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The Social Interest in the Aesthetic and the Socialization of the Law

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THE SOCIAL INTEREST IN THE AESTHETIC AND THE SOCIALIZATION OF THE LAW.—How far, if at all, should the law secure the interest of society in æsthetic surroundings? For example, how far, if at all, should the law uphold legislation, including ordinances, designed to beautify communities by establishing æsthetic building lines, prohibiting unsightly advertisement signs, preventing the erection of other than private residences in residential districts or the erection of hideous private residences? Until recently it was universally held that, under the police power at any rate, an owner of property could not lawfully be restrained from making an anti-æsthetic use of his property when the only objection was that such use merely injured the æsthetic sensibilities of his neighbors.[1] And some courts, including the West Virginia court, still so hold.[2]

[1] City of Passaic *v.* Patterson Bill Posting etc. Co., 72 N. J. L. 285, 62 Atl. 267 (1905) in which Mr. Justice Swayze says: "No case has been cited nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity and it is necessity alone which justifies the exercise of the police power to take private property without compensation."

[2] Fruth *v.* Board of Affairs, 75 W. Va. 456, 84 S. E. 105 (1915); State *v.* Stahlman, 81 W. Va. 335, 94 S. E. 497 (1917). But see authorities cited in notes 13, 14 and 15.

But shouldn't the owner of property be restrained under the police power, from making an unreasonably anti-æsthetic use of his property? Does the so-called absolute owner of property, and no other, have a legally recognized interest in the use of the property? Or is the property, though owned in fee simple by an individual, in a sense also a sort of asset of society—a social institution with a social function to perform[3] so that the owner may not lawfully make an anti-social, *e. g.*, an anti-æsthetic, use of his property?[4] Just as the so-called absolute owner, because of the interest of society in the use of his property, cannot, according to the modern and better view, make an anti-social use of his property by erecting a high fence simply to spite his neighbors,[5] so doesn't the interest of society in the use of property justify the prevention of an unreasonably anti-æsthetic and therefore anti-social use of property?

The subject matter that law deals with is interests, that is, human wants, claims, desires.[6] These interests are either individual interests, *i. e.*, interests of individuals, or public interests, *i. e.*, interests of the state as a juristic person or as guardian of social interests, or social interests, *i. e.*, interests of society.[7] The owner of the property has a want or interest in using his property for anti-æsthetic purposes—an individual interest. Society has a want or interest in having property in its midst so used as not to prevent society or individual members thereof from living a proper life—a social interest. The state as guardian of social interests has an interest of the same sort as the last—in form a public interest but in substance a social interest. Now, here as elsewhere in the law, it is not possible for the law to secure or satisfy all wants or interests since some of them conflict. Therefore the end of law today is to secure or satisfy as many of these wants or interests as possible and sacrifice as few as possible and in so doing to secure the more important interests and sacrifice the less

[3] See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 87 (1921): "Men are saying today that property, like every other social institution has a social function to fulfill." POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 233, 234 (1922): "Social-utilitarian theories explain and justify property as an institution which secures a maximum of interests or satisfies a maximum of wants."

[4] See Pound, A Theory of Social Interests, 15 Pulications of the American Sociological Society 16, 40 (1920); POUND, THE SPIRIT OF THE COMMON LAW, 185, 186 (1921).

[5] Barger *v.* Barringer, 151 N. C. 433, 66 S. E. 439 (1909); See POUND, THE SPIRIT OF THE COMMON LAW, 185, 186, 196, 197. But see *contra* Koblegard *v.* Hale, 60 W. Va. 37, 53 S. E. 793 (1906).

[6] See POUND, THE SPIRIT OF THE COMMON LAW, 91-93, 197-203; CARDOZO, *Op. Cit.* 112, 113.

[7] See POUND, OUTLINE OF A COURSE ON THE HISTORY AND SYSTEM OF THE COMMON LAW, 2, 3, 4 (1919).

important.[8] If we apply this method of reasoning, which of the above mentioned interests with respect to the anti-æsthetic use of property should, upon a balancing of the conflicting interests, be considered paramount and therefore be secured?

Until rather recently Anglo-American law ignored the purely æsthetic sensibilities of society for the reason principally that until rather recently the æsthetic sensibilities of society, as such, were not sufficiently acute to insist upon legal recognition. Thus, a few years ago an eminent English jurist, comparing the French and English in this respect, could appropriately quote:[9]

> "Nature which gave them the *goût*
> Only gave us the gout."

But with the advance of civilization, æsthetic sensibilities of society became more sensitive and unsightly surroundings may in a given community cause as much general and genuine human unhappiness as perturbing sounds,[10] or noisome smells[11] against which the law gives protection under the police power. Therefore the opinion of civilized society is beginning to preponderate, in some communities at any rate, in favor of reasonably securing the æsthetic sensibilities of society against anti-æsthetic surroundings. Hence, since "every opinion tends to become a law,"[12] as Mr. Justice Holmes so well says, the recent tendency is to secure the social interest in æsthetic surroundings by laws designed to beautify communities,[13] *e. g.*, by laws establishing æsthetic building lines[14] or exclusively residential sections.[15] And the law should go still

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[8] See Pound, The End of Law as Developed in Lagal Rules and Doctrines. 27 HARV. L. REV. 195 (1914); Pound, The End of Law as Developed in Juristic Thought, 27 HARV. L. REV. 605, 30 HARV. L. REV. 201.

[9] Sir Frederick Pollock, 13 LAW QUAR. REV. 337-338 (1897).

[10] State *v.* White, 64 N. H. 48, 5 Atl 828 (1886); *Ex parte* Foote, 70 Ark. 12, 65 S. W. 706 (1901).

[11] The Manhattan Mfg. etc. Co. *v.* Van Keuren, 23 N. J. Eq. 251 (1872).

[12] Lochner v. New York, 198 U. S. 45, 76 (1905).

[13] See Pound, A Theory of Social Interests, *supra.* See Comments, 30 YALE L. J. 171, supporting this tendency as a proper exercise of the police power, citing cases. But see, *contra,* arguing that this can be justified only under the power of eminent domain by paying reasonable compensation, Notes, 34 HARV. L. REV. 419, citing cases. In St. Louis Poster Advertising Co. *v.* St. Louis, 249 U. S. 269 (1919) the court uses language somewhat in favor of an exercise of the police power for æsthetic purposes but there were also other than æsthetic purposes involved in the billboard ordinance in question. But see Ayer *v.* Cram, 136 N. E. 338 (Mass. 1922) where in dealing with a municipal commission's order as to the height of buildings the court said: "Aesthetic considerations alone cannot justly form the basis for the exercise of police power to limit the use of private property, but they may be taken into account as ancillary to some other main purpose within the appropriate sphere of the police power." See also the authorities cited in notes 14 and 15.

[14] See, *e. g.,* Town of Windsor *v.* Whitney, 111 Atl. 354 (Conn. 1920). See comments, 30 YALE L. J. 131. But see *contra,* Fruth *v.* Board of Affairs, 75 W. Va. 456, 84 S. E. 105 (1915).

[15] Lincoln Trust Co. *v.* Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209 (1920); City of Des Moines *v.* Manhattan Oil Co., 184 N. W. 823 (Ia. 1921). See also State *v.* Houghton, 176 N. W. 159 (Minn. 1920), an eminent domain case. But see *contra* Spann *v.* City of Dallas, 235 S. W. 513 (Tex. 1921); See also City of Dallas *v.* Mitchell, 245 S. W. 944 (Tex. Civ. App. 1922); *Cf.* Ayer *v.* Cram, 136 N. E. 338 (Mass. 1922).

farther in this direction. We are beginning to realize that the central unit of civilization is not the individual but society[16] and that therefore social interests are more important than individual interests. Hence, where the two interests conflict, since both can not be secured, the tendency is to sacrifice the individual interest so far as it is necessary in order to secure, to a reasonable extent, the more important interests of society. This salutory change in the law secures to the owner of property his reasonable wants with respect to the use of his property—which is all that the owner can reasonably ask—and secures to society its reasonable wants with respect to æsthetic surroundings, thus socializing the law by reasonably securing the social interest in æsthetic surroundings and harmonizing the law with the preponderant settled opinion of civilized society.

—T. P. H.

[16] *Cf.* Beale, The Development of Jurisprudence during the Nineteenth Century, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 558, 561.