community interests and utility, in deciding whether to prohibit nuisance activities. Generally, courts are unwilling to accept mere unsightliness as an actionable wrong.<sup>83</sup> This is exemplified in a recent decision of the Supreme Court of Vermont (US), where the impact of a commercial solar array on an area’s ‘rural aesthetic’ was deemed insufficient to constitute a nuisance.<sup>84</sup> Instead, private nuisances are largely decided on the basis of olfactory and aural criteria which can be more objectively assessed and thus avoids courts taking on the uneasy role of ‘arbiters of style and taste.’<sup>85</sup>

Examples do exist of courts being less anxious about engaging with complex aesthetic considerations. In a 2004 decision of the High Court of South Africa, the court elevated an aesthetic complaint to one about the value of the property, which enabled it to find that the installation of a thatched roof amounted to a private nuisance.<sup>86</sup> In the US, courts have adjudicated claims about the beauty of a particular area in relation to zoning decisions and administrative challenges to the exercise of the government power of eminent domain (that is, to take private property for public purposes).<sup>87</sup> In the growing body of jurisprudence relating to climate change, US courts have acknowledged that ‘aesthetic and environmental wellbeing, like economic wellbeing, are important ingredients of the quality of life.’<sup>88</sup> Applicants have evoked ugly imagery such as sewage-soaked carpets and the ‘black dead spikes’ of fire-decimated forests in order to demonstrate an injury in fact (a requirement of standing) in challenges to state inaction on greenhouse

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<sup>82</sup> Lanark Stewardship Council (LSC), *A Place in Time: Te Natural Resoucrs of Lanmark Council* (LSC, 2008), p. 108.

<sup>83</sup> G.P. Smith II, ‘The Price of Beauty: An Economic Approach to Aesthetic Nuisance’ (1991) 53(15) *Harvard Environmental Law Review*, pp. 53-83, at 66-75; however, visual asethetics have been found relevant in terms of access to natural light (*Regan v. Paul Properties DPF No 1 Ltd* [2006] EWCA Civ 1391) and the notorious ‘sight’ of sex workers (*Thompson-Schwab v. Costaki* [1956] 1 WLR 335 (CA)).

<sup>84</sup> *Myrick v. Peck Electrival Company*, VT 4 (2017).

<sup>85</sup> *Ibid.*

<sup>86</sup> *Waterhouse Properties v. Hyperception Properties* [2004] ZAFSHC 97.

<sup>87</sup> Smith II, n. 87 above, pp. 73-80.

<sup>88</sup> *Washington Environmental Council v. Bellon* 732 F.3d 1131 (9th Cir. 2013)

gas (GHG) emissions.<sup>89</sup> Judicial confidence in introducing aesthetic criteria into legal doctrine is therefore mixed, but not beyond the realms of possibility.

International environmental law also acknowledges aesthetic criteria sporadically. It does so most emphatically in the 1972 World Heritage Convention with 'outstanding ... natural beauty' being one stipulated criterion for properties to be included in the World Heritage List.<sup>90</sup> Yet, the term 'natural beauty' is defined not in the legislation but through supplementary guidance. UNESCO, which administers the Convention, had advised that there is no formal classification system of 'natural beauty' and its Operational Guidelines for the Convention give little elaboration other than to explain that it means 'exceptional natural beauty and aesthetic importance'.<sup>91</sup> Similarly, the Council of Europe's European Landscape Convention of 2000,<sup>92</sup> acknowledges in its Preamble the importance of landscapes of 'outstanding beauty' but does not contain any other provisions that explicitly refer to aesthetic values although they certainly can be implied as highly relevant.<sup>93</sup> Interestingly, the Convention extends to 'landscapes that might be considered outstanding as well as everyday or degraded landscapes',<sup>94</sup> thus recognizing that culturally valuable landscapes including aesthetic values should not be confined to the stereotypically scenic.

### ***3.4. Aesthetics of State Sovereignty over Nature***

The third way in which the legal system may interact with beauty, and other environmental aesthetics, is by embodying them in expressions of state sovereignty rather than in the regulation of environmental activities and impacts as such. Such use of environmental aesthetics is sometimes ambiguous, equally capable of interpretation as a symbol of respect for nature as of its subjugation. Sovereign legal authority has long been expressed through symbols that draw on aesthetic imagery, which often make reference to beautiful animals and plants. They appear frequently on coat-of-arms, bank notes and coins, and national flags. The Australian coat-of-arms features a kangaroo and emu, while India's includes a lion. Greenland has the polar bear, and Swaziland an elephant. National

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<sup>89</sup> *Julian v. United States* 271 F. Supp. 3d 1224 (2016)

<sup>90</sup> N. 2 above, Art. 2.

<sup>91</sup> UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention* (July 2012), p. 21, available at: <https://whc.unesco.org/archive/opguide12-en.pdf>.

<sup>92</sup> Florence (Italy), 20 Oct. 2000, in force 1 Mar. 2004, available at: <https://rm.coe.int/1680080621>.

<sup>93</sup> *Ibid.*, Preamble.

<sup>94</sup> *Ibid.*, Art. 2.

currency is similarly filled with natural iconography, such as the elephants and giraffes on Zimbabwe's bank notes and the zebra on Rwanda's. Likewise, many sovereign flags display environmental features associated with their country, such as the maple leaf (Canada), condor (Ecuador) and turtle (Cayman Islands). In some case, prominent species have become politicized symbols of sovereign authority and national culture, as with the charismatic panda bear for China and its international practice of 'panda diplomacy' to win political favours.<sup>95</sup> Music is also used to articulate sovereign authority, notably through melodious national anthems that affirm state authority (for example, the British anthem beginning with 'God save the Queen').

Another aesthetic expression of state authority, albeit one not tied explicitly to beauty, is cartography.<sup>96</sup> Official maps can serve to stamp government authority on territory and subjects, thereby exerting control over any Indigenous peoples (for instance, by deeming their lands to be *terra nullius*) and over 'wilderness' and other environmental spaces to be colonized for nation building. By demarcating boundaries and dividing geographies, maps aid in excluding or granting access to natural resources and determining how they will be governed. The spatial representation of nature through maps can violate ecological (and cultural) relationships as legal authority is mapped according to different political and historical exigencies. This is illustrated by the long-standing mismanagement of Australia's Murray-Darling river basin, which became highly degraded owing to governance arrangements attuned more to the territorial claims of competing Australian state governments than the holistic ecological relationships with the huge river basin.<sup>97</sup> Maps matter, as they contribute symbolically to the legitimacy of governmental authority. Environmental law thus functions within a cartographic expression of sovereign authority that influences the options available to its regulators.

### **3.5. Aesthetics in Legal Process and Dialogue**

Decision-making fora such as courts, public inquiries, treaty conferences and secretariats, shape the aesthetics of environmental law. These governance spaces evoke their own material aesthetics and articulate aesthetics-informed dialogue

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<sup>95</sup> H. Nicholls, *The Way of the Panda. The Curious History of China's Political Animal* (Pegasus, 2011).

<sup>96</sup> J. Branch, *The Cartographic State: Maps, Territory and the Origins of Sovereignty* (Cambridge University Press, 2014); K. Miles, 'Insulae Moluccae: Map of the Spice Islands, 1594', in IJ. Hommann & D. Joyce (eds), *International Law's Objects* (Oxford University Press, 2018), *forthcoming*.

<sup>97</sup> D. Connell, *Water Politics in the Murray Darling Basin* (Federation Press, 2007).

about the issues they consider. This understanding of environmental aesthetics as embedded in institutionalized relationships of cultural and ecological salience dovetails with the regulatory insights of others who have touched on this topic, such as Andreas Philippopoulos-Mihalopoulos.<sup>98</sup>

The material aesthetic includes public consultation processes that engage participants with aesthetic imagery (for example, posters and brochures), the decorum of public environmental inquiries and tribunals such as judges' attire and courtroom layout (often informal compared to regular courts),<sup>99</sup> and presentation of scientific evidence in such fora (including maps and photos of environmental impacts). Public inquiries and environmental assessment procedures sometimes include site visits to places where participants can engage directly with specific aesthetic contexts. For instance, New Zealand's Waitangi Tribunal, which considers Maori grievances relating to rights to control natural resources and other issues connected with the 1840 Treaty of Waitangi, often makes field trips to sites of significance in claims.<sup>100</sup> Aesthetic considerations also arise in legal discourses. Much environmental governance emanates from institutionalized community consultation and stakeholder engagement, and these processes can by virtue of their terms of reference, methods and member composition become a valuable means to articulate and debate aesthetic values. Such institutional processes can have particular traction in communities whose sense of place is at stake. Case law also reveals the presence of aesthetic character in legal reasoning, where legal arguments are embellished with 'rhetoric, metaphor, form, images and symbols'.<sup>101</sup> Martha Nussbaum believes that law can be investigated as an aesthetic product in its own right, as a form of literature, and she encourages greater use of narratives in legal reasoning that evoke sympathy for the cause, which is lacking in other models of legal reasoning with a more abstract and technical style lack.<sup>102</sup> The British judge Lord Denning was master of this juridic poetry, evoking iconic visions of bluebell woods and English summertime as a prelude to his legal analysis.<sup>103</sup>

The foregoing remarks obviously cover a lot of ground, so we will illustrate them in more detail with a further example – an important Australian court case

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<sup>98</sup> Philippopoulos-Mihalopoulos, n. 14 above.

<sup>99</sup> G. Watt, *Dress, Law and Naked Truth* (Bloomsbury, 2013).

<sup>100</sup> Waitangi Tribunal, 'Tribunal Site Visit, Wairau', available at: <https://teara.govt.nz/en/photograph/32499/tribunal-site-visit-wairau>.

<sup>101</sup> D. Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (University of California Press, 2010), preface.

<sup>102</sup> M. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Beacon Press, 1997).

<sup>103</sup> *Hinz v. Berry* [1970] 2 QB 40; *Miller v. Jackson* [1977] QB 96.

over a proposed wind farm. Heard by the New South Wales Land and Environment Court, the litigation pitched the public benefits of green, renewable energy against the aesthetic impacts on the community which would host 62 wind turbines.<sup>104</sup> In approving the development, Chief Justice Brian Preston cited the principle of intergenerational equity as a prevailing consideration in a project that would help address climate change. In gauging the aesthetic impacts on the historic village of Taralga and its vicinity, the court reviewed five photomontages depicting how the turbines might look from different locations. It also gathered evidence from a site inspection and heard from three 'visual impact assessment experts'. All this was in addition to the assessment of the aesthetic issues during the government's initial approval of the project, which included an environmental impact study that attracted 218 submissions from the general public and non-governmental organizations (NGOs), of which 165 opposed the project and 23 raised some concerns.

The Court grappled at great length with how to comprehend the visual and sonic impacts in legally cognizable language. Chief Justice Preston began by noting that 'insertion of wind farms into a rural landscape involves interrupting the rural and natural cohesion of that landscape'.<sup>105</sup> Yet, he found the evidence of the 'visual impact assessment experts' to 'ultimately [be] of little assistance as there was no agreement between [them]'.<sup>106</sup> He then considered whether the project could be modified, such as by fewer or repositioned turbines, but concluded that this might render the project 'uneconomic'.<sup>107</sup> He also rejected requests for monetary compensation for property owners affected by the 'blight' of the wind farm, concluding that the claim would 'strike at the basis of the conventional framework of landuse planning'.<sup>108</sup> The noise impacts, in contrast, were much easier for the court to adjudicate because technology allows for precise quantification of noise levels, and the availability of governance standards are available, such as the 'South Australian Environmental Noise Guidelines: Wind Farms', which the court considered.

In sum, the Taralga wind farm case shows how different aesthetic values resonate in legal discourse unevenly, and how the processes used to understand them, spanning site visits, commissioning expert evidence and public

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<sup>104</sup> *Taralga Landscape Guardians Inc v. Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59 (12 Feb. 2007).

<sup>105</sup> *Ibid.*, para. 116.

<sup>106</sup> *Ibid.*, para. 123.

<sup>107</sup> *Ibid.*, para. 136.

<sup>108</sup> *Ibid.*, para. 160.

submissions, might resist definition or comparison in legally intelligible standards. We take this enquiry further in the following part and evaluate systematically the principal challenges to including beauty in environmental law decisions, and discuss how to overcome them.

#### 4. BEAUTY: A VIABLE VALUE FOR ENVIRONMENTAL LAW?

##### 4.1. *What knowledge and values can beauty convey to environmental governance?*

Thus far, we have explained the importance of beauty as a key aesthetic value, emphasizing its socio-cultural context and the philosophical debates that give rise to interpretations of beauty as a decision-making criterion. We have considered how beauty, and aesthetic criteria more broadly, shape environmental law in matters of legal doctrine, political advocacy for stronger laws, institutional processes, and as expressions of state sovereignty. We now turn to the key challenge of ascertaining or evaluating the value of beauty in the context of environmental law. The issue is that a beautiful aesthetic relationship imparts diverse knowledge and values, both potentially positive and negative, for environmental governance. Beauty can fortify emotional and ethical commitments to nature stewardship but also detract from them and even invite unscrupulous manipulation. Thus, to guide our enquiry we pose three subsidiary questions. Firstly, what knowledge and values can beauty convey to environmental governance, such as for nature conservation or pollution control? Secondly, can, and should, beauty be codified into functional legal standards? Thirdly, can beauty be reconciled with other non-aesthetic values in governance, such as scientific and economic values?

Proponents of natural beauty postulate that it strengthens emotional empathy for environmental causes,<sup>109</sup> primarily because human beings have biophilic instincts, as Harvard biologist Edward O. Wilson argued.<sup>110</sup> Eco-art can facilitate such compassion, by shaping ‘public conception of “unknowable” spaces that are beyond the reach and view of the average person’.<sup>111</sup> Where governance solicits public participation, such as in community-based land care, such

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<sup>109</sup> R. Lumber, M. Richardson & D. Sheffield, ‘Beyond Knowing Nature: Contact, Emotion, Compassion, Meaning, and Beauty are Pathways to Nature Connection’ (2017) *Plos One*, <https://doi.org/10.1371/journal.pone.0177186>.

<sup>110</sup> E.O. Wilson, *Biophilia* (Harvard University Press, 1986).

<sup>111</sup> G. Kolb & J. Needham, ‘Antarctic Dreams’ (2014) 47(2) *Exposure*, pp. 4-7, at 7.

emotional connection might nurture participants' fidelity.<sup>112</sup> In contrast, while science and economics supply ample reasons to safeguard nature's bounty regardless of its 'beauty', these phlegmatic disciplines may be less successful in emotionally engaging us. No doubt, science can stir passions, as witnessed by fiery debates over genetically modified organisms and climate change predictions. Economic policy can generate similar visceral feelings, especially regarding poverty and inequality. But these disciplines tend to arouse us on mostly intangible or abstracted concerns regarding fear of health impacts or economic hardship, rather than to focus human emotions on specific localities or landscapes, as do aesthetic values such as recognition of beautiful scenery.

Environmental behavioural models in the social psychology literature have verified empirically how opportunities to appreciate the aesthetic values of nature, especially via artistic representation and community arts, can stimulate pro-environmental behaviour, such as by fostering awareness of the consequences of one's behaviour, unfreezing ingrained, adverse habits, and fostering social cooperation on environmental challenges.<sup>113</sup> Beauty may thus fortify ethical constraints on our environmental behaviour. One pioneer of ecological ethics, Aldo Leopold, suggested this when hypothesizing that: 'a thing is right when it tends to preserve the integrity, stability, and *beauty* of the biotic community. It is wrong when it tends otherwise'.<sup>114</sup> Thus natural beauty can be interpreted as a non-instrumental value and, following Akhtar-Khavari, its artistic expressions of it can help foster 'less anthropocentric conceptions of matter and the natural world'.<sup>115</sup>

Such claims however depend on the relationships and knowledge of participants in specific contexts. We might even find 'beauty' in ghastly environs, depending on the artistic interpretation: the sublime imagery of industrialized China in Edward Burtynsky's *Manufactured Landscapes*<sup>116</sup> can captivate the viewer with 'beautiful' devastation. Wind farms or solar arrays, as noted earlier, can blight the landscape in the eyes of some but beautifully express our commitment to a safer climate. Emily Brady suggests that active community relationships with, rather than just observations of nature, such as via ecological restoration and

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<sup>112</sup> GHD, *Multiple Benefits of Landcare and Natural Resource Management* (Final report for the Australian Landcare Council, 2013), pp. 13-7.

<sup>113</sup> D.J. Curtis, 'Using the Arts to Raise Awareness, and Communicate Environmental Information in the Extension Context' (2011) 17(2) *Journal of Agricultural Education and Extension*, pp. 181-94.

<sup>114</sup> A. Leopold, *A Sand County Almanac* (Oxford University Press, 1949), p. 262 (emphasis added).

<sup>115</sup> Akhtar-Khavari, n. 17 above, p. 130.

<sup>116</sup> J. Baichwal, *Edward Burtynsky: Manufactured Landscapes*, (Zeitgeist Films, 2006).



community gardening, can foster eco-centric ethical commitments.<sup>117</sup> Even so, aesthetics is surely only one of several overlapping bases for ethical valuation of nature, which include theories about intergenerational equity and intrinsic values.

Not only might we perversely find 'beauty' in ecological damage; beauty can directly motivate wantonness. Animals have long been hunted for their furs, feathers, tusks and other aesthetic 'commodities' in our desire to decorate our bodies and homes, often with the imprimatur of the law. Plants do not escape either, with orchids and other pretty species pillaged by collectors. Taxidermy displays in natural history museums and hunters' trophy lodges memorialize the aesthetics of vanquished wildlife. Blending science and spectacle, taxidermy attained its apotheosis in the 20<sup>th</sup> century landscape diorama providing viewers with life-like, three-dimensional displays of colonized nature.<sup>118</sup> The persecution of the beautiful inhabits many cultures, not just Western societies; native Americans traditionally adorned themselves with furs and feathers as symbols of chiefly status.<sup>119</sup> Beauty might thus be a *lingua franca* of humanity's desire to dominate nature as much as protect it.

Even when we desire to restore damaged ecologies, our aesthetic preferences might clash with nature's best interests. Lay people might perceive as messy and unruly a rewilding ecosystem as messy and unruly whereby forest fires, fallen trees, or animal carcasses are left to perform their regenerative roles. British academics Jonathan Prior and Emily Brady identify two such examples in Europe.<sup>120</sup> One is the Oostvaardersplassen reserve in the Netherlands, where the 'de-domestication' of introduced species such as Heck cattle and Konik ponies is occurring on 56 km<sup>2</sup> of polder reclaimed in 1968.<sup>121</sup> In the name of rewilding, the wildlife have been left to the vagaries of nature, which in some instances has led to mass die-offs during winter food shortages – a negative aesthetic for animal welfare groups who tried unsuccessfully to challenge in court the reserve's management.<sup>122</sup> Another example is the restoration of Scotland's Carrifran Wildwood: the project led by an NGO to rewild a denuded valley to its condition

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<sup>117</sup> E. Brady, 'Aesthetic Regard for Nature in Environmental and Land Art' (2007) 10(3) *Ethics, Place and Environment*, pp. 287-300.

<sup>118</sup> S.T. Asma, *Stuffed Animals and Pickled Heads: The Culture of Natural History Museums* (Oxford University Press, 2003).

<sup>119</sup> A.M. DeMeo, 'Access to Eagles and Eagle Parts: Environmental Protection v. Native American Free Exercise of Religion' (1995) 22 *Hastings Constitutional Law Quarterly*, pp. 771-813.

<sup>120</sup> Prior & Brady, n. 59 above.

<sup>121</sup> J. Lorimer & C. Driessen, 'Wild Experiments at the Oostvaardersplassen: Rethinking Environmentalism in the Anthropocene' (2014) 39(2) *Transactions*, pp. 169-81.

<sup>122</sup> See further: J. Lorimer & C. Driessen, 'Experiments with the Wild at Oostvaardersplassen' (2014) 35(3-4) *ECOS*, pp. 44-52, at 47.

of 6,000 years ago has been controversial for some in the local community. They prefer the area's existing aesthetic and recreational values associated with open, pastoral countryside to the uncertain future aesthetics of a forest that will take a few centuries to fully mature.<sup>123</sup> This controversy has played out more extensively across the UK with George Monbiot criticizing the National Trust's adoration of the highland moors of Wales and Scotland, which, he points, out were once verdant forests until logged or grazed to destruction.<sup>124</sup>

Finally, the seductive qualities of beauty can manipulate public opinion, as the business sector knows well. In the name of 'corporate social responsibility' (CSR), contrived aesthetics figure prominently in businesses' campaigns to convince consumers to buy products or services for their supposed green credentials. Advertisements for cars, which may highlight their fuel efficiency or other 'eco-benefits', typically show drivers cruising unhurriedly through magnificent, unhurried countryside, as though motor vehicles belong with the trees and animals rather than to congested, polluted highways. Deceitful aesthetics can get even more repugnant: the DuPont chemical company, one of the largest US polluters, in 1990 unveiled its new double-hulled oil tankers with advertisements that featured seals and other marine life clapping their flippers or wings in applause to the tune of Beethoven's Ode to Joy.<sup>125</sup> As Toby Miller shows in *Greenwashing Culture*, such hubris, is not confined to selling corporate wares.<sup>126</sup> It manifests in Hollywood's 'green celebrities', whose jet-setting lifestyles impose a huge eco-footprint, and corporate sponsorship of museums, art galleries and in other cultural institutions by firms with poor eco-credentials (such as BP's patronage of London's Tate Gallery for 26 years in defiance of climate change activists).<sup>127</sup> Corporate green washing should concern environmental lawyers because governance trends over recent decades which have ceded greater self-responsibility to business actors amplify risks of unscrupulous practices that can weaken environmental performance.

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<sup>123</sup> See further at: <http://www.carrifran.org.uk>.

<sup>124</sup> G. Monbiot, 'Why are Britain's Conservation Groups so Lacking in Ambition?', *The Guardian*, 18 Oct. 2013, available at: <https://www.theguardian.com/environment/georgemonbiot/2013/oct/18/uk-carnivores-rewild-wolves-bison-conservation>.

<sup>125</sup> The advertisement is available at, see at: <http://www.youtube.com/watch?v=zJZFfeLRCJs>.

<sup>126</sup> T. Miller, *Greenwashing Culture* (Routledge, 2013).

<sup>127</sup> N. Khomami, 'BP to end Tate Sponsorship after 26 Years', *The Guardian*, 11 Mar. 2016, available at: <https://www.theguardian.com/artanddesign/2016/mar/11/bp-to-end-tate-sponsorship-climate-protests>.

The foregoing suggests that beauty is a two-edged sword. It enriches environmental decision making, from the levels of individual emotional empathy through to social cooperation. But beauty can also serve less desirable behaviours—corporate green washing or community resistance to ecological restoration projects that defy expectations of beauty. These considerations thus highlight the importance of legal institutions in influencing how beauty informs environmental behaviour. For instance, corporate greenwashing can be curbed if laws are enforced to prevent misleading advertising. Public participation in decision-making can be critical to mediating a community's distaste for aesthetically challenging eco-restoration activities. Law can make the difference between the positive and negative connotations of beauty from the perspective of the health of the biosphere.

#### ***4.2. Can and should beauty be codified into functional legal standards?***

If a society values its aesthetic relationships with fauna, flora and landscapes, can it codify them into governance standards? Current legal practice suggests the answer is no if the expectation is a prescriptive, laundry list of beauty attributes. Although human beings show strong propensities to mould their surroundings to their aesthetic taste, from garden design to urban architecture, the language of aesthetics does not easily convert into legal formulae. Indeed, it seems preposterous to imagine rigid legal standards of natural beauty based on tree girth and height, water hue, or species composition. British landscape planning has largely jettisoned the statutory language of protecting 'natural beauty' in favour of landscape 'character' assessments.<sup>129</sup> As noted earlier, in international law the World Heritage Convention's operational guidelines shed little guidance on what 'outstanding natural beauty' means.<sup>130</sup> Some aesthetic attributes are potentially measureable and definable, such as ambient noise and cultural heritage; yet the quality of beauty itself is more elusive. Many jurisdictions possess detailed regulations on acceptable noise levels because they can be precisely measured through acoustic technologies and explained through expert evidence.<sup>131</sup> As a result, courts are content to adjudicate private disputes on the basis of quantifiable aesthetic values whereas they tend to eschew 'notoriously subjective and

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<sup>129</sup> Selman & Swanwick, n. 61 above.

<sup>130</sup> UNESCO, n. 91 above, cl. 77(vii).

<sup>131</sup> J. Stewart, et al. (eds), *Why Noise Matters: A Worldwide Perspective on the Problems, Policies and Solutions* (Earthscan, 2011).

personal' discussions about what is 'pretty' or 'beautiful'.<sup>132</sup> Similarly, laws to safeguard historic heritage such as buildings and archaeological ruins use indicia like rarity and representativeness to justify protections, although we may disagree whether such criteria denote 'beauty'.<sup>133</sup>

More specifically, three challenges must be managed if we expect the law to codify beauty. Firstly, judgements of beauty are strongly personality- and culture-bound. Secondly, standards of beauty change, as societies change and, thirdly, codification of beauty might favour protection of 'special' nature at the expense of the 'ordinary'.

Firstly, because of the common assumption that the human response to aesthetics is subjective rather than rational or factual, judgements of beauty can be viewed as deficient. Colloquially, this means 'beauty is in the eye of beholder'. However, some evidence to the contrary exists. Research suggests a shared, cross-cultural preference for landscapes that resemble *Homo sapiens'* evolutionary cradle, the African savannah.<sup>134</sup> Psychologists also identify a shared desire for fractal patterns 'that repeat at increasingly fine magnifications' such as clouds, tree lines and coastlines.<sup>135</sup> Water also is a near-universal attractant for people.<sup>136</sup> Such commonalities however do not preclude cultural variations in aesthetic tastes. As noted earlier, we disagree on wind farms, and indigenous environmental managers can read different aesthetic values in landscapes to their non-indigenous counterparts. All this is apart from the underlying uneasiness many legal theorists, from 'Crits' to Legal Realists, have with any belief that the law can objectively reflect social norms in unequal and pluralistic societies.<sup>137</sup> Thus, judgements of beauty seem to have a biological basis but can manifest in diverse ways in cultural contexts.

Secondly, because standards of beauty change, the question arises whether the law *should* follow or shape aesthetic preferences, especially given they can shift quite dramatically as the following anecdote shows. The Tasmanian devil (*Sarcophilus harrisi*), inhabiting the Australian island of Tasmania, was in the 19<sup>th</sup> century described by one colonial writer as a 'very ugly, savage and mischievous

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<sup>132</sup> *Cornelis Dorland v. Anna Aletta Smits* [2002] ZAWCHC 20.

<sup>133</sup> Boer & Wiffen, n. 15 above.

<sup>134</sup> D. Dutton, *The Art Instinct. Beauty, Pleasure, and Human Evolution* (Bloomsbury, 2010), passim; J. Appleton, *The Experience of Landscape* (Wiley, 1975), pp. 73-4.

<sup>135</sup> J. Briggs, *Fractal Patterns: The Patterns of Chaos* (Touchstone, 1992).

<sup>136</sup> W. Nichols & C. Cousteau, *Blue Mind* (Back Bay Books, 2015).

<sup>137</sup> R.M. Unger, *Law in Modern Society* (The Free Press, 1976).

little beast,<sup>138</sup> and had incurred private and government bounties to hasten its demise. Yet, the marsupial carnivore is now a beloved tourist ambassador and in 2015 became the state's official animal emblem. The species received legal protection in 1941 owing to its rarity, but this had seemingly little impact on its aesthetic appeal, which only shifted decisively into positive territory over the last few decades. A similar story could be told about the European wolf, now enjoying a renaissance in countries where it was persecuted as vermin until recently.<sup>139</sup> The law is not irrelevant to these shifting aesthetic relationships, yet neither can it be particularly instrumental if its role is simply to prescribe an animal's conservation status (pest or protected) rather than to cultivate community knowledge about wildlife and their stewardship.

Thirdly, attempting to codify beauty risks stratifying nature into 'special' versus 'ordinary' categories to the potential detriment of the latter. The aesthetic values that tend to captivate us most are frequently associated with 'specialness' – Mount Fuji, the Grand Canyon or the Pyramids of Giza. The World Heritage Convention and its domestic law variants evoke that sentiment, and we can hardly deter societies wishing to protect their most esteemed natural and cultural heritage. However 'specialness' has drawbacks: species should be protected before they become so endangered or rare as to move us; and pretty landscapes are not necessarily more ecologically valuable than the 'mundane' grasslands or swamps.<sup>140</sup> 'Specialness' should also trouble us if it serves to bifurcate the human and natural worlds. Even human-dominated urban landscapes can provide refuges for resilient wildlife<sup>141</sup> and, conversely, nature is a cultural landscape not a wilderness. The 'special' versus 'ordinary' bias in judgements of natural beauty also highlights that anthropocentric taste can be damaging when determining the level of environmental protection. Beauty may thus amount to no more than another human-serving, utilitarian criterion, at odds with the push by deep ecologist thinkers to respect the intrinsic values of nature.<sup>142</sup>

Accordingly, if we are to leverage action through environmental aesthetics, we must cultivate beauty or other aesthetic values more widely than just within

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<sup>138</sup> C.A. Meredith, *My Home in Tasmania: During a Residence of Nine Years, Volume 1* (John Murray, 1852), p. 261.

<sup>139</sup> A.D. Smith, 'On the Trail of the Wolf, Europe's Much Maligned and Misunderstood Predator', *The Guardian* 3 Jan. 2016, available at: <https://www.theguardian.com/environment/2016/jan/02/wolf-maligned-predator-poland-carpathians>.

<sup>140</sup> H. Doremus, 'The Special Importance of Ordinary Places' (2000) 23(2-3) *Environ*, pp. 3-16.

<sup>141</sup> T. Low, *The New Nature* (Penguin, 2017).

<sup>142</sup> L. Vikka, *The Intrinsic Value of Nature* (Rodopi, 1997).

nature's 'special' enclaves. Artists can aid here by helping people to re-imagine aesthetic values and relationships in our environs: some artists have photographed amazing beauty in obscure fungi on the forest floor or recorded evocative nature soundscapes,<sup>143</sup> while others have enlightened us about the character of humble marine invertebrates rather than majestic whales,<sup>144</sup> or revealed the evocative and ephemeral impacts of human breath on natural materials like limestone.<sup>145</sup> Furthermore, artist collaborations with environmental lawyers and political groups, such as the Climarte group in Australia,<sup>146</sup> show how environmental art can occupy public spaces to forge new socio-legal narratives about global environmental challenges and solutions.

In meeting the foregoing three challenges, it becomes clear that the law seemingly cannot codify timeless and universal standards of natural beauty, however that does not mean beauty cannot be an important pillar of governance for a given community at a specific point in time. Fiona Reynold's recent book *The Fight for Beauty* gives examples of how some British communities have cited beauty to improve environmental governance, such as their successful campaign in the 1980s to stop forestry authorities creating ugly (and biologically damaging) conifer plantations on moorland landscapes.<sup>147</sup> Likewise, communities across Europe have stopped wind farms in EU Natura 2000 sites, in which aesthetic and biological criteria have dovetailed.<sup>148</sup> It would therefore seem that beauty can be a positive *lingua franca* in specific legal contexts even if it cannot be a global language.

### ***4.3. Can we reconcile beauty with non-aesthetic values in environmental governance?***

There are clear challenges for beauty to become its own global language, and we must further acknowledge that obstacles exist to beauty 'communicating' with the

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<sup>143</sup> E.g. work of Stephen Axford: discussed in J. Davis, 'Micro Fungi of Australia: In Pictures', *The Guardian* 23 June 2014, available at:

<https://www.theguardian.com/artanddesign/gallery/2014/jun/23/photography-fungi>.

<sup>144</sup> See the artistic portrayals of coral reefs by Alex McKenzie and Miranda Lowe: Royal Museums Greenwich, 'Who Are the Radical Fun Advisors', 27 Sept. 2017: available at:

<http://www.rmg.co.uk/discover/behind-the-scenes/blog/who-are-radical-fun-advisors>.

<sup>145</sup> See work of Inés Cámara Leret, available at: <http://www.inescamaraleret.com>.

<sup>146</sup> See at: <http://www.climarte.org>.

<sup>147</sup> F. Reynolds, *The Fight for Beauty* (Oneworld, 2016), pp. 177-86.

<sup>148</sup> European Commission, *EU Guidance on Wind Energy Development in Accordance with the EU Nature Legislation* (European Union, 2011), available at:

[http://ec.europa.eu/environment/nature/natura2000/management/docs/Wind\\_farms.pdf](http://ec.europa.eu/environment/nature/natura2000/management/docs/Wind_farms.pdf).

different languages that inhabit environmental law, notably the natural sciences and economics that commonly occupy its centre-stage. Their vernacular, evoked through concepts and methods such as the precautionary principle, conservation status, cost-benefit analysis, and financial incentives, not only neglect aesthetic values but may also conflict directly with them. Yet, public participation and social justice are strongly endorsed values in many legal instruments, such as the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).<sup>149</sup> Hence, it would be problematic to ignore the popular interest in experiencing aesthetic values or to reserve judgements of beauty to any self-proclaimed experts of aesthetic taste.

To illustrate this quandary, let us briefly return to the Australian wind farm litigation discussed in Section 3.5. The Court had to adjudicate over the alleged visual and acoustic sequelae of proposed wind turbines, with such impacts weighed against other law-mandated considerations including biodiversity impacts (including bird strikes), the provision of renewable energy to combat global warming, and possibly non-environmental considerations such as job creation. Clearly, the Court had a daunting task. Economists like to believe that they can reconcile such disparate factors through cost-benefit analysis, yet such approaches are problematic due to the necessary human judgements (biases) in determining the monetary values to assign.<sup>150</sup> Conceivably, the Court could have come to a variety of decisions, ranging from prioritizing the aesthetic impacts to ignoring them. Legislation could make life easier for judges by ranking in advance the relative importance of different factors, but judicial discretion can never be entirely eliminated, and local and novel circumstances frequently require bespoke solutions.

The problem of reconciling divergent values in legal governance is brought into sharp relief by systems theory, which conceptualizes modern society as acephalous, centrifugal and polycentric, functioning through semi-autonomous subsystems such as the market and government bureaucracy, each with its own language and protocols.<sup>151</sup> Sociologist Niklas Luhmann describes these subsystems as 'autopoietic', implying that each has evolved its own *lingua franca*, and therefore can respond to issues defined only within that language.<sup>152</sup> These

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<sup>149</sup> Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, 2161 available at: <http://www.unece.org/env/pp/welcome.html>.

<sup>150</sup> D. Kysar, *Regulating from Nowhere* (Yale University Press, 2010).

<sup>151</sup> See N. Luhmann, *Ecological Communication* (University of Chicago Press, 1989); N. Luhmann, *The Differentiation of Society* (Columbia University Press, 1982).

<sup>152</sup> N. Luhmann, *Social Systems* (Stanford University Press, 1995).

conditions make it difficult for society to govern environmental challenges in an integrated manner through different subsystems, including science (ecological knowledge) and market forces (economic values). This insight has led some legal scholars, such as Gunther Teubner and Eric Orts, to propose a model of 'reflexive law' that eschews expectations that the law, as a subsystem itself, can meld all other subsystem values into a single modality.<sup>153</sup> Instead, the law should stimulate a culture within companies, government agencies and other actors that encourages internal learning and behavioural change. To illustrate this process, the law could oblige companies to publicly report on their environmental performance, and that reporting process might in turn encourage corporate managers to learn more about their company's environmental impacts, and then their financial implications for the business, and finally to take corrective action. All this would occur without top-down edicts from the regulator to reduce pollution or whatever the desired environmental outcome. Systems theory does not however suggest rigid boundaries separating different spheres of society but rather maintains that cross-overs depend on finding common language or means of translating different ideas.

So, what would the foregoing mean for the incorporation of aesthetics with other factors in environmental regulation? Bricolage governance might ensue through process-oriented standards such as public inquiries that foster dialogue among different constituencies representing aesthetic values, scientific expertise, and economic incentives. Yet, this could easily lead to outcomes that favour the most well-resourced and 'noisy' advocates. Equally problematic would be to commodify environmental aesthetics into the language of economics, a trend already evident in CSR 'green washing', which can lead to unacceptable ecological impacts, for instance, national parks become playgrounds for eco-tourism rather than biodiversity stewardship.

A more productive communicative alliance might ensue through involvement of artists as interpretative intermediaries across economic, scientific and cultural domains. Evidence exists already of this productive synergy. Recent eco-documentary films such as *Plastic Ocean* (exposing marine plastic pollution) and *The End of the Line* (challenging global overfishing), as well as older films like Al Gore's *Inconvenient Truth* (addressing climate change), have become a popular

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<sup>153</sup> G. Teubner, *Law as an Autopoietic System* (Blackwell, 1993); E.W. Orts, 'Reflexive Model of Environmental Regulation' (1995) 5(4) *Business Ethics Quarterly*, pp. 779-94.



strategy for eco-artists and scientists to collaboratively shape public discourse.<sup>154</sup> Likewise, the collaboration between the London-based artist Alex McKenzie and scientist Miranda Lowe from Natural History Museum, has successfully forged new interpretative guidance on coral reefs and their need for greater protection.<sup>155</sup> Such collaboration in fact has much older vintage: artists regularly joined scientists in the 'Age of Discovery' of European overseas exploration, with artistic renderings of newly discovered plants and animals, and landscape drawings, that were instrumental in dissemination of scientific knowledge.<sup>156</sup> These partnerships, no doubt, may also foster narratives that marginalize certain perspectives and issues, as *Plastic Ocean* allegedly does. This suggests that the law must help structure interdisciplinary dialogue through transparency standards and interpretative guidance, which this article's conclusion further reflects on. The law does not sit outside these collaborative ventures. Social activism is fostered within engineered spaces such as public museums, art galleries and civic parks, and these spaces are created and supported by governments through land-use planning schemes, arts funding, freedom of expression laws, and diverse other mechanisms.

## 5. CONCLUSION

Some of the foregoing discussion might lead one to conclude that beauty should be banished from environmental law. But that is not our intention. Aesthetic taste is undeniably deeply ingrained in human nature, but manifests diversely through personal and cultural contexts. Nature is more than a material resource for economic sustenance, as it partakes in aesthetic relationships whose emotional and ethical dimensions can improve humankind and our fellow creatures with whom we share the biosphere.

The purpose of this article is not to 'solve' how environmental law should deal with beauty, but rather to map the key issues, challenges and future directions. We probably cannot codify environmental beauty into any stable or precise legal formulae that have timeless or universal application. However, sometimes a specific community will articulate and deliberate over a particular

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<sup>154</sup> L. Henderson, 'Q&A: A Plastic Ocean – Can a Movie Help Us See this Invisible Crisis?', *The Conversation*, 7 June 2016, available at: <http://theconversation.com/qanda-a-plastic-ocean-can-a-movie-help-us-see-this-invisible-crisis-56691>.

<sup>155</sup> Royal Museums Greenwich, n. 144 above.

<sup>156</sup> E.g., the French-sponsored, Baudin scientific expedition to Australia: J. Fornasiero, L. Lawton & J. West-Sooby (eds), *Nicolas Baudin's Voyagers 1800-1804* (Wakefield Press, 2016).

aesthetics-based environmental position, for example to oppose an ugly waste dump or to conserve a treasured landscape, which the law can respond to. Hereby, a *lingua franca* arises, albeit not on a global scale, and the community's concerns can be codified into legal norms through the terms of a pollution permit, development consent or land use plan, for example.

But we should not be despondent about the absence of *lingua franca* of beauty in other contexts, and indeed there are some reasons why we might avoid trying to create one. Acknowledging the wonder of our world and being open to different aesthetic interpretations of natural beauty is surely beneficial, just like the adaptive and dynamic properties of the ecosystems that the law should protect. Seeking agreement on what is beautiful might unhelpfully halt the evolution of those values in dealing with new contexts and challenges. Science and economics must also be part of the conversation here rather than pushed into separate silos: science can help alert us to the value of 'ordinary' nature while economics illuminates the financial winners and losers. The arts must also partake, by marrying different fields of knowledge and raising public awareness of and participation in environmental aesthetics. As the firebrand art theorist T.J. Demos recommends, 'the artist [who] merely draw[s] attention to the problem is not enough; what is needed is further collective mobilization to pressure government institutions'.<sup>157</sup>

The law cannot avoid its responsibilities here. Even where it is neither possible nor desirable to articulate precise definitions of what is beautiful, the law can help society express its aesthetic relationships with nature. By setting democratic and transparent process standards and interpretative guidance, communities are empowered to know their surroundings better and engage in richer dialogue about aesthetic values. Public hearings and environmental assessment procedures provide a starting point, and indeed are already commonly used in some jurisdictions, such as in the UK's landscape planning. Further, participatory processes that help 'gauge community values' can in turn empower courts in adjudicating disputes involving culturally complex aesthetic considerations.<sup>158</sup> Thus complaints about unlovely activities, such as landfill sights or scrap metal businesses, are not placed outside the realms of justiciability. This is particularly important given that judicial forays into adjudication of the beautiful are enmeshed with economic considerations about property values or dominated by costly aesthetic expertise. Opening up aesthetic considerations to

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<sup>157</sup> Demos, n. 47 above, p. 112.

<sup>158</sup> Smith II, n. 87 above, p. 75.

community deliberations democratizes beauty by helping to ensure that it is no longer a value that can be wielded only by the politically privileged.

Our article is not designed to write blueprints for reform, but we can identify already some interesting precedents that might help tackle some governance challenges. The recently reformed governance framework for the Tasmanian Wilderness World Heritage Area (TWWHA), a huge region covering 15,800 km<sup>2</sup>, has forged new ground in accommodating aboriginal aesthetic values, with inclusion of better consultation protocols and shared decision making with local aboriginal representatives.<sup>159</sup> Previously, the TWWHA's aesthetic values were shaped narrowly around a *terra nullius* 'wilderness paradigm' and a commodified aesthetics catering to eco-tourism. At the international level, as Alice Palmer has researched,<sup>160</sup> treaty secretariats and conferences on nature conservation and climate change are evolving more space for deliberation about aesthetic values. This might go further, by changing the composition of participating delegations and working with artists to re-imagine how to address the upheavals of the Anthropocene.

Furthermore, this article cautioned that references to natural beauty risk importing an anthropocentric 'special' versus 'ordinary' dichotomy in environmental protection, thereby undermining efforts over recent decades to shift protection towards an ecocentric approach that upholds nature's integrity for its own sake. Recent New Zealand legislative reforms give some natural places their own legal personality, protected by fiduciary regimes that require trustees to speak for those places' aesthetic and other values.<sup>161</sup> The New Zealand reforms were designed not with beauty in mind but rather to settle historical grievances for theft of Indigenous territories, but the legal model adopted might be considered analogously to help foster greater respect for nature's intrinsic value. Whether the New Zealand model will be less anthropocentric in practice, given that decisions about aesthetic and other values remain the province of a board of trustees, remains for further enquiry.

In sum, beauty is a language by which we enter into aesthetic *relationships* rather than just admire objects. It may not ever be a global *lingua franca*, but we

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<sup>159</sup> Tasmania Department of Primary Industries, Parks, Water and Environment (DPIPWE), *Executive Summary TWWHA Management Plan* (DPIPWE, 2016).

<sup>160</sup> Palmer, n. 16 above.

<sup>161</sup> K. Sanders, 'Beyond Human Ownership? Power and Legal Personality for Nature in Aotearoa New Zealand' (2017) *Journal of Environmental Law*, <http://academic.oup.com/jel/advance-article/doi/10.1093/jel/eqx029/4641865>. <check issue publication and page span at proofs stage?>

should improve its status in local and transnational environmental law as a vital *process* that enriches the existing ways of knowing and protecting the biosphere.