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Aesthetic Nuisance: Re-Educating the Judiciary

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Aesthetic Nuisance: Reeducating the Judiciary

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This article discusses how the traditional common-law refusal to grant relief for an aesthetic nuisance has been eroded by various case decisions. The author suggests an "average person" standard for the judiciary to follow for recognizing an aesthetic nuisance.

Historical Perspective

Throughout the evolution of nuisance law, courts have been nearly unanimous in their refusal to recognize nuisance actions based on aesthetic considerations.[1] The primary reason for this judicial reluctance is the assumption that it is impossible to find an objective standard on which disputes over aesthetic considerations may be decided.[2] Yet, there have been a number of courts that have not hesitated to recognize the right of a landowner to be free from unaesthetic conditions.[3] Courts recognizing the right to be free from unaesthetic uses of land have had no problem in determining an appropriate standard on which to base their decisions.[4] In fact, the standards applied in

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[1] See Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 192 S.E. 219 (1973) (Kenna, J. concurring); Ness v. Albert, 665 S.E.2d 1 (Mo. App. 1983); Houston Gas & Fuel Co. v. Harlow, 297 S.W. 570 (Tex. Civ. App. 1927); Perry Mount Park Cemetery Ass'n v. Netzal, 274 Mich. 97, 264 N.W. 303 (1936); Salt River Valley Water Users Ass'n v. Arthur, 51 Ariz. 101, 74 P.2d 582 (1937); State ex. rel. Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970); Whitmore v. Brown, 102 Me. 47, 65 A. 516 (1906); 58 Am. Jur. 2d Nuisances § 44 (1971). See generally Coletta, "The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes," 48 Ohio St. L.J. 141 (1987).

[2] See, e.g., Parkersburg Builders Material Co. v. Barrack, note 1 *supra* (Kenna J., concurring).

[3] Foley v. Harris, 223 Va. 20, 286 S.E.2d 186 (1982); Allison v. Smith, 695 P.2d 791 (Colo. App. 1984); Parkersburg Builders Material Co. v. Barrack, note 1 *supra*; Martin v. Williams, 141 W. Va. 595, 93 S.E.2d 835 (1956); Hay v. Stevens, 271 Or. 16, 539 P.2d 37 (1975); Feldstein v. Kammauf, 209 Md. 479, 121 A.2d 716 (1956); State ex. rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923); Robie v. Lillis, 299 A.2d 155 (1972).

[4] *Id.*

cases finding aesthetic nuisances to exist appear to be very similar to those that have long been applied in cases finding aural[5] and olfactory[6] nuisances to exist. The unique character of aesthetic phenomena, however, requires that such standards be refined so that courts will have a solid and clearly objective foundation for their decisions in aesthetic nuisance cases.

One of the most common contexts in which the problem of aesthetic nuisance arises is when a property owner adjacent to or near other residential landowners uses his or her property to store "junk."[7] The Missouri case of *Ness v. Albert*[8] is not only an example of such situations, but also illustrates clearly the prevailing judicial perspective toward actions based on aesthetic considerations. In refusing to hold that the storage of, among other things, rusted appliances and a partially burned mobile home was a nuisance, a Missouri court of appeals said that unsightliness alone could not constitute a nuisance.[9] To support its decision, the court reasoned:

> Aesthetic considerations are fraught with subjectivity. One man's pleasure may be another man's perturbation, and vice-versa. What is aesthetically pleasing to one may totally displease another—"beauty is in the eye of the beholder." Judicial forage into such a nebulous area would be chaotic. Any imaginary good from doing so is far outweighed by the lurking danger of unduly circumscribing inherent rights of ownership of property and grossly intimidating their lawful exercise. This court has no inclination to knowingly infuse the law with such rampant uncertainty[10]

The equation of aesthetics and "beauty," which is found in the *Ness* decision, is characteristic of other opinions rejecting aesthetic nuisance actions,[11] has been criticized as an "imprisonment of the courts in their own linguistic web."[12] By formulating the problem of aesthetic standards in this manner, judges assume that they would be called on to enforce their own subjective ideas about what is beauti-

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[5] See W. Rodgers, *Environmental Law*, 551–563 (1977).

[6] *Id.* at 101–102.

[7] Foley, note 3 *supra*, Barrack, note 3 *supra*, Ness v. Albert, 665 S.W.2d 1 (Mo. App. 1983).

[8] Ness, note 7 *supra*.

[9] *Id.* at 1–2.

[10] Coletta, note 1 *supra* (quoting *Ness*, note 7 supra).

[11] See cases note 1 *supra*.

[12] Coletta, note 1 *supra*, at 153.

ful and ugly.[13] However, modern thinking about aesthetics tends to undermine this judicial prejudice by maintaining that people's aesthetic preferences are the product of an interaction between their visual environment and their cultural or community values.[14]

Emerging Case Law

This alternative perspective on the nature of aesthetics seems to be reflected in some judicial opinions that have upheld the right to be free from aesthetic nuisances.[15] It has been observed that "the rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the dominant human sensibilities, may well be pondered."[16] Among the cases most often cited in support of the doctrine of aesthetic nuisance is the 1937 West Virginia case *Parkersburg Builders Material Co. v. Barrack*.[17] *Barrack* was a suit by residential landowners to enjoin the defendant from using his land for the storage of wrecked automobiles. The lower court ruled that the land use constituted a nuisance solely because of its unsightliness.[18] However, on appeal the Supreme Court of Appeals of West Virginia reversed the injunction on the

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[13] Ness, note 7 *supra*.

[14] Professor Coletta argues that the traditional rationale for denying relief from injury to aesthetic sensibilities is a form of "aesthetic formalism." Coletta, note 1 *supra*, at 153. Aesthetic formalism describes aesthetic preference or beauty as "an abstract property [which resides] in the object [(or environment)] itself." *Id.* at 154. Furthermore, the individual is seen merely as a "tabula rasa" on which is reflected the aesthetic properties found in the visual environment. Coletta rejects this description of the relationship between human beings and their visual surroundings. Instead, he argues that "it is the observer's intellectual, psychological and cultural history which create the symbolic meanings the observer imparts to the sensory data." *Id.* at 154 (citing Costonis, "Law and Aesthetics: A Critique and a Reformulation of the Dilemmas," 80 Mich. L. Rev. 355 (1982)).

Epstein argues that if aesthetics are, for example, of greater importance to more members of a common unit development than other issues of more practical significance, strict control standards may be imposed on set-backs and exterior designs of the units while accepting a relaxed tolerance on music and noise from the units. "It hardly matters that the aesthetics ordinarily lie outside the law of nuisance while noise is the paradigmatic wrong. What the parties *think* not what the law holds, is decisive. *Any harm that the parties perceive should be taken into account, just like any benefit.*" Epstein, "The Utilitarian Foundations of Natural Law," 12 Harv. J. L. & Pub. Pol'y 713, 714, 742 (1987) (emphasis added).

[15] See note 3 *supra*.

[16] Noel, "Unaesthetic Sights as Nuisances," 25 Cornell L.Q. 1, 4 (1939) (quoting State ex. rel. Carter v. Harper, 182 Wis. 148, 159, 196 N.W. 451, 455 (1923)).

[17] Barrack, note 3 *supra*.

[18] *Id.* at 608.

ground that the area had not been clearly established as residential.[19] Despite the court's holding, there was strong dictum in support of nuisance actions based on aesthetic considerations.[20] Writing for the majority, Judge Maxwell declared that unaesthetic uses of land "may seriously affect the residents of a community in the reasonable enjoyment of their homes, and may produce a decided reduction in property values. Courts must not be indifferent to the truth that within essential limitations aesthetics has a proper place in the community affairs of modern society."[21]

Following the dictum in *Barrack*, the Supreme Court of Appeals of West Virginia again addressed the issues of aesthetic nuisance in the 1956 case of *Martin v. Williams*.[22] The case involved a suit to enjoin a used car lot being operated in a residential neighborhood. While the decision to affirm the lower courts injunction rested primarily on the finding that the bright lights and noise from conducting business were a nuisance, the court also reiterated the view expressed by the majority in *Barrack*.[23] It was held that, in the context of considering claims for aesthetic injury, the courts "should not be aroused to action merely on the basis of the fastidiousness of taste of complaintants..., [but] should act only where there is presented a situation which is offensive to the view of average persons of the community.[24]

Together, *Martin* and *Barrack* stand for the proposition that courts need not shy away from cases involving aesthetic injury because they are apprehensive about dictating standards of taste and beauty. Again, it is not the judge's role to decide what is beautiful or ugly, but only to ascertain through an examination of the evidence the relevant community standards. After the court establishes the character of the community in question, then it may consider whether the land use in question is reasonable under the circumstances. As the Oregon court in *Hay v. Stevens*[25] has concluded, it is best to "begin with the assumption that in the appropriate case recovery will be permitted under the law of nuisance for an interference with visual aesthetic sensibilities. The difficulty, however, is in determining whether the interference complained of is of such gravity as to warrant relief."[26]

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[19] *Id.* at 613.

[20] *Id.* at 612–613.

[21] *Id.*

[22] Martin, note 3 *supra*.

[23] *Id.* at 843.

[24] *Id.*

[25] Hay, note 3 *supra*.

[26] *Id.* at 91. *See* E. Yokley, *Zoning Law and Practice* § 1-5 (4th ed. 1980).

Granting Relief

Aside from the important dicta in *Barrack*, *Martin*, and *Hay*, there have been two recent cases that have actually found an aesthetic interference to be of sufficient gravity to warrant relief:[27] *Foley v. Harris*[28] and *Allison v. Smith*.[29] *Foley* was a suit by residential property owners to enjoin the defendant from using his lot to store wrecked automobiles. The trial court granted the injunction on the ground that the automobiles were unsightly and therefore constituted a nuisance.[30] In affirming the chancellor's decree, the supreme Court of Virginia held that the wrecked automobiles "definitely obstructed the reasonable and comfortable use of the [neighbor's] property," and therefore were an enjoinable nuisance.[31] Almost identical to the facts in *Foley* was the 1984 *Allison* case. There, the plaintiffs sued for damages and an injunction to prevent the defendant from continuing to keep junk automobiles, scrap metal, and rubbish on his property. In finding for the plaintiffs, the Colorado Court of Appeals held that "legitimate but unsightly activity such as the accumulation of debris on land or the operation of a junkyard or auto salvage business may become a private nuisance if it is unreasonably operated so as to be unduly offensive to its neighbors, particularly when it is located in a residential district."[32]

As these decisions illustrate, and as Justice Sutherland aptly observed in *Village of Euclid v. Amber Reality*, "a nuisance may be merely a right thing in a wrong place—like a pig in the parlor instead of the barnyard."[33] Certainly the common law should recognize that some unaesthetic uses of land are just like "a pig in the parlor" and should be treated appropriately. That this view should be adopted by the common law seems even more logical given the fact that aural[34] and olfactory[35] interferences with the enjoyment of land have long been held to be actionable under the rubric of the nuisance doctrine.

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[27] See note 29 *infra*.

[28] Foley, note 3 *supra*.

[29] Allison, note 3 *supra*.

[30] Foley, at 191.

[31] *Id.*

[32] Coletta, note 1 *supra*, at 150 (quoting *Allison*, note 3 *supra*, at 794).

[33] Village of Euclid v. Amber Realty, 272 U.S. 365, 388 (1926).

[34] See, e.g., W. Rodgers, *Environmental Law*, 551–563 (1977).

[35] *Id.* at 101–102.

Average Person Standard

The fact that the common law has historically recognized aural and olfactory nuisances seems to be inconsistent with the notion that aesthetic considerations are too subjective to be the subject of judicial determination. Indeed, the type of concern expressed about objective standards for aesthetics would appear to be equally relevant for odors and noise. Yet, the courts have had no difficulty in enforcing what they deem to be sufficient standards for determining the reasonableness of an invasion.[36] As courts deciding aesthetic nuisance cases are not asked to be arbiters of taste, neither are the judges who hear complaints of excessive noise or odor. As one judge in an aural nuisance suit declared,"[While] I [cannot] say how many popular songs may be sung in a private residence of an evening or how much music or what kind may be produced there or whether those songs must be rendered in English or Yiddish..., I do not mean to intimate that excessive noise...could not be restrained by the court."[37]

If the judiciary were to generally recognize the action of aesthetic nuisance, they would be carrying out the very same analysis that they have been doing for many years in aural and olfactory nuisance cases. The controlling issue would always be whether "normal persons living in the area or community would regard the defendant's land use as a substantial interference with their use and enjoyment of land...The objective standard is, therefore, provided by the 'objective, normal individual.' "[38] There is, however, a fundamental problem with this approach that must be addressed. Mere philosophical clarification of the nature of the aesthetic as a cultural and community-bound construct is not going to convince the majority of judges to recognize aesthetic nuisance actions. As Professor William Rodgers observes, "Judges need some sort of community preference poll ...to support a judgment that the [aesthetic] injury complained of is 'substantial' in a legal sense."[39]

Perhaps because it is thought to be impractical to literally poll the community to make such a determination in specific situations, courts have been loath to tread in aesthetic waters. However, if there was an empirically accurate and practical method by which to measure the value of the aesthetic character of real property, the courts might be more willing to recognize the action of aesthetic nuisance. Judging

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[36] Noel, note 16 *supra*, at 5.

[37] *Id.* at 5 (quoting Miller et al. v. Jersey Coast Resorts, 98 N.J. Eq. 289, 299, 130 A. 824, 828 (1925)).

[38] Coletta, note 1 *supra*, at 161. See Yokley, note 26 *supra*.

[39] 1 W. Rodgers, Environmental Law: Air and Water § 2.5, at 55 (1986).

by the important role of aesthetic zoning in today's world, it is clear that aesthetics are of significant societal value.[40] But more importantly, given modern real estate appraisal techniques that attach economic value to aesthetic considerations,[41] it seems as though community preferences can be accurately measured by a phenomenon that serves as the very basis of our whole capitalist system—the free market. Indeed, one area of the law has for some time been utilizing this empirical economic approach to the valuation of the aesthetic in the context of real property law.[42]

Conclusion

There seems to be little doubt that recognition of nuisance actions based on aesthetic considerations would contribute to the efficient and equitable solution of situations that currently go unremedied. Courts would not be asked to make subjective determinations any more than they are currently asked to do so in the context of aural and olfactory nuisance disputes. The societal value of aesthetics is clear from the popularity of aesthetic zoning in many municipalities.[43] Furthermore, the judicial recognition of the exercise of such police powers[44] contradicts the reluctance of common law to confront aesthetics in the realm of nuisance.

Given today's emphasis on law and economics, it seems logical that the common law will change its view of aesthetic nuisance.[45] Modern real estate appraisal methods make it possible to express

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[40] See, generally, D. Mandelker, *Land Use Law* §§ 11.1–11.13 (1982); Costonis, note 14 *supra*, at 361.

[41] Cowley, "The Value of View, " Appraisal J., Apr. 1951, 239–242; Searles, "Aesthetics in the Law," Appraisal Digest, Winter 1969, 1–7; Edman, "Damages to Aesthetic Values," Appraisal J.L. Jan. 1960, 126–127; Sussna, "Is the View Worth It?," Appraisal Digest, Winter 1964, 22–24.

[42] See "Unsightliness of Powerline or Other Wire, or Related Structure, as Element of Damages in Easement Condemnation Proceeding," Anno., 97 A.L.R. 3d 587 (1980); "Eminent Domain: Compensability of Loss of View from Owner's Property—State Cases," Anno. 25 A.L.R. 4th 671 (1983).

[43] See R. Anderson, *American Law of Zoning* § 7.16 (3d ed. 1986). Today, through the use of zoning or sign ordinances, a goodly number of state municipalities control the sitting of signs as well as billboards. N. Robinson, Environmental Regulation of Real Property, § 7.01 (1988).

[44] Increasingly, municipal police powers have been exercised to regulate areas in order to conform them to reasonable aesthetic standards. N. Robinson, *Id.* at Ch. 7. See generally, D. Mandelker, J. Gerard & E. Sullivan, *Federal Land Use Law* § 7.02 [1] et. seq. (1989).

[45] See, e.g., State ex. rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955), *cert. denied,* 350 U.S. 841; Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963).

community aesthetic preferences in monetary terms.[46] This possibility, in turn, allows for the resolution of aesthetic disputes within the framework of the modern nuisance balancing tests. It only remains now for courts to recognize the new economic and social realities emerging in today's world. When they do, the common law can once again boast that it has a remedy for every harm.

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[46] Smith & Fernandez, "The Price of Beauty: An Economic Approach to Aesthetic Nuisance," 15 Harv. J. Envt'l L. 53 (1991).