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## PUBLIC ESTHETICS AND THE BILLBOARD

HENRY W. PROFFITT\*

The romance of "the skin you love to touch", the story of the discriminating gentleman who "walked a mile" for a cigarette, the epic of that "good 5 cent cigar", the tale of the medicine that "children cry for", the flaming vision of those innumerable products of American manufacture and commerce so prominently displayed on billboards, are daily thrust upon the traveling public, whether it likes it or not. The motorist is met at every turn by the ubiquitous billboard; he is exhorted to "reach for a Lucky instead of a sweet", to "keep that school-girl complexion", to insist on the breakfast food that is "shot from guns", to consume "hot-dogs" and "hamburgers", and to stop at all the "biggest and finest hotels."

The country is over-run with a vast and heterogeneous collection of billboards, most of which are of surpassing ugliness and many of which appear to have been designedly located for the express purpose of despoiling the scenic beauty of the country-side.

In actual fact, the great majority of these advertising structures cannot be said to endanger the health, morals or safety of the public. They might continue to be used, increase and multiply, and the public would not thereby be exposed to any real danger. The complaint against the billboards on the part of that growing body of people who are laboring for their suppression is simply—"We don't like them."

The insistent demand for reform is evidenced by the many societies which have been organized and have conducted campaigns of education in an effort to foster in the general public, higher civic ideals, and finer esthetic sensibilities. The support of garden clubs, civic societies, national, state, and local bodies has been enlisted, and it is doubtless due in large measure to these efforts that the esthetic tastes of the public appear gradually to be undergoing a refining development.

With a realization, however, that something more potent than an educational campaign was necessary if the "billboard nuisance" was to be held in check, strenuous efforts have been made during the past

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decade to obtain legislation on the subject and, as shall be pointed out in this paper, such efforts have met with substantial success.

The principle that unsightly advertisements as such should be subject to governmental restriction and regulation is not novel. The courts have found no difficulty in restraining offensive noises and odors. A similar protection to the eye would not establish a new principle, but would merely carry a recognized principle to further applications.

Just how far the courts and law-making bodies should go in the regulation of billboard advertising is a question on which opinions will differ widely. The extreme view of the billboard enemies is that such structures are unsightly even under the best circumstances and should be entirely prohibited by law. On the other hand, there are those who are alarmed at the mass of laws which are annually added to our already-crowded statute books, and who say that we have a chronic mania for regulating other people's affairs by law and we should discourage the notion that nearly every problem, whether social, economic or political, is solved and disposed of by passing a law about it.

Whether, from the viewpoint of political science, the regulation of billboards as such is properly within the scope of legislative activity is a question with which we are not here concerned. Rather, we are concerned with a consideration of the present attitude of the public and the judiciary on the subject of billboard regulation by governmental agencies regardless of whether or not such regulation is a proper function of government. We are here interested in what the public through their law makers ordain *shall* be done with respect to this subject and what the courts recognize as valid and constitutional; and we are not concerned with what political scientists say *should* be done.

It is clear at the outset that the power of eminent domain is neither adequate nor appropriate to deal with the elimination or regulation of billboards. One sufficient reason is that it would be impracticable either to measure the damage for the taking or regulating of the property rights involved or to provide adequate funds for compensation. These difficulties, however, do not hamper the use of the police power for billboard regulation; and, with the exception of laws taxing billboards, all the legislation in this country having for its object the restriction and regulation or suppression of outdoor advertising is expressly based upon police power.

The term "police" has never been strictly defined or clearly circumscribed. Blackstone couples it with economy and defines them

as "the due regulation and domestic order of the Kingdom, whereby the individuals of the state, like the members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations."<sup>1</sup>

The object of the police power is to bring about "the greatest good of the greatest number" and its maxim is that "every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskilful, careless or unscrupulous."<sup>2</sup>

From the broad general nature and purpose of this power of government, it will be recognized that it is not a fixed quantity; it is the expression of current social, economic and political conditions and is consequently elastic and capable of development to meet changing conditions.

Blackstone's definition would include the regulation of many matters which in this country have generally been regarded as outside of the scope of legislation and governmental control. It would seem to embrace the regulation of nearly all activities which may injuriously affect the mental, moral, spiritual and physical welfare of the people. Obviously, at the present stage of our development we are not prepared to concede that in the exercise of the police power our governmental agencies can go to such lengths in enacting regulatory measures. The courts of this country cling tenaciously to our so-called "constitutional guaranties of liberty".

It is the purpose of this paper (1) to review briefly the recent use of police power in this country, with particular reference to zoning ordinances, with a view to considering how much importance courts

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<sup>1</sup>4 BL. COMM. \*162-175.

<sup>2</sup>FREUND, POLICE POWER (1904) § 8. Mr. Chief Justice Vickers, writing for the Supreme Court of Illinois in *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 440, 94 N. E. 920, 922 (1911), says: "All uses of property or courses of conduct which are injurious to the health, comfort, safety and welfare of society may be prohibited under the sovereign power of the State, even though the exercise of such power may result in inconvenience or loss to individuals. In this respect individual rights must be subordinate to the higher rights of the public. The power that the State may exercise in this regard is the overruling law of necessity, and is founded upon the maxim, *salus populi est suprema lex*. The existence and exercise of this power are an essential attribute of sovereignty, and the establishment of government presupposes that the individual citizen surrenders all private rights the exercise of which would prove hurtful to the citizens generally. *City of Chicago v. Rogers Park Water Co.*, 214 Ill. 212; *Mugler v. Kansas*, 123 U. S. 623."

attribute to esthetic considerations in dealing with police power legislation, (2) to examine and analyze the recent court decisions on legislation and ordinances adopted for the regulation and restriction of billboards and billboard advertising, and (3) to review the recent legislation on the subject of billboard advertising and to consider the constitutionality of such legislation as an exercise of the police power.

## I

The limitation upon the police power of the states grows out of the Fourteenth Amendment to the Federal Constitution providing that no state shall deprive any person of life, liberty or property without due process of law. This guaranty was not new to our Constitution but may be noted in the Magna Carta and was originally intended as a safeguard against the arbitrary use of executive power and not against legislation. The limitations upon the legislative power were otherwise provided by express prohibitions against impairing the obligations of contracts, taking property for public use without compensation, etc. It is at least doubtful whether the guaranty that no person should be deprived of life, liberty or property without due process of law was intended as a curb on the legislative power.

However this may be, it is now uniformly held that the Fourteenth Amendment to the Constitution of the United States applies to the legislative power of the state governments.

On the broad foundation of the guaranty of private property rights contained in the Fourteenth Amendment, the courts have constructed the rule that all legislation and municipal ordinances which are adopted purely for esthetic purposes are invalid. The courts have insisted that legislative enactments, whether State or local, adopted under the police power must, in order to be valid, be reasonably calculated to promote the "safety, health, morals or general welfare of the public."

This phrase which appears so frequently in the decisions has of recent years been expanded to embrace and recognize many laws and ordinances which a few decades ago would have seemed clearly outside of the proper scope of legislative activity. The extent of our progress along these lines may be visualized if we can imagine the astonishment of a citizen of the nineteenth century had he been told that he could not build on his property within so many feet of the street line; that he could not conduct a business on his property, or erect any building over so many feet in height; that he must allow so much space for courts and area-ways; that he must not permit an unreasonable discharge of smoke from his chimneys; that he could be

put in jail if he carried a bottle of liquor across the street, or carried on his person a concealed weapon; that his dog must be licensed and not allowed to roam unmuzzled; and that in numerous other ways his freedom of action was restricted and limited. He would have felt that the constitutional guaranties of liberty were a mockery. And yet all these things have come to pass. In one of these instances the assistance of a constitutional amendment has been necessary, but the fact remains that these restrictions on the liberty of the individual have come to pass just the same.

Municipalities, under authority from the states and with the sanction of the courts, have gone far in regulating the conduct of individuals and in restricting the uses to which property may be put. Thus, regulations have been enacted governing the maintenance of livery stables,<sup>3</sup> public laundries,<sup>4</sup> garages,<sup>5</sup> the manufacture of bricks,<sup>6</sup> dairies,<sup>7</sup> the disposition of garbage,<sup>8</sup> the height of buildings,<sup>9</sup> stone crushers, machine shops and carpet beating establishments,<sup>10</sup> the installation of sinks and water closets in tenement houses,<sup>11</sup> the slaughter of animals,<sup>12</sup> the registration of plumbers,<sup>13</sup> hay barns, wood yards, and laundries,<sup>14</sup> the discharge of smoke,<sup>15</sup> the storing of oil,<sup>16</sup> change of location of street railroad company tracks,<sup>17</sup> and many other businesses and activities too numerous to mention. The list appears to be endless and as time passes the police power expands with the advance of civilization, equal and responsive to the increasing demands of civic progress.

Perhaps the best example of the modern development of the police power is to be found in the mass of zoning ordinances which are today

<sup>3</sup>Reinman v. City of Little Rock, 237 U. S. 171, 35 Sup. Ct. 511 (1915).

<sup>4</sup>Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730 (1884).

<sup>5</sup>Matter of McIntosh v. Johnson, 211 N. Y. 265, 105 N. E. 414 (1914).

<sup>6</sup>Hadacheck v. City of Los Angeles, 239 U. S. 394, 36 Sup. Ct. 143 (1915).

<sup>7</sup>Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673 (1903).

<sup>8</sup>City of Rochester v. Gutherlett, 211 N. Y. 309, 105 N. E. 548 (1914).

<sup>9</sup>Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567 (1908).

<sup>10</sup>Matter of Montgomery, 163 Cal. 457, 125 Pac. 1070 (1912).

<sup>11</sup>Tenement House Dept. of N. Y. City v. Moeschel, 179 N. Y. 325, 72 N. E. 231 (1904), *aff'd*, 203 U. S. 583, 27 Sup. Ct. 781 (1906).

<sup>12</sup>Cronin v. People, 82 N. Y. 318 (1880).

<sup>13</sup>People ex rel. Nechamcus v. Warden City Prison, 144 N. Y. 529, 39 N. E. 686 (1895).

<sup>14</sup>*Ex parte* Quong Wo, 161 Cal. 220, 118 Pac. 714 (1911).

<sup>15</sup>City of Rochester v. Macauley Fein Milling Co., 199 N. Y. 207, 92 N. E. 641 (1910).

<sup>16</sup>Union Oil Co. v. City of Portland, 198 Fed. 441 (D. Ore. 1912); Standard Oil Co. v. City of Danville, 199 Ill. 50, 64 N. E. 1110 (1902).

<sup>17</sup>People ex rel. City of Olean v. W. N. Y. & Pa. Traction Co., 214 N. Y. 526, 108 N. E. 847 (1915).

commonly in use in progressive communities. Upwards of forty states have passed laws authorizing zoning ordinances, and although the struggle to sustain the constitutionality of such ordinances has met with resistance in some states, it is with less and less frequency that we find them condemned by the courts as unconstitutional. That some of our courts have changed their views with respect to such ordinances during the past twenty years is readily illustrated.

For example, in 1918 the Minnesota courts held that an ordinance prohibiting an owner from erecting a store building upon land within a residential district (even where the city had legislative authority for adopting the ordinance) could not be sustained as a legitimate exercise of the police power and was an unlawful invasion of the rights secured to the owner by the constitution. The ordinance established a residential district and provided that "no person shall hereafter erect within said district any building except those used for residence purposes including duplex and double houses, flats, tenement and apartment houses, and there are hereby prohibited within said district the erection and maintenance of hotels, stores, factories, warehouses, dry cleaning plants, public garages or stables or any industrial establishment or any business whatsoever."<sup>18</sup>

Nine years later the Minnesota Courts held valid and constitutional a zoning ordinance resulting in the exclusion of a four family flat building from a designated residential district. In sweeping aside several earlier decisions the court said:

"Zoning statutes are becoming common. The police power, in its nature indefinable, and quickly responsive, in the interest of common welfare, to changing conditions, authorizes various restrictions upon the use of private property as social and economic changes come. A restriction, which years ago would have been intolerable, and would have been thought an unconstitutional restriction of the owner's use of his property, is accepted now without a thought that it invades a private right. As social relations become more complex restrictions on individual rights become more common. With the crowding of population in the cities there is an active insistence upon the establishment of residential districts from which annoying occupations and buildings undesirable to the community are excluded. . . . We hold that a fair zoning ordinance resulting in the exclusion of a four-family flat building from a designated residential district is constitutional. *This holding is not in harmony with our earlier decisions.*"<sup>19</sup>

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<sup>18</sup>State *ex rel.* Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017 (1916).

<sup>19</sup>State *ex rel.* Beery v. Houghton, 164 Minn. 146, 150, 204 N. W. 569, 570 (1925), *aff'd*, 273 U. S. 671, 47 Sup. Ct. 474 (1927) (Italics are writer's).

The courts of Illinois in 1913 declared invalid as an exercise of the police power an ordinance making it unlawful to locate, build or construct any retail store in any block used exclusively for residence purposes without the written consent of a majority of the property owners according to frontage on both sides of the street in the block in which the building was to be located. In declaring this ordinance unconstitutional and an improper exercise of the police power, the court stated that there was nothing inherently dangerous to the health or safety of the public in conducting a retail store.<sup>20</sup>

Twelve years later the Illinois Court, naively ignoring its earlier decision, decided in favor of a zoning ordinance and enjoined a defendant from constructing a building to be used as a grocery store in a residential district where the operation and maintenance of a grocery store was prohibited by the zoning ordinance.<sup>21</sup>

In the same year the Illinois Court in the case of an owner who desired to erect an apartment house on her property in a residential district refused to enjoin the city from enforcing a zoning ordinance limiting buildings in the residential district to single family dwellings, churches and temples, schools and colleges, and libraries.<sup>22</sup>

Zoning ordinances sometimes go so far as to regulate and restrict the height and bulk of buildings, the size and location of area-ways, yards, etc. A fair illustration of a modern zoning ordinance is found in the recent case of *Matter of Wulfsohn v. Burden*,<sup>23</sup> involving a zoning ordinance of the city of Mount Vernon, which divided the city into A, B and C residence districts—A and B business districts, and industrial districts, regulated the height and bulk of buildings, contained "set-back" restrictions, prescribed the size and extent of areas, courts, etc. The ordinance was held valid. Another illustration is found in *Lincoln Trust Company v. Williams Building Corporation*,<sup>24</sup> where the court sustained a resolution adopted by the Board of Estimate and Apportionment of the City of New York pursuant to the so-called Zoning Law<sup>25</sup> regulating and limiting and determining the area of yards, courts and other open spaces and re-

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<sup>20</sup>*People ex rel. Friend v. Chicago*, 261 Ill. 16, 103 N. E. 604 (1913).

<sup>21</sup>*Aurora v. Burns*, 319 Ill. 84, 149 N. E. 784 (1925).

<sup>22</sup>*Deynzer v. Evanston*, 319 Ill. 226, 149 N. E. 790 (1925); See also *State v. New Orleans*, 154 La. 271, 97 So. 440 (1923), criticizing the earlier cases of *Blaiser v. New Orleans*, 142 La. 73, 76 So. 244 (1917), and *Calvo v. New Orleans*, 136 La. 480, 67 So. 338 (1915).

<sup>23</sup>241 N. Y. 288, 150 N. E. 120 (1925).

<sup>24</sup>229 N. Y. 313, 128 N. E. 209 (1920).

<sup>25</sup>N. Y. Laws 1901, c. 466, as amended by N. Y. Laws 1914, c. 470, and as further amended by the N. Y. Laws 1916, c. 497.

stricting the location of trades and industries and the location of buildings designed for specified uses and establishing the boundaries of districts for such purposes.

The majority of zoning regulations cannot be said to deprive an owner of the use of his property. He is permitted to improve it by the erection of buildings designed for uses which are permitted in the neighborhood. In the improvement of his property, it is required that he shall comply with the legislative or municipal idea of what is necessary for the good of the community.

On the other hand, zoning ordinances which contain setback restrictions and establish building lines along private property abutting on public streets might appear to violate the Fourteenth Amendment, for they obviously deprive the owner of the use of a portion of his property. Although there has been some conflict in the decisions respecting the validity of this feature of such ordinances, the question has been expressly settled by the United States Supreme Court. *Gorieb v. Fox*<sup>26</sup> involved an ordinance of Roanoke, Virginia, which, for the declared purpose of establishing building lines and regulating and restricting the construction and location of buildings and for other purposes, divided the city into business and residential districts, and a further ordinance containing a setback or building line with relation to the street to which all buildings subsequently erected were required to conform. In sustaining these ordinances the Court, by Mr. Justice Sutherland, after referring to its earlier consideration and discussion of the question in *Euclid v. Ambler Company*,<sup>27</sup> set at rest all doubt as to the constitutionality of such an ordinance and stated:

"The remaining contention is that the ordinance, by compelling petitioner to set his building back from the street line of his lot, deprives him of his property without due process of law. Upon that question the decisions are divided, as they are in respect of the validity of zoning regulations generally. But, after full consideration of the conflicting decisions, we recently have held, *Euclid v. Ambler Co.*, 272 U. S. 365, that comprehensive zoning laws and ordinances, prescribing, among other things, the height of buildings to be erected (*Welch v. Swasey*, 214 U. S. 91) and the extent of the area to be left open for light and air and in aid of fire protection, etc., are, in their general scope, valid under the federal Constitution."<sup>28</sup>

It is becoming more and more apparent from the decisions dealing with zoning ordinances that a consideration of public esthetics is

<sup>26</sup>274 U. S. 603, 47 Sup. Ct. 675 (1926).

<sup>27</sup>272 U. S. 365, 47 Sup. Ct. 114 (1926).

<sup>28</sup>*Supra* note 26, at 608, 47 Sup. Ct. at 677. See also *Matter of Wulfsohn v. Burden*, *supra* note 23.

regarded as increasingly important in the judicial conception of the scope of the police power. For example, Mr. Justice Owen, writing for the Supreme Court of Wisconsin, in discussing the validity of a zoning ordinance, says:

"The benefits to be derived to cities adopting such regulations may be summarized as follows: They attract a desirable and assure a permanent citizenship; they foster pride in and attachment to the city; they promote happiness and contentment; they stabilize the use and value of property and promote the peace, tranquility, and good order of the city. We do not hesitate to say that the attainment of these objects affords a legitimate field for the exercise of the police power. He who owns property in such a district is not deprived of its use by such regulations. He may use it for the purposes to which the section in which it is located is dedicated. That he shall not be permitted to use it to the desecration of the community constitutes no unreasonable or permanent hardship and results in no unjust burden.

"It is sometimes said that these regulations rest solely upon aesthetic considerations. The results which they tend to accomplish, as above summarized, are material rather than aesthetic in their nature. It is not necessary for us to consider how far aesthetic considerations furnish a justification for the exercise of the police power. . . .

"It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race our sensibilities are becoming more refined and that which formerly did not offend cannot now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed as such by the written law. This is not because the subject outlawed is of a different nature, but because our sensibilities have become more refined and our ideals more exacting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. 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 average or dominant human sensibilities, well may be pondered."<sup>29</sup>

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<sup>29</sup>State v. Harper, 182 Wis. 148, 158, 196 N. W. 451, 455 (1923). See also the well considered opinion of Mr. Justice Sutherland in *Euclid v. Ambler Co.*, *supra* note 27. See also *State v. New Orleans*, 154 La. 271, 283, 97 So. 440, 444, 33 A. L. R. 260 (1928), where the court, dealing with zoning ordinances, said: "If by the term 'aesthetic considerations' is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe any substantial reason for saying that such a consideration is not a matter of general welfare. . . . Why should not the police power avail, as well to suppress or prevent a nuisance committed by offending the sense of sight, as to suppress or prevent a nuisance committed by offending the sense of hearing, or the olfactory nerves? An eyesore in a neighborhood of residences might be as

And again, in a recent New York case upholding a zoning ordinance of the City of Mount Vernon which regulated the height of buildings, the area of yards, courts, etc., and provided for setback restrictions, the learned Mr. Chief Judge Hiscock, says:

"[T]he application of the police power has been greatly extended during a comparatively recent period, and . . . while the fundamental rule must be observed that there is some evil existent or reasonably to be apprehended which the police power may be invoked to prevent and that the remedy proposed must be generally adapted to that purpose, the limit upon conditions held to come within this rule has been greatly enlarged. The power is not limited to regulations designed to promote public health, public morals or public safety or to the suppression of what is offensive, disorderly or unsanitary but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity."<sup>30</sup>

## II

In many states the regulation of billboards and sign advertisements has been left to the municipalities under appropriate delegation of authority from the state government. Municipalities have no inherent power to enact ordinances and by-laws regulating the erection of signs and billboards; such power must come by a legislative delegation of authority from the State. The power may be by a general delegation of authority to enact ordinances for police purposes. It may be conferred by a delegation of authority to pass ordinances for the good government of the municipality and the preservation of peace and good order,<sup>31</sup> or to enact ordinances for the prevention and abatement of nuisances.<sup>32</sup> Such power also follows by necessary implication from a delegation of authority to license and regulate bill posters and bill distributors and sign advertising. It is also generally considered

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much a public nuisance, and as ruinous to property values in the neighborhood generally, as a disagreeable noise, or odor, or a menace to safety or health. The difference is not in principle, but only in degree. In fact, we believe that the billboard case, *Cusack v. Chicago*, 242 U. S. 526, 37 Sup. Ct. 190, 61 L. Ed. 472, L. R. A. 1918 A, 136, Ann. Cas. 1917 C, 594, or *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269, 39 Sup. Ct. 274, 63 L. Ed. 599, or the skyline case, *Welch v. Swasey*, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923, or the case of *Hubbard v. Taunton*, 140 Mass. 467, 5 N. E. 157, might have rested as logically upon the so-called aesthetic considerations as upon the supposed other considerations of general welfare."

<sup>30</sup>*Matter of Wulfsohn v. Burden*, *supra* note 23, at 298, 150 N. E. at 122.

<sup>31</sup>*Gunning System v. Buffalo*, 75 App. Div. 31, 77 N. Y. Supp. 987 (4th Dept. 1902).

<sup>32</sup>*Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035 (1905).

to be included in the general welfare clause, where the charter has one.

Municipal ordinances adopted under the police power must be reasonable, and it is within the jurisdiction of the courts to pronounce upon their reasonableness.<sup>33</sup>

In ruling upon the constitutionality of municipal ordinances regulating signs and billboards, the test generally applied by the courts has been whether or not the ordinance could be said to be reasonably adapted to preserve and protect the health, morals, safety and general welfare of the people. Thus the United States Supreme Court in sustaining as constitutional an ordinance of the City of Chicago regulating signs and billboards, held it to be important and material that the evidence introduced upon the trial showed, and the Supreme Court of Illinois found, that

“. . . fires had been started in the accumulation of combustible material which gathered about such billboards; that offensive and unsanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals.”<sup>34</sup>

The court also noted evidence offered on the trial and which the Supreme Court of Illinois held had been erroneously excluded by the trial court tending to show that

“. . . residence sections of the city did not have as full police and fire protection as other sections have, and that the streets of such sections are more frequented by unprotected women and children than, and are not so well lighted as, other sections of the city are, and that most of the crimes against women and children are offenses against their persons.”<sup>34a</sup>

The court concluded that there was sufficient testimony to show convincingly the propriety of putting billboards as distinguished from buildings and fences in a class by themselves and to justify the

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<sup>33</sup>*Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064 (1885).

<sup>34</sup>*Cusack Company v. City of Chicago*, 242 U. S. 526, 529, 37 Sup. Ct. 190, 191 (1916). The ordinance under consideration in this case read as follows: "It shall be unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing of the owners or duly authorized agents of said owners owning a majority of the frontage of the property on both sides of the street in the block in which such billboard or signboard is to be erected, constructed or located. Such written consents shall be filed with the Commissioner of Buildings before a permit shall be issued for the erection, construction or location of such billboards or signboards."

<sup>34a</sup>*Ibid.*

prohibition against their erection in residence districts of a city in the interest of the safety, morals, health and decency of the community.

Approaching the problem from the same viewpoint, the New York Court of Appeals condemned as unconstitutional an ordinance of the city of New York containing an absolute prohibition against the erection of "sky signs" unless they complied with the detailed requirements of the code. The court pointed out that the absolute prohibition in this case was confined wholly to "sky signs", as they were defined in the ordinance, and that it was not the structure but the wording, announcement, direction or advertisement which was prohibited; that such wording, announcement, direction or advertisement, has no relation to the safety of the structure itself; that the ordinance was not directed solely against indecent or immoral advertisements but against all advertisements; and that it consequently appeared that the ordinance in question was not enacted in the interest of the public health, morals or safety, or to conserve public peace, order and general welfare.<sup>35</sup>

Where, however, it has appeared that the ordinance was reasonably adapted for the protection and promotion of the safety, health and general welfare of the people, the New York courts have not hesitated to sustain it. Thus an ordinance of the City of Rochester was upheld which forbade the erection within the city limits of billboards more than six feet in height without the consent of the common council. The court stated that the purpose of the ordinance was to obviate a real danger to the public since billboard structures unlimited as to height and dimensions

"might readily become a constant and continuing danger to the lives and persons of those who should pass along the street in proximity to them."<sup>36</sup>

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<sup>35</sup>People *ex rel.* M. Wineburgh Adv. Co. v. Murphy, 195 N. Y. 126, 88 N. E. 17 (1909). *But see* People *ex rel.* Publicity Leasing Co. v. Ludwig, 218 N. Y. 540, 113 N. E. 532 (1916) where the New York court sustained an ordinance regulating the structure of sky signs.

<sup>36</sup>City of Rochester v. West, 164 N. Y. 510, 514, 58 N. E. 673, 674 (1900). See also People *ex rel.* Van Beuren and New York Bill Posting Co. v. Miller, 161 App. Div. 138, 146 N. Y. Supp. 403 (1st Dept. 1914). The Missouri courts have formulated three propositions governing the power of municipalities to regulate billboards. "First, that municipal corporations, even under their general police powers may, by ordinance, exercise reasonable control over the construction and maintenance of billboards, house signs and sky signs. Second, that said power to regulate said matters begins where the public safety, health, morals and good government demand such regulation, and ends where those public interests will not be beneficially served thereby. And third, that the mere unsightliness of bill-

The Circuit Court for the Southern District of California sustained an ordinance of the city of Los Angeles making it unlawful to "erect, build, construct, or maintain in the city of Los Angeles any fence, building or other structure of or to a greater height than six feet from the surface of a sidewalk, street or the ground where the same is erected, built, constructed or maintained for the purpose of containing thereon any sign or advertisement for advertising purposes or posting thereon or affixing or attaching thereto or thereon any bills or signs, placards, cards, posters or other advertising matter for advertising purposes."<sup>37</sup> In sustaining the ordinance, Judge Ross wrote as follows:

"It is a matter of common knowledge, and therefore within the notice of the court (*Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304), that these are usually, if not invariably, cheap and flimsy affairs, constructed of wood, and erected on vacant lots of land along or near to the streets, in order to catch the eye of the passers-by. Such structures, if of sufficient height, may be very readily blown over by wind, or shaken down by an earthquake, and in such event (depending upon their height and proximity to the public thoroughfare) may very easily cause injury to persons standing or passing thereon. Moreover, the views in and about a city, if beautiful and unobstructed, constitute one of its chief attractions, and in that way add to the comfort and well-being of its people. Billboards for advertising purposes, erected to any great height, would undoubtedly be subject to all of these, as well as other, objections, and such structures are, therefore, plainly within the regulating power of the governing body of the city."<sup>37a</sup>

An ordinance of the city of St. Louis which went much farther than either the Rochester or Los Angeles ordinances just referred to, came before the Supreme Court of the United States in *St. Louis Poster Advertising Company v. St. Louis*.<sup>38</sup> This ordinance allowed no billboard of 25 feet square or more to be put up without a permit and none to extend more than 14 feet above the ground; required an open space of 4 feet between the lower edge and the ground and forbade an approach nearer than 6 feet to any building or to the side of any lot or nearer than 2 feet to any other billboard or 15 feet to the street; required conformity to the building line; limited billboards in

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boards and of similar structures as well as their failure to conform to esthetics, is no valid reason for their total or partial suppression." *Kansas City Gunning Adv. Co. v. Kansas City*, 240 Mo. 659, 144 S. W. 1099 (1912); *St. Louis Gunning Adv. Co. v. City of St. Louis*, 235 Mo. 99, 137 S. W. 929 (1911).

<sup>37</sup>*In re Wilshire*, 103 Fed. 620 (C. C. S. D. Cal. 1900).

<sup>37a</sup>*Ibid.* at 623, 39 Sup. Ct. 274.

<sup>38</sup>249 U. S. 269, 39 Sup. Ct. 274 (1918).

area to 500 square feet; and exacted a permit fee of \$1.00 for every five lineal feet. The ordinance was sustained as a valid exercise of the police power. It was urged in the Supreme Court that the several restrictions were unreasonable and unconstitutional limitations on the liberty of the individual and on rights of property in land. Replying to this argument Mr. Justice Holmes writing for the court said:

"But the argument comes too late. This court has recognized the correctness of the decision in *St. Louis Gunning Advertising Company v. St. Louis*, 235 Missouri, 99, followed in this case, that billboards properly may be put in a class by themselves and prohibited in residence districts of a city 'in the interest of the safety, morality, health and decency of the community.' *Cusack Co. v. Chicago*, 242 U. S. 526, 529, 530. It is true that according to the bill the plaintiff has done away with dangers from fire and wind, but apart from the question whether those dangers do not remain sufficient to justify the general rule, they are or may be the least of the objections adverted to in the cases. 235 Missouri, 99. *Kansas City Gunning Advertising Co. v. Kansas City*, 240 Missouri, 659, 671. Possibly one or two details, especially the requirement of conformity to the building line, have aesthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary. *Hubbard v. Taunton*, 140 Massachusetts 467, 468."<sup>38a</sup>

Instances might be multiplied of ordinances regulating billboards which have been before the courts for consideration,<sup>39</sup> but they would all tend to show that the courts have uniformly held ordinances valid which have been shown to be reasonably designed to promote and protect the safety, health, morals or general welfare of the public. The courts have never defined the phrase "general welfare." It is conceivable that as time passes, if the general public develops a

<sup>38a</sup>*Ibid* 274, 39 Sup. Ct. at 275.

<sup>39</sup>See *inter alia* *Whitmier & Filbrick Co. v. Buffalo*, 118 Fed. 773 (C. C. W. D. N. Y. 1902); *Varney & Green v. Williams*, 155 Cal. 318, 100 Pac. 867 (1909); *Bill Posting Sign Co. v. Atlantic City*, 71 N. J. L. 72, 58 Atl. 342 (1904); *State v. Whitlock*, 149 N. C. 542, 63 S. E. 123 (1908); *Gibbons v. Missouri, K. & T. R. R.*, 285 Pac. 1040 (Okla. 1930); *Bryan v. Chester*, 212 Pa. 259, 61 Atl. 894 (1905). Ordinances prohibiting the placing of any advertising device upon any fence or other structure in, about, or upon any vacant land fronting upon public parks have been declared invalid as an unreasonable restriction upon the use of property. *Haller Sign Works v. Physical Culture Training School*, *supra* note 2; *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 74 N. E. 601 (1905); *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460 (1st Dept. 1903).

higher sense of esthetics, the phrase "general welfare" may be given a sufficiently broad meaning to permit the courts to uphold as a valid exercise of the police power an ordinance prompted solely by esthetic considerations.

That the courts are alive to the possibility of future governmental regulation of unsightly advertisements as such and are pointing the way for a valid and constitutional broadening of the police power may reasonably be inferred from the trend of court decisions and opinions. For example, in *Cochran v. Preston*<sup>40</sup> the court admitted that by the weight of authority regulations designed only to enforce upon the people the legislative conceptions of artistic beauty and symmetry will not be sustained however much such regulations may be needed for the artistic education of the people, but the court added:

"Such is undoubtedly the weight of authority, though it may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the Fine Arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power even for such purposes."<sup>40a</sup>

In the same connection, the forward-looking opinion of Mr. Justice Angell in the recent case of *People v. Sterling*<sup>41</sup> may profitably be given attention. The case involved an alleged violation of Section 61-a of the Conservation Law of New York which read as follows:

"Use of signs and billboards restricted. In order to conserve the natural beauty of the Adirondack park by preserving and regulating it for public uses for the resort of the public for recreation, pleasure, air, light and enjoyment by keeping it open, clean and in good order for the welfare of society, and to abate the public nuisance which has arisen through the unrestricted use of signs and billboards therein, no person shall erect or maintain within the boundaries thereof any advertising sign or billboard, except under written permit from the commission. The provisions of this section shall not apply to signs erected or maintained upon property in connection with a business conducted thereon, or within the limits of an incorporated village."

The complaint alleged that the defendant had been maintaining within the boundaries of the Adirondack Park eleven billboards varying in size from 6 x 12 to 12 x 24 feet. *The signs were erected on private property* in sight of and close to the State highways running through the park between Lake Placid and Saranac Lake.

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<sup>40</sup>108 Md. 220, 70 Atl. 113 (1908).

<sup>40a</sup>*Ibid.* 229, 70 Atl. at 114.

<sup>41</sup>128 Misc. 650, 220 N. Y. Supp. 315 (Sup. Ct. 1927).

The defendant made a motion to dismiss the complaint for failure to state a cause of action on the theory that Section 61-a of the Conservation Law was unconstitutional. In denying the motion the court pointed out that the statute states two purposes— (1) “to conserve the natural beauty of the Adirondack Park” and (2) “to abate the public nuisance which has arisen through the unrestricted use of signs”; that the declaration in the statute that an act is a public nuisance will not take the place of proof and the complainant is entitled to his day for offering proof; and that the constitutionality of the statute could not therefore be determined on a motion.

Having reached this conclusion, the court by way of dicta says:

“If the statute here in question had been worded with more care the first part of it would not have to stand or fall as voicing solely an esthetic object. That it is so infelicitously worded in this respect is unfortunate. If, for instance, it had been made to read, ‘In order to conserve the natural beauty of the Adirondack Park, and to preserve and regulate it for public uses . . . and enjoyment, and to keep it open . . . and to abate the public nuisance which had arisen,’ etc., a different situation would be presented. We have reached a point in the development of the police power where an esthetic purpose needs but little assistance from a practical one in order to withstand an attack on constitutional grounds. . . .”

“Perhaps a statute which, in addition to conserving the natural beauty of the Adirondack Park, also declared its object to be to preserve and regulate it for public uses and enjoyment, and to keep it open, clean and in good order for the welfare of society (which includes the public health), might have just the additional elements of strength necessary to enable it to stand. There surely should be some way to curb the modern billboard nuisance, aside from the efforts of public-spirited women. It would seem to be fairly certain that, when the State highways through the privately owned lands in the Adirondack Park become solidly lined with billboards, hot dog stands, and stations furnished in connection with gasoline selling agencies conspicuously labeled ‘For men’ and ‘For women,’ the State will have some right to intervene in behalf of a long-suffering public. If it will have the right then, it should have it before the line becomes absolutely solid. And perhaps it should have it at the point where we are now. The People have a vast investment in the Adirondack Park. The police power should be sufficient to enable them to enjoy it to the utmost.”<sup>42</sup>

Another recent New York case throws considerable light on the present and probable future trend of judicial opinion regarding governmental regulation of billboard advertising as such. *People v.*

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<sup>42</sup>*Ibid.* 655, 220 N. Y. Supp. at 318.

*Wolf*<sup>43</sup> involved an ordinance of the small and exclusive residential Village of Kings Point on Long Island reading as follows:

"Section 1. It shall be unlawful for any person to post, erect or maintain any advertisement in the form of a bill or sign or other device or display within the Village of Kings Point or for any owner of property within the Village of Kings Point to permit the posting, erection or maintenance on his property of any advertisement in such form; except that signs solely advertising real property to be for sale or for rent may be placed on the real property so advertised, not nearer than twenty-five feet to a public street or highway or, in the case of developed property, not nearer to such street or highway than the building line thereof, provided that no such sign shall be so placed as to obstruct the clear view of the highway from any direction, and further provided that no such sign shall be of greater dimensions than four feet by four feet.

"Section 2. Any person violating the provisions of this Ordinance, or any part thereof, shall be liable for and forfeit and pay a penalty not exceeding Fifty dollars for each offence.

"Any violation of this ordinance, or any part thereof, shall constitute disorderly conduct, and the person violating the same shall be and is hereby declared a disorderly person."

The defendants, Wolf and Jennings, being employer and employee respectively, erected in violation of this ordinance a billboard nine feet high by twelve feet wide, advertising land for sale. The sole violation arose by reason of the size of the billboard. They were convicted by a Police Justice of the Village of Kings Point and upon appeal to the County Court of Nassau County, the conviction was reversed on the ground that the ordinance was invalid and an improper exercise of the police power. The opinion of the County Judge stated that the ordinance was based solely upon esthetic considerations; that to be valid, it was essential that the ordinance be designed in the interests of public health, public safety, public morals or the general welfare; and that as none of these purposes was within the purview of the ordinance, the same was illegal and void.

The People appealed to the Appellate Division, Second Department, and that court, holding the ordinance to be a valid exercise of the police power, reversed the County Court and affirmed the judgment of conviction of the Police Court.<sup>44</sup> The Appellate Division, in an opinion by Mr. Justice Kapper, after reviewing the cases dealing with the exercise of the police power in modern times and remarking on the expanding scope of this governmental power, stated that in its opinion the ordinance bore a substantial relation to public

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<sup>43</sup>127 Misc. 382, 216 N. Y. Supp. 741 (Co. Ct. 1926).

<sup>44</sup>220 App. Div. 71, 220 N. Y. Supp. 656 (2d Dept. 1927).

health, safety, morals and general welfare in that the evidence showed that the land behind billboards was a depository for trash, litter, and debris of every character and description, that leaves and other inflammable material would accumulate about them and be a possible source of fire and a menace to health, etc. The opinion continues:

"Even without such evidence, must we close our eyes to the obvious? If the respondents are correct in the position which they take, then this village is powerless to either regulate or prohibit billboards. The result of that is, of course, no ordinance, no restriction whatever. What does such a situation come to? Signs of inordinate height may be erected from the ground up and on the street line and for an indefinite linear space. Must the municipality appoint supervisors to inspect the safety of such structures and thus tax residents in no manner benefited so that an owner of property may lease the land to sign or billboard advertisers? Are the nuisances which are created behind such billboards to go on, increase and become permanent to the menace of the health of the community, as well as its morals? These things are universally known and should be accepted in law as facts. If these views are correct, then how can it be said that this ordinance does not aim at subserving or have 'substantial relation to the public health, safety, morals or to the general welfare'?"<sup>44a</sup>

An appeal was taken to the Court of Appeals,<sup>45</sup> which was dismissed on the ground that, under the rules of practice, in New York, the Appellate Division had no jurisdiction to hear the appeal before that court; that since no appeal lay to that tribunal from the County Court, the judgment of the Appellate Division was void; the case was improperly before the Court of Appeals, and the judgment of reversal of the County Court was undisturbed.

Although this technical ruling of the Court of Appeals negatives the effect of the Appellate Division's decision in this case, nevertheless, the opinion of the Appellate Division is illuminating as indicative of the liberal tendencies of the courts on this subject.

### III

Billboard legislation in this country has for the most part been enacted only during the past decade, but the popular demand for such legislation has been so great that in this short period of time statutes dealing with the subject have been adopted in thirty-three states. The legislation is regulatory in its character and may for convenience be divided into several groups.

<sup>44a</sup>*Ibid.* 77, 220 N. Y. Supp. at 661.

<sup>45</sup>247 N. Y. 189, 159 N. E. 906 (1928).

1. California has forbidden the placing or displaying of any advertisement on public property without consent, and has declared that anyone violating this statute is guilty of a misdemeanor.<sup>46</sup> Similar legislation has been adopted in Colorado,<sup>47</sup> Connecticut,<sup>48</sup> Illinois,<sup>49</sup> Iowa,<sup>50</sup> Louisiana,<sup>51</sup> Maine,<sup>52</sup> Maryland,<sup>53</sup> Michigan,<sup>54</sup> Minnesota,<sup>55</sup> New Jersey,<sup>56</sup> North Carolina,<sup>57</sup> North Dakota,<sup>58</sup> Pennsylvania,<sup>59</sup> and Utah.<sup>60</sup>

2. A statute of North Carolina provides that anyone placing advertising matter on private property without first obtaining the written consent of the owner is guilty of a misdemeanor and subject to fine or imprisonment.<sup>61</sup> Legislation of a similar nature has been adopted in California,<sup>62</sup> Colorado,<sup>63</sup> Connecticut,<sup>64</sup> Illinois,<sup>65</sup> Indiana,<sup>66</sup> Louisiana,<sup>67</sup> Maryland,<sup>68</sup> New Jersey,<sup>69</sup> New York,<sup>70</sup> Pennsylvania,<sup>71</sup> Rhode Island,<sup>72</sup> and Utah.<sup>73</sup>

3. New York permits anyone to remove advertising matter from along public highways which has been placed there without per-

<sup>46</sup>CAL. GEN. LAWS (Deering, 1923), Act 89; *ibid.* Act 3267, § 6; CAL. PEN. CODE (Deering, 1923) §§ 602 *et seq.*

<sup>47</sup>COLO. COMP. LAWS (1921) § 7017.

<sup>48</sup>CONN. GEN. STAT. (1921) c. 79.

<sup>49</sup>ILL. REV. STAT. (Cahill, 1924) c. 38, §453 (9).

<sup>50</sup>IOWA CODE (1924) §§ 4846-7.

<sup>51</sup>LA. REV. STAT. ANN. (Marr, 1926) 381.

<sup>52</sup>Me. LAWS 1925, c. 188.

<sup>53</sup>MD. ANN. CODE (Bagby, 1924) art. 39A, § 24.

<sup>54</sup>Mich. LAWS 1925, no. 108, § 5.

<sup>55</sup>MINN. STAT. (Mason, 1923) § 2615 (3).

<sup>56</sup>N. J. COMP. STAT. (Cum. Supp. 1925) 21.

<sup>57</sup>N. C. LAWS 1924 (extra sess.) c. 109.

<sup>58</sup>N. D. COMP. LAWS ANN. (Supp. 1925) § 2037b.

<sup>59</sup>18 PA. STAT. ANN. (Purdon, 1930) § 3082; Pa. LAWS 1925 no. 388.

<sup>60</sup>Utah LAWS 1923, c. 27.

<sup>61</sup>N. C. LAWS 1924 (extra sess.) c. 109.

<sup>62</sup>CAL. GEN. LAWS (Deering, 1923) Act 89; CAL. PEN. CODE (Deering, 1923) §§ 602, *et seq.*

<sup>63</sup>COLO. COMP. LAWS (1921) § 7017.

<sup>64</sup>CONN. GEN. STAT. (1921) c. 79.

<sup>65</sup>ILL. REV. STAT. (Cahill, 1924) c. 38, § 453 (9).

<sup>66</sup>IND. ANN. STAT. (Burns, 1926) § 2504.

<sup>67</sup>LA. REV. STAT. ANN. (Marr, 1926) 382.

<sup>68</sup>MD. ANN. CODE (Bagby, 1924) art. 39A, § 24.

<sup>69</sup>N. J. COMP. STAT. (Cum. Supp. 1925) 21.

<sup>70</sup>N. Y. CONS. LAWS, c. 40 (PENAL LAW) §§ 121, 1423 (11).

<sup>71</sup>18 PA. STAT. ANN. (Purdon, 1930) § 3082.

<sup>72</sup>R. I. GEN. LAWS (1923) § 6098.

<sup>73</sup>Utah LAWS 1923, c. 27.

mission from the proper governmental authority.<sup>74</sup> New Jersey<sup>75</sup> and Rhode Island<sup>76</sup> have adopted similar legislation.

4. In New Jersey, by statute, a presumption is raised that the person whose goods are advertised authorized the unlawful placing of the advertisement.<sup>77</sup> Similar provisions appear in the New York<sup>78</sup> and Colorado<sup>79</sup> laws.

5. Vermont exacts a license fee from anyone engaging in the business of outdoor advertising within the state.<sup>80</sup> Statutes requiring licenses for anyone engaging in the business of outdoor advertising, or taxing billboards, have also been adopted in Connecticut,<sup>81</sup> Florida,<sup>82</sup> Michigan,<sup>83</sup> Mississippi,<sup>84</sup> New Jersey,<sup>85</sup> and Vermont.<sup>86</sup>

6. A statute has been adopted in Colorado prohibiting the erection of billboards along any highway outside city limits within 300 feet of intersecting corners or sharp curves if such structure would interfere with the view of an approaching vehicle.<sup>87</sup> Legislation of a similar nature has been enacted in Iowa,<sup>88</sup> Kansas,<sup>89</sup> Maine,<sup>90</sup> Michigan,<sup>91</sup> Nebraska,<sup>92</sup> North Dakota,<sup>93</sup> South Dakota,<sup>94</sup> Vermont,<sup>95</sup> Washington,<sup>96</sup> and Wisconsin.<sup>97</sup>

7. Arkansas has enacted legislation which prohibits the erection of any billboard within 100 yards of a state highway calculated to make travelers leave such highway and travel any public road to any town, etc., in the state unless the person erecting such billboard

<sup>74</sup>N. Y. CONS. LAWS, c. 40 (PENAL LAW) §§ 121, 1423 (11).

<sup>75</sup>N. J. COMP. STAT. (Cum. Supp. 1925) 21.

<sup>76</sup>R. I. GEN. LAWS (1923) § 6098.

<sup>77</sup>N. J. COMP. STAT. (Cum. Supp. 1925) 21.

<sup>78</sup>N. Y. CONS. LAWS, c. 40 (PENAL LAW) §§ 121, 1423 (11).

<sup>79</sup>COLO. COMP. LAWS (1921) § 7017.

<sup>80</sup>Vt. LAWS 1925, no. 32.

<sup>81</sup>CONN. GEN. STAT. (1918) §§ 3024, *et seq.*

<sup>82</sup>FLA. GEN. LAWS (Skillman, 1927) § 1071.

<sup>83</sup>Mich. LAWS 1925, no. 325.

<sup>84</sup>Miss. LAWS 1924, c. 117, § 3 (amending Code, § 3779).

<sup>85</sup>N. J. COMP. STAT. (1910) pp. 656, 659.

<sup>86</sup>Vt. LAWS 1925, no. 32.

<sup>87</sup>COLO. COMP. LAWS (1923) c. 128.

<sup>88</sup>IOWA CODE (1924) §§ 4844-5.

<sup>89</sup>KAN. REV. STATS. ANN. (1923) c. 19, § 2612.

<sup>90</sup>Me. LAWS 1925, c. 188.

<sup>91</sup>Mich. LAWS 1925, no. 108, § 6.

<sup>92</sup>Neb. LAWS 1923, c. 159.

<sup>93</sup>N. D. COMP. LAWS ANN. (Supp. 1925) § 2037b.

<sup>94</sup>S. D. LAWS 1925, c. 186.

<sup>95</sup>Vt. LAWS 1925, no. 32.

<sup>96</sup>Wash. LAWS 1923, c. 129 (Code Supp. §§ 10510-3, *et seq.*).

<sup>97</sup>WIS. STAT. (1927) 343, 482.

shall first obtain permission of the State Highway Commission. The statute further prohibits the erection of billboards giving false information as to highways, provides that a violator shall be guilty of a misdemeanor and fined, and further provides for the removal of any sign boards then in existence giving such misleading information.<sup>98</sup>

8. Connecticut prohibits any sign within 300 feet of any state highway having the word "Danger" thereon or any other word used to give warning to traffic except under authorization from the Highway Commissioner. Signs erected by municipalities are excepted from this prohibition provided that none of such signs shall contain advertising matter. The Highway Commissioner is given authority to remove any signs in violation of this statute and a fine is provided for violation.<sup>99</sup>

There is also a statute in Connecticut prohibiting the dropping of handbills from airplanes except over a place established for that purpose.<sup>100</sup>

Although the foregoing will give some idea of the legislation which has been generally adopted throughout the country, it is, perhaps, of interest to summarize some of the more comprehensive statutes in a few states.

In 1925 Vermont enacted legislation which prohibits the display of advertising matter over six feet square except in proximity to the place of manufacture of the goods advertised unless the person or corporation displaying such advertising matter shall first obtain a license to do so and pay the license fee required by the statute. Billboards are required to meet with the approval of the Secretary of State with the exception of advertisements erected by towns and highway signs placed at points of danger. Billboards may not be erected within 50 feet of public parks except on buildings where the goods advertised are manufactured. A non-resident desiring to erect advertising displays in the state is required to give a bond. The Secretary of State may require the removal of any billboard or advertising matter if in his opinion the vision along the highway is obstructed, and if the owner fails to remove the billboard it may be removed by order of the Secretary of State and the cost of removal charged to the owner. All signs in violation of the Act are to be removed by the State Highway Department and penalties are provided for violation of the statute.<sup>101</sup>

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<sup>98</sup>Ark. Laws 1925, no. 135.

<sup>99</sup>Conn. Laws 1925, c. 103.

<sup>100</sup>CONN. GEN. STAT. (1925) c. 249, § 11.

<sup>101</sup>Vt. Laws 1925, no. 32.

In Nevada, by statute, it is unlawful for anyone to place advertising matter on any improved state highway, or within 20 feet of the main traveled way of unimproved highways, or on property of another in view of such highway without the owner's written consent. Signs within the limits of an incorporated town are excepted as are also notices required by law. It is unlawful outside of the limits of a town to put any billboard on public property, or on leased land if the manufacture of the goods advertised is not done on such land, and unless a permit is first obtained. Fees are provided for such permits, and a limited exception is made for billboards already erected at the time the statute was passed. No permit may be granted *where the billboard would measurably destroy the natural beauty of the scenery or obstruct the view*. Any sign which is a hazard to traffic may be removed. Violations are declared to be a public nuisance and the violator guilty of a misdemeanor and subject to fine or imprisonment.<sup>102</sup>

The Penal Law of New York provides that any person who places advertising matter on property without the owner's consent is punishable by imprisonment or fine.<sup>103</sup> It further provides that any person placing advertising matter on public property without permission is liable to imprisonment or fine and that unlawful advertising matter along public highways may be removed by anyone.<sup>104</sup> No person may erect a billboard in the Adirondack State Park except under authority of the Park Commission, but this prohibition does not apply to signs on premises on which the business advertised is conducted or in the limits of an incorporated village.<sup>105</sup>

Massachusetts, seeking to avoid the delay incident to the natural evolution of the law through the courts, adopted in 1918 an amendment to its Constitution by the insertion of a new article reading as follows:

*“Article L: Advertising on public ways in public places and on private property within public view may be regulated and restricted by law.”*

In 1921 a statute was enacted providing for the regulation of billboards on public highways, requiring licenses, and giving to the State Department of Public Works jurisdiction over advertising signs on public ways “or on private property within public view of any highway, public park or reservation”.<sup>106</sup> In 1924 the Division of

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<sup>102</sup>Nev. Laws 1925, c. 90.

<sup>103</sup>N. Y. CONS. LAWS, c. 40 (PENAL LAW) § 121.

<sup>104</sup>*Ibid.* § 1423 (II).

<sup>105</sup>N. Y. Laws 1924, c. 531.

<sup>106</sup>MASS. GEN. LAWS (1921) c. 93, as amended by Mass. Acts 1924, c. 329, c. 334, c. 490.

Highways of the Department of Public Works adopted rules and regulations for the control and restriction of billboards, signs and other advertising devices. These regulations were put into effect on January 24, 1924. They require that permits be obtained for advertising signs, that no permit shall be granted for a sign within 300 feet of any public park or reservation if visible from any part of the same, that no outdoor advertising shall be painted or affixed upon any fence or pole within 50 feet of any public way or upon any rock or tree nor directly upon any wall, and that no permit will be granted to place signs near certain public ways where in the opinion of the Division of Highways, having regard to the usual scenic beauty of the territory, signs would be particularly harmful to the public welfare.

An attack was immediately launched against this legislation and the Department's regulations by the billboard interests. The matter is now pending in three separate cases before the Supreme Judicial Court of Massachusetts. Evidence has been taken by a Master but no decision has at this writing been rendered.

The New Jersey law regulating billboards and enacted in the 1930 session of the New Jersey Legislature is perhaps one of the most complete acts on this subject.<sup>107</sup> It provides that no person, firm or corporation shall engage in the business of outdoor advertising for profit without a license from the Commissioner of Motor Vehicles and payment of the sum of \$100 as a fee. Such license is to remain in force for a year and may be renewed annually upon the same terms. The applications for licenses are to be on forms furnished by the Commissioner of Motor Vehicles and such information must be given as is required in the application. In addition, a permit must be obtained for the erection and use of each billboard or other structure for advertising purposes. No person, firm or corporation not engaged in the business of outdoor advertising for profit may erect or maintain any billboard or other structure for advertising except on the premises where the business advertised is carried on without a permit from the Commissioner of Motor Vehicles. A tax of three cents per square foot is levied on each billboard or structure used and it is required that every person desiring to erect or maintain such billboard shall file detailed specifications with the Commissioner of Motor Vehicles as to each billboard to be used. The name and address of the person owning such billboard must be inscribed thereon. No permit is required for billboards on real estate exclusively for the purpose of advertising the same for sale or to let, or to erect or maintain a billboard on the premises where the business advertised

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<sup>107</sup>N. J. Laws 1930, c. 41.

is carried on. Non-residents of the state desiring to maintain billboards in the state are required to file with the Commissioner of Motor Vehicles a bond of \$1,000. No billboard or other structure for advertising purposes may be erected or maintained within a distance of 500 feet of an intersection of a highway with another highway, railroad, or street railway at a point where it would interfere with a view of a train, street car or other vehicle on the intersecting highway or railroad or street railway, and no billboard may be erected on any public property without the written consent of the Commissioner of Motor Vehicles. No permit may be issued for any billboard "*which in the judgment of the Commissioner of Motor Vehicles is or would be injurious to property in the vicinity thereof or injuriously affect any public interest.*" An exception is contained in the Act for contracts made prior to January 1, 1930, for the construction or use of billboards until the term of such contract shall have expired. Violations of the Act are punishable by a fine of \$100 and it is provided that every day that such violation continues is to be treated as a separate violation of the Act.

But little doubt can be expressed as to the validity of most of this legislation. The reasonable taxation of billboards and the requirements for license fees are clearly within the powers of the states. The prohibition against the erection of billboard structures near intersecting highways or railroad crossings seems justified and required for the protection of the traveling public. The right of the State to make it a misdemeanor for anyone to erect a billboard on public property without consent will not be seriously questioned. The statutes which declare it to be a misdemeanor for anyone to erect a billboard or place an advertisement on private property without the consent of the owner may likewise be expected to withstand attack.

The statutes which are likely to receive the most attention from the billboard interests are those like the Nevada statute which prohibit billboards that "destroy the natural beauty of the scenery". Such a provision is clearly prompted solely by esthetic consideration. It may be stated to be in furtherance of the health, safety, morals and general welfare of the people, but in dealing with it, the courts will be compelled to answer the question whether or not the police power may legally be extended to justify such regulation resting solely on considerations of esthetics or artistic beauty or the preservation of the country-side free from defacement by unsightly advertisements.

England has dealt with the billboard problem in the Advertisements Regulation Acts of 1907 and 1925 which, read together,

authorize the prescribed local authorities to make by-laws for regulating, restricting or preventing within their district the exhibition of advertisements in such places and in such manner or by such means as to affect injuriously: (a) the amenities of a public park or pleasure promenade; or (b) the natural beauties of a landscape; or (c) the view of rural scenery from a highway or railroad or from any public place or water; or (d) the amenities of any village within the district of a rural district council (in Scotland, within the district of a county exclusive of any burgh situated therein); or (e) any amenities of any historic building or monument or of any places frequented by the public solely or generally on account of its beauty or historic interest.

It is required by these acts that the by-laws be confirmed by the Home Secretary and in Scotland by the Secretary for Scotland. Exemptions are included in the acts for advertisements existing at the time the by-laws are made which are exempt for a period of five years, and further, for advertisements upon land relating solely to any trade or business carried on there. By-laws adopted under the authority of the Advertisements Regulation Acts and confirmed by the Home Secretary, have been upheld by the English Courts.<sup>107a</sup>

Legislation for the control and restriction of billboard advertising has also been adopted in Bermuda,<sup>107b</sup> Newfoundland,<sup>108</sup> Ontario,<sup>109</sup> New Zealand,<sup>109a</sup> New South Wales,<sup>109b</sup> Hongkong,<sup>110</sup> Palestine,<sup>111</sup> Queensland,<sup>112</sup> South Australia,<sup>113</sup> Victoria,<sup>114</sup> and Western Australia.<sup>115</sup>

<sup>107a</sup>United Bill Posting Co. v. Somerset County Council, 95 L. J. K. B. 899 (1926).

<sup>107b</sup>Advertisements Regulation Act of March 14, 1911. 1 Bermuda Laws (1923) 460.

<sup>108</sup>NEWFOUNDLAND CONS. STAT. (1916) c. 55.

<sup>109</sup>Ont. Stat. 1915, c. 17, § 37, p. 52; Ont. Stat. 1926, c. 15, § 77, p. 203; Ont. Stat. 1927, c. 22, § 15; ONT. REV. STAT. (1927) c. 54, § 78.

<sup>109a</sup>New Zealand Stat. 1903, No. 54, 3 EDW. VII, 240; amended New Zealand Stat. 1906, No. 46, 6 EDW. VII, 128.

<sup>109b</sup>Local Government Act, 1906, No. 56, § 115, 7 New So. Wales Stat. 1907, 759. These provisions were later amended, to conform to the language of the English Advertisements Regulation Act of 1907. Local Government Act, 1908, No. 28, § 19, 8 New So. Wales Stat. 1912, 129; id. 1919 no. 41, §§ 249j, 510, 15 New So. Wales Stat. 1920, 325, 429. By-laws made under these acts have been upheld against the claim that they were unreasonable and ultra vires. *Ex parte Hagon*, 8 N. S. W. St. R. 58 (1908); *Bennett v. Daniels*, 12 N. S. W. St. R. 134 (1912).

<sup>110</sup>Advertisements Regulation Ordinance, May 17, 1912, 4 Ordinances of Hongkong (1924) 2196; 2 Laws of Hongkong (1913) 2251.

<sup>111</sup>1 Legislation of Palestine 1918-1925 (1926) 60.

<sup>112</sup>Local Authorities Act, 2 EDW. VII, No. 19, 4th sched. § 55 (1902); 2 Queensland Stat. 1911, 2018.

<sup>113</sup>So. Australia Acts 1916, no. 1238.

<sup>114</sup>Vict. Stat. 1914, no. 2557.

<sup>115</sup>W. Australia Acts 1906, no. 32, § 179 (19), 6 EDW. VII, 55. A drastic by-law under this act has been upheld. *Lean v. Barrett*, 19 W. A. L. R. 86. (1917).

As bearing upon the possible attitude of the courts in this country toward modern billboard legislation, the recent case of *General Outdoor Advertising Co. v. City of Indianapolis*,<sup>116</sup> decided by the Indiana Supreme Court is of some significance. This case dealt with an ordinance adopted July 8, 1922, by the Board of Park Commissioners of Indianapolis, prohibiting the location or maintenance of any billboard or advertising device or structure, or the leasing of any premises for the purpose, within 500 feet of any park, parkway or boulevard, and directing that all such existing structures within the city be removed. The court upheld the ordinance as a proper exercise of police power but stated that it was not enforceable against billboards lawfully existing at the time the ordinance was adopted unless compensation were provided for the owners of such billboards. In the course of its opinion the court referred to certain earlier decisions in Colorado, Illinois, Kansas, Massachusetts, Missouri, New Jersey, New York, North Carolina and Ohio, in some of which the courts declared unconstitutional prohibitions against the erection of billboards within given distances of parks and boulevards, and the Indiana court indicated its opinion that if the same cases were presented today the decisions would be in favor of the constitutionality of such prohibitions. Significant portions of the opinion are as follows:

"Under a liberalized construction of the general welfare purposes of State and Federal Constitutions there is a trend in the modern decisions (which we approve) to foster, under the police power, an aesthetic and cultural side of municipal development—to prevent a thing that offends the sense of sight in the same manner as a thing that offends the senses of hearing and smelling. [Citing cases] But this trend must be kept within reasonable limitations, for citizens must not be compelled under the police power to give up rights in property solely for the attainment of aesthetic objects. . . .and under the law as it exists today aesthetic or artistic considerations alone are not considered sufficient to warrant the exercise of the police power to prohibit advertising billboards generally throughout the city, because such considerations of themselves are not such a necessity as justifies the taking of private property without compensation.

"But aesthetic considerations enter in to a great extent, as an auxiliary consideration where the regulation has a real or reasonable relation to the safety, health, morals, or general welfare, . . . and where a regulation of billboards does not apply to an entire city, but merely applies to billboards in close proximity to public parks and boulevards it may properly have a relation to the public health, comfort and welfare which it would not otherwise possess. . . .

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<sup>116</sup>172 N. E. 309 (Ind. 1930), commented on in N. Y. L. J., Nov. 5, 1930, at 638.

"Whether an advertising billboard is a disfigurement or a desirable addition to a community depends upon the character of the surroundings in the community as well as upon the billboard advertising itself. But the determination of such a question and the determination of what regulations or what prohibitions within certain areas there shall be of billboards under the police power is (subject to the limitations hereinbefore stated) for the legislative body of the city. . .

"As social relations become more complex, restrictions on individual rights become more common. Restrictions which years ago would have been deemed intolerable and in violation of the property owners' constitutional rights are now desirable and necessary, and zoning ordinances fair in their requirements are usually sustained. . . . A zoning law (sections 10372-10380, Burns' 1926) and ordinances enacted thereunder have been in effect in this State and in municipalities thereof for eight or nine years, and their constitutional validity has never been questioned in this court. Under laws and ordinances of this character many regulations and limitations of structural design and property use have been upheld which bear no closer relation to the public safety, health, morals, and general welfare, or public comfort, convenience and prosperity (which latter terms are also included in the recent cases. . .) than does the ordinance concerning billboards in the instant case. . ."<sup>117</sup>

Attention should also be invited, in passing, to the well-reasoned opinion of Mr. Justice Trent in the Philippine case of *Churchill v. Rafferty*,<sup>118</sup> which involved a statute taxing billboards and giving to the Collector of Internal Revenue the power summarily to remove any sign or billboard exposed to public view which, after investigation, he decided was "*offensive to the sight* or otherwise a nuisance." Section 5 of the Philippine Bill of July 1, 1902, which may be considered in the nature of its constitution, contains the usual prohibition against laws which deprive "any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws."<sup>119</sup> In sustaining the statute the court, by Mr. Justice Trent, remarked that the eye is equally entitled to protection with the nose and the ear and said:

"Without entering into the realm of psychology, we think it quite demonstrable that sight is as valuable to a human being as any of his other senses, and that the proper ministration to this sense conduces as much to his contentment as the care bestowed upon the senses of hearing or smell, and probably as

<sup>117</sup>*Ibid.* 312, 313.

<sup>118</sup>32 Philippine 580 (1915). Appeal dismissed 248 U. S. 591, 39 Sup. Ct. 20 (1918). See also (1928) 17 CALIF. L. REV. 120, 214.

<sup>119</sup>32 STAT. 691 (1902), reenacted in 39 STAT. 546 (1916), 48 U. S. C. A. § 1008 (1928).

much as both together. Objects may be offensive to the eye as well as to the nose or ear."<sup>120</sup>

Referring to the decisions which hold that the police power may not be exercised for purely aesthetic purposes, the court said:

"The courts, taking this view, rest their decisions upon the proposition that the esthetic sense is disassociated entirely from any relation to the public health, morals, comfort, or general welfare and is, therefore, beyond the police power of the state. But we are of the opinion, as above indicated, that unsightly advertisements or signs, signboards, or billboards which are offensive to the sight, are not disassociated from the general welfare of the public. This is not establishing a new principle, but carrying a well recognized principle to further application."<sup>121</sup>

That the problem of the regulation of billboards as such is not easy of solution admits of little doubt. The line between what is objectionable and what is not objectionable in signs and billboards is, perhaps, difficult to draw. It is not likely that reasonable men would differ as to the noises, which are of such volume and such objectionable qualities as to warrant their being restrained, nor is it likely that there would be much difference of opinion as to the odors which should be prohibited. On the other hand, reasonable men differ widely as to what is attractive and what is ugly, and unless the erection and maintenance of billboards can constitutionally be prohibited entirely, it may be necessary that regulations restricting the erection and maintenance of signs and billboards throughout the country-side should lay down some basis by which it could be determined whether or not a given billboard in a given locality would constitute a violation of the restriction.

But, as we have attempted to show, the tendency in our courts is to recognize the elasticity of the police power. "The heresy of today is the religion of tomorrow." If the people of this country, speaking through their governing bodies, ordain that esthetic considerations require the restriction and regulation of the billboard nuisance throughout the country-side, the courts will undoubtedly make every effort to sustain such enactments. The courts may even discard the rule that legislation based solely on esthetic considerations is unconstitutional. They may sustain such enactments on the theory that the police power extends to the protection of the "comfort," "peace" and "convenience" of the public.

It is more likely, however, that they will seek some "practical" peg on which to hang such legislation. The practical peg may be

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<sup>120</sup>Churchill v. Rafferty, *supra* note 118, at 608.

<sup>121</sup>*Ibid.* 611.

slim in importance, as, for example, the argument that every billboard within sight of a public highway tends to distract the attention of the motorist and is, consequently, a potential source of danger to traffic. It might be pointed out that the eradication of billboards would improve the appearance of property and thus enhance its value, or that in sections of the country which enjoy a large income from tourist traffic, the uncommercialized appearance of the landscape would attract tourists and augment the income of the populace from this source. But, however fragile the "peg", as Mr. Justice Angell succinctly states in *People v. Sterling*:

"We have reached a point in the development of the police power where an esthetic purpose needs but little assistance from a practical one in order to withstand an attack on constitutional grounds."<sup>122</sup>

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<sup>122</sup>*People v. Sterling*, *supra* note 41, at 653, 220 N. Y. Supp. at 318.