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ESTHETICS AND JURISPRUDENCE: A Bibliographic Primer

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INTRODUCTION.

This bibliography is primarily intended for the nonlawyer -- planner, Administrator, academician, or citizen advocate -- with a legal interest in esthetics, but lawyers may also find it useful. The references to journals have been left in the customary legal citation form, which differs somewhat from common bibliographic practice. For details see the guide published by the Harvard Law Review Association (1958). Citation is to author, title, journal volume, journal name, first page, and year. This parallels the practice in case law citations where reference is to case name, volume number, report, series if more than one, page, and year. Statutes when passed are designated as a particular public law or state law with a popular title. They then, however, become part of the federal or state code of laws.

The coverage is not exhaustive, omitting some peripheral items and in-house reports that are often impossible to locate. A very large number of articles addressed to esthetics have appeared in law journals and continue to appear at an increasing rate. Many of them overlap in content, since the interest has been high, but the rate of change in the law has been slow. On the other hand, the duplication may be helpful since many of these law journals are not readily available in most academic libraries. Examples include Agnor (1962), Anderson (1962), Baker (1926a,b), Dukeminier (1955), Miller (1967), Mosotti and Selfon (1969), Newsom (1969), Rodda (1954), Wolfson (1944), and various unsigned commentaries and notes. A particularly valuable collection of discussions on the subject are contained in the American Bar Association's 1967 publication "Junkyards, Geraniums and Jurisprudence." Some of the papers in that collection are also listed separately by author name.

FOUNDATIONS.

The law has traditionally taken a skeptical view of esthetics, or "ass-thetics" as Estes Kefauver is reputed to have pronounced it, as a reason for restricting the use of property. Anderson (1968, p. 503) aptly summarizes the attitude toward the word "esthetic":

> It was effeminate, or at least not to be taken seriously where practical matters were being considered by realistic men. It referred to beauty but suggested the esoteric schools of art and the fringes of personal preference. It invited the attention of the dilettante; it did not command the respect of the court.

This may explain, in part, the popularity of the word "amenity" as a more comprehensive substitute for esthetics. But the law evolves and the nature and basis of judicial decisions has been influenced both by expansion of zoning law and broader societal attitudes on esthetics and the environment. This change has parallelled the urbanization of the United States, and as Searles (1967) notes, the bulk of the case law on esthetics is built on urban cases, for that is where the population density and intensity of land use has forced recognition of problems and practices that could be ignored in rural areas. There is a distinct danger in being over-optimistic in analyzing the present position of esthetics in the law for lack of a clear precedent in most jurisdictions. This may be better understood by a consideration of the legal foundation for esthetic or beauty based restrictions.

The police power and the law of eminent domain, singly or together, justify all esthetic regulation (Anderson, 1968; Netherton, 1967; Searles, 1967; Johnson, 1967b). The police power permits regulation to promote the health, safety, morals, and the general welfare of the community, subject to the guarantees of the 14th amendment to the Constitution of due process of the law and equal protection of the law. Eminent domain (Nichols, 1962) involves a taking or damaging of private property for some public purpose and payment of just compensation. As public programs have increased in number and scope, both of these legal concepts have been expanded. Their distinction is critical to the property owner, for with the exercise of the police power he absorbs any losses incurred due to restrictions on his property, whereas eminent domain requires that just compensation be made for losses. Sometimes the legislative intent on compensation is clearly expressed, as in the Highway Beautification Act of 1965. In programs where it is a policy decision whether to proceed under eminent domain or the police power, there are sound political and economic reasons for not using the latter to its fullest extent (Netherton, 1967).

NUISANCES, ZONING, AND EASEMENTS.

A nuisance is the use of property by one landowner that is sufficiently unreasonable and annoying to another landowner or the public that it may be abated by the police powers (Billett, 1967). Demonstration of an esthetic nuisance has traditionally been more difficult than one involving a smell or noise, because the variability of esthetic taste has been considered greater. But, as the court pointed out in Ghaster Properties, Inc. v.

Preston, the important factor is often whether a nuisance has been legislatively determined, for the courts give great weight to legislative findings. Nuisance doctrine has been used much less than zoning, however, in controlling the appearance of communities.

Zoning also is based on the police powers and is a concept that has undergone great expansion. Increasingly the regulation of community land use by zoning has come to rest on the general welfare justification, rather than the more specific health, safety, and morals. How far communities can continue in the expansion of zoning regulation is not clear. Already there are a number of cases, such as In re Girsh, that have struck down exclusionary zoning on the grounds that the esthetic purpose -- to protect the character of the town -- is not a sufficient reason to exclude housing for certain groups of people. Other cases in other jurisdictions have upheld large lot zoning and in Girsh there was a strong dissenting opinion. Also open to doubt is the effectiveness of zoning in the long term, for the granting of variances may result in a land use pattern that bears little resemblence to the original goals (Anderson, 1968; Mitrisim, 1969; Norton, 1967; Turnbull, 1971).

The instability of zoning has raised interest in the use of scenic easements to achieve esthetic control of a more permanent kind. Scenic easements are like easements in general, in that they involve transfer of selected rights to the land, but not the ownership of the land (Mullen, 1967; Whyte, 1959, 1970; Dunham, n.d.). Scenic easements are often negative, i.e., they prohibit actions such as the building of houses or cutting of trees, without necessarily allowing the public to physically occupy or use the land. While scenic easements can be purchased by communities, the usual municipal economics make gifts of easements the hoped for practice. Easements can also be obtained by eminent domain, as they have been along some highways. The valuation of easements is a difficult problem, whether to determine the purchase price or in the calculation of reduced taxes afterwards (Williams and Davis, 1968). There are quite a number of possible variations on scenic easements and they lead into other sorts of covenants and agreements designed to achieve conservation and esthetic ends (Little, 1969).

Certain cases have become classics, if for no other reason than frequent citation. Passaic v. Patterson Bill Posting, Advertising & Sign Painting Co. is often presented as an example of the early hard line taken by courts on esthetics, with esthetics described in that case as "a matter of luxury and indulgence." Before long, however, some courts began to find ways to justify essentially esthetic purposes on other grounds, often with great ingenuity. In re Wilshire upheld a Los Angeles ordinance limiting billboard heights because the court managed to find an impressive variety of safety hazards associated with higher billboards. St.

Louis Gunning Advertising Co. v. The City of St. Louis continued this approach, while ostensibly denying regulation based on fickle esthetic standards. This has led to many cases where esthetics have been upheld as a secondary or peripheral issue, while primary reliance has been placed on health or safety. The court recognized this in Perlmutter v. Green with the often quoted:

> Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality, or decency.

Gradually, too, the link between esthetics and economics became recognized with United Advertising Corp. v. Metuchen stating "a discordant sight is as hard an economic fact as an annoying odor or sound." Berman v. Parker is often considered a landmark case for the manner in which the Supreme Court upheld a redevelopment plan under eminent domain to obtain, among other things, a more attractive community:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy . . ."

Reading a smattering of cases is useful for the background and perspectives they provide on the issues, but they do not provide specific guidelines for action in a given jurisdiction. More useful in that situation is the type of analysis Martin (1967) prepared on architectural control in Kansas, or the broader survey and classification of cases involving zoning ordinances contained in Ghent (1968). At the present time esthetics in ordinances have been uniformly upheld as a secondary purpose, but the courts are divided as to whether it is an allowable primary purpose (as upheld in New York in People v. Stover) or not.

LEGISLATION AND ADMINISTRATION.

Federal legislation passed during the past decade has been a stimulus to the interest in esthetic regulation. The Wild and Scenic Rivers Act of 1968 was enacted to protect selected rivers which have outstanding scenic or other value. The Highway Beautification Act of 1965 was designed to restrict signs and junkyards along the interstate highway system. The National Environmental Policy Act of 1969 calls for there to be "esthetically and culturally pleasing surroundings" for all Americans and the Environmental Quality Improvement Act of 1970 expressly states there will be a national policy on the enhancement of environmental quality. Some state legislation may have national impact due to its

"model" nature. The Michigan Environmental Protection Act of 1970 may eventually be the basis for a national law clarifying the standing of parties to environmental issues to bring suit. The Delaware Coastal Zone Act of 1971 prohibits and limits certain land uses within a defined coastal zone. One of the explicit criteria in the Delaware Act in assessing land use permits within the zone is "aesthetic effect, such as impact on scenic beauty of the surrounding area."

Highway have claimed a disproportionate share of the effort on scenic regulation. It is ironic that so much attention has been devoted to the view from highways, with little evaluation of the scenic impact of the highway itself on the area traversed. The major legislation is the Highway Beautification Act of 1965, which requires each state to pass appropriate legislation for its full implementation. The Act itself should be read to gain an appreciation of the many loopholes and ambiguities written into this type of legislation and reading of the excellent review by Cunningham (1971) is recommended to understand why, some seven years later, very few signs have been removed as a result of the Act. Even when the legality of a sign or junkyard is clear, there are serious valuation problems involved to arrive at just compensation.

The area of administrative law has become one of particularly acute concern for environmental problems, for many of the contested actions, such as Scenic Hudson Preservation Conference v. Federal Power Commission or Udall v. Federal Power Commission, involve decisions by duly authorized administrative agencies supposed to be acting in the public interest. Sax (1971) presents a good introduction to the question of judicial review, burden of proof, and standing to sue, though to temper Sax's enthusiasm it is advisable to see the review of his book by Grad or Jaffe. Grad and Rockett (1970) and Sive (1970) also discuss the issues which confront esthetic challenges to administrative actions. The National Environmental Policy Act of 1969, in section 102, calls for the much discussed environmental impact statements. How these will affect agency activity is still uncertain (White, 1972), but Rosenbaum and Roberts (1972) discuss one set of water resource cases. The implication and interest for esthetics is the possibility that administrative agencies may be required to consider less traditional impacts and measures. However, the courts have long been reluctant to interfere with the findings of legislatively authorized agencies unless gross carelessness or capriciousness can be shown and they may very well continue to avoid the substance of administrative findings if good faith and care can be shown.

Administrative law is undergoing rapid change and the next decade should define many of the developing trends as they affect esthetics. At the national scale this is likely to have a greater impact on esthetics than the cumulative effect of zoning ordinances.

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