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Noise and the Law: A Survey

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The subject of noise and the law has received extensive comment recently as a consequence of a more general concern with environmental protection. Although a certain amount of redundancy, therefore, cannot be avoided in treating this subject, the purpose of this article is to set forth the state of the law with respect to problems of noise. Consideration will first be given to the private remedies available to persons whose personal or property rights are adversely affected by noise. Secondly, the law of public nuisance will be explored as a transitional concept from private remedy to public regulation. The various types of public regulation will then be discussed. Finally, certain conclusions about the manner in which the law seeks to deal with problems of noise and the direction of prospective legislation and programs of noise control will be made.

I. Private Legal Remedies

A. *Private Nuisance*

Private nuisance, as opposed to public nuisance, is an unreasonable interference with a person's right to the use and enjoyment of his property.[1] Such a nuisance exists when the interference is substantial, results in damage, and is caused by the use of the actor's property which the law deems unreasonable.[2] That noise may constitute a private nuisance has never been open to serious question.[3]

When noise constitutes a private nuisance, the remedies available to the plaintiff are those generally available in private nuisance actions. Thus, the plaintiff in a common law action may obtain compensatory damages for a nuisance caused by noise, and in an appropriate case,

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1. W. Prosser, Law of Torts § 89 (4th ed. 1971) [hereinafter cited as Prosser].
2. *Id.*
3. Lloyd, *Noise as a Nuisance*, 82 U. Pa. L. Rev. 567 (1933).

punitive damages.[4] Injunctive relief is also available as in other cases of private nuisance.[5]

Inasmuch as a private nuisance is defined as an unreasonable interference with a person's right to the use and enjoyment of his property, the plaintiff in a private nuisance action must have such an interest in property as will entitle him to its use and enjoyment. In *Wilson v. Parent*,[6] it was held that a dower interest, not entitling the person to a present interest in the use and enjoyment of property, will not support a nuisance action.[7] Moreover, a party may not maintain a nuisance action to protect another's interest in real estate. Thus, a tenant may not maintain a nuisance action to protect a reversionary interest.[8]

If the activity of a defendant is not the legal cause of the invasion of plaintiff's interest, no liability will attach to defendant's conduct. In *Molony v. Pounds*,[9] the Pennsylvania Supreme Court reversed the grant of an injunction by the court below that prohibited defendants from operating their twenty-four hour restaurant between the hours of one a.m. and six a.m. because the appellate court found the defendants were not legally responsible for the alleged nuisance. The plaintiff in *Molony* objected to the noise outside the restaurant from patrons talking, slamming automobile doors, and blowing horns intermittently. The operation of the restaurant itself, however, was not the cause of the complaint. The court held that the defendants were in no way responsible for the conduct of their patrons either before they entered or after they left the restaurant premises.

The crux of any private nuisance action consists in the balancing of the gravity of a harm done to plaintiff's interests against the reasonableness of defendant's use of his own property. This balancing process to determine initially whether a private nuisance exists should not be confused with that balancing process in a court of equity to determine whether an injunction should be issued to restrain a nuisance. The initial balancing process is to determine the very essence of the nui-

4. Gorman v. Sabo, 210 Md. 155, 122 A.2d 475 (1956).
5. Nair v. Thaw, 156 Conn. 445, 242 A.2d 757 (1968); Wheat Calvert Co. v. Jenkins, 240 Ky. 319, 55 S.W.2d 4 (1932); Kobielski v. Belle Isle East Side Creamery Co., 222 Mich. 656, 193 N.W. 214 (1923); Anderson v. Guerrein Sky-Way Amusement Co., 346 Pa. 80, 29 A.2d 682 (1943); Quinn v. American Spiral Spring & Mfg. Co., 293 Pa. 152, 141 A. 855 (1928).
6. 228 Ore. 354, 365 P.2d 72 (1961).
7. *See also* RESTATEMENT OF TORTS § 822 (1938); PROSSER, *supra* note 1 (a plaintiff may maintain a private nuisance action only to protect *his* property interest).
8. PROSSER, *supra* note 1, at 593.
9. 361 Pa. 498, 64 A.2d 802 (1949).

sance itself; the second of these processes determines whether an injunction will lie.[10]

It is difficult to determine in advance what constitutes a substantial interference with a person's right to the use and enjoyment of his property in the case of noise. As W. H. Lloyd has said:

> . . . for it is generally admitted that noise alone may constitute a nuisance, although in determining whether it is in fact such a nuisance as to entitle the complaining party to relief at law or in equity, volume, time, place and duration of its occurrence, as well as the locality, must be taken into consideration.[11]

In order to determine whether the interference is substantial, it is not enough that the noise affects someone with highly idiosyncratic responses to noise. As Prosser has indicated:

> Where the invasion affects the physical condition of plaintiff's land, the substantial character of the interference is seldom in doubt. But where it involves mere personal discomfort or annoyance, some other standard must obviously be adopted than the personal tastes, susceptibilities and idiosyncracies of the particular plaintiff. The standard must necessarily be that of definite offensiveness, inconvenience or annoyance to the normal person in the community . . . .[12]

The following cases are merely illustrative of what have been considered to be unreasonable interferences with one's right to the use and enjoyment of his land, and do not exhaust the possibilities as to what type of sound may be considered a nuisance. In *Keenly v. McCarty*,[13] cries and screams of patients in a private hospital for alcoholics and drug addicts were held to constitute a nuisance. Noises from a creamery during a period from midnight to eight in the morning have been held a substantial interference where loud and profane talking was combined with the clamor of milk wagons and cans.[14] Likewise, noises emanating from a plant during sleeping hours were held to be a substantial interference in *Wheat Calvert Co. v. Jenkins*.[15] What may be one man's music may be another's nuisance. Thus, in *Lambton*

10. 1 F. HARPER & F. JAMES, TREATISE ON THE LAW OF TORTS § 1.30 (1956) [hereinafter cited as HARPER & JAMES].
11. Lloyd, *supra* note 3, at 569.
12. PROSSER, *supra* note 1, at 578.
13. 137 Misc. 524, 244 N.Y.S. 63 (Sup. Ct. 1930).
14. Kobielski v. Belle Isle East Side Creamery Co., 222 Mich. 656, 193 N.W. 214 (1923).
15. 240 Ky. 319, 55 S.W.2d 4 (1932).

v. Mellish,[16] the sound of an organ which could be heard for over a mile was held to be substantial interference with the use and enjoyment of the plaintiff's land.

The reasonableness of the defendant's use of his property is an element in determining whether, in light of the gravity of plaintiff's harm, a nuisance exists. As the court in *Molony v. Pounds*,[17] indicated:

> At the time of the hearing, appellants' restaurant was the only all-night restaurant in Conshohocken, and practically all its patrons are local people. During the day its customers include businessmen, school teachers, clergymen and office workers. Many of its night patrons are workmen employed by industries in and about Conshohocken which operate on a twenty-four hour schedule, and some of these industries maintain charge accounts at the restaurant for the accommodation of their employees. No intoxicating beverages are sold and there is no musical or other noise-making entertainment device on the premises. The noises subject of complaint, and on which the suspension of appellants' business was based, arise wholly outside the restaurant, from loud talking by people entering or leaving, and from the slamming of automobile doors and blowing of horns. There is no evidence that appellants have encouraged or abetted such noises in any manner. Moreover, the unavoidable inference from the evidence is that these noises do not occur regularly, but are only occasionally heard.[18]

That the defendant's conduct has social utility has not always inured to his benefit. It is only one element in the complex of factors that determine the existence of a nuisance. Neither does the fact that defendant is operating a manufacturing establishment in an area zoned "industrial" confer upon the defendant the right to create a nuisance. In *Quinn v. American Spiral Spring & Manufacturing Co.*,[19] the court reversed the dismissal by the lower court of a bill in equity brought to restrain the operation of a plant manufacturing iron and steel springs because of the great noise and racket it produced. Prior to building the establishment on the property adjacent to plaintiff's, the defendant endeavored to purchase plaintiff's property. Plaintiff, however, did not wish to sell at the price offered by defendant. The court found that

16. 3 Ch. D. 163 (1894).
17. 361 Pa. 498, 64 A.2d 802 (1949).
18. *Id.* at 503, 64 A.2d at 804.
19. 293 Pa. 152, 141 A. 855 (1928). *But see* Wojnar v. Yale & Towne Mfg. Co., 348 Pa. 595, 36 A.2d 321 (1944) (person living in an area zoned "Industrial" only had the right to that degree of quietness consistent with the standard of comfort prevailing in the locality in which he dwells).

since the plaintiff lived in an industrial zone that did not give the defendant the right to maintain a nuisance. Further, the court found that the defendant had built the plant creating the noise on that portion of his property which was closest to plaintiff's dwelling, although it had the option of placing the plant on another part of its property where it would not constitute a nuisance to plaintiff. In reversing the court below, which dismissed plaintiff's bill in equity, the Pennsylvania Supreme Court instructed the lower court as follows:

> On a careful consideration of the whole case, we are of opinion that defendants should be required, within such reasonable time as the court below shall direct, to so relocate and install their heavy machinery, as to cause a minimum of injury to plaintiff and his property, consistent with a reasonable operation of the plant; that, if they do not do so within the time specified, they should be enjoined from operating the machinery until they do; and that they should be required to pay to plaintiff such damages as will recompense him for the injuries he has sustained from the improper location and use of the heavy machinery. For the proper determination of these matters, leave is given to produce further evidence, if desired by the court or either party.[20]

That a defendant is conducting a lawful business is not a sufficient defense, in itself, against a nuisance suit.[21]

A frequent element in noise nuisance cases is the time the noise occurs. Where noise during normal working hours may not be a nuisance, the same noise during sleeping hours may create a nuisance.[22]

In those cases in which relief has been denied the plaintiff, it has sometimes been found that the alleged nuisance created by noise did not exist. Thus, in *Grzelka v. Chevrolet Motor Car Co.*,[23] the court upheld a jury verdict for the defendant in a case in which plaintiff alleged injury to premises caused by vibrations from large hammers and interference with the enjoyment of his property. The defendant in this case was located in a large industrial area. And, in *Pawlowicz v. American Locomotive Co.*,[24] where plaintiffs sought an injunction against the operation of a drop-forge plant and damages for injury to property al-

20. 293 Pa. at 161, 141 A.2d at 858.
21. Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944); Kroker v. Westmoreland Painting Mill Co., 274 Pa. 143, 117 A. 914 (1922).
22. Nair v. Thaw, 156 Conn. 445, 242 A.2d 757 (1968); Wheat Calvert Co. v. Jenkins, 240 Ky. 319, 55 S.W.2d 4 (1932); Kobielski v. Belle Isle East Side Creamery Co., 222 Mich. 656, 193 N.W. 214 (1923).
23. 286 Mich. 141, 281 N.W. 568 (1938).
24. 90 Misc. 450, 154 N.Y.S. 768 (Sup. Ct. 1915).

legedly caused by the jar of the plant, relief was denied because the noise was characterized as slight and the vibrations of the plant were found not to be the cause of the property damage.

Noise may have legal significance in landlord and tenant relationships. In *Ben Har Holding Corp. v. Fox*,[25] the court found that the chirping of crickets within the plaintiff's apartment was not such a serious interference with plaintiff's right to use and enjoy his leasehold as to constitute a constructive eviction. But in *Barnard Realty Co. v. Bonwit*,[26] continuous noise from rats within the walls of a house was held to be a constructive eviction. And in *Bonan v. Sarni Original Dry Cleaners, Inc.*,[27] the Supreme Judicial Court of Massachusetts affirmed the action of the trial court in refusing to grant an injunction to the owner of a shopping center against its tenant who operated a drycleaning establishment. The plaintiff alleged that, contrary to the provisions of the lease, the defendant operated the drycleaning establishment in an offensive and noisy manner. The evidence produced at trial, however, not only failed to substantiate the allegations of the plaintiff, but tended to show that whatever noise was being produced was due to multiple causes which could not be distinguished. There also appeared to be a good faith attempt on the part of the defendant to reduce the noise levels emanating from the drycleaning establishment by the installation of new equipment designed to reduce noise levels substantially.

Clearly, where defendant produces noise with the intent to annoy his neighbors, such noise is both intentional and unreasonable. Therefore, it lacks social utility.[28]

B. *Injunctive Relief*

Injunctive relief is sought in many noise nuisance cases since it offers a means of direct abatement of the problem and offers great flexibility. While in some cases injunctive relief was granted against a total operation, in the majority of cases the relief was fashioned to the measure of the annoyance or, to paraphrase Gilbert and Sullivan, "The remedy was made to fit the wrong."

In cases where noise disturbed residents during their normal sleep-

25. 147 Misc. 300, 263 N.Y.S. 695 (N.Y.C. Mun. Ct. 1933).
26. 155 App. Div. 182, 139 N.Y.S. 1050 (1913).
27. 268 N.E.2d 366 (Mass. 1971).
28. Collier v. Ernst, 46 Pa. D. & C. 1 (C.P. Del. Co. 1942).

ing hours, injunctions have been granted more or less frequently against operations causing noises at that time. In *Nair v. Thaw*,[29] an injunction was granted against the operation of a noisy air-conditioner between ten p.m. and eight a.m. until the sound volume was reduced to a certain decibel level. Thus, defendants were given the opportunity of finding a way to reduce the objectionable noise.

Similarly, in *Kobielski v. Belle Isle East Side Creamery Co.*,[30] and in *Wheat Calvert Co. v. Jenkins*,[31] injunctions were granted to restrain the noise only during normal sleeping hours. In *Davis v. Levin*,[32] however, an injunction against the operation of an air-conditioner was refused in circumstances similar to that of *Nair*.

Sometimes an injunction will be granted against the total operation of a business, if that is the only method by which the nuisance can be avoided.[33] At other times a court of equity will enter a decree giving a defendant the choice of rectifying the situation or refraining totally from the conduct producing the nuisance. In *Quinn v. American Spiral Spring & Manufacturing Co.*,[34] the court afforded the defendant a choice within a given time period. Likewise, in *Anderson v. Guerrein Sky-Way Amusement Co.*,[35] an injunction was granted only after the court had granted defendant sufficient time to abate the noise problem and defendant had failed to comply.

In *Assembly of God Church of Tahoka v. Bradley*,[36] an injunction was sought and granted to restrain the construction of a church on the ground that it would be so operated as to constitute a nuisance. Generally, before the construction of a building which is not a nuisance *per se* will be enjoined, it must appear that the use of the building will necessarily create a nuisance. The court in *Bradley*, however, was influenced because the defendant church had previously conducted its services in a nearby tent and disturbed property owners in the vicinity

The flexibility of a court of equity to fashion a remedy to fit the circumstances is illustrated in *Collier v. Ernst*.[37] In that case the court's decree had the following provisions:

29. 156 Conn. 445, 242 A.2d 757 (1968).
30. 222 Mich. 656, 193 N.W. 214 (1923).
31. 240 Ky. 319, 55 S.W.2d 4 (1932).
32. 138 So. 2d 351 (Fla. 1962).
33. Thompson v. Hodge, 348 S.W.2d 11 (Mo. 1961).
34. 293 Pa. 152, 141 A. 855 (1928).
35. 346 Pa. 80, 29 A.2d 682 (1943).
36. 196 S.W.2d 696 (Tex. Civ. App. 1946).
37. 46 Pa. D. & C. 1 (C.P. Del. Co. 1942).

(1) No marimba playing between the hours of 1 P.M. and 10 P.M. on Sundays, and 9 A.M. to 10 P.M. on weekdays;
(2) Marimba could not be played for a total of more than three hours per day, and more than one hour at a time;
(3) Loud playing of the marimba was prohibited; and
(4) The defendant was enjoined from playing certain offensive tunes characterizing certain neighbors with an intent to annoy them.[38]

While airplane noise problems present many legal ramifications that will be dealt with elsewhere in this article, three cases are of interest from the viewpoint of injunctive relief. In *Maitland v. Twin City Aviation Corp.*,[39] plaintiffs sought damages and injunctive relief against defendants to prevent aircraft from flying low over plaintiff's property. Damages in this case were sought for injury to plaintiff's mink farm. The court held that in addition to damages for injury to plaintiff's business, plaintiff was entitled to an injunction restraining defendant from permitting low flying aircraft over plaintiff's property as the take-offs and landings from defendant's airport were in violation of Civil Aeronautics Administration regulations.

In *Antonik v. Chamberlain*,[40] however, the court refused to grant an injunction to restrain defendants from using their property as a privately owned airport. The injunction was denied because plaintiffs failed to show a prediction of great and irreparable injury. The only showing in the case was the inconvenience that would be suffered by residential property owners in the vicinity of existing airports. Although an injunction is available to restrain a potential nuisance, apparently the court in this case was of the opinion that a nuisance in the legal sense was not likely to develop from the operation of the airport.

Except where flights are made in violation of Civil Aeronautics Administration regulations, it is doubtful whether an injunction would ever lie at the instance of a private party to restrain the operations of a public airport. Air transportation is sanctioned by Congress and is the subject of a vast scheme of regulation and promotion, including the acquisition of land for publicly operated airports. This precludes the issuance of an injunction under such circumstances.[41]

While a private landowner might not be entitled to injunctive relief

38. *Id.* at 10.
39. 254 Wis. 541, 37 N.W.2d 74 (1949).
40. 81 Ohio App. 465, 78 N.E.2d 752 (1947).
41. East Haven v. Eastern Airlines, Inc., 333 F. Supp. 338 (D. Conn. 1971).

against the operation of an airport, nevertheless, an airport owner, especially a publicly operated one, may be entitled to an injunction against aircraft utilizing its facilities where the aircraft does not conform to the rules and regulations of the airport management.[42]

In *Port of New York Authority v. Eastern Airlines, Inc.*,[43] the court held that it was not necessary that the Port Authority show irreparable damage or loss to be entitled to injunctive relief. Applying New York law, the federal district court treated the agreement of the airlines with the Port Authority as being in the nature of a lease. Thus, as the landowner, the Port Authority, was entitled to an injunction merely on the ground that the tenant violated a covenant in the lease.

C. *Damages*

Where damages are sought for noise nuisances, the measure of damages depends upon the extent of the injury and the kind of injury involved.

In *Dixon v. New York Trap Rock Corp.*,[44] plaintiffs were awarded $750 damages for injury to their property, and $2000 in damages for "deterioration of health" due to discomfort and inconvenience caused by disturbance of plaintiffs' right to the enjoyment of their property. Likewise, in *Nair*, plaintiff was awarded $3500 in damages for physical discomfort and annoyance caused by defendants' unreasonable use of their air-conditioning unit. These damages were awarded to plaintiff for the interference with the "comfortable" use and enjoyment of her property. And in *Gorman v. Sabo*,[45] plaintiffs were awarded $3500 for interference by defendant with their right to the use and enjoyment of their property. Defendant, in *Gorman*, intentionally and maliciously harassed plaintiffs with loud noises.

Where a court grants injunctive relief in addition to damages, the damages will be compensation for past injury, and not punitive or exemplary.[46] Moreover, where a court grants an injunction, it may not grant damages contingent on the defendant's noncompliance with the injunction. In *Thompson v. Hodge*,[47] the court upheld the granting of an in-

42. Port of N.Y. Authority v. Eastern Airlines, Inc., 259 F. Supp. 745 (E.D.N.Y. 1966).
43. *Id.*
44. 293 N.Y. 509, 58 N.E.2d 517 (1944).
45. 210 Md. 155, 122 A.2d 475 (1956).
46. Nair v. Thaw, 156 Conn. 445, 242 A.2d 757 (1968).
47. 348 S.W.2d 11 (Mo. 1961).

junction but reversed the award of $1000 damages for noncompliance with the injunction. The court characterized such damages as punitive in nature and not allowable in an equitable proceeding.

When a court of equity takes jurisdiction over a nuisance action for the purpose of determining whether it should grant equitable relief, it may also grant damages in an appropriate case.[48] There is a split of opinion, however, as to whether a court of equity may award damages in the absence of granting equitable relief.[49] The award of damages without the grant of equitable relief would seem to imply the existence in a particular case of an adequate remedy at law. Traditionally, equity lacks jurisdiction where the remedy at law is adequate.

Punitive damages are available in nuisance cases, and have been awarded in nuisance cases involving noise.[50] As has been noted above, however, a court of equity is without power to grant punitive or exemplary damages.[51] The theory is that the grant of an injunction will be sufficient deterrence to defendants and others who may have similar acts in mind. Thus, equitable relief will have the same function as the award of punitive or exemplary damages would have in a common law nuisance case.

D. *Aircraft Noise*

Since most airports in the United States are owned and operated by governmental agencies, the problem of aircraft noise in and around such airports is elevated to the status of a constitutional problem. Under the fifth amendment of the Federal Constitution and like provisions of the constitutions of several states, private property may not be taken for a public use without the payment of just compensation to the property owner. Whether it be the construction of highways, bridges, public buildings, or airports, the owners of that property taken for the particular public use involved, have a constitutional right to just compensation. Ordinarily, there is no dispute regarding whether private property is taken in the constitutional sense; most disputes arise over the value of the property. If a dispute arises as to whether property is taken, this dispute must be settled before damages can be ascertained.

48. 25 C.J.S. *Damages* § 117 (1966); 30 C.J.S. *Equity* § 72 (1965); 43 C.J.S. *Injunction* § 217 (1945); 66 C.J.S. *Nuisance* § 121 (1950).
49. Gorman v. Sabo, 210 Md. 155, 122 A.2d 475 (1956).
50. *Id.*
51. It has been held that even in a common law action for nuisance where damages have been awarded for a temporary nuisance, the defendant is under an obligation to abate the nuisance. Ganster v. Metropolitan Elec. Co., 214 Pa. 628, 64 A. 91 (1906).

Disputes of this nature most often arise in communities surrounding public airports. They are occasioned by the adverse effects on private property resulting from the operation of the airport, particularly noise from the take-off and landing of jet aircraft. While the facilities of a public airport may not encroach upon surrounding private property, nevertheless, there may be a constitutional taking. If the airport operations produce objectionable noise and other inconvenience to surrounding property owners as to deprive them effectively of the beneficial use of their land, then the law of "taking" comes into contact with the law of trespass, nuisance, and air easements.[52]

In *Richards v. Washington Terminal Co.*,[53] the United States Supreme Court recognized that a governmental agency, or a private corporation endowed with the power of eminent domain, may create such a private nuisance so as to render the use and enjoyment of one's property valueless. Under such conditions, *Richards* recognized that a nuisance of this magnitude would constitute a taking of private property for which, constitutionally, just compensation would be required.[54] While *Richards* did not involve airports or aircraft, it nevertheless stated a principle that came to full fruition in the age of aircraft.

In *United States v. Causby*,[55] the Supreme Court of the United States made authoritative pronouncements on constitutional law, ownership rights of land, and Congressional power to regulate the airways, that formed the basis of future developments in this area. The Court disposed of the old common law doctrine that the owner of the surface of real estate owned vertically to the heavens above and to the depths below the earth.[56] Declining to sanction such a doctrine in an age of air transportation, the Court enunciated another rule; namely, that with regard to the super-adjacent airspace above a person's land, that person owns only so much of that airspace as he can use.[57]

Presumably, flights within such airspace would constitute a trespass if the flights were not authorized by the owner of the surface. However, flights above that limit over a person's property would not constitute a trespass since the owner of the surface did not own the airspace above this limit.

Causby concerned a chicken farmer and his wife whose farm was

52. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946).
53. 233 U.S. 546 (1914).
54. *Id.* at 553.
55. 328 U.S. 256 (1946).
56. *Id.* at 260-61.
57. *Id.* at 264.

adjacent to an army air force base in North Carolina. Frequent flights of army aircraft at extremely low altitudes over plaintiffs' land not only caused much annoyance and fright to plaintiffs personally, such flights also frightened the chickens causing them to run against the walls, thereby killing themselves. Thus, the effect of the frequent flights of military aircraft was to ruin plaintiffs' business.

Under the provisions of the Air Commerce Act[58] prevailing at the time *Causby* was decided, navigable airspace was defined in such a manner so as to exclude from its definition the path of glide necessary for take-offs and landing. In this circumstance the Court found that the United States Government had, by the operation of the air force base, taken a property right, in the nature of an easement, belonging to plaintiffs for which just compensation must be made. Since the facts of the case and some of the language of the Court suggested that there was a trespass involved, subsequent court decisions, mostly in the federal courts, have sometimes insisted that the Supreme Court required a trespass in these cases before a constitutional taking could exist. The Court did recognize, however, that the nuisance caused by the low flying military aircraft was of such a nature as to deprive plaintiffs of the beneficial use of their land.[59] Thus, in *Causby* the concepts of taking merged with those of trespass, nuisance, and easement.

In *Batten v. United States,*[60] a divided court of appeals held that under the *Causby* rationale there is no taking if the aircraft did not invade the airspace of the property owner. The dissent voiced vigorous objection to this interpretation of *Causby*. The rationale of the dissent was followed in *Thornburg v. Port of Portland.*[61] In that case there were flights over plaintiff's land and flights adjacent to but not over plaintiff's land. The flights over the land were at such altitudes as not to be invasions of plaintiff's property under the *Causby* rationale. Nevertheless, the court in *Thornburg* decided that the presence of a nuisance that substantially deprived plaintiff of the use and enjoyment of her property constituted a taking despite the absence of a trespass.

The question of what entity is liable to a landowner for a taking caused by overflights of aircraft was decided by the United States Supreme Court in *Griggs v. Allegheny County.*[62] In that case, the Court

58. Act of May 20, 1926, ch. 344, §§ 1-14, 44 Stat. 568-76.
59. 328 U.S. at 258-59.
60. 306 F.2d 580 (10th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963).
61. 233 Ore. 178, 376 P.2d 100 (1962).
62. 369 U.S. 84 (1962), *rev'g* 402 Pa. 411, 168 A.2d 123 (1961).

held that the taking was by the governmental entity owning and operating the airport and not the federal government. The Court overruled a decision by the Pennsylvania Supreme Court that held that the county which owned and operated the airport was not liable to plaintiffs for taking their property.

In *Griggs*, as in *Causby*, the flights over plaintiffs' land were extremely low, almost touching the rooftops. The provisions of the Air Commerce Act[63] were amended after *Causby* to provide that navigable airspace includes the paths of glide necessary for landing and take-off. An effort was made by defendants in *Griggs* to rely on this change in the Act to claim that there could be no invasion of plaintiffs' airspace if the planes were operating all the time within the navigable airspace as defined by Congress. In response to this claim the United States Supreme Court cited *Causby* for the principle that frequent flights of low flying aircraft depriving the landowner of beneficial use of his property constitute a taking under the Federal Constitution.

Other cases involving aircraft noise illustrate the various fact situations that arise, the claims advanced, and the manner of their determination. In *Westchester Home Owners Association v. Los Angeles*,[64] the court held that where homeowners living near the Los Angeles International Airport maintain a suit against the city as owner and operator of the airport under either nuisance, negligence, or inverse condemnation theories for the noise and air pollution caused by the jet aircraft using the airport, the city may maintain a suit for subrogation against the airlines using the airport and the manufacturers of the aircraft.

In *Maynard v. United States*,[65] a military aircraft flew low over an area where plaintiff was riding a horse. The noise of the aircraft frightened the horse causing the rider to be thrown and injured. In denying plaintiff's claim for compensation under the Federal Tort Claims Act, the court in *Maynard* held that the selection of the route of the aircraft was an act in furtherance of governmental policy and discretionary in nature, therefore, not actionable.

In *City of Boston v. Massachusetts Port Authority*,[66] the plaintiff claimed that the defendant port authority which operated Logan Airport took property belonging to the city of Boston in violation of the city's

63. Act of May 20, 1926, ch. 344, §§ 1-14, 44 Stat. 568-76.
64. No. 931989 (L.A. Co., Cal. Super. Ct., April 17, 1970).
65. 430 F.2d 1264 (9th Cir. 1971).
66. 444 F.2d 167 (1st Cir. 1971).

fourteenth amendment rights since the noise of aircraft taking off and landing at the airport substantially diminished the value of the city's school property. The court of appeals affirmed a district court determination that the city did not state a claim for which the federal court could grant relief. The court held that the city had no such due process claim under the Federal Constitution.

In *Kirk v. United States*,[67] landowners were held to have a contractual claim against the United States under circumstances in which it appeared that their properties were damaged by sonic boom tests made by the Federal Aviation Administration, and where the Federal Aviation Administration publicly assured people that it would pay for damages done. The issue arose on whether the shorter statute of limitations under the Federal Tort Claims Act barred the suit, or whether the suit could be brought under the Tucker Act, relating to contractual claims against the United States that has a longer statute of limitations.

II. Public Nuisance

The principles of public nuisance provide a transition from private legal remedies available in the field of noise to governmental regulation. Prosser has defined public nuisance in the following terms:

> No better definition of a public nuisance has been suggested than of an act or omission "which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects." The term comprehends a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community, or the comfort or convenience of the general public. It includes interferences . . . with the public peace, as by loud and disturbing noises . . . .[68]

The difference between a public and private nuisance is not in the activity of the actor but in the nature of the interest with which there is interference. As has been stated above, a private nuisance is an unreasonable interference with one's right to use and enjoy his property, whereas a public nuisance is an unreasonable interference with a right of the public. In the field of environmental insults, many activities, for example the making of noise, production of smoke and offensive

67. 326 F. Supp. 843 (W.D. Okla. 1970).
68. Prosser, *supra* note 1, at 583-84.

odors, and the pollution of the waters, may constitute both a public and a private nuisance.

While a public nuisance is usually a species of minor criminal offense, it also may be the basis of civil litigation—either on behalf of the state or on behalf of a private party. Except where specifically authorized to do so by statute, a private party may not maintain an action either at law or in equity for a public nuisance unless the party alleges that he suffers some special or particular damage as a result of the public nuisance, or that the activity of the defendant also constitutes a private nuisance insofar as plaintiff is concerned.[69]

Principles that were first enunciated in private nuisance cases have been, because of the similarity in terminology, utilized as well in public nuisance cases. Thus, in public nuisances, the interference must be a substantial one—objectionable to the ordinary reasonable man.[70] Also, the balancing process of weighing the degree of harm caused by the actor's conduct against its social utility is part of the public as well as the private nuisance theory.[71]

The special injury which allows a private party to maintain a public nuisance action need not be the result of conduct constituting the public nuisance itself, but may be due to some incidental activity associated with it. In *Wittmer v. Fretti*,[72] plaintiff commenced an action in equity against the operation of a gambling house seeking an injunction and damages. The gambling house was situated approximately eight-tenths of a mile from plaintiff's residence and the operation of the gambling establishment was a public nuisance under state law. Plaintiff alleged and proved, *inter alia*, that the persons who frequented the establishment blew their automobile horns frequently and loudly to the disturbance of the plaintiff. The court found this situation to be that type of special injury which would support an action for public nuisance at the instance of a private party. While the court refused the plaintiff's request for damages on the basis that it deemed them too speculative, nevertheless, it granted the plaintiff the requested injunction. The court noted that while private persons may not ordinarily resort to equity to prevent criminal acts, they may do so if they suffer injury distinct from that suffered by the public generally.

69. PROSSER, *Private Action For Public Nuisance*, 52 VA. L. REV. 997 (1966).
70. *Id.* at 1002.
71. *Id.* at 1003.
72. 95 Ohio App. 7, 116 N.E.2d 728 (1952).

The distinction between a public and private nuisance is well illustrated in *Wilson v. Parent.*[73] *Wilson* involved an equity action by plaintiff to restrain defendant, her son-in-law, from using foul and obscene language and making obscene gestures toward her in public. In addition to the family relationship, plaintiff and defendant were next door neighbors. While the court denied plaintiff equitable relief,[74] it noted the distinction between private and public nuisance and the requisites for bringing an action in either case. The court noted that the plaintiff did not have standing to bring a private nuisance action inasmuch as she only had a dower interest in her husband's property. However, it held that the defendant's action constituted a public nuisance and that the plaintiff suffered special injury. Therefore, she had the right to maintain an action based on public nuisance.

Much of the regulatory legislation relating to noise is premised on noise being a public nuisance. This is especially true of municipal ordinance.[75] The reason appears to be two-fold: (1) It is difficult, except in the case of hearing loss due to occupational exposure to noise, to relate noise levels to serious health effects; (2) While loudness, duration and frequency of sound are capable of precise measurement, many of its other characteristics are not susceptible of such measurement. Thus, while state legislation and local ordinances relating to the regulation of noise contain decibel limitations, most of them also contain provisions relating to noise as a nuisance.

Within constitutional limitations, the legislature has the power to declare what may constitute a public nuisance, or authorize activity which, lacking such authorization, would otherwise constitute a public nuisance.[76] The legislature may not, however, confer absolute immunity for conduct constituting a nuisance since such legislative action may conflict with constitutional inhibitions against the taking of property for public use without just compensation. Where Congress or a state legislature has authorized the construction and operation of railway facilities and conferred upon the railway company the right of eminent

73. 228 Ore. 354, 365 P.2d 72 (1961).
74. The grounds utilized by the court in refusing to grant plaintiff relief were that he possessed an adequate remedy at law and that he was himself a wrongdoer. *Id.* at 361, 365 P.2d at 79.
75. 115 CONG. REC. 32178 (1969) (Extension of Remarks by Senator Mark Hatfield entering into the record material entitled *Legal aspects of noise control* (1969), by James J. Kaufman).
76. PROSSER, *supra* note 1, at 606.

domain, incidental injury suffered by the public at large is noncompensable if the activity is carried on without negligence.[77] However, where the activity would constitute a private nuisance of such a character as to substantially deprive a person of the beneficial use of his property, he is entitled to compensation for a taking under the fifth or fourteenth amendment of the United States Constitution.[78]

It should be noted that this exemption from liability extends only to that type of annoyance or inconvenience which must be suffered by the public at large as a consequence of the activity which is legislatively authorized. The activity is not exempt from liability if it is conducted negligently or is creating special injury to a party not suffered by the public generally.[79]

This rule has been well stated in *Richards v. Washington Terminal Co.*:[80]

> We deem the true rule, under the 5th Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it 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.[81]

Thus, where the legislature has the power to authorize an activity that would otherwise be denominated a public nuisance, such legislative power cannot deprive a person of a property right otherwise guaranteed by the Constitution. However, even though an activity might be a public nuisance if not legislatively authorized, if authorized it would prevent the state from prosecuting a party conducting such activity.[82]

III. Government Efforts at Noise Abatement

A. *Introduction*

It is perhaps a cliche to note that the problems associated with effective noise abatement, as with other pressing problems, transcend political boundaries and cannot effectively be solved at one governmental level. Any effective noise abatement problem requires governmental

77. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).
78. *Id.* at 553.
79. *Id.* at 555.
80. *Id.*
81. *Id.* at 553.
82. People v. Brooklyn-Queens Transit Corp., 283 N.Y. 484, 28 N.E.2d 925 (1940).

cooperation throughout our federal system. Although the effects of noise are local, effective control of the noise often requires action beyond a local level. For example, while there may be local ordinances directed toward excessive horn-blowing, no local ordinances will be able to accomplish the desired noise level reduction from aircraft noise. Santa Barbara, California, adopted an ordinance on September 26, 1967,[83] declaring it to be unlawful to pilot any aircraft over or in the vicinity of the city of Santa Barbara at supersonic speed so as to cause loud, sudden, and intense sonic boom impacts in the city of Santa Barbara. Apart from whether such an ordinance is constitutional,[84] there is a real question as to the effectiveness of this type of ordinance in preventing sonic booms from adversely affecting the residents of a municipality. The prevention of flying at supersonic speed over any well-populated city would require a federal policy with respect to the use of navigable airspace by supersonic aircraft.

Existing patterns of governmental regulation demonstrate the types of responses to the problem of noise and the nature of the legal problems arising in this context. Therefore, the efforts of local, state, and federal government will be set forth in that sequence.

B. *Noise Abatement on a Local Level*

Within the confines of this article it is impossible to analyze all the local municipal ordinances within the United States pertaining to noise abatement.[85] Municipal ordinances relating to noise abatement take a variety of forms. Some municipalities, such as Chicago,[86] have rather comprehensive noise ordinances that regulate sources and activities that are noise producing. The main emphasis in the Chicago ordinance is on vehicular noise abatement, although its provisions cover stationary sources as well.[87] This ordinance, although of recent date, does not regulate noise from construction operation. Ordinances of other municipalities, however, do regulate construction noises. For

83. Santa Barbara, Cal., Ordinance 3246, Sept. 26, 1967.
84. *See* Lockheed Air Terminal, Inc. v. City of Burbank, 318 F. Supp. 914 (C.D. Cal. 1970); American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1966).
85. *See* note 75 *supra*.
86. *See* Callavari, *A New Comprehensive Noise Ordinance*, in PROCEEDINGS OF THE PURDUE NOISE CONTROL CONFERENCE 263 (M. Crocker ed. 1971).
87. *Id.*

example, an Anchorage, Alaska, ordinance prohibits the use of pile drivers, power shovels, pneumatic hammers, and other such equipment in the conduct of building operations between specified hours.[88]

Municipal ordinances regulating noise vary in sophistication. Some rely wholly upon nuisance concepts, while others contain decibel limits. Ordinances containing decibel limitations take a variety of forms. Apart from general noise abatement ordinances, zoning ordinances, building codes, and ordinances regulating vehicular noises may also contain specific limitations.

Some municipalities regulate noise through a variety of different ordinances relating to different sources and activities producing noise. This type of approach to noise control seems more indicative of early efforts to control noise.[89] More modern ordinances tend to be of a comprehensive character with separate sections devoted to different categories of sources and activities.

A significant number of ordinances regulate the use of sound trucks and sound amplification devices in public places. These ordinances have been subject to a substantial amount of litigation in both federal and state courts.[90] The ordinances raise questions concerning abridgments of the right of freedom of speech guaranteed under the first amendment of the United States Constitution. The United States Supreme Court has twice had occasion to rule on the constitutionality of sound truck ordinances. In *Saia v. New York*,[91] the Court at the instance of a minister of the Jehovah's Witnesses, struck down as unconstitutional an ordinance of the city of Lockport, New York, that required prior permission from the city's chief of police in order to use a sound amplification device in a public place. Appellant was convicted under the ordinance for using such a device in a public place without the requisite permission. The Court held that the ordinance was unconstitutional in that it constituted a prior restraint on the right of free speech as guaranteed under the first amendment of the Federal Constitution. The

88. *See* note 75 *supra*.
89. PITT. DIGEST 724-27 (1936).
90. Rovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948); Phillips v. Borough of Folcroft, 305 F. Supp. 766 (E.D. Pa. 1969); Wollam v. City of Palm Springs 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963); Brinkman v. City of Grinsville, 83 Ga. App. 508, 64 S.E.2d 344 (1951); Matthes v. Collyer, 32 Misc. 2d 224, 223 N.Y.S.2d 280 (Sup. Ct. 1961); Commonwealth v. Geuss, 168 Pa. Super. 22, 76 A.2d 500 (1950). For a review of these cases, *see* A. GORDON, C. HARTELIUS & S. LEWIN, LAW AND MUNICIPAL ECOLOGY: AIR, WATER, NOISE, OVERPOPULATION 63-67 (1970).
91. 334 U.S. 558 (1948).

lack of any standard controlling the discretion of the chief of police in granting or denying permits was the basis for the Court's decision.

In *Kovacs v. Cooper*,[92] the Supreme Court upheld an ordinance of Trenton, New Jersey, forbidding the use or operation on the public streets of sound trucks or instruments attached to a vehicle which emitted "loud and raucous noises." The Court has subsequently relied on *Kovacs* as a recognition of the power of the state to protect, within constitutional limitation, the well-being and tranquility of a community,[93] and to prohibit the making of artificially amplified raucous sounds in public places.[94]

In *Complaint of Antonelli*,[95] the Quarter Session Court of Allegheny County, Pennsylvania, held invalid a borough ordinance that prohibited the use of sound trucks and amplifying devices within the Borough of McKees Rocks. The court reviewed the various cases in which the issue of the constitutional validity of sound truck ordinances were discussed. On reviewing the previously litigated cases in this area, the Allegheny County court concluded that while sound trucks could be excluded from public streets, they could not constitutionally be barred from all places within the borough.[96] In the course of its opinion the court made the following observation concerning freedom of speech and nuisance:

> Freedom of speech and nuisance are not mutually exclusive concepts. The right of privacy, so drastically reduced in today's modern cities, is a right fast becoming extinct. Surely a balance between the conflicting rights of an individual to freely express his views and the right of another individual to enjoy freedom from distraction can be reached without turning the average city dweller into a "captive audience."[97]

Where local ordinances regulating noise are used to stifle political opposition, such misuse of official power will be enjoined by the courts. In *Phillips v. Borough of Folcroft*,[98] the district court issued a preliminary injunction against the enforcement of a local ordinance that was being used to prohibit the use of sound trucks in an election campaign. In *Phillips* the ordinance involved was a disorderly conduct ordinance

92. 336 U.S. 77 (1949).
93. Breard v. City of Alexandria, 341 U.S. 622 (1951).
94. Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952).
95. 113 Pitt. L.J. 13 (Pa. C.P. 1964).
96. *Id.* at 20-21.
97. *Id.* at 20.
98. 305 F. Supp. 766 (E.D. Pa. 1969).

that, *inter alia,* prohibited loud and/or unnecessary noises. The court found that this ordinance was void for vagueness when applied to sound trucks being used for political purposes. Whether, outside the free speech area, the term "unnecessary noise" has the same constitutional infirmity as in *Phillips* is open to serious question.[99]

C. *State Noise Abatement Legislation*

Most state legislation explicitly directed toward noise abatement concerns noise made by motor vehicles.[100] Typical legislation in this field concerns the requirement that mufflers on motor vehicles be in good repair so as to prevent excessive or unusual noise.[101] For example, New York and California make it unlawful for vehicular noise to exceed a given decibel limit.[102] The use of terms in the legislation such as "unusual or excessive noise" has encouraged some defendants to attack the validity of these laws as being too vague and indefinite to be constitutional. Uniformly, such claims have been unsuccessful.[103] The court in *Department of Public Safety v. Buck,*[104] stated the prevailing view on this question as follows:

> Every motor vehicle when in normal operation necessarily makes some noise, emits some smoke, and permits gas or steam to escape to some extent. They are in constant operation on our streets and highways and even in sparsely settled areas of our state. They are operated daily within the hearing and view of the citizens. We think any ordinary and interested person would have no difficulty in determining whether or not an excessive and unusual noise or offensive or excessive exhaust fumes accompany the operation of a motor vehicle.[105]

Some of these laws have unique provisions. Subsection (d) of section 828 of the Pennsylvania Vehicle Code[106] provides:

> No violation charged under this section for causing excessive noise shall be proved except by the testimony of at least two (2)

99. *See* Connecticut v. Schuster's Express, Inc., 6 Conn. Supp. 108 (Cir. Ct. 1970).
100. Illustrative legislation of this type is set forth in Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research,* 70 COLUM. L. REV. 652 (1970).
101. *See* note 75 *supra.*
102. CAL. VEHICLE CODE § 23130 (West 1971): N.Y. VEH. & TRAF. LAW § 386 (McKinney Supp. 1968-69).
103. *See* Connecticut v. Schuster's Express, Inc., 6 Conn. Supp. 108 (Cir. Ct. 1970).
104. 256 S.W.2d 642 (Tex. Civ. App. 1953).
105. *Id.* at 646.
106. PA. STAT. ANN. tit. 75, § 828 (1971).

peace officers who were on the scene of the alleged violation, each testifying that in his opinion the noise caused was excessive and each describing such excessive noise.

Subsection (a) of this section relates to unusual, as well as excessive, noise.[107] The language of subsection (d) would not appear to apply to the causing of unusual, rather than excessive noise. Subsection (d) is interesting from several points of view:

(1) No state or local police official in Pennsylvania traveling alone on the highway could ever initiate a successful prosecution for violation of this section for causing excessive noise.
(2) Assume that a person is charged under this section for causing excessive noise and that two peace officers were on the scene of the alleged violation. Would it be a defense to the charge that either of the two policemen, or both, were hypersensitive to noise?
(3) Does this provision meet the constitutional requirements of definiteness for criminal laws?

Although this provision may be difficult, if not impossible, to enforce, it is illustrative of the difficulties that may arise if sound or odor panels become a recognized part of noise and odor abatement legislation. It would have been far better to have provided that excessive noise was noise above a certain decibel level. Pennsylvania has recently enacted legislation placing quantitative noise limits on motor vehicles traveling Pennsylvania highways.[108]

Section 23130 of the California Vehicle Code[109] establishes decibel limits for motor vehicles traveling California highways. Subsection (e) of that section provides:

No person shall have a cause of action relating to the provisions of this section against a manufacturer of a vehicle or a component part thereof on a theory based upon breach of express or implied warranty unless it is alleged and proved that such manufacturer did not comply with noise limit standards of the Vehicle Code

107. § 828(a) reads as follows:
No person shall operate a motor vehicle except fire department and fire patrol apparatus, on a highway unless such motor vehicle is equipped with an exhaust system, in good working order and in constant operation, to prevent excessive or unusual noise.
Id.
108. PA. STAT. ANN. tit. 75, § 828.2 (Supp. 1972).
109. CAL. VEHICLE CODE § 23130 (West 1971).

applicable to manufacturers and in effect at the time such vehicle or component part was first sold for purposes other than resale.[110]

Apart from the question of the desirability of such a provision, a question arises concerning its constitutionality. Section 10 of article 1 of the United States Constitution provides that no state may, *inter alia*, pass any law impairing the obligation of contracts.[111] Does the California provision, above quoted, offend this federal constitutional provision with respect to express warranties in effect at the time of its enactment?

Apart from state legislation relating to vehicular noise, other laws may be invoked in an effort to abate noise. Public nuisance statutes may be invoked as an instrument of noise abatement.[112] Moreover, statutes relating to disorderly conduct have sometimes been pressed into service.[113] With few exceptions, state legislation regulating noise relates to vehicular noise and mufflers. The regulation of most other sources of noise has been left to local political subdivisions.

D. *Federal Noise Legislation*

Federal activity in the field of noise abatement is authorized by the following categories of congressional legislation:

1. Occupational health and safety legislation;
2. Laws authorizing federal grants or other federal funds in the fields of airport construction, highways, and housing;
3. Aircraft regulation; and
4. Environmental impact legislation.

Occupational Health and Safety Legislation

The federal government, under a variety of authorizing legislation, has entered the occupational health and safety field. Congress in the past has regulated occupational health and safety matters under the Walsh-

110. *Id.*
111. U.S. CONST. art. I, § 10.
112. Recently, the Commonwealth of Pennsylvania brought a criminal action against a manufacturer who was creating "excessive noise" in the operation of his business thereby provoking much complaint in the community. The action was brought under PA. STAT. ANN. tit. 18, § 4612 (1963), which makes it a misdemeanor to maintain a public nuisance. The defendant in the case chose not to contest the matter. Although the case was not litigated, it represented an effort on the part of the commonwealth to utilize the public nuisance provisions of the Penal Code in the field of noise abatement. To the authors' knowledge, this is the first time a case of this sort has been brought in Pennsylvania. Commonwealth v. Atlas Alloys, Inc., Crim. No. 93 (Wash. Co., Pa. Magis. Ct., filed Oct. 29, 1970).
113. Disorderly conduct statutes generally have provisions that relate to loud, boisterous, and unseemly noise. *See, e.g.*, PA. STAT. ANN. tit. 18, § 4406 (1963).

Healey Act,[114] the Service Contract Act of 1965,[115] and the National Foundation on Arts and Humanities Act.[116] More recently Congress has enacted the Occupational Health and Safety Act of 1970,[117] and the Coal Mine Health and Safety Act.[118]

Under the provisions of the Walsh-Healey Act, the Department of Labor adopted rules and regulations for employees working in establishments covered by that Act.[119] Under these regulations, the Secretary of Labor and Industry established maximum levels of exposure to occupational noise.[120] These same noise exposure levels were adopted under the Occupational Safety and Health Act of 1970,[121] that covers establishments affecting interstate commerce.[122] The Secretary of the Interior has adopted rules and regulations with respect to noise levels in mines under the authority of the Coal Mine Health and Safety Act.[123]

Both the Occupational Health and Safety Act of 1970 and the Coal Mine Health and Safety Act have much more effective sanctions for those employers who violate the rules and regulations of either department than does the Walsh-Healey Act.[124] Additionally, the administration of these latter Acts has greater enforcement possibilities than does the Walsh-Healey Act. There are provisions in both the Occupational Safety and Health Act of 1970 and the Coal Mine Health and Safety Act for inspectors with substantial powers to enter premises and make realistic inspections.[125] Under the Walsh-Healey Act little inspectional

114. 41 U.S.C. §§ 35-45 (1970).
115. 42 U.S.C. §§ 2011-12 (1970).
116. 20 U.S.C. §§ 951-63 (1970).
117. 29 U.S.C. §§ 651-78 (1970).
118. 30 U.S.C. §§ 801-960 (1970).
119. 41 C.F.R. §§ 50-204.1-.75 (1972).
120. 41 C.F.R. § 50-204.10 (1972).
121. 29 C.F.R. § 1910.95 (1972).
122. Occupational Safety and Health Act of 1970 § 3(3), 29 U.S.C. § 652(3) (1970), defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof."
123. 30 C.F.R. §§ 71.300-.301 (1972).
124. *See* § 17 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 666 (1970), and § 109 of the Coal Mine Health and Safety Act, 3 U.S.C. § 819 (1970), both of which provide for substantial penalties. § 2 of the Walsh-Healey Act, 41 U.S.C. § 36 (1970), provides for contract cancellation and damages in the case of a breach of contract by the contractor. That Act has no penal provisions.
125. § 8 of the Occupational Health and Safety Act of 1970, 29 U.S.C. § 657 (1970), confers upon the Secretary of Labor comprehensive inspectional authority. Likewise, § 103 of the Coal Mine Health and Safety Act, 30 U.S.C. § 813 (1970), confers on the Secretary of the Interior expansive investigatory powers for the enforcement of his responsibilities under that Act.

activity was conducted. Moreover, its sanctions were merely a cancellation of the contract and a suit for the breach.[126]

The Occupational Safety and Health Act of 1970 encourages state plans which are compatible with the provisions of the Act.[127] Thus, there is a distinct possibility of increasing enforcement personnel by having compatible state plans, and thereby providing the clear possibility that industrial noise levels will be regulated in a more effective manner than in the past. However, there are those who argue that the noise levels under the Walsh-Healey Act, the Occupational Safety and Health Act of 1970, and the Coal Mine Health and Safety Act are not sufficient to protect employees from the adverse effects of occupational noise.[128]

Laws Authorizing Federal Grants

Federal acts that authorize noise to be taken into effect in the making of grants and the utilization of other types of federal funding are the Aviation Act,[129] the Federal Aid Highways Act,[130] and the National Housing Act.[131] Under the Aviation Act, national airport facilities and state or local airport facilities that are built with federal funds must take into consideration environmental matters.[132] Although the term "environmental matters" is not specific with respect to noise, the term does embrace considerations of noise.[133] Under the Federal Aid Highways Act, state highways built with federal funds must take into consideration the environmental impact of the highways.[134] The Department of Transportation has specific duties under that Act[135] to implement its provisions relating to hearings that must be held by the states that wish to avail themselves of the benefits of the Federal Aid

126. Walsh-Healey Act § 2, 41 U.S.C. § 36 (1970).
127. Occupational Health and Safety Act of 1970 § 18, 29 U.S.C. § 667 (1970).
128. There is substantial opinion to the effect that the noise standards in the federal regulations are designed to protect employees from occupational hearing loss, not hearing loss in general. Some who have studied the problem are of the opinion that the federal regulations should be more stringent than they are at present in order to protect the employees exposed to noise in an occupational environment from the "loss of the human resource of hearing." Professor Kenneth Steward of the Graduate School of Public Health, University of Pittsburgh, is one expert in the noise control field who has advanced this position.
129. 49 U.S.C. §§ 1301-542 (1970).
130. 23 U.S.C. §§ 101-44 (1970).
131. 12 U.S.C. §§ 1701-50g (1970).
132. 49 U.S.C. §§ 1712(d), 1716(d) (1970).
133. *Id.*
134. 23 U.S.C. § 128 (1970).
135. *Id.*

Highways Act.[136] The Department of Housing and Urban Development has adopted standards for housing and other facilities which serve as collateral or security for loans guaranteed by the federal government.[137]

Aircraft Regulation

The Aviation Act[138] has provisions relating to aircraft noise and sonic boom.[139] Under the provisions of section 611 of the Act, enacted July 21, 1968, the Federal Aviation Administrator, after consultation with the Secretary of Transportation, is given the authority to prescribe and amend standards for the measurement of aircraft noise and sonic boom. He is also required to prescribe and amend such rules and regulations as he may find necessary for the control and abatement of aircraft noises and sonic boom including the application of such standards, rules, and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by the Act.[140]

Under these provisions of the Aviation Act, if the application of the noise abatement standards has the effect of amending, modifying, or suspending a particular certificate granted under the Act, the holder of such certificate has the opportunity to question the propriety of applying these standards to him by requesting a hearing before the administrator.[141] If the holder is not satisfied with the action of the administrator, he may take an appeal to the National Transportation Board[142] that stays the action of the administrator unless there is an emergency.[143] This action is stayed pending decision on appeal by the Board.[144] The Board may amend, modify, or reverse the action of the administrator if it finds either:

> (a) that the application of the standards to the particular certificate holder are not required for the control or abatement of aircraft noise or sonic boom, and the public interest does not require such a decision, or
>
> (b) that the decision is inconsistent with safety in air commerce or transportation.[145]

136. *Id.*
137. For example, the Department of Housing and Urban Development has standards with respect to multi-family dwellings, homes for aged, and nursing homes.
138. 49 U.S.C. §§ 1301-542 (1970).
139. 49 U.S.C. § 1431 (1970).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*

Environmental Impact Legislation

Clearly, the most extensive and far-reaching federal legislation having to do with environmental matters is the National Environmental Policy Act of 1970,[146] usually referred to as NEPA. Under this Act, all major federal action which has an impact upon the human environment is required to be accompanied by an environmental impact statement which must be drafted before the action is taken.[147] Federal agencies are required by the Act to follow certain procedural steps to assure that the environmental consequences of their proposed action are thoroughly explored with a view toward minimizing adverse environmental impacts.[148] NEPA has already been the subject of substantial litigation.[149] NEPA buttresses environmental impact provisions of other federal laws such as the Aviation Act, and the Federal Aid Highways Act. Inasmuch as noise is a serious environmental factor, environmental impact statements must consider the problem of noise where appropriate. While NEPA specifically does not direct a given resolution of federal activity, it does mandate that serious consideration be given to the environmental impact of major federal actions.[150]

While it is too early to determine the exact impact of NEPA, the federal judiciary has refused to consign it to oblivion.[151] The federal courts have required that federal agencies comply with the procedural aspects of the law before embarking upon projects or actions that must be evaluated under the Act in terms of their environmental impact.[152]

In addition to NEPA, Congress recently enacted the Noise Pollution and Abatement Act of 1970.[153] Under this Act there is established within the Environmental Protection Agency an Office of Noise Abatement and Control charged with the full and complete investigation of the effects of noise on public health and welfare. The purpose of such study and investigation is to identify and classify causes and sources of noise and to determine the following:

146. 42 U.S.C. §§ 4321-47 (1970).
147. 42 U.S.C. § 4352 (1970).
148. *See* Calvert Cliff's Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).
149. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Port of N.Y. Authority v. United States, 451 F.2d 783 (2d Cir. 1971); Calvert Cliff's Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); West Virginia Highland Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Zabel v. Tabb, 438 F.2d 199 (5th Cir. 1970); Environmental Defense Fund v. Corps of Eng'rs, 320 F. Supp. 878 (D.D.C. 1971).
150. Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).
151. *Id.*
152. National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).
153. 42 U.S.C. §§ 1858-(a) (1970).

1. the effect of noise at various levels,
2. projected growth of noise levels in urban areas through the year 2000,
3. the psychological and physiological effect of noise on humans,
4. the effect of sporadic, extreme noises (such as jet noise near an airport) as compared with constant noise,
5. the effect on wildlife and property (including property values),
6. the effect of sonic booms on property (including property values), and
7. such other matters as may be of interest in the public welfare.[154]

This legislation, which is Title IV of the Clean Air Act,[155] also requires that, where any federal department or agency is carrying out or sponsoring any activity resulting in noise which the administrator determines amounts to a public nuisance or is otherwise objectionable, such department or agency shall consult with the administrator to determine possible means of abating such noise.

If one compares the progress of federal air pollution control legislation with the recently enacted Noise Pollution and Abatement Act of 1970,[156] one is impressed with the similarity of approach. As in the air pollution control field, Congress has first mandated that a federal study on the noise problem be made to determine the effect on public health and welfare. Congressional regulatory activity in the air pollution field followed federal studies of the effects of air pollution, so there is the great expectation that the federal government will also obtain regulatory authority over the problems of noise.[157] The only difference between air pollution control and noise abatement is that the federal activity in the noise abatement field will probably follow more closely upon the Noise Pollution and Abatement Act of 1970[158] than did the air pollution control legislation follow upon the studies of air pollution by the federal government.[159] Currently, the Office of Noise Abatement

154. *Id.*
155. *Id.*
156. The first congressional act relating to air pollution was enacted in 1955. Act of July 14, 1955, ch. 360, §§ 1-6, 69 Stat. 322. Throughout the fifteen subsequent years ending with the most recent amendments to the Federal Clean Air Act, 42 U.S.C. §§ 1857-e (1970). Congress has progressively strengthened federal involvement in this field. The initial federal legislation, relating to the conduct of research programs and to federal-state cooperation in the field of air pollution control relating to noise, emphasized research into problems of noise.
157. *See, e.g.*, S. 3324, 92d Cong., 1st Sess. (1971); H.R. 11021, 92d Cong., 1st Sess. (1971).
158. In all probability, Congress will enact one of the noise control bills currently before it in the near future.
159. As noted above, *see* note 155 *supra*, the first federal act relating to air pollution was enacted in 1955. This contained no enforcement provisions. It was not until 1963 that

and Control in the Environmental Protection Agency has a legislative proposal for federal control over certain noise-making equipment, appliances, and devices.[160]

IV. Conclusion

As indicated in the foregoing, the legal problems associated with noise may, like other environmental problems, be analyzed in terms of private remedies and public regulation. This, however, is not to suggest that these two divisions of the problem are mutually exclusive. Governmental intervention in the field of noise abatement which makes use of some of the same legal mechanisms that are available to the private individual in asserting his rights is merely an obvious example of this inter-relationship. On a more subtle level, the noise problems associated with aircraft have resulted in a mixture of private and public remedies—clearly showing that the problems cannot be separated into such airtight compartments. Nevertheless, it has been useful to delineate the area of private remedies from the area of public intervention for purely analytical purposes.

In the field of private nuisance, the types of problems that have arisen can be categorized as follows:

1. The making of noise for the deliberate purpose of offending others. It is no triumph of legal reasoning that such noise-making has been universally the subject of legal liability.
2. Noise-making that is a concommitant of business or industrial activity. That the type of activity which gives rise to the problem of noise in cases of this sort may lead to differing results in differing jurisdictions is indicative of the competing values that arise in adjusting private rights of this nature. Kramon has shown that the law of nuisance is an imperfect legal instrument in the field of noise abatement.[161] While this may be the case, nuisance law cannot be completely disregarded. It does provide a remedy in many instances. That it does not provide a panacea is no reason to deny its usefulness.

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some enforcement provision was embodied in federal air pollution control legislation. For a history of this legislation through 1967, *see* United States v. Bishop Processing Co., 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 905 (1970); Bishop Processing Co. v. Gardner, 275 F. Supp. 780 (D. Md. 1967).

160. H.R. 11021, 92d Cong., 1st Sess. (1971).

161. Kramon, *Noise Control: Traditional Remedies and a Proposal for Federal Action*, 7 Harv. J. Legis. 533, 538–44 (1970).

3. The problem of vehicular and aircraft noise as it impinges upon the remedies otherwise available in the nuisance area. In both cases, the problem is posed in terms of strongly sanctioned policy in favor of the promotion and development of air and vehicular travel as opposed to the detrimental effects in terms of noise, as well as other detrimental characteristics, that are suffered by individuals and the general public. The strongly articulated policies in favor of air transportation, for example, have precluded the use of the injunction as a viable means of curtailing the nuisance due to aircraft.[162] Rather, private remedies have been exclusively compensatory in nature. In addition, there have been legislative efforts to minimize the impact of aircraft and vehicular noise. However, with regard to aircraft noise, safety considerations take preference where noise abatement procedures might conflict with the needs of air safety.[163]

Except where the federal government requires measures to abate and reduce aircraft noise, there is no other legal remedy realistically available which would compel aircraft noise reduction. The alternative remedy, damages for the taking of property, merely allows for the purchase of rights to make noise over a greater area, rather than directly requiring noise reduction.

State and local noise control laws, for the most part, have been poorly enforced. The failure of effective noise control legislation on a state and local level has led to demands for federal legislation that will ultimately occupy much of the field of noise regulation. The most promising types of federal response are the proposals emanating from the Environmental Protection Agency and some representatives in Congress. If viable noise control standards can be adopted for products in interstate commerce including motor vehicles, effective enforcement of such laws has the possibility of reducing substantially the noise emitting potential of such products.

The environmental impact legislation on the federal level will lead to more concern with problems of noise. Inasmuch as NEPA does not authoritively sanction particular choices, however, this environmental impact legislation can affect noise levels only if federal agencies seriously take into consideration the basic purpose of NEPA.

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162. *See* pp. 140-41 *supra.*
163. *See* note 145 *supra.*

Although nuisance law has been the mainstay of much state and local legislation regulating noise, it is important that decibel levels be specified in noise statutes and ordinances. Not only will this help to make standards more definite; but it will reduce the evidentiary problem of determining whether the elements of nuisance exist. Moreover, as decibel limits become feasible as a viable tool in noise abatement, there will be less need to resort to nuisance law. Nuisance law will then become a residual category to be used when it is impossible to quantify responses to noise. Such a development would tend to bring more rationality to regulatory devices in the field of noise abatement.

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