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# Noise and the Law

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## I. About Some Ancient Noises and Some Modern Noises

Long before the beginning of modern science, men were making sounds that were disagreeable to their neighbors. Many of these were the natural noises of people and their domestic animals but a surprisingly large number were the noises of industry. One of the adventures of Don Quixote and Sancho Panza begins with the "terrible din" of a fulling mill. The fourteenth century Sir Gawain and The Green Knight speaks of the "wondrous loud noise" of a grind stone. The streets of the medieval town resounded with the "beating out of iron upon a blacksmith's anvil, hammering of carpenters, pounding on sheet copper from a kettle maker's." A poem written about 1350 complains that blacksmiths "Drive me to death with the din of their dints"; because of them "No man . . . can get a night's rest." And four hundred years later in what we think of as the peaceful colonial city of Philadelphia, Ben Franklin felt compelled to move from High Street to Second and Sassafras because "the din of the Market increases upon me; and that, with frequent interruptions, has, I find, made me say some things twice over."[1]

These random selections illustrate that noise, far from being an invention of the modern world, has been a problem as long as men have been living together in towns. For this reason the law began to concern itself very early with the types of annoyance characteristic of communal living. These annoyances were not limited to noise, but encompassed the entire range of activities resulting from the use of one's own property in a way that may adversely affect the use of a neighbor's property—smoke, smells, soot, bright lights, vibration, flooding, water pollution and explosive blasts, as well as noise.[2]

The peculiar contribution of modern science has been to add

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I am indebted to Richard A. Lempert, Esq., of New York City for the collection of railway and highway cases that appears in notes 110 and 111 and to A.C.L. Smith, Esq., of London, England, for assistance in compiling the information on English law contained in Part IV, *infra*.

1. Cervantes, The Ingenious Gentleman Don Quixote de la Mancha ch. XX (Putnam ed. 1949); Medieval Romances 380 (Loomis ed. 1957); Hunt, Fifteenth Century England 26 (1962); Chaucer's World 16-17 (Rickert ed. 1962); Bridenbaugh, Cities in Revolt 24 (1964).

2. "There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapour, or water, or any other gas or fluid." Lord Romilly in Crump v. Lambert, L.R. 3 Eq. 409, 413 (1867).

some new types of noise-makers. While the source of the annoyance is different, the impact of these noises on neighbors is not new. Airplanes, trucks and outboard motor boats can drown out voices and interrupt sleep. The sonic boom of low flying supersonic aircraft can break windows. Experiments are currently being conducted with noises that kill small animals and would presumably kill humans. While the addition of any new noises to an already noisy world is upsetting, legal principles already exist, and have long existed, which deal with interferences that drown out voices or interrupt sleep, that break windows and that kill animals and humans. As has so often been the case in the history of the law, the story of noise and the law is not one of the development of new principles to fit new noises, but the application of established principles to solve old problems arising in somewhat different forms.[3]

## II. About Some Characteristics of Noise

For practical purposes the discussion of the law of noise can be considered in two parts: first, the rights of a complainant against a private person and second, the rights of a complainant against the government or an agency acting by government authority.

Whether the noise-maker is a private person or the government, it is important to recognize that noise is more difficult to deal with than many nuisances because at certain levels, at least, it is largely subjective.[4] Noise, by definition, is sound that is not wanted by those who hear it.[5] A Mozart divertimento when played on my phonograph may be a noise to you as transmitted through our adjoining walls. Even if it were not distorted in the transmission, you might not like Mozart or you might not like it at the particular time I have chosen to play it. This would make it noise to you. Also, some sounds are

3. See Judge Friendly, Book Review, 77 Harv. L. Rev. 582, 583 (1964): "[I]n the main, 'air law' is simply the application of general legal principles and skills to a new industry made possible by technological advance—the equivalent for lawyers of our century of what the railroad, the telephone, and the telegraph demanded of our nineteenth century forebears."

4. Certain noises, however, can do visible physical damage, the best known being the ability even at relatively low volumes to break glass—a characteristic that has been recognized for more than a thousand years. Scholes, The Oxford Companion to Music 6, 14 (8th ed. 1950).

5. Handbook of Noise Control 1-11 (Harris ed. 1957). Sound is caused by the exertion of energy (a hand clap for example, or a bow pulled across the strings of a violin) transmitted by pressure waves from the source of the energy to the receiver. In some instances the pressure waves may be inaudible—they may be too weak or, because of their frequency, may be beyond the capacity of the human ear to receive. When audible, these pressure waves are "sound" and when the sound is unwanted by the receiver, it is "noise."

more objectionable than others. People who work comfortably within the hum of an air conditioner might be most uncomfortable if they were subjected to a high frequency noise of the same intensity, say the scratch of a fingernail on a blackboard. Noises that have frightening connotations are more annoying than those with pleasant connotations.[6] And a high level of tolerance can be developed to noises that have become familiar; the city dweller temporarily in the country may find his sleep interrupted by barnyard noises while the rural resident often may experience difficulty sleeping in the city because of the unfamiliar sounds of urban activity. All of these have been factors which have shaped the law pertaining to this subject.

## III. About Noises Made by Private Persons[7]

For hundreds of years, indeed throughout most of the history of the common law as we know it, courts have been struggling to reconcile the conflicting interests of two property owners—one who believes that his ownership entitles him to use his property as he wills and the neighbor who believes that his ownership entitles him to enjoy his property without annoyance.[8] It is obvious that out of such conflict, in which both sides are relying on their "absolute" property rights, no easily applied set of rules could be established. Courts have attempted to do justice, case by case, but two major principles, it would appear from the *Restatement of the Law of Torts*, have evolved:

> First, each person must put up with a certain amount of annoyance, inconvenience and interference.[9]
>
> Second, in determining the amount of annoyance, inconvenience and interference that must be tolerated, the gravity of the harm to the complainant should be weighed against the utility of the conduct of his troublesome neighbor.[10]

The first of these principles tells us what every city dweller experiences every day of his life. It is not possible to live together without

6. "[P]ublic tolerance . . . depends greatly on the hazards that people associate with a noise." Dr. Paul S. Veneklasen, acoustical consultant, in *Hearings on Aircraft Noise Problems Before the Subcommittees of the House Committee on Interstate and Foreign Commerce*, 86th & 87th Cong., 590 (1962).

7. An asterisk following the name of a case in Parts III and IV indicates that noise has not been a factual element in the case, but the rationale has been thought applicable to the point for which it is cited.

8. See generally Chafee, Cases on Equitable Relief Against Torts 55 (1924); 2 Pollack & Maitland, The History of the English Law 53 (2d ed. 1911); 4 Restatement, Torts 218-19 (1939).

9. See 4 Restatement, Torts § 822, comment on clause (d) (1939).

10. See *id.*, § 826. See also 1 Harper & James, Torts 73 (1956); Prosser, Torts § 88 (3d ed. 1964).

putting up with annoyances created by the activities of those living near us. In some areas, such as those devoted largely to industry, we must expect more annoyances than in others.

The second principle, the gravity-utility rule, is less easy to understand. This is because the word "utility" is used in the *Restatement* in a broad and, it seems to me, somewhat awkward sense. Another rule is required in the *Restatement* to make it plain that in determining the "utility" of the defendant's conduct one must consider, in addition to the social value of his conduct, its suitability to the locality and the "impracticability of preventing or avoiding" the annoyance.[11]

Even with this explanation, the gravity-utility rule is confusing to one who is not an expert in the field. A simpler introduction to the cases, although possibly not as complete an explanation, is that courts are primarily concerned, on the one hand, with the harm that is being caused to the plaintiff by the annoyance, and on the other hand, with the reasonableness of the defendant's conduct and the harm that would be caused to the defendant (and sometimes to the public) if the defendant were forced to discontinue the activity that produces the annoyance. When an injunction is sought, the opposing elements on the scale are weighed against each other.[12] When damages are sought and proved, the question is largely whether the defendant's conduct is reasonable.[13]

What circumstances, then, will justify the award of damages or the issuance of an injunction for noise made by a private person?

### A. *The Award of Damages*

In the typical case, the plaintiff can recover damages when the defendant's noise causes a decrease in the value of plaintiff's property.[14] It is frequently said that damages can also be recovered for injury to plaintiff's person or to that of members of his household,

11. See 4 RESTATEMENT, TORTS § 828 and comment on clause (c) (1939).

12. "The relative hardship likely to result to the defendant if injunction is granted and to the plaintiff if it is denied, is one of the factors to be considered in determining the appropriateness of an injunction against tort." *Id.* § 941. See Harrisonville v. W. S. Dickey Clay Mfg. Co.,* 289 U.S. 334, 338 (1933). *But cf.* Vowinckel v. N. Clark & Sons,* 216 Cal. 156, 13 P.2d 733 (1932).

13. In determining whether noise is a nuisance "the character, volume, time, place and duration of its occurrence, as well as the locality, must be taken into consideration." Lloyd, *Noise as a Nuisance*, 82 U. PA. L. REV. 567, 569 (1934). This article contains an interesting collection of cases dealing with specific types of noises such as bells, barking dogs, music, etc.

14. See, *e.g.*, Maitland v. Twin City Aviation Corp., 254 Wis. 541, 37 N.W.2d 74 (1949) (low flights from private airport).

but as a practical matter recovery for personal injury is rare and the amounts of recovery are usually small, possibly because of the extreme difficulty of proving injury from noise.[15]

No damages can be recovered for a noise that constitutes a mere annoyance.[16] All of us must accept the normal noises of communal living.[17] The standard is not determined by the individual idiosyncracies of the plaintiff, but by what a person of "ordinary sensibilities" can tolerate.[18] And one who purchases property or builds in an area devoted to noisy activity cannot recover damages for noise of the character that could be reasonably anticipated in the area.[19] "No one can move into a quarter given over to foundries and boiler shops and demand the quiet of a farm."[20] One who buys into such an area takes his property subject to a sort of easement.[21]

### B. *The Issuance of an Injunction*[22]

Courts are reluctant to grant an injunction when to do so would cripple a business that is being properly conducted.[23] For this reason,

15. "The action for private nuisance . . . is properly an action for the invasion of a person's interest in . . . land," but sometimes recovery for personal injury is allowed in an action for private nuisance. 4 RESTATEMENT, TORTS 219-20 (1939), and § 827, comment on clause (b). One of the rare cases in which more than nominal damages have been recovered for personal discomfort due to noise is Dixon v. New York Trap Rock Co., 293 N.Y. 509, 58 N.E.2d 517 (1944), involving the continuous blasting at a quarry where there was a recovery of $2,000 for drugs, medical bills and demonstrable decline in health, in addition to recovery for damage to property. In Walker v. Wearb, 6 N.Y.S.2d 548 (Sup. Ct. 1938), the award was $12 for medicine and 6¢ for nominal damages. *But see, Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1003 (1965), "many courts . . . have awarded substantial sums for . . . the personal discomforts caused by noise . . . ," citing no cases.

16. Liability in damages for nuisance "begins only when the interference causes substantial harm." PROSSER, *op. cit. supra* note 10, § 88.

17. 4 RESTATEMENT, TORTS § 822, comment on clause (d) (1939).

18. See, *e.g.*, Gunther v. E. I. duPont de Nemours & Co., 157 F. Supp. 25, 32 (N.D. W.Va. 1957), *appeal dismissed*, 255 F.2d 710 (4th Cir. 1958).

19. "If my neighbor makes a tan-yard, so as to annoy and render less salubrious the air of my house or garden, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue." 2 BLACKSTONE, COMMENTARIES *402. "He who dislikes the noise of traffic must not set up his abode in the heart of a great city." SALMOND, TORTS 182 (12th ed. 1957). *But see* Campbell v. Seaman,* 63 N.Y. 568, 584 (1876) (noxious gases); Laflin-Rand Powder Co. v. Tearney, 131 Ill. 322, 23 N.E. 389 (1890) (exploding powder magazine).

20. Stevens v. Rockport Granite Co., 216 Mass. 486, 488, 104 N.E. 371, 373 (1914). See also Irby v. Panama Ice Co., 184 La. 1082, 168 So. 306 (1936); Grzelka v. Chevrolet Motor Car Co., 286 Mich. 141, 281 N.W. 568 (1938); Eller v. Koehler, 68 Ohio St. 51, 67 N.E. 89 (1903).

21. 1 HARPER & JAMES, TORTS 74 (1956).

22. At one time it was necessary for the plaintiff to establish his right at law before he could obtain an injunction against a nuisance. See AMES, CASES IN EQUITY JURISDICTION 553-60 (1904); Lewis, *Injunctions Against Nuisances and the Rule Requiring the Plain-*

the alert plaintiff will commence his action before the facility which threatens to be a nuisance is constructed and before the defendant has irretrievably laid out a substantial expenditure.[24] If the plaintiff is unwilling to seek injunctive relief at this stage, he would nevertheless be well advised to warn the defendant in writing that the incipient nuisance will not be tolerated and to endeavor to get some advance assurances.[25]

Once a business is under way, a noise that causes a substantial decrease in the value of the plaintiff's property or a material discomfort to plaintiff will be enjoined:

(a) if the annoyance is due to poor design or improper operation of defendant's facility and can be abated by the adoption of an improved design or operation,[26] but the improvement must be one that is commercially feasible,[27] or

(b) if the activity creating the noise was established in a neighborhood obviously inappropriate for the activity.[28]

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*tiff To Establish His Right at Law*, 56 U. PA. L. REV. 289 (1908). A useful general discussion on injunctive relief against noise appears in Note, 25 VA. L. REV. 465 (1939).

A California statute denies the right to an injunction for private nuisances created by certain business activities in areas zoned for those activities. CAL. CIV. PROC. CODE § 731a.

23. See, *e.g.*, De Blois v. Bowers,* 44 F.2d 621, 623-24 (D. Mass. 1930); McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co., 164 Fed. 927, 940 (9th Cir. 1908); Pawlowicz v. American Locomotive Co., 90 Misc. 450, 154 N.Y.S. 768 (Sup. Ct. 1915).

24. "If the plaintiff had filed his bill before the mill was built, the balance of convenience would have been different, and we should not have hesitated to stop what as yet remained only a project." Judge L. Hand in Smith v. Staso Milling Co., 18 F.2d 736, 738 (2d Cir. 1927). See Cities Serv. Oil Co. v. Roberts, 62 F.2d 579 (10th Cir. 1933); Herbert v. Rainey, 54 Fed. 248 (W.D. Pa. 1892). See also New York v. Pine,* 185 U.S. 93, 99 (1902). *But cf.* Commerce Oil Ref. Corp. v. Miner,* 281 F.2d 465 (1st Cir.), *cert. denied*, 364 U.S. 910 (1960) (refusal to enjoin anticipatory nuisance).

25. In Swetland v. Curtiss Airports Corp., 55 F.2d 201, 204 (6th Cir. 1932), where the plaintiffs had given prior notice that the intended use of the land "would destroy their property for residential purposes," the court rejected cases cited by defendant against the issuance of an injunction because "in many of them there was not a precedent or concurrent notice." See also Smith v. Staso Milling Co., *supra* note 24, at 738; Krocker v. Westmoreland Planing Mill Co., 274 Pa. 143, 145, 117 Atl. 669 (1922).

26. Courts will usually require the defendant to do whatever is reasonably necessary to minimize the annoyance, including modifications to bring the defendant's plant or mode of operations up to the latest developments for the control of the annoyance complained of. Dauberman v. Grant, 198 Cal. 586, 246 Pac. 319 (1926). Private flights required to fly at higher altitudes: Anderson v. Souza, 38 Cal. 2d 825, 243 P.2d 497 (1952); Vanderslice v. Shawn, 26 Del. Ch. 225, 27 A.2d 87 (1942); Scott v. Dudley, 214 Ga. 565, 105 S.E.2d 752 (1958); Hyde v. Somerset Air Service, Inc., 1 N.J. Super 346, 61 A.2d 645 (1948); Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949); Reynolds v. Wilson, 2 Av. Cas. 14863 (Pa. C.P. 1949); Maitland v. Twin City Aviation Corp., 254 Wis. 541, 37 N.W.2d 74 (1949).

27. See, *e.g.*, Grzelka v. Chevrolet Motor Car Co., 286 Mich. 141, 281 N.W. 568 (1938).

28. Residential area cases: Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932); Brandes v. Mitterling, 67 Ariz. 349, 196 P.2d 464 (1948); People v. Dycer Flying Serv. Inc., 1 Av. Cas. 817 (Cal. Super Ct. 1939); Kramer v. Sweet, 179 Ore. 324, 169 P.2d 892 (1946) (slaughterhouse); Krocker v. Westmoreland Planing Mill Co., 274 Pa.

A plaintiff who establishes his right to an injunction may, in the same suit, also recover compensation for damages to the effective date of the decree.[29]

It is often said that an injunction will not issue if there is no evidence of a material decline in the value of a plaintiff's property or a material injury to his person.[30] But as a practical matter, a noise of a type that would be annoying to the average person may be enjoined, even though damages are not recoverable if the activity causing the noise falls within either of the two categories listed above or if the noise can be abated at little cost to the defendant.[31] However, when that is not the case and the defendant's activity is neither negligently designed or operated nor conducted in an inappropriate place, an injunction will rarely issue without a showing of material property damage.[32] And when the defendant has engaged in a naturally noisy activity over a long period of time and there is no showing of negligence, his neighbors may be required to tolerate a very substantial amount of annoyance.[33]

Contrasting sharply with these situations requiring negligent design and operation, or inappropriate location, or material damage before an injunction can be obtained, there are numerous circumstances in which a relatively minor showing of annoyance will be deemed sufficient for the granting of relief. For example, if the defendant deliberately made the noise for the purpose of annoying his neighbor, the plaintiff can enjoin the continuance of the noise

143, 117 Atl. 669 (1922) (planing mill); Gay v. Taylor, 19 Pa. D. & C. 31 (C.P. 1932) (private airport); Johnson v. Drysdale, 66 S.D. 436, 285 N.W. 301 (1939) (horses).

29. See, *e.g.*, Anderson v. Souza, 38 Cal. 2d 825, 243 P.2d 497 (1952).

30. "An injunction will not be granted unless there is either an actionable invasion under the rule stated in this Section [dealing with liability for damages] or unless an invasion is threatened which would be actionable hereunder." 4 RESTATEMENT, TORTS, § 822, general comment *b* (1939).

31. "If there be no such remedy at law, then, *a fortiori*, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiffs." Story, J., in Webb v. Portland Mfg. Co.,* 29 Fed. Cas. 506 (No. 17322) (1838) (diversion of water). The barking dog cases are typical instances of abatement without a showing of compensable damage to the plaintiff. See, *e.g.*, Adams v. Hamilton Carhartt Overall Co., 293 Ky. 443, 169 S.W.2d 294 (1943), and cases cited.

32. Injunction against flights operating from private air field denied where no substantial property damage shown: Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385 (1930); Kuntz v. Werner Flying Serv., Inc., 257 Wis. 405, 43 N.W.2d 476 (1950). Other examples in which injunction denied on failure to show substantial property damage: Gunther v. E. I. duPont de Nemours & Co., 157 F. Supp. 25 (N.D. W.Va. 1957), *appeal dismissed on procedural grounds*, 255 F.2d 710 (4th Cir. 1958) (blasting); Bostick v. Smoot Sand & Gravel Corp., 154 F. Supp. 744 (D. Md. 1957), *aff'd on issue of nuisance*, 260 F.2d 534, 541 (4th Cir. 1958) (dredging).

33. See, *e.g.*, Benton v. Kernan, 130 N.J. Eq. 193, 21 A.2d 755 (1941); Pawlowicz v. American Locomotive Co., 90 Misc. 450, 154 N.Y.S. 768 (Sup. Ct. 1915).

no matter how slight the annoyance.[34] Similarly, continuous loud music used for advertising that is above the level of the other sounds in the neighborhood can be enjoined without much showing of economic loss or personal injury to the plaintiff.[35] In addition, courts seem quite ready to grant equitable relief against noises resulting from the operation of what our Puritan consciences might think of as frivolous activities such as a carousel, a drive-in movie, an amusement park, a dance hall, or other place of entertainment.[36] Here, apparently, is one area where the low utility of defendant's conduct scores heavily against him and is commonly outweighed by the annoyance to his neighbor.

Between those cases at one end of the spectrum, where no damages can be proved and the defendant's conduct is reasonable, and those at the other end, where damages can be proved and the defendant is guilty of negligent design or operation or improper location, lies an area of extreme difficulty. The most that can be said of this gray area is that, when the plaintiff is being materially harmed by the defendant's activity and the defendant would be materially harmed if he were compelled to stop, courts are left to their ingenuity to devise compromise decrees that will allow the defendant to continue his activity without the imposition of crippling economic burdens and at the same time provide some measure of relief to the plaintiff.[37] A typical compromise is a curtailment of defendant's

34. In Collier v. Ernst, 46 Pa. D. & C. 1 (C.P. 1942), the defendant was enjoined from playing certain tunes on her marimba with the intention of annoying the plaintiff.

35. See Stodder v. Rosen Talking Mach. Co., 241 Mass. 245, 135 N.E. 251 (1922); Clinic & Hosp., Inc. v. McConnell, 236 S.W.2d 384 (Mo. Ct. App. 1951).

36. "The operation of the theatre is neither a public duty nor a private necessity, and if defendants cannot operate it, for whatever reason, without depriving plaintiffs of the normal enjoyment of their homes, they must abandon the enterprise altogether." Anderson v. Guerrein Sky-Way Amusement Co., 346 Pa. 80, 29 A.2d 682 (1943). See also, *e.g.*, Payne v. Johnson, 20 Wash. 2d 24, 145 P.2d 552 (1944). In many cases the injunctive relief is limited to the evening hours when the noise may interfere with the plaintiff's sleep. See Bartlett v. Moats, 120 Fla. 61, 162 So. 477 (1935); Asmann v. Masters, 151 Kan. 281, 98 P.2d 419 (1940); Meadowbrook Swimming Club v. Albert, 173 Md. 641, 197 Atl. 146 (1938); Ritz v. Woman's Club, 114 W.Va. 675, 173 S.E. 564 (1934) (all cases involving public dancing); Hansen v. School Dist., 61 Idaho 109, 98 P.2d 959 (1939) (night baseball).

37. "The very right on which the injured party stands . . . is a quantitative compromise between two conflicting interests. What may be an entirely tolerable adjustment, when the result is only to reward damages for the injury done, may become no better than a means of extortion if the result is absolutely to curtail the defendant's enjoyment of his land. Even though the defendant has no power to condemn, at times it may be proper to require of him no more than to make good the whole injury once and for all." Judge L. Hand in Smith v. Staso Milling Co., 18 F.2d 736, 738 (2d Cir. 1927). *But see* comment in Franke v. Wiltschek,* 209 F.2d 493, 499 n.6 (2d Cir. 1953). See also Vanderslice v. Shawn, 26 Del. Ch. 225, 27 A.2d 87 (1942) (low flights prohibited). Injunctive relief as a means of extortion is discussed in *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1005-06 (1965).

noisy activities during the usual hours of bedtime,[38] but the only limit to the possibilities of designing appropriate relief is the imagination of the court and of the parties applied to the peculiar circumstances in each case.[39]

## IV. About Noises Made by Government or by Government-Authorized Entities

Many of the most troublesome modern noises are caused by the government or government-authorized entities involved in the operation of railroads, highways, and aircraft. The right to recover in such cases is affected by two principles that apply to the performance of governmental functions.

There is, first of all, the well-recognized concept of sovereign immunity—that the government is not liable for any of its acts except those for which recovery has been expressly provided. Almost inextricably intertwined with that concept is the second principle that members of the public shall bear without redress certain of the burdens that arise from action which the government has taken or has authorized in the common interest. Wholly apart from the arbitrary bar of sovereign immunity, there is the very practical consideration that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."[40] A man drafted into the military forces may suffer a substantial loss of earnings for which he is not compensated. The operator of a formerly prosperous gasoline station may find his business has disappeared after the opening of a new highway. An employer may be put out of business by being required to raise his wages to a minimum level. It is inevitable in our form of political system, and perhaps in any form of political system, that the government, acting in the public interest, will perform functions or authorize the performance of functions that will be harmful to some people and not

38. See, *e.g.*, Kosich v. Poultrymen's Serv. Corp., 136 N.J. Eq. 571, 43 A.2d 15 (1945) (poultry feed plant); City of Rochester v. Charlotte Docks Co., 114 N.Y.S.2d 37 (Sup. Ct. 1952) (emptying conveyor cars); Firth v. Scherzberg, 366 Pa. 443, 77 A.2d 443 (1951) (private truck terminal); Rhoads v. Piacitelli, 2 Av. Cas. 14658 (Pa. C.P. 1948) (private airport). See also cases cited in note 36 *supra*.

39. See, *e.g.*, Five Oaks Corp. v. Gathmann, 190 Md. 348, 58 A.2d 656 (1948). "The best solution is often to be found in what may be called an experimental injunction, a definite order subject to revision in the light of experience therewith." 4 Restatement, Torts § 943, at p. 725, comment (1939). See also *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1063-64 (1965).

40. Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

to others or that will be more harmful to some than to others. This occurs every day, and in most cases no compensation is paid to those harmed.

The application of these principles to the problem of noise is illustrated by the decision of the United States Supreme Court in *Richards v. Washington Terminal.*[41] In that case, the plaintiff, whose house was approximately one hundred feet from defendant's railroad track and tunnel, brought an action to recover for damage to his property resulting from an alleged nuisance. Plaintiff suffered (1) from the noise, vibration, and smoke of the passing trains "cracking the walls . . . breaking glass in the windows, and disturbing the peace and slumber of the occupants" and (2) from gas and smoke forced out of the tunnel and directed onto plaintiff's property by a fanning system. Defendant's activities, however, had been authorized by the government—its tracks and tunnel were located, constructed, and maintained under acts of Congress. There was no claim that the trains were negligently constructed, operated, or maintained.

The Court held that the plaintiff, like all other property owners along a railroad right-of-way, was required to bear without redress the amount of noise, vibration, and smoke incident to the running of the trains.[42] However, the plaintiff was entitled to compensation to the extent he was damaged by the fan arrangement which artificially concentrated gas and smoke on the plaintiff to a degree not shared by other property owners, "and this, without, so far as appears, any real necessity existing for such damage."[43]

The general conclusion to be drawn from *Richards v. Washington Terminal* is that under federal law no right of action exists in private property owners for noise made by an entity functioning under authority of the government (and, a fortiori, for noise made by the government itself) even though the noise may cause a decline in the value of affected property.[44] In such circumstances both damages and equitable relief are denied.

41. 233 U.S. 546 (1914).

42. *Id.* at 553-54 (1914): "[R]ailroads constructed and operated for the public use, although with private capital and for private gain, are not subject to actions in behalf of neighboring property owners for the ordinary damages attributable to the operation of the railroad, in the absence of negligence," including such damages as result from "the noises and vibrations incident to the running of trains, the necessary emission of smoke and sparks from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad."

43. *Id.* at 556-57.

44. Railroad: Richards v. Washington Terminal Co., 233 U.S. 546 (1914). Military aircraft: Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied,* 371 U.S. 955, *rehearing denied,* 372 U.S. 925 (1963); Moore v. United States, 185 F. Supp. 399

However, it is necessary to qualify this broad rule somewhat by two limitations: First, the activity being performed by the government or government-authorized entity must be sanctioned by law.[45] Second, the facility creating the noise must be properly designed and operated,[46] and in certain limited cases a government-authorized entity will be held responsible when it has not properly located the facility.[47]

The legal consequences of exceeding these limitations are not always the same for the government as for a public utility. The government begins with complete immunity, and claims against it can be enforced only to the extent that this immunity has been specifically waived.[48] The situation of the public utility is just the

(N.D. Tex. 1960); Freeman v. United States, 167 F. Supp. 541 (W.D. Okla. 1958); Fitch v. United States, 5 Av. Cas. 17841 (D. Kan. 1958); Boskovich v. United States, 3 Av. Cas. 17252 (D. Utah 1950); Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964); Aaron v. United States, 311 F.2d 798 (Ct. Cl. 1963); Matson v. United States, 171 F. Supp. 283 (Ct. Cl. 1959). Military aircraft on warm-up pads: Mock v. United States, 8 Av. Cas. 18080 (Ct. Cl. 1964). Military bombing and ground detonation: Nunnally v. United States, 239 F.2d 521 (4th Cir. 1956). Engine test cell: Bellamy v. United States, 235 F. Supp. 139 (E.D. S.C. 1964); Pope v. United States, 173 F. Supp. 36 (N.D. Tex. 1959). *But cf.* Martin v. Port of Seattle, 64 Wash. 2d 324, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962).

45. See Transportation Co. v. Chicago,* 99 U.S. 635, 640 (1879): "If the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded."

46. *E.g.*, Transcontinental Gas Pipe Line Co. v. Gault, 198 F.2d 196 (4th Cir. 1952); Alford v. Illinois Central R. Co.,* 86 F. Supp. 424 (W.D. La. 1949), *aff'd*, 187 F.2d 144 (5th Cir. 1951), *cert. denied*, 342 U.S. 825 (1951) (smoke). See Chronister v. City of Atlanta, 99 Ga. App. 447, 108 S.E.2d 731 (1959); Brooks v. Patterson, 159 Fla. 263, 31 So. 2d 472 (1947); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942); Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934); Jeffers v. Montana Power Co.,* 68 Mont. 114, 217 Pac. 652 (1923). The cases enjoining a nuisance from the discharge of city sewage (see, *e.g.*, note in 77 L. Ed. 1213) are illustrative since it is obvious that sewers can be designed which will not cause nuisances.

47. In deference to the executive and legislative branches, courts will not ordinarily contest the location of a government facility. "[T]he law does not permit courts to select the location of sites for the establishment of essential public enterprises." State *ex rel.* Helsel v. Board of County Comm'rs, 37 Ohio Op. 58, 79 N.E.2d 698, 709, *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d.911 (1948). See also United States v. 64.88 Acres of Land,* 244 F.2d 534 (3d Cir. 1957). *But cf.* Hassell v. City & County of San Francisco,* 11 Cal. 2d 168, 78 P.2d 1021 (1938).

In the case of a public utility, the reasonableness of the location can be questioned when feasible alternatives exist, as for example, when the question is the location of railroad shops and switchyards as distinguished from the tracks themselves. Baltimore & P. R. R. v. Fifth Baptist Church, 108 U.S. 317, 330-32 (1883). *But cf.* Thompson v. Kimball, 165 F.2d 677 (8th Cir. 1948), denying recovery for noise of switching engines spotted so that plaintiff "gets it worst," since that is merely a matter of degree in a situation where the injury is "common to the public whose property is situated . . . near the switch-yard."

Throughout this article, the phrase "public utility" is used in its broader sense—an entity deriving its authority to operate from the government.

48. In the case of the federal government, liability can be enforced only when a "taking" occurs under the fifth amendment for which an action can be brought under

reverse. Claims against utilities can be enforced except to the extent they are performing acts specifically authorized by the government; their immunity is strictly limited to that which has been derived from the government, and their acts are protected only so long as they are a necessary consequence of the exercise of the authority granted by the government.[49] Objectionable actions which fall within such authority are sometimes referred to as "legalized nuisances."[50] Any action outside such authority subjects the utility to liability in the same manner as any private citizen.[51] Thus, the railroad in *Richards v. Washington Terminal* was responsible for the smoke concentrated on the plaintiff because the conduct of the railroad in this respect was not a necessary consequence of the authority granted to it by the government.[52]

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the Tucker Act, 62 Stat. 940 (1948), as amended, 28 U.S.C. § 1491 (1958) or when a government employee has committed a tort of the type for which recovery has been provided, since 1946, by the Federal Tort Claims Act, 62 Stat. 982 (1948), 28 U.S.C. § 2671 (1958) et seq. Under the Federal Tort Claims Act, recovery is not permitted for acts of an employee "exercising due care in the execution of a statute or regulation" or claims "based upon the exercise [of] . . . a discretionary function or duty on the part of a federal agency . . . ." Ordinarily, no recovery is permitted for the deliberate act of government in performing its functions. Thus, for example, while the act permits no recovery for damages resulting from government construction or operation of an airport next to a residence, it would permit recovery for damages resulting from the negligent or wrongful act of a military pilot operating from the airport. United States v. Gaidys,* 194 F.2d 762 (10th Cir. 1952). See also Dalehite v. United States,* 346 U.S. 15, 44-45 (1953), and discussion of Federal Tort Claims Act in 2 HARPER & JAMES, TORTS 1648-67 (1956).

49. "The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad." Richards v. Washington Terminal Co., 233 U.S. 546, 554 (1914).

50. "That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes," Transportation Co. v. Chicago,* 99 U.S. 635, 640 (1879). See also Richards v. Washington Terminal Co., 233 U.S. 546, 551, 554 (1914), and compare United States v. Causby, 328 U.S. 256, 262 (1946). And see Note, *Nuisance and Legislative Authorization*, 52 COLUM. L. REV. 781 (1952).

Legislation in several states provides that "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." See, *e.g.*, CAL. CIV. CODE § 3482 (1960); IDAHO CODE ANN. § 52-108 (1957); MONT. REV. CODES ANN. § 57-104 (1962); N.D. CENT. CODE 42-01-12 (1960); OKLA. STAT. tit. 50 § 4 (1962); S.D. CODE § 37.4703 (1939); WASH. REV. CODE § 7.48.160 (1952).

51. "When an act is done by a [railway] company in excess of its powers, or in a wanton and careless use of them, there is an injury for which the sufferer retains a remedy by an action at common law, or by suit in equity for an injunction; but things done by a company in the due execution of its powers are lawful, being duly authorized, and no action lies on account of them." Lord Westbury, dissenting on other grounds, in Ricket v. Metropolitan Ry.,* L.R. 2 H.L. 175, 202 (1867).

52. The court states that, if the damage could not be prevented, the railroad should proceed to acquire plaintiff's property by purchase or condemnation, but, if the damage is "readily preventable, the statute furnishes no excuse and defendant's responsibility follows on general principles" (*i.e.*, to the extent its action is outside the statute, the railroad has no immunity and must pay for the nuisance). Richards v. Washington Terminal Co., 233 U.S. 546, 557 (1914). See also Baltimore & P. R.R. v. Fifth Baptist

Claims which have arisen from the sonic boom of supersonic aircraft operated by the government fall within the second of the two limitations on the broad rule of no liability. A normal, properly conducted flight is one that accelerates to supersonic speed at altitudes high enough to avoid the overpressures that cause physical damage.[53] Since physical damage is not a necessary consequence of operating supersonic aircraft, persons suffering such damage are entitled to recover.[54] However, no recovery will be allowed for the mere annoyance caused by sonic booms, even though the annoyance may be severe enough to occasion a decline in property values. This is a burden shared by society in general—a part of the burden of communal living.

The reasons leading to these results are to be found in an analysis of our constitutional structure.

### A. *The Federal Constitution*

Since there is hardly a government act which could not cause someone substantial damage, an arbitrary boundary line must be drawn

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Church, 108 U.S. 317, 331 (1883), which points out that the authority conferred on the railroad was accompanied by an "implied qualification" governing where it could place its works.

53. The design criteria of the supersonic transport aircraft currently under consideration by the United States government provide that the "maximum over-pressure" (*i.e.*, the pressures created by the shock waves in excess of normal pressures at sea level) shall not exceed two pounds per square foot. "Request for Proposals for the Development of a Commercial Supersonic Transport," Federal Aviation Agency, August 15, 1963, p. 19. Experiments of the Federal Aviation Agency have demonstrated that overpressures of two pounds per square foot or less will not break normal window glass. Power, *Some Results of the Oklahoma City Sonic Boom Tests*, 4 MATERIALS RESEARCH & STANDARDS 623 (1964). See Roth, *Sonic Boom*, 44 A.B.A.J. 216, 220 (1958), for Air Force standard operating procedures.

54. "According to the face of the amended complaint, the United States committed a wrong for which it was liable under the Tort Claims Act . . . ." Lloyds' London v. Blair, 262 F.2d 211 (10th Cir. 1958). See also Coxsey v. Halaby, 334 F.2d 286 (10th Cir. 1964), and 231 F. Supp. 978 (D.C. Okla. 1964). *But see* Huslander v. United States, 234 F. Supp. 1004 (W.D. N.Y. 1964), in which the court granted the government's motion for summary judgment on the theory that undertaking supersonic flight was a "discretionary function" under the Federal Tort Claims Act, 28 U.S.C. § 1491 (1958). This conclusion seems to be based on a misunderstanding of *Dalehite*, in which the Supreme Court denied recovery for damage due to the explosion of government-made fertilizer which "experience showed could be handled safely in the manner it was handled here" and cited *McPherson v. Buick* to indicate that recovery *would* be allowed when damage is foreseeable as the "probable" result of a government activity. Dalehite v. United States, 346 U.S. 15, 42 (1953). Thus, in the *Huslander* case, if the flight had been specifically authorized by the Air Force, those granting the authorization knew it would break windows. But the court in *Huslander* even denied plaintiffs the opportunity to "ascertain whether established policies and procedures [of the Air Force] were adhered to in this case." 234 F. Supp. 1004, 1007 (W.D.N.Y. 1964).

An extended discussion of federal liability for sonic booms appears in Comment, 31 So. CAL. L. REV. 259 (1958).

between compensable and noncompensable injury. In the case of the federal government that boundary was embodied in the fifth amendment which provides that property may not be taken for public use without just compensation.

> "The Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but only those which result from a taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by the courts merely by implication from the constitutional provision."[55]

The words "taking" or "taken" have become so tainted with secondary meanings that it is easy to overlook the fact that when Smith has "taken" my horse, it ordinarily means that Smith now has in his possession a horse that was formerly in my possession.[56] It does not mean that Smith has injured my horse.[57] This common-

55. United States v. Willow River Power Co.,* 324 U.S. 499, 502 (1945). See also Legal Tender Cases,* 79 U.S. (12 Wall.) 457, 551 (1871). *But cf.* the dissenting opinion of Chief Judge Murrah in Batten v. United States, 306 F.2d 580, 587 (10th Cir. 1962), *cert. denied*, 371 U.S. 955, *rehearing denied*, 372 U.S. 925 (1963): "fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone," cited with approval in Martin v. Port of Seattle, 64 Wash. 2d 324, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965).

56. "TAKE, to lay hold of, seize, grasp, get." SKEAT, ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE (rev. ed. 1956). And this is the meaning of the word as it is used in the distinguished ancestors of the constitution, Magna Carta §§ 28, 30 and 31 and Act Abolishing Relics of Feudalism and Fixing an Excise, 12 Charles 2, c. 24, § 12. So also in Treaty of Amity and Commerce with France, February 6, 1778, Art. XX, a contemporary of the Constitution, which deals separately with goods "taken" from merchants of the two countries and "injury" done them. This use of "taken" as an act of expropriation has been carried forward into a number of our modern treaties which provide that property of nationals "shall not be taken . . . except for a public purpose, nor shall it be taken without the prompt payment of just compensation." See, *e.g.*, Treaty of Friendship and Commerce with Pakistan, Art. VI § 4, 12 U.S.T. 111, 113 (1961). The identical language has even been used in a recent agreement between Cuba and Japan. Jennings, *The Sabbatino Controversy*, 20 Record of N.Y.C.B.A. 81, 88 (1965). In sum, the internationally accepted interpretation of "take" is exactly its original meaning—to "seize." After seven hundred years of consistent usage, it is difficult to see how this word can be tortured into a meaning broad enough to encompass damage occasioned by objectionable noise.

*But see* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 54-55 (1964): "The direct antecedents of the just compensation provision of the fifth amendment are the jurisprudential writings of such 17th and early 18th century scholars as Grotius, Pufendorf, Bynkershoek, Burlamaqui, and Vattel," who were "essentially non-property oriented."

57. Constitutional protection exists only when property is taken for a "public *use*." Although the latter word is frequently slighted, it confirms the concept of a purposeful appropriation of something that is wanted, in marked contrast to government action that incidentally happens to cause damage. *Cf.* United States v. General Motors Corp.,*

sense interpretation is close to the original constitutional sense, and even twentieth century cases speak of "taking" as the type of intentional act which would create an implied contract to pay.[58]

Despite loose language in some Supreme Court opinions,[59] the actual holdings of the Court dealing with rights in tangible property stick surprisingly close to the original concept, in which a taking involves the displacement of the owner from some part of his property by the government with the result that the government occupies what the landowner once occupied or had the right to occupy.[60] The

323 U.S. 373, 378 (1945): "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." This explanation is correct so far as it goes, but it fails to state the whole rule, which is that "the deprivation of the former owner" must be due to an action of the government which demonstrates its intention to appropriate. See notes 66 & 72 *infra*.

58. See, *e.g.*, Bothwell v. United States,* 254 U.S. 231 (1920). "There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation." *Id.* at 233. See also *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 876-82 (1957).

59. For example: (1) "[T]here are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken." Pumpelly v. Green Bay Co.,* 80 U.S. 166, 179 (1872), in which the court held that a flooding of plaintiff's land by a dam erected by the government was a taking. (2) "[A] destruction for public purposes may as well be a taking as would be an appropriation for the same end." United States v. Welch,* 217 U.S. 333, 339 (1910) (land flooded and private right-of-way cut off). (3) "Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking," and "it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking," United States v. General Motors Corp.,* 323 U.S. 373 at 383 and 384 (1945), in which the Court held that when the Government took a temporary term from a leaseholder it must also pay the cost of the leaseholder's removal from the premises.

60. The following Supreme Court cases have been frequently cited, along with United States v. Causby, 328 U.S. 256 (1946), and United States v. General Motors Corp., *supra* note 59, as extreme examples of taking: Armstrong v. United States,* 364 U.S. 40 (1960) (taking occurred when government exercised its contractual right to have a defaulting contractor transfer work-in-process to government, thereby depriving plaintiff of the ability to enforce his materialman's lien on the work); United States v. Kansas City Life Ins. Co.,* 339 U.S. 799 (1950) (a taking occurred when government raised river level to improve navigation, thereby "underflowing" plaintiff's property and rendering it unfit for farming); United States v. Dickinson,* 331 U.S. 745 (1947) (when government, to improve navigation, took plaintiff's property for flooding, it must also pay for resulting erosion and easement on remaining properties which would be intermittently flooded); Portsmouth Harbor Land & Hotel v. United States,* 260 U.S. 327 (1922) (establishment of a land battery permanently aimed over plaintiff's property and a fire control station on such property may be a taking if it shows an "abiding purpose to fire when the United States sees fit"); Pennsylvania Coal v. Mahon,* 260 U.S. 393, 414-15 (1922) (state statute prohibiting mining of coal by subsurface owners, except by complying with "commercially impracticable" requirements for support of the surface, would constitute taking: "while property may be regulated

rule seems to be that there can be no "taking" of tangible property under the federal constitution unless two conditions exist: First, there must be a physical or direct "invasion" of the property and, second, the invasion must be of a type which results in "exclusive" appropriation.[61] To have a taking the governmental use must be of a nature that excludes simultaneous use of the same property interest by the title holder. Or phrased differently, the government must effectively displace the owner from some part of his property.[62]

Consistent with this definition, the Court found that the noise and vibration did not constitute a "taking" in *Richards v. Washington Terminal,* despite the admitted damage to the neighboring properties.[63] And one strongly suspects that noise alone, no matter how

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to a certain extent, if regulation goes too far it will be recognized as a taking"); United States v. Welch,* 217 U.S. 333 (1910) (when government took land for flooding, it must also pay for right-of-way rendered useless as a result of flooding).

61. "[T]here was a physical invasion of the real estate of the private owner, and a practical ouster of his possession." Gibson v. United States,* 166 U.S. 269, 276 (1897). A "direct invasion" is used in United States v. Cress,* 243 U.S. 316, 327, 328 (1917) and in United States v. Causby, 328 U.S. 256, 265 (1946). The phrase "physical invasion" and "directly encroaching" appears in Transportation Co. v. Chicago,* 99 U.S. 635, 642 (1879).

"[T]here is no exclusive and permanent appropriation of any portion of plaintiff's land [and] since he is not wholly excluded from the use and enjoyment of his property, there has been no 'taking' of the land in the ordinary sense." Richards v. Washington Terminal Co., 233 U.S. 546, 551-52 (1914). In *Causby,* the Court said that "an accurate description of the property taken is essential, since that interest vests in the United States." United States v. Causby, *supra,* at 267. The term "practical ouster of his possession" is used in Transportation Co. v. Chicago,* *supra,* at 642, as well as in Gibson v. United States,* *supra.* In Sanguinetti v. United States,* 264 U.S. 146, 149 (1924), the Court said it was necessary that there be "an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."

62. "[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." United States v. Cress,* 243 U.S. 316, 328 (1917). Compare 2 HARPER & JAMES, TORTS 1616 (1956): "It is enough that defendant's conduct destroys or substantially impairs the use of plaintiff's property either permanently or for a protracted period. . . . Consequential damage, however . . . are (*sic*) not included." See also Harvey, *Landowners' Rights in the Air Age—The Airport Dilemma,* 56 MICH. L. REV. 1313, 1321 (1958), in which it is suggested that a taking occurs when the infringement is "sufficiently serious."

63. "[T]here is no exclusive and permanent appropriation of *any portion* of plaintiff's land [and] since he is not wholly excluded from the use and enjoyment of his property, there is no 'taking' of the land in the ordinary sense." Richards v. Washington Terminal Co., 233 U.S. 546, 551-52 (1914). (Emphasis added.) *But see* Batten v. United States, 306 F.2d 584, 598 (10th Cir. 1962), *cert. denied,* 371 U.S. 955, *rehearing denied,* 372 U.S. 925 (1963), in which the dissenting opinion erroneously assumes that the Supreme Court in *Richards v. Washington Terminal, supra,* decided there had been a "constitutional taking by indirect interference" through the smoke concentrated on plaintiff. *Cf.* United States v. General Motors Corp.,* 323 U.S. 373, 378, 384 (1944). See also Sullivan v. Commonwealth,* 335 Mass. 619, 625, 142 N.E.2d 347, 352 (1957); Friendship Cemetery v. City of Baltimore, 197 Md. 610, 81 A.2d 57 (1951); 54 A.L.R.2d 768 (1957); McKee v. City of Akron,* 176 Ohio St. 282, 285, 199 N.E.2d 592, 594 (1964).

aggravating (short of the lethal intensities with which our military forces have been experimenting, or something nearly as drastic) cannot constitute a taking as defined by the cases; *i.e.*, a displacement of the landowner by a direct or physical invasion of the government.[64] If "physical invasion" alone were the test, noise might constitute such an invasion—as Piggott pointed out as early as 1885.[65] However, by the second requirement of "exclusive" appropriation, the Supreme Court made it plain that sounds drifting through the air are not the type of invasion contemplated.

In considering these constitutional standards, it should be noted that the scope of this article is confined to "taking" as it applies to overt acts which affect physical property. The invasion concept is obviously inapplicable either to legislative acts of the government affecting physical property or to any acts of the government affecting interests in intangible property, which are also entitled to constitutional protection.[66] Some of those writing on this subject have at-

64. In United States v. Causby, 328 U.S. 256, 261 (1946), counsel for the government agreed that if overflights made plaintiff's land uninhabitable, there would be a taking, and this would seem inescapable regardless of the cause if we define "uninhabitable" as meaning that the landowner has been involuntarily displaced rather than subjected to an aggravated case of discomfort. Compare Beseman v. Pennsylvania R.R., 50 N.J.L. 235, 236, 13 Atl. 164 (Sup. Ct. 1888), *aff'd*, 52 N.J.L. 221, 20 Atl. 169 (Ct. Err. & App. 1889); Taylor v. Chicago, M. & St. P. R.R., 85 Wash. 592, 594-95, 148 Pac. 887 (1915) (denying relief to an adjacent property owner despite the allegation that his property had been rendered "uninhabitable" by passing trains). See also Richards v. Washington Terminal Co., *supra* note 63, at 553, stating that the legislature "may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use." Six state cases were cited in support of this statement. One involved the discharge of slush on plaintiff's property. Sadlier v. City of New York,* 40 Misc. 78, 81 N.Y.S. 308 (Sup. Ct. 1903). Another related to an embankment on defendant's property that affected the foundation of plaintiff's house. Costigan v. Pennsylvania R.R.,* 54 N.J.L. 233, 23 Atl. 810 (Sup. Ct. 1892). The remaining four cases related to odors and noises from a gas tank and railroad yard facilities which should have been placed elsewhere, following Baltimore & P.R.R. v. Fifth Baptist Church, 108 U.S. 317 (1883), note 47 *supra*. In one of these, Pennsylvania R.R. v. Angel, 41 N.J. Eq. 316, 7 Atl. 432 (1886), which involved operation of a switchyard, the court stated, in a dictum, that smells and noise may constitute a taking of property. Two years later, however, the New Jersey Supreme Court limited the *Angel* case to its facts; *i.e.*, where a railroad was "doing certain acts which were obviously *ultra vires*." Beseman v. Pennsylvania R.R., *supra*, at 241. See also Roman Catholic Church v. Pennsylvania R.R., 207 Fed. 897 (3d Cir. 1913) (interpreting the law of New Jersey).

65. PIGGOTT, PRINCIPLES OF THE LAW OF TORTS 331 (1885). The sound wave argument is pressed in Lester, *Nuisance as a "Taking" of Property*, 17 U. MIAMI L. REV. 537 (1963). See also comment in Martin v. Port of Seattle, 64 Wash. 2d 324 n.4, 391 P.2d 540 n.4 (1964). And compare Avery v. United States, 330 F.2d 640, 643-45 (Ct. Cl. 1964).

66. Here one is thrown back to the broader interpretation of the Legal Tender Cases,* 79 U.S. (12 Wall.) 457, 551 (1871), in which the Court said that taking referred to "a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." The distinction between a "direct appropriation" by the government and "consequential damages" as the indirect result of action by the

tempted to throw all types of cases together higgledy-piggledy and to come out with a generalization which appears to cover them all, such as the statement that "any substantial interference which destroys or lessens the value of private property or the rights or enjoyment incidental to such property is, in fact and in law, a 'taking' in the constitutional sense, even though title and possession of the owner remain undisturbed."[67] If this bald generalization were true, most tax legislation would constitute a taking.[68]

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government, seems to be largely one of intent: "There can be no recovery . . . if the intention to take is lacking." Mitchell v. United States,* 267 U.S. 341, 345 (1925).

When the government admits an intention to take, it ordinarily commences an action to condemn. The cases coming before the courts, therefore, are usually instances in which the government has denied a taking, and the court has the problem of deciding whether some ambiguous action of the government demonstrates an intention to take. "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case." United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958). At least three different tests appear to have been applied depending on the type of property and nature of the government act:

(1) When the government commits an overt act that affects physical property, a taking will be assumed only when there has been an invasion resulting in exclusive possession by the government of some part of plaintiff's property. See, *e.g.*, United States v. Kansas City Life,* 339 U.S. 799 (1950); United States v. Dickinson,* 331 U.S. 745 (1946); United States v. Causby, 328 U.S. 256 (1946); Portsmouth Harbor L. & H. Co. v. United States,* 260 U.S. 327 (1922); United States v. Welch,* 217 U.S. 333 (1910).

(2) When the action of the government is by legislative proscription, a taking will be assumed when the plaintiff is excluded by terms of the law from using some part of his property. Jankovich v. Indiana Toll Road Comm'n,* 379 U.S. 487 (1965); Thompson v. Consolidated Gas Utilities Corp.,* 300 U.S. 55 (1937); Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). Compare United States v. Central Eureka Mining Co.,* *supra*, involving the exercise of war power.

(3) When the action of the government affects intangible property, a taking will be assumed if the government is "the direct positive beneficiary" of the loss suffered by the plaintiff. Armstrong v. United States,* 364 U.S. 40, 48 (1960). See also Cities Serv. Co. v. McGrath,* 342 U.S. 330 (1952). This is reminiscent of the implied contract theory referred to in note 58, *supra*, that was an essential feature of many of the earlier cases. *But see* Omnia Commercial Co. v. United States,* 261 U.S. 502 (1923).

67. 17 S.W. L.J. 308, 310 (1963) (borrowing from 2 NICHOLS, EMINENT DOMAIN 259 (3d ed. 1950)). The same thought is expressed in the current edition of 2 NICHOLS, EMINENT DOMAIN § 6.3 (rev. 3d ed. 1963), which cites United States v. Dickinson, United States v. Causby, and Portsmouth Harbor L. & H. Co. v. United States, *supra* note 66, and quotes at length from Smith v. Erie R.R.,* 134 Ohio St. 135, 16 N.E.2d 310 (1938), an access case which says that "if there is no taking there can be no recovery of consequential damages."

Even cautiously worded generalizations in this field seem to lend themselves to distortion. Lewis stated: "Whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed *by reason of the exercise of eminent domain*, his property is, pro tanto, taken and he is entitled to compensation." 1 LEWIS, EMINENT DOMAIN 56 (3d ed. 1909). (Emphasis added.) At an earlier point, Lewis pointed out the several ways, other than exercise of eminent domain, government can use or interfere with private property, flatly concluding, "it seems objectionable to define eminent domain as the power to take property for a public use." *Id.* at 3-5. Yet in Morrison v. Clackamas County,* 141 Ore. 564, 568, 18 P.2d 814, 816 (1933), the Supreme Court of Oregon, in a case involving erosion of soil as the

There have been two aviation cases involving flights over neighboring property in which the Supreme Court has held that there was a taking, *Causby v. United States*[69] and *Griggs v. County of Allegheny*.[70] In each of these cases there existed both the invasion and exclusive use which are required to effect a displacement of the property owner.[71] The "taking" was not based on the existence of an objectionable noise. The objectionable noise was there and may have caused damage, but damage alone does not constitute a taking.[72] In *Causby*, military aircraft regularly passed over the plaintiff's land at altitudes of eighty-three feet.[73] This effectively displaced the plaintiff: "The superadjacent air space at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself."[74] In *Griggs* a similar displacement was found, with

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result of a bridge constructed on adjoining property, cited Lewis as supporting the statement that "any destruction, restriction or interruption of the common and necessary use and enjoyment of the property of a person *for a public purpose* constitutes a 'taking' thereof." (Emphasis added.)

Thus, Lewis' statement that there is a taking when, by *exercise of eminent domain*, rights in use and enjoyment of property have been damaged, is converted by the Oregon court into a conclusion that there is taking when there has been *any* interruption in the use and enjoyment of property for a public purpose. In this distorted form the rule became the support for Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962).

68. In addition to taxes, four other types of non-compensable interference are listed in 1 LEWIS, *op. cit. supra* note 67, at 5.

The proponents of these broadened interpretations of "taking" never face up to the application of such a rule to personal property. If a United States mail truck dents the fender of a car, thereby lessening its value, is this too a "taking in the constitutional sense?"

Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 67 (1964), suggests that a taking occurs "when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise."

69. 328 U.S. 256 (1946).

70. 369 U.S. 84, *petition for rehearing denied*, 369 U.S. 857 (1962).

71. According to 2 HARPER & JAMES, TORTS 1615 n.13 (1956), in *Causby* "the Court was driven either to find a taking or to deny relief, because of the unavailability of recovering on a nuisance theory at least before the Federal Tort Claims Act." See also Note, 59 MICH. L. REV. 968, 969 (1961). It now seems plain that the Federal Tort Claims Act would not permit recovery in such a case unless the military pilots were negligently or intentionally flying below the prescribed altitudes necessary for safe flight to and from the airport. See note 48 *supra*.

72. "[D]amage alone gives courts no power to require compensation where there is not an actual taking of property." United States v. Willow River Power Co.,* 324 U.S. 499, 510 (1945). See also United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958).

73. United States v. Causby, 328 U.S. 256, 258 (1946). This was 67 feet above plaintiff's house, 18 feet above the highest tree on plaintiff's land.

74. *Id.* at 265. The government abandoned the use of the easement after the end of the war. Causby v. United States, 75 F. Supp. 262 (Ct. Cl. 1948).

aircraft regularly passing on a glide path eleven feet above plaintiff's chimney.[75]

Both of these decisions were written by Mr. Justice Douglas. The rationale in each case was that a taking had occurred because the landowner had lost the use of the airspace immediately above his property to the extent it had been occupied by the government:

> "[I]t is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted and even fences could not be run. *The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land.* The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."[76]

Although this seems clear enough, there are some who claim that what the Court really meant to say was that the noise made by the aircraft, not their use of the plaintiff's airspace, constituted the taking. For these disbelievers, a few more words may be added.[77] The opinion in *Causby* contains a fact statement of approximately five hundred words, in which the frequency and level of flights as well as the resulting noise, glare and risk of accidents are described. This fact statement is followed by a discussion of the relevant law for approximately three thousand words. The legal discussion is devoted entirely to the rights of landowners in the use of airspace above their property[78] and only two references are made to noise,

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75. Griggs v. Allegheny County, 369 U.S. 85, 86 (1962). "The question whether repeated aircraft overflights constitute a taking of particular property under the *Causby* and *Griggs* doctrine depends upon three factors: (1) the character of the land itself and (2) the altitude and (3) the frequency of the overflights." City of Atlanta v. Donald, 9 Av. Cas. 17439, 17443 (Ga. Ct. App. 1965).

76. United States v. Causby, 328 U.S. 256, 264 (1946). (Emphasis added.) Once a taking occurs, the damage from noise is compensable. See cases cited in note 86 *infra.*

77. The dissent of Mr. Justice Black (Mr. Justice Burton concurring) in *Causby*, contended the majority had wrongfully found that "noise and glare" constituted a taking. 328 U.S. at 269. See also Comment, 74 HARV. L. REV. 1581 (1961): "The compensable 'taking' . . . consists not in an appropriation of the landowner's property in a zone or column of airspace but rather in the creation of noise which substantially interferes with surface use and enjoyment." *Id.* at 1585. This questionable analysis was adopted a year later by the majority in Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962), and adopted in substance by Martin v. Port of Seattle, 64 Wash. 2d 324, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965). See also Dunham, *Griggs v. Allegheny County in Perspective—Thirty Years of Supreme Court Expropriation Law*, in SUPREME COURT REVIEW 63, 88 (1962).

78. "The path of glide for airplanes might reduce a valuable factory site to grazing land. . . . [T]he use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value," United States v. Causby, 328 U.S. 256,

each of which is inconsistent with the concept that the noise constituted a taking. The first, and very pertinent, reference serves to distinguish *Richards v. Washington Terminal,* where "property owners whose land *adjoined* a railroad line were denied recovery for damages resulting from the noise," whereas in *Causby* "the line of flight is *over the land.*"[79] The second, and equally significant, reference is the statement that "The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment."[80]

Similarly in the *Griggs* opinion written sixteen years later, after once stating the facts, Mr. Justice Douglas never again mentions noise. The decision in *Griggs* is based on the opinion in *Causby*:

> "[A]s we said in the *Causby* case, the use of land presupposes the use of some of the airspace above it. . . . Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.' 328 U.S. at 265."[81]

If the plaintiffs in *Causby* and *Griggs* had merely been subjected to

262 (1946); "[T]he flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it." *Id.* at 264; "[I]f the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports . . . rested on the land . . . . While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used . . . . We think that the landowner, as an incident to his ownership, has a claim to it [the superadjacent airspace] and that invasions of it are in the same category as invasions of the surface." *Id.* at 264-65.

79. *Id.* at 262. (Emphasis added.) According to Martin v. Port of Seattle, 64 Wash. 2d 324, 391 P.2d 540, 545 (1964), *cert. denied,* 379 U.S. 989 (1965), the surface displacement was of no importance: "The reliance placed upon the high noise level by the Supreme Court in both decisions, without detectable preoccupation with its angle of incidence, strongly indicates that the holdings are not limited to those instances where the aircraft passes directly over the land." See also Thornburg v. Port of Portland, 233 Ore. 178, 193, 376 P.2d 100, 107 (1962): "Whether expressed in so many words or not, the principle found in . . . Causby . . . is that when the government *conducts an activity upon its own land* which . . . is sufficiently disturbing to the use and enjoyment of *neighboring lands* to amount to a taking thereof, then the public . . . should bear the cost of such public benefit." (Emphasis added.)

80. United States v. Causby, 328 U.S. 256, 266 (1946).

81. Griggs v. Allegheny County, 369 U.S. 85, 88-89 (1962). Mr. Justice Black dissented in both *Causby* and *Griggs.* In the first case, joined by Mr. Justice Burton, he claimed that there had been no taking—that the majority had based its decision on "noise and glare" which is "at best an action in tort." United States v. Causby, 328 U.S. 256, 269-70 (1946). In the second case, joined by Mr. Justice Frankfurter, he agreed with the Court there had been a taking "under the *Causby* holding," but asserted that the taking in *Griggs* was by the federal government and not by the defendant county (the airport operator) as decided by the majority. Mr. Justice Black again claimed that *Causby* based its finding of taking on "noise, vibration and fear caused by constant and extremely low overflights." Griggs v. Allegheny County, 369 U.S. 85, 91 (1962).

the noise they experienced, no recovery would have been allowed. This is the conclusion that was reached in *Richards v. Washington Terminal,* and it is also the conclusion in all the federal court cases on aviation. Flights over private land may constitute a taking if they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land below. However, no recovery is allowed nearby landowners for the damage to their property caused solely by the noise to which they are subjected.[82]

The distinction just described has been said to make hard law since compensation under the Constitution is provided to the landowner "directly under" the path of low-flying aircraft, but not to the landowner whose property is a "fraction of an inch" beyond the wing tip of the same aircraft.[83] This kind of argument makes two erroneous assumptions: first, that the nature of the injury to the two landowners is identical; and second, that whenever there is damage, compensation must be paid—an obviously unsupportable conclusion.[84] In answer to the first assumption, it can be accepted for purposes of argument that the noise suffered by the two landowners is exactly the same. The difference is that the landowner over whose property the flight path has been laid has lost the use of that airspace. The right to the exclusive use of a definable, although invisible, portion of his property has passed from him to the airport operator just

82. See aviation cases in note 44 *supra.* "We are referred to no decisions holding that the mere maintenance of a nuisance effects a taking of adjoining or nearby property absent repeated physical invasions which are cognizable as the imposition of a servitude—the taking of an easement—rather than the tortious creation of a liability for which damages are recoverable under state law." Mosher v. City of Boulder, 225 F. Supp. 32, 36 (D. Colo. 1964). "We are cited to no decisions holding that the United States is liable for noise, vibration, or smoke without a physical invasion." Batten v. United States, 306 F.2d 580, 584 (10th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963).

83. Martin v. Port of Seattle, 64 Wash. 2d 324, 391 P.2d 540, 545 (1964), *cert. denied,* 379 U.S. 989 (1965). See also Thornburg v. Port of Portland, 233 Ore. 178, 198, 376 P.2d 100 (1962). The statement of the problem somewhat distorts the facts since where there has been a taking the easement acquired has been usually described as a right-of-way "1500 feet wide or 750 feet on either side of the center line of the runway" (*e.g.,* United States v. 765.56 Acres of Land, 174 F. Supp. 1,3 (E.D.N.Y. 1959)), thus providing a swath that is over a quarter of a mile wide, or eight times the breadth of the largest jet aircraft now in service. This is more than wide enough to cover normal deviations from the flight path and only rarely would an aircraft using the right-of-way pass a "fraction of an inch" from the property of adjacent landowners.

84. See cases cited in note 72 *supra.* Compare Comment, 74 HARV. L. REV. 1581, 1583 (1961), urging a nuisance theory of relief: "Attention would be focused on the degree of actual interference, rather than on formalistic factors like the relationship of the flight path to a particular zone or column of air space." See also Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain,* 48 VA. L. REV. 437, 444 n.27 (1962).

as definitely as if a visible highway, railway, or canal had been laid out on the surface of his property. Although the flight path in the air (like the pipeline laid below the surface of the earth) is not visible, in each case the landlord has been displaced from some part of his property. He can no longer build in the flight path or safely fly kites in it. But, his neighbor whose property lies a "fraction of an inch" from the flight path may do whatever building or kite flying he chooses. Moreover, there are added risks of physical damage and injury imposed on the landowner whose property is subject to a flight easement.[85] Thus, despite the assumed equality of the noise level, there is a very different impact on the two landowners. Both have been damaged, but in only one case has property been taken. And the federal constitution, along with half of the state constitutions, provides for compensation only when there has been a taking. Once the taking is established, the landowner may recover for consequential damages to the balance of his property, and this would include the damage from noise of aircraft utilizing the flight path.[86] This principle that a landowner whose property is taken may recover for consequential damages to his remaining property, but that a neighboring landowner may not recover for damage arising from the same objectionable activity, was well established long before noise from airplanes became a problem.[87]

In summary, then, when we are talking about real property, a taking occurs when landowners give up a portion of their property for use by the government or a public utility functioning under authority of the government. No legal difference exists between the

85. The resulting fear has been a major factual element in most taking cases. "If we had engine failure we would have no course but to plow into your house." Griggs v. Allegheny County, 369 U.S. 85, 87 (1962). See also United States v. Causby, 328 U.S. 256, 259 (1946); Bacon v. United States, 295 F.2d 936 (Ct. Cl. 1961); Johnson v. Airport Authority, 173 Neb. 801, 115 N.W.2d 426 (1962). Noise is more disturbing to individuals who associate the noise with risk of physical injury to themselves. "Eighty per cent of those who complained of aircraft noise reported some fear in connection with aircraft, either fear of machines crashing on the house or else unwillingness to fly themselves." HANDBOOK OF NOISE CONTROL 10-12 (Harris ed. 1957). See also note 6 *supra*.

86. See, *e.g.*, Boyd v. United States, 222 F.2d 493 (8th Cir. 1955); Mock v. United States, 8 Av. Cas. 18080 (Ct. Cl. 1964); Bowling Green Airport Board v. Long, 364 S.W.2d 167 (Ky. Ct. App. 1962); Johnson v. Airport Authority, 173 Neb. 801, 115 N.W.2d 426 (1962); Tennessee v. Rascoe, 181 Tenn. 43, 178 S.W.2d 392 (1944). This is frequently referred to as "severance damage." Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437, 441 (1962).

But any recovery for such consequential damages will be limited to those caused by activity on the property that has been taken. Campbell v. United States,* 266 U.S. 368 (1924); Boyd v. United States, *supra*; People v. Symons, 54 Cal. 2d 855, 357 P.2d 451 n.108 (1960).

87. See Campbell v. United States,* *supra* note 86; Sadlier v. City of New York,* 185 N.Y. 408, 78 N.E. 272 (1906); Church v. Railroad, 36 Utah 238, 103 Pac. 243 (1909).

low-level aircraft flight path which interferes with surface use of the land and the direct appropriation of the surface itself for railways, highways, canals or transmission lines, or the direct appropriation of the subsurface for the laying of pipelines. Those whose property is taken for any of these purposes can recover for the value of the property taken plus any consequential damages to the property that has not been taken, and this would include damages from noise and other objectionable activity resulting from the proposed use of the property taken. Neighbors, who have not had property taken, cannot recover for such consequential damages due to noise or other types of nuisances: "the doctrine has become so well established that it amounts to a rule of property, and should be modified, if at all, only by the lawmaking power."[88] This is the law under the federal constitution and is, or should be, the law in those states with similar constitutional provisions.[89]

### B. *The English Law*

The law of England as it applies to these problems is of general interest for comparison with the federal pattern, and is of specific interest in understanding some of the state constitutions.

The common-law rule applicable to the noise of utilities functioning under legislative authority was stated by Mr. Justice Blackburn in a leading case, *Hammersmith & City Ry. v. Brand*:

> "I think it is agreed . . . that if a person, not authorized by Act of Parliament so to do erected a railway or any other private road on his land, and then worked it by running locomotives and trains, or any other species of carriages, upon it, so that the vibration and noise . . . [annoyed] a neighbour, that injury would be a nuisance, and that neighbour would have a fresh cause of action against the maintainer of the way every time that the way was so worked . . . and he might . . . obtain an injunction. . . . But if, instead of making and maintaining a private way of his own, the owner of the land dedicated it as a *public* highway, and . . . the noise and vibration seriously affected the neighbours, I apprehend they would be without

88. Richards v. Washington Terminal Co., 233 U.S. 546, 555 (1914). See also United States v. Willow River Power Co.,* 324 U.S. 499, 506, 510 (1945): "The uncompensated damages sustained by this riparian owner on a public waterway are not different from those often suffered without indemnification by owners abutting on public highways by land."

89. Legal principles applicable to municipalities may sometimes differ from those applicable to states. See, *e.g.*, Town of Amherst v. Niagara Frontier Port Authority, 19 App. Div. 2d 107, 241 N.Y.S.2d 247 (1963), *complaint dismissed for legal insufficiency*, 40 Misc. 2d 116, 242 N.Y.S.2d 831 (Sup. Ct. 1963).

remedy. The common law would leave them suffering a private hardship for the public benefit."[90]

The plaintiffs in *Hammersmith* had acquired their property before the railroad had been constructed. None of the plaintiffs' property had been used in the construction, and there was no showing of negligence in the operation of the railroad. It was admitted that the value of the plaintiffs' property had declined as a result of the running of the trains. The specific question before the House of Lords was whether the common-law rule had been altered by special legislation enacted in 1845, by which compensation was to be paid by railroads for "any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof."[91] After considering the purpose of the statute, the court denied the asserted claim on the basis that the compensation provided by Parliament was limited to damages occasioned by the construction of a railroad and did not give "any remedy to the Plaintiffs for damage occasioned to their house in the course of using the railway."[92]

This House of Lords decision remains the law in England today except to the extent modified by special acts of Parliament. Such an act has been adopted for the regulation of civil aviation (the Civil Aviation Act, 1949).[93] This act provides that no action for trespass or nuisance shall lie for normally conducted flights and no action for nuisance shall lie for noise and vibration caused by aircraft at airports, but it imposes absolute liability for "material loss or damage" caused to persons or property on land or water by an aircraft in flight, taking off or landing.[94] Government aircraft are exempt

90. Hammersmith & City Ry. v. Brand, L.R. 4 H.L. 171, 195-96 (1869).

91. Railway Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 20, § 6. The pertinent part of this section provides that "the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company. . . ." Also considered in the decision were the general provisions of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 18.

92. At p. 206 the headnote reads: "The *Land Clauses Consolidation Act*, and the *Railways Clauses Consolidation Act*, do not contain any provisions under which a person whose land has not been taken for the purposes of a railway, can recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration occasioned (without negligence) by the passing of trains, after the railway is brought into use, even though the value of the property has been actually depreciated thereby."

93. 12 & 13 Geo. 6, c. 67 (1949).

94. *Id.* §§ 40(1), 40(2) and 41(2). "'Material' loss or damage connotes, it is thought, injury to persons or property which is of a physical nature;" 5 HALSBURY'S LAW OF ENGLAND 246 n.k (1953).

from the act unless the Queen, by Order in Council, shall apply the act to such aircraft,[95] but no such Order in Council has issued. Furthermore, the Crown Proceedings Act of 1947[96] relieves the government from any liability for torts of the armed forces (which would include the operation of governmental aircraft) while training or maintaining their efficiency.

Returning for a moment to the law of England as it relates to noises other than those produced by aircraft, it will be observed that the rule is the same as that stated by the Supreme Court in *Richards v. Washington Terminal.* However, there is a difference between the two regimes in another respect which bears directly on the discussion to follow. In England, compensation is payable to an abutting owner whose property has declined in value as the result of losing a right of access to his property, or the stopping of a passageway used by him, or the narrowing of a road before his house.[97] Under the "taken" language of the federal constitution and of the states, such an abutting neighbor is ordinarily denied compensation.[98]

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Section 41(2) provides: "No action shall lie in respect of nuisance by reason only of the noise and vibration caused by aircraft on an aerodrome to which this subsection applies by virtue of an Order in Council under section eight of this Act . . . ."

Pursuant to article 64 of the Air Navigation Order 1960, regulations have been issued providing that noise and vibration may be caused at licensed aerodromes when "(a) the aircraft is taking off or landing, or (b) the aircraft is moving on the ground or water, or (c) the engines are being operated" to check their performance, to warm them before flight or to insure the components of the aircraft are in satisfactory condition. Regulation 10 of Air Navigation (General) Regulations, 1960.

Despite the annoyance caused by noise of jet aircraft at England's principal airport "the demand, as reflected in rents and prices, was at least as great for houses close to the Airport as for those a few miles away." Report of the Committee on the Problem of Noise, Final Report, Cmd. No. 2056 at 64 (1963). The report recommended, however, that grants be made to cover a portion of the cost of soundproofing adjacent homes, and this recommendation has been recently adopted for a maximum of £100 ($280) per home. New York Times, March 11, 1965, p. 65, col. 7.

95. Civil Aviation Act, 12 & 13 Geo. 6, c. 67, § 61 (1949).

96. 10 & 11 Geo. 6, c. 44.

97. Under the 1845 Acts of Parliament referred to in note 91 *supra*, a distinction was made between damage arising from authorized user for which no recovery was allowed (Hammersmith v. Brand) and damage to an abutting owner directly resulting from construction for which recovery was allowed. See, *e.g.*, M'Carthy v. Metropolitan Board of Works,* L.R. 7 C.P. 508 (1872); Beckett v. Midland Ry.,* L.R. 3 C.P. 82 (1867); East & West India Docks & B. Ry. v. Gattke,* 3 Mac. & G. 155 (1851); Chamberlain v. West End of London & C.P. Ry.,* 2 Best & Smith 605, 110 E.C.L.R. 604, *affirmed* at 617 (1863). Compare Ricket v. Metropolitan Ry.,* L.R. 2 H.L. 175 (1867), in which compensation was denied for a temporary interruption of access which substantially affected the business at plaintiff's hotel.

98. See Transportation Co. v. Chicago,* 99 U.S. 635 (1879).

### C. *The State Constitutions*

At the present time the state constitutions are of two types. Nearly half of the states have constitutional provisions similar to the federal, providing compensation for property "taken" for public use. The other half provide compensation for property "taken or damaged," or contain other language with equivalent meaning.[99]

The manner in which these differences arose provides some assistance in interpreting the provisions themselves. Until 1870, the federal language had been uniformly copied by the states. In 1870 Illinois made the change, the first state to do so.[100] The impetus for the change was the great increase in rail and municipal highway construction following the end of the Civil War which changed the contour of many American cities. Property owners adjacent to this new construction frequently found that the grading had cut off their access to adjoining streets or that they had otherwise been adversely affected. The railroads and municipalities denied liability on the basis that there had been no taking, and this position was generally upheld by the courts. At the 1869 Illinois Constitutional Convention, it was urged that broader protection be afforded property owners by adding the word "damaged" to the constitutional provision for the purpose of providing the recovery available under English law which "has been well settled."[101]

The first two cases decided by the Illinois Supreme Court under the new language made it clear that the English rules were to be followed and that there was no intention to permit recovery for every conceivable type of property damage. In the first decision, the Illinois court held that a property owner whose land was adjacent to a street and who had lost his access to it as a result of municipal construction could recover for the decline in value of his property.[102]

99. This latter group includes: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia and Wyoming. In Alabama, Kentucky and Pennsylvania the "damaged" language is limited to action by municipalities and public utilities with the power of eminent domain. North Carolina has no state constitutional provision governing eminent domain, but property owners there are protected by the fourteenth amendment of the federal constitution, as well as by judicial interpretation of the state due process clause. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 222 (1931).

100. Prior to 1870 there had been some special state statutory provisions allowing recovery in limited instances for property damaged, and it is not uncommon today for a state with a federal type clause to make broader statutory provision for compensation in connection with a specific construction project.

101. 2 ILLINOIS CONSTITUTIONAL CONVENTION, DEBATES AND PROCEEDINGS 1578 (1869-70).

102. Rigney v. City of Chicago,* 102 Ill. 64 (1882). This was a definite expansion

The court relied upon the English rule that a landowner has a property interest in such access.[103] However, in the second case, which was decided during the same term, the court refused to consider the claim of a landowner whose business was located several blocks away from a street which had been closed because under Illinois law (and the law of England) an owner has no property interest in non-abutting streets.[104] The test applied by the court was not whether there had been a decline in property values, which was claimed in both cases, but whether the decline was due to an established property right that had been destroyed. The first of these Illinois opinions contained the following statement, which was repeated verbatim in the second:

> "[T]o warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. . . . [I]t was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law."[105]

Several other states, following the example of Illinois, changed their constitutions to include the word "damaged" or its equivalent,[106] and the constitutions of most of the states admitted to the union after 1870 contained the broader terminology. An encyclopedic work would be needed to trace the history of the constitutional provisions in each of the states, but I have been able to find nothing to indicate any intention to allow a neighboring property owner to recover for loss due to noise.[107]

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of the traditional rule, which denied compensation for loss of access unless part of the plaintiff's property had been taken and the taking itself resulted in a loss of access. Transportation Co. v. Chicago,* 99 U.S. 635 (1879). See discussion in Chicago v. Taylor,* 125 U.S. 161 (1888).

103. The English rule allowing recovery for loss of access by an abutting property owner is stated in M'Carthy v. Metropolitan Board of Works,* L.R. 7 C.P. 508 (1872), a case cited by Rigney v. City of Chicago, *supra* note 102. *Rigney* was not, strictly speaking, an "abutting" property owner since his land was 220 feet from the street closed, but nevertheless he had lost a valuable access right and was treated by the Illinois court as though he were an abutting owner.

104. Chicago v. Union Bldg. Ass'n,* 102 Ill. 379 (1882), involving a suit for an injunction. The English rule denying recovery to the non-abutting property owner is stated in Ricket v. Metropolitan Ry.,* L.R. 2 H.L. 175, 198-99 (1867).

105. Rigney v. City of Chicago,* 102 Ill. 64, 81 (1882); Chicago v. Union Bldg. Ass'n,* 102 Ill. 379, 394 (1882).

106. See 2 NICHOLS, EMINENT DOMAIN, § 6.44 (3d rev. ed. 1963).

107. The history of the Virginia amendment, for example, closely follows that of

The changed language, it should be noted, did not say that compensation will be paid whenever a person has suffered damages, but was confined to situations in which his property has been damaged. The usual interpretation was that "damaging" was merely an extension of the idea of "taking." Thus "taking" was a physical process as it applied to real property; a taking did not occur unless there was a physical invasion of plaintiff's land. Similarly, "damaging" was also a physical process; a damaging did not occur unless there was either visible physical deterioration of plaintiff's land or loss of some right pertaining to his land which could be physically demonstrated, such as loss of access.[108] As already explained, this was also the pattern worked out in England. When the courts said that the addition of the word "damaged" was intended to restore the situation as it had existed under the common law, this is what was meant.[109]

This conclusion is supported by the preponderance of opinion among the states making the change that there is no right of recovery for noise from public improvements, whether operated by the government or those acting under government authority. The point appears to have been considered by twenty-two of the twenty-six states which have constitutions containing the term "damaged" or equivalent language. In fifteen of these states the courts adopted the federal rule (and the common-law rule) expressed in *Richards v. Washington Terminal*, that property owners adjacent to a right-of-way are required to bear without redress any depreciation in their property due to the noise resulting from its use.[110] In the remaining

Illinois. VIRGINIA CONSTITUTIONAL CONVENTION, PROCEEDINGS AND DEBATES 714-15 (1902). In California, the change was made to permit recovery for loss of access. 3 CALIF. CONSTITUTIONAL CONVENTION 1189-90 (1878-1879). Two of the members of the court in Pennsylvania R.R. v. Marchant, 119 Pa. 541, 13 Atl. 690 (1888), *aff'd*, 153 U.S. 380 (1894), which denied recovery for noise, were Pennsylvania constitutional delegates.

108. See, *e.g.*, Rigney v. City of Chicago,* 102 Ill. 64, 81 (1882) (there must be "some direct physical disturbance of a right . . . which gives to it an additional value"); Church v. Railroad, 36 Utah 238, 247, 103 Pac. 243, 247 (1909) ("there must be some physical interference with the property itself or with some easement which constitutes an appurtenant thereto"). Compare Tidewater Ry. v. Shartzer, 107 Va. 562, 59 S.E. 407 (1907). See Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 259-60 (1931), where it is suggested that the physical conception of "taking" should be abandoned and recovery allowed for any violation of the "legal relations" of an individual.

109. See, *e.g.*, Rigney v. City of Chicago,* 102 Ill. 64 (1882); Pennsylvania R.R. v. Marchant, 119 Pa. 541, 561, 13 Atl. 690 (1888), *aff'd*, 153 U.S. 380 (1894).

110. See McClung v. Louisville & N.R.R., 255 Ala. 302, 51 So. 2d 371 (1951); Arkansas State Highway Comm'n v. McNeill, 381 S.W.2d 425 (Ark. 1964) (highway noise); Hot Springs R.R. v. Williamson,* 45 Ark. 429 (1885), *aff'd*, 136 U.S. 121 (1890); People v. Symons, 54 Cal. 2d 855, 357 P.2d 451 (1960) (highway noise); Harrison v. Denver City Tramway Co., 54 Colo. 593, 131 Pac. 409 (1913); Austin v. Augusta Terminal R.R., 108 Ga. 671, 34 S.E. 852 (1899); Louisville Ry. v. Foster, 108 Ky. 743, 57 S.W. 480 (1900);

seven states having the term "damaged," there is a conflict in the decisions within the individual states, but in six of the seven states the more recent decisions indicate that noise is not compensable.[111] Finally, the few cases that have been found dealing with the loud noises made by trucks and cars moving on modern high-speed expressways unanimously hold that there can be no recovery.[112]

A clear statement of the predominant view appears in *Bennett v. Long Island R.R.*,[113] which, although arising in New York where

Chesapeake & O. Ry. v. Gross, 19 Ky. L. Rep. 1926, 43 S.W. 203 (Ct. App. 1897); Louisville & S.R.R. v. Hooe, 18 Ky. L. Rep. 521, 38 S.W. 131 (1897); Matthias v. Minneapolis, St. P. & S. Ste. M. Ry., 125 Minn. 224, 146 N.W. 353 (1914); Romer v. St. Paul City Ry., 75 Minn. 211, 77 N.W. 825 (1899); Dean v. Southern Ry., 112 Miss. 333, 73 So. 55 (1916); Randle v. Pacific R.R., 65 Mo. 325 (1877); Smith v. Northern Pac. Ry., 50 Mont. 539, 148 Pac. 393 (1915); Gram Constr. Co. v. Minneapolis, St. P. & S. Ste. M. Ry., 36 N.D. 164, 161 N.W. 732 (1916); Wunderlich v. Pennsylvania R.R., 223 Pa. 114, 72 Atl. 247 (1909); Pennsylvania R.R. v. Marchant, *supra* note 109; Pennsylvania R.R. v. Lippincott, 116 Pa. 472, 9 Atl. 871 (1887); Hyde v. Minnesota, D. & P.R.R., 29 S.D. 220, 136 N.W. 92 (1912); Board of Educ. v. Croft, 13 Utah 2d 310, 373 P.2d 697 (1962); Church v. Railroad, 36 Utah 238, 103 Pac. 243 (1909); Taylor v. Chicago, M. & St. P.R.R., 85 Wash. 592, 148 Pac. 887 (1915); DeKay v. North Yakima & Valley Ry., 71 Wash. 648, 129 Pac. 574 (1913); Smith v. St. Paul, M. & M.R.R., 39 Wash. 355, 81 Pac. 840 (1905).

111. Compare decisions following the majority view: Thompson v. Kimball, 165 F.2d 677 (8th Cir. 1948) (construing law of Nebraska); Weiner v. Pennsylvania R.R., 292 Ill. App. 303, 10 N.E.2d 981 (1937); Illinois Cent. R.R. v. Trustees of School, 212 Ill. 406, 72 N.E. 39 (1904); Aldrich v. Metropolitan W. Side Elevated Ry., 195 Ill. 456, 63 N.E. 155 (1902); Metropolitan W. Side Elevated Ry. v. Goll, 100 Ill. App. 323 (1902); Britt v. City of Shreveport,* 83 So. 2d 476 (La. App. 1955); Oil Fields & Santa Fe R.R. v. Treese Cotton Co.,* 78 Okla. 25, 187 Pac. 201 (1920); St. Louis, S.F. & T. Ry. v. Shaw, 99 Tex. 559, 92 S.W. 30 (1906); City of Lynchburg v. Peters, 156 Va. 40, 157 S.E. 769 (1931); See Gardner v. Bailey,* 128 W. Va. 331, 36 S.E.2d 215 (1945)—highway noise; with contrary views in the same state: Ill. Cent. R.R. v. Kuehle, 95 Ill. App. 185 (1901); Chicago, P. & St. L. Ry. v. Leah, 152 Ill. 249, 38 N.E. 556 (1894); Chicago, M. & St. P. Ry. v. Darke, 148 Ill. 226, 35 N.E. 750 (1893); Helmer v. Colorado, So. N.O. & P.R.R., 122 La. 141, 47 So. 443 (1908); Kayser v. Chicago B. & Q.R.R., 88 Neb. 343, 129 N.W. 554 (1911); Omaha & N.P.R.R. v. Janecek, 30 Neb. 276, 46 N.W. 478 (1890); St. Louis-San Francisco Ry. v. Matthews, 174 Okla. 167, 49 P.2d 752 (1935); Ft. Worth & R.G.R.R. v. Downie, 82 Tex. 383, 17 S.W. 620 (1891); Gainsville, H. & W.R.R. v. Hall, 78 Tex. 169, 14 S.W. 259 (1890); Tidewater Ry. v. Shartzer, 107 Va. 562, 59 S.E. 407 (1907); Fox v. Baltimore & O.R.R., 34 W. Va. 466, 12 S.E. 757 (1890).

In addition, in a few states it is held that although there can be no recovery for the noise of passing trains, damages may be recovered for noise caused by railroad shops on the theory that they could be placed anywhere by the railroad—perhaps where it would annoy no one—and that the property owner required to bear the brunt of the annoyance produced by such a facility should be compensated for such damages as are not "common to the public at large." See, *e.g.*, Matthias v. Minneapolis, St. P. & S. Ste. M. Ry., 125 Minn. 224, 146 N.W. 353 (1914). This is not, however, the accepted rule in this country or in England. London, B. & S.C. Ry. v. Truman, H.L. 11 App. Cas. 45 (1885).

112. See Arkansas State Highway Comm'n v. McNeil, 381 S.W.2d 426 (Ark. 1964); People v. Symons, 54 Cal. 2d 855, 357 P.2d 451 (1960); See Gardner v. Bailey,* 128 W. Va. 331, 36 S.E.2d 215 (1945). See also Mathewson v. New York State Thruway Authority, 11 App. Div. 2d 782, 204 N.Y.S.2d 904 (1960), *aff'd*, 9 N.Y.2d 788, 174 N.E.2d 754 (1961).

113. 181 N.Y. 431, 74 N.E. 418 (1905).

the constitution follows the federal pattern, has been cited with approval a number of times by courts in states which have the broader constitutional language:[114]

> "The rumble of trains, the clanging of bells, the shriek of whistles, the blowing off of steam, the discordant squeak of wheels in going around the curves, the emission of smoke, soot and cinders, all of which accompany the operation of steam cars, are undoubtedly nuisances to the neighboring dwellings in the popular sense, but as they are necessarily incident to the maintenance of the road, they do not constitute nuisances in the legal sense, but are regarded as protected by the legislative authority which created the corporation and legalized its corporate operations. Nor does the legal nature of such annoyances change as traffic increases them in volume and extent."[115]

As anyone knows who has heard the passage of a hundred-car freight train, the railroad cases cannot be explained away as differing in degree from the airway cases. The railway cases are characterized by claims of cracked walls, broken windows, and interrupted sleep.[116] In addition, the neighbors of railroads have been required to bear smoke, smells, sparks and cinders.[117]

Thus, in 1946 when the Supreme Court approached the issues in *Causby*, it had available to it two established principles of law: first, the rule that noise alone (absent negligence and the other special exceptions discussed earlier) does not constitute a ground for recovery under the federal constitution, the broadened state constitutions, the common law, or the statutory law of England; second, the rule that invasion and exclusionary possession of the airspace of a landowner does constitute an appropriation which requires the payment of compensation.[118] In *Causby* the Supreme Court fitted an

114. See, *e.g.*, Smith v. Northern Pac. Ry., 50 Mont. 539, 148 Pac. 393 (1915); Church v. Railroad, 36 Utah 238, 103 Pac. 243 (1909); Taylor v. Chicago, M. & S.P.R.R., 85 Wash. 592, 148 Pac. 887 (1915).

115. Bennett v. Long Island R.R., 181 N.Y. 431, 436-37, 74 N.E. 418, 420 (1905).

116. See, *e.g.*, Richards v. Washington Terminal Co., 233 U.S. 546, 550 (1914); Taylor v. Chicago, M. & St. P.R.R., 85 Wash. 592, 594-97, 148 Pac. 887 (1915); cases cited in note 110 *supra*.

117. See cases cited notes 110 and 116 *supra*. The decisions also deny relief for an increase in the level of noise over what was originally anticipated. See, *e.g.*, Thompson v. Kimball, 165 F.2d 677 (8th Cir. 1948); McClung v. Louisville & N.R.R., 255 Ala. 302, 51 So. 2d 371 (1951); Harrison v. Denver City Tramway Co., 54 Colo. 593, 131 Pac. 409 (1913); Louisville & N.R.R. v. Scomp, 124 Ky. 330, 98 S.W. 1024 (1907). See also Staton v. Atlantic Coast Line R.R., 147 N.C. 318, 61 S.E. 455 (1908).

118. United States v. Causby, 328 U.S. 256, 264 (1946). See Hinman v. Pacific Air Transport Corp., 84 F.2d 755, 759 (9th Cir. 1936), *cert. denied*, 300 U.S. 655 (1937), where the court stated that in Portsmouth Harbor L. & H. Co. v. United States,* 260 U.S 327 (1922), "the use or occupancy of the airspace, if it can be so considered, was under such circumstances as amounted to a taking of the surface also." See also Butler

airways noise case into the whole fabric of the law. I stress this because it would seem that the essence of Government under Law is a pattern that provides some assurance of reasonable consistency of treatment and not a patchwork derived from the whim of a Haroun al Raschid dispensing a case-by-case brand of "justice" without reference to any standard except his own.

### D. *Two Recent State Court Decisions*

And this brings us to the recent decisions of two state courts involving aviation noises: *Thornburg v. Port of Portland,*[119] an Oregon case decided in 1962, and *Martin v. Port of Seattle,*[120] a Washington case decided in 1964. In Oregon the constitution follows the federal pattern; in Washington the constitution is in the broadened form, containing the words "taken or damaged." Despite the difference in constitutions, both of these states had previously decided that damage from noise alone, in the absence of negligence, did not constitute a compensable injury.[121] These earlier decisions had involved railways. However, when the courts of Oregon and Washington faced the issue of airway noise, the earlier holdings were simply ignored. A four-to-three majority in Oregon and a unanimous court in Washington held that the airway noise was a compensable injury. In each of the cases, persons who alleged that their property had been damaged by the noise of aircraft not shown to have been negligently operated and which did not pass over their property were held to have valid constitutional claims.

In *Thornburg,* the court decided that a "continuing and substantial interference with the use and enjoyment of property" is a taking, and that the issue of whether it is substantial enough to permit recovery will be for the jury to determine.[122] Since the accepted defini-

v. Frontier Telephone Co.,* 186 N.Y. 486, 491, 79 N.E. 716, 718 (1906): "The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly."

119. 233 Ore. 178, 376 P.2d 100 (1962).

120. 64 Wash. 2d 324, 391 P.2d 540 (1964), *cert. denied,* 379 U.S. 989 (1965).

121. See McQuaid v. Portland & V. Ry., 18 Ore. 237, 250, 22 Pac. 899, 904 (1889): "[T]he adjoining lot owner . . . will, doubtless, be obliged to submit to the ordinary inconvenience and consequences which the construction of a railroad track, and the moving of a locomotive and cars thereon, occasion,—be compelled to endure the smoke, noise and screeching which naturally result from the use of that character of vehicles; but they cannot be deprived of the right of ingress and egress to and from their premises, without compensation." For Washington cases, see note 110 *supra.*

122. Thornburg v. Port of Portland, 233 Ore. 178, 194-95, 376 P.2d 100 (1962). On retrial, the jury found there had been no taking. Docket No. 245-004, Cir. Ct. Multnomah County, Feb. 17, 1964. An appeal has been entered.

tion of nuisance is a "substantial" interference with "the use or enjoyment of land,"[123] *Thornburg* would, by this approach, convert every nuisance into a taking, a truly unique doctrine.[124] As the dissent pointed out, "Not a single Oregon case will support the theory that a mere nuisance can be considered a taking, as provided in our constitution, nor does any other jurisdiction where the language of the constitution is similar to ours hold that a mere nuisance can be considered a taking, nor does the majority cite any case so holding."[125]

The court in the *Martin* decision went even further. It decided that the interference did not have to be substantial,[126] and thus held that constitutional protection is afforded against aviation noises that are even below the level required for a nuisance. Indeed, the Washington court rejects the nuisance concept[127] and requires recovery "when the land of an individual is diminished in value for the public benefit. . . ."[128] The court did not even mention its earlier decisions dealing with railroads wherein it had flatly declared that railroad noises which "depreciate the value of adjoining private property" result in damage that "is purely consequential and is not recoverable."[129]

Since neither *Thornburg* nor *Martin* reconciles its holdings with other decisions by the same courts, it is not possible to say what these cases mean. Did the court in *Martin* literally mean that "When the land of an individual is diminished in value for the public benefit, then justice, and the constitution, require that the public pay?" If that is the intent, damages may be recovered in Washington for enacting building restrictions or zoning requirements, for converting a two-way street into a one-way street, for narrowing sidewalks, for constructing neighborhood fire or police stations, or even

123. See 4 RESTATEMENT, TORTS § 822 (1939).

124. For the origin of this fallacious standard, see note 67 *supra*.

125. Thornburg v. Port of Portland, 233 Ore. 178, 207, 376 P.2d 100, 113-14 (1962). However, the dissent suggests (p. 213) that under Oregon law the plaintiffs may have a damage action against the municipality operating the airport "for the creation of a nuisance for the benefit of the public," citing Wilson v. City of Portland,* 153 Ore. 679, 58 P.2d 257 (1936), which involved negligent dumping of garbage in a ravine.

126. Martin v. Port of Seattle, 64 Wash. 2d 324, 391 P.2d 540, 546-47 (1964), *cert. denied*, 379 U.S. 989 (1965).

127. Although not mentioned in the decision, in Washington "nothing which is done or maintained under express authority of a statute, can be deemed a nuisance." WASH REV. CODE § 7.48.160 (1952).

128. Martin v. Port of Seattle, 64 Wash. 2d 324, 391 P.2d 540, 547 (1964), *cert. denied*, 379 U.S. 989 (1965).

129. Conger v. Pierce County, 116 Wash. 27, 198 Pac. 377 (1921). See also Washington cases cited in note 110 *supra*.

for erecting a new lamppost, as well as for the noise of highways, railways and airways. And we may ask with reasonable curiosity if only land is to be protected by this new rule or whether personal property, which is also covered by the constitution, must be paid for when it has been "diminished in value for public benefit?" When a new bus franchise is authorized in the interest of public convenience and necessity, is compensation to be paid to the other holders of bus franchises and to the competitive rail and airlines who can show a decline in value of their licenses?

If only a small fraction of this is intended to be protected, the principle of socializing losses has been carried by the Washington court beyond anything previously known under American or English law.[130] But is that what is meant? It would not seem unreasonable to expect a court that makes such a drastic change in its constitutional concepts to have said so plainly. That was not done in *Martin*. As to its real meaning, not a clue is given—not a single case dealing with any subject other than aviation is mentioned throughout the entire opinion. Whether the court intended to make a separate rule for aviation but hesitated to say so because of the equal protection clause of the fourteenth amendment,[131] or whether it intended to change its constitutional standards, will presumably remain a mystery until the decision is tested in subsequent litigation in other causes.[132]

## Summary

In summarizing the subject of noise caused by the government or by government authorized utilities, I offer these conclusions:

First, *Richards v. Washington Terminal* still represents the federal law. A nuisance resulting from noise made by the government

130. Compare Note, 30 J. Air L. & Comm. 287, 291 (1964): "[T]he Supreme Court . . . is most likely to follow the lead of the Washington court . . . overruling *Batten* in the process."

131. Although the Supreme Court has rejected previous contentions that the equal protection clause was violated by allegedly inconsistent judicial opinions, the cases in which the issue was raised suggest that some logical distinction between the opinions was drawn by the courts or was apparent on the face of the opinions. See, *e.g.*, Marchant v. Pennsylvania R.R., 153 U.S. 380 (1894), holding that equal protection of the laws under the fourteenth amendment was not denied by the distinction drawn by the Pennsylvania courts between a property owner damaged by loss of access (to whom compensation was granted) and a property owner damaged by noise (to whom compensation was denied). Compare Beck v. Washington,* 369 U.S. 541, 554-55 and dissenting opinion at 568 (1962), also involving a decision of the Supreme Court of Washington.

132. The petition of the Port of Seattle to the United States Supreme Court for a writ of certiorari [denied 379 U.S. 989 (1965)] did not make the equal protection argument.

or by an entity operating pursuant to government authority does not constitute a taking even when it causes a decline in the value of neighboring property. Whether the noise emanates from a railroad, an express highway, an airway, or from a fire engine house makes no difference. To the extent the noise is a necessary incident of an activity sanctioned by law and is free from negligence, there is no right to recover damages.

Second, the preceding paragraph represents the federal rule; it is also the common-law rule and would appear to be the correct interpretation of the state constitutions which follow the federal pattern.[133] The word "taken" as used in the state constitutions, and as used in the ancestors of those constitutions, was not intended to provide recovery of damages for noise.

Third, it has not been possible to examine in full the purpose that each of the individual states may have had when they incorporated the term "damaged" into their constitutions. To the extent this purpose has been discussed in the decisions of those states and in the few constitutional debates that have been referred to, there appears to have been no intention of providing compensation for the damage that may be caused by noise.[134] And surely an interpretation of a statute or constitution must be applied equally to all persons coming before the courts. When this is not done, as for example in *Thornburg* and *Martin*, the result must be condemned as a grave abuse of judicial power.

Obviously it cannot be contended that a court may not correct an erroneous interpretation once it has been shown to be erroneous. Neither can it be contended that constitutional provisions should be regarded as inflexible regardless of changes in economic and social conditions.[135] However, in the aviation cases it is apparent that no new legal problems have been created by changes in economic and social conditions. The legal problems are exactly the same as they have always been: where is the line to be drawn between compensable and noncompensable damage, and who is to draw it?

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133. "[I]t was the common law of England, and consequently of this country, when the constitutions were adopted, that if a private owner suffered necessary damage from a public improvement, but his land was not actually entered on or taken, it was *damnum absque injuria*." 2 NICHOLS, EMINENT DOMAIN § 6.38[1] (rev. 3d ed. 1963).

134. See Wofford, *The Blinding Light—The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

135. See Israel, *Gideon v. Wainright: The "Art" of Overruling*, SUPREME COURT REVIEW 211, 219-29 (1963).

> "Where is the line to be drawn? If property owners on Filbert street may recover, why not those on Arch street, and Race, and so on north and south, east and west, as far as the whistle of the locomotive can be heard, and its smoke can be carried? The injury is the same, it differs only in degree. And it does not stop here. The constitution does not apply to railroads merely. It affects all corporations clothed with the power of eminent domain, including cities, boroughs, counties, and townships; it is applicable to canals, turnpikes, and other country roads. If, by judicial construction, we extend the constitution to all the possibilities resulting from the lawful operation of a public work; to all kinds of speculative and uncertain consequential injures [*sic*], we shall find ourselves at sea, without chart or compass to guide us."[136]

In deciding where the line is to be drawn, consideration should be given to a number of subjects—the first that come to mind are the fairness of one line compared with another as it affects the individuals on whom the loss first falls and the cost to the government of socializing the loss. However, additional considerations are the ease of applying the rule, the importance of avoiding multiplicity of suits, and the ability of property owners and their lawyers to know when and how the rule applies. The common-law concept of physical invasion which was embodied in our constitutions is probably the easiest to apply of all possible choices, assuming that compensation is to be granted at all. The extended controversy over this relatively simple standard illustrates what would happen if a standard like that suggested by *Martin* were adopted.

What is clear is that the line has to be drawn somewhere, and wherever it is drawn there will be some who will argue persuasively that this results in injustice:

> "[A] tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other, it has an arbitrary look."[137]

136. Pennsylvania R.R. v. Marchant, 119 Pa. 541, 558-59, 13 Atl. 690, 696 (1888), *aff'd*, 153 U.S. 380 (1894). Pennsylvania had previously added the "and damaged" language.

137. This is a statement by Mr. Justice Holmes, but I can no longer remember the source. Similar statements by him appear in Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 41 (1928), and Holmes, *The Theory of Torts*, 44 HARV. L. REV. 773, 775 (1931).

*Where* the line is to be drawn is considerably harder to answer than who should draw it. Here, it would seem that the line had already been drawn, and that it is only for the courts to determine whether particular cases fall on one side or the other. But even if that were not the case and the problem was solely one of what the rule should be, one might think that courts would be especially reluctant to embark on a novel course in a field involving so many considerations requiring the type of broad factual investigation and analysis characteristic of the legislative rather than the judicial function. The judicial expansion of constitutional language through interpretation is familiar enough, but we must not forget that this is largely either an effort to find a way to carry out the will of the people as expressed through the legislature or an attempt to accommodate a new social or economic fact within the framework of old words of general purport.[138] A court cannot lawfully expand the constitution simply because it disagrees with what the constitution says.

> "Of course we know full well that law must be administered by men, and that human judgment is an inevitable element in the application of law. But it is one thing to act according to one's personal predilections or choice, and a wholly different thing to come to one's own best conclusion in the light of his understanding of the law as it has been established by statute, decision, tradition, received ideals and standards, and all the other elements that go to make up our legal system."[139]

Fourth and finally, the one point on which courts appear agreed, regardless of the form of constitution, is that an injunction will not issue to restrain the government or a government-authorized entity from an activity which creates noise[140] so long as it is a necessary inci-

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138. See Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

139. Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 92 (1960). See also Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949); and Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 773 (1965).

140. See, *e.g.*, Railroads: Osborne & Co. v. Missouri Pac. R.R., 147 U.S. 248 (1893); McClung v. Louisville & N.R.R., 255 Ala. 302, 51 So. 2d 371 (1951); Stetson v. Chicago & E.R.R., 75 Ill. 74 (1874). Pipelines, water and power companies: Transcontinental Gas Pipe Line Corp. v. Gault, 198 F.2d 196 (4th Cir. 1952); Hillside Water Co. v. Los Angeles,* 10 Cal. 2d 677, 76 P.2d 681 (1938); Gurnsey v. Northern Cal. Power Co.,* 160 Cal. 699, 117 Pac. 906 (1911). Construction of public airports: Jasper v. Sawyer, 3 Av. Cas. 18118 (D.C. Cir. 1953); Warren Township v. City of Detroit, 308 Mich. 460, 19 N.W.2d 134 (1944); State *ex rel.* Helsel v. Board of County Comm'rs, 37 Ohio Op. 58, 79 N.E.2d 698 (1947), *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911 (1948); Atkinson v. City of Dallas, 353 S.W.2d 275 (Tex. Civ. App. 1961). Operation from public airports: Smithdeal v. American Airlines, Inc., 80 F. Supp. 233 (N.D. Tex. 1948); Loma Portal Civil Club v. American Airlines, Inc., 39 Cal. Rptr. 708, 394 P.2d 548 (Sup. Ct. 1964); City of Phoenix v. Harlan, 75 Ariz. 290, 255 P.2d 609 (1953); Brooks v. Patterson, 159

dent of an activity sanctioned by law and is not negligently conducted.[141] The courts will often give other reasons for withholding relief, but the result is that an injunction is regularly denied under these circumstances. If the courts were to adopt any other course, it would constitute an unreasonable interference with legislative authority.

A great service would be rendered potential litigants if the courts in all jurisdictions, federal and state, regardless of the constitutional language, would make the reason for their action clear. Because of the apparent reluctance of courts to state the proposition plainly, the point is constantly being relitigated.[142] It should be unequivocally laid to rest.

So far as I am aware, this is the first attempt to draw together, on a broad scale, the cases dealing with the scope of the immunity of the government and government-authorized entities from legal action for objectionable noises or other nuisances. While I have been led at times to assert with a fair degree of positiveness what the law is or what the law should be, the article is cheerfully offered as a starting point for comment and criticism in this extremely interesting and difficult field.

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Fla. 263, 31 So. 2d 472 (1947); Bourland v. City of San Antonio, 347 S.W.2d 660 (Tex. Civ. App. 1961). Operation from military airport: Western v. McGehee, 202 F. Supp. 287 (D. Md. 1962). Sonic boom tests: Coxsey v. Halaby, 231 F. Supp. 978 (W.D. Okla. 1964). A possible exception is Dlugas v. United Airlines Trans. Corp., 53 Pa. D. & C. 402 (C.P. 1944), in which an airline was enjoined from operating flights below one hundred feet not to exceed ten days a year in order to permit plaintiff's land to be farmed. The scope of the injunction in *Dlugas* is described in Anderson v. Souza, 38 Cal. 2d 825, 243 P.2d 497 (1952).

In states requiring compensation to be paid before a taking, an injunction may issue if this procedure has not been followed. See, *e.g.*, Stockdale v. Rio Grande Western Ry., 28 Utah 201, 77 Pac. 849 (1904).

141. See, *e.g.*, Village of Blue Ash v. City of Cincinnati,* 173 Ohio St. 345, 182 N.E.2d 557 (1962) (municipality enjoined from condemning property of another municipality). Squaw Island Freight Terminal Co. v. Buffalo,* 246 App. Div. 472, 284 N.Y.S. 598 (1936), *modified*, 273 N.Y. 119, 7 N.E.2d 10 (1937) (city enjoined from improper discharge of sewage). Pennsylvania R.R. v. Angel, 41 N.J. Eq. 316, 7 Atl. 432 (1886) (railroad enjoined from ultra vires operation of switchyard in front of plaintiff's house). See note 64 *supra*.

142. Consider, for example, the waste in two recent cases where this point was involved: Mathewson v. New York State Thruway Authority, 22 Misc. 2d 410, 196 N.Y.S.2d 215 (Sup. Ct. 1959), *aff'd*, 11 App. Div. 2d 782, 204 N.Y.S.2d 904 (1960), *aff'd*, 9 N.Y.2d 788, 174 N.E.2d 754 (1961) (action to enjoin night operations of trucks on New York thruway); Loma Portal Civic Club v. American Airlines, Inc., No. 259763, San Diego, Cal., Super. Ct., July 5, 1962, *reversed*, 37 Cal. Rptr. 253 (Ct. App. 1964), *rehearing denied*, March 31, 1964, *trial court's denial of injunction affirmed*, 39 Cal. Rptr. 708, 394 P.2d 548 (Sup. Ct. 1964), *petition for rehearing denied*, Sept. 11, 1964 (action to enjoin low flights at San Diego municipal airport).