Is "Public Necessity" Necessary?
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**IS "PUBLIC NECESSITY" NECESSARY?**

**Osborne M. Reynolds, Jr.***

In tort law, the defense of public necessity is something of a curiosity; it has not been applied, or even discussed, with much frequency, but it has the potential for wide use and devastating effect. Because it allows those acting for the public good to destroy property without having to make compensation, it clearly presents dangers of abuse. Therefore, at a time when government exercise of power is being closely scrutinized, the need for such a privilege may well be questioned.

*Development and Scope of “Necessity” Privilege*

The common law starts with the rule that a private person has no right to enter the land or disturb the possessions of another without the owner’s permission even in order to protect the former’s own property.¹ A public officer has greater privileges but only when incident to arrests, executing process, or otherwise performing governmental duties.² There is an obvious harshness in applying such a rule to situations where human safety is threatened, as by some natural calamity, and the only or chief means of evading the danger involves interference with someone’s property. Thus, early cases came to recognize a privilege of “necessity,” excusing what would otherwise be tortious disturbance of property, in at least five situations. First, it was long ago recognized that goods might be jettisoned from an endangered ship in order to save the passengers.³ Second, it was also held in early English law that the king might without compensation seize property essential to the country’s defense.⁴ Third, it has long been recognized that a traveler on a highway who finds the road impassable may, without being

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1 Grant v. Allen, 41 Conn. 156 (1874) (person has no right without permission to enter his neighbor’s land from which surface water flows onto his own in order to divert flow of water). *Cf.* Brame v. Clark, 148 N.C. 364, 62 S.E. 418 (1908).


4 The Case of the King’s Prerogative in Saltpetre, 12 Co. Rep. 12, 77 Eng. Rep. 1294 (All the Judges of England 1607). *Cf.* Maleverer v. Spinke, 1 Dyer 35b, 36b, Eng. Rep. 79, 81 (1538) (dictum that in time of war a person may make fortifications on another’s land, or may pull down a burning house to save neighboring homes).

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liable for trespass, make a reasonable deviation onto private land. This situation obviously involves less urgency than the earlier two and is more a case of individual need, especially when the privilege is recognized as to an obstructed private right-of-way. But there is still an element of need because the traveler must somehow reach his goal, and to await the removal of the obstruction might require unreasonable delay. Fourth, it has been held, at least since the late 1800's, that destruction of property may be justified to prevent the spread of disease, as where infected clothing is burned. Comparable to this is the situation where it is necessary to quarantine an ill person, or kill a rabid animal; here, too, the privilege of necessity has been recognized.

Finally, it was recognized by 1845 that buildings might be blown up or otherwise destroyed without liability in order to prevent the spread of fire. This last rule may continue to have significance. Generally, when the total defense of necessity has been applied in recent times, it has been in the second-mentioned situation—that of taking or destroying property in the interest of national defense. Applying the principle that injury to private property from war must be borne by the harmed individual, the United States Supreme Court ruled that no compensation need be paid for destruction of oil companies' terminal facilities during World War II where the demolition by United States armed forces was to prevent this strategic property from falling into enemy hands. Similarly, there is no

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8 Seavey v. Preble, 64 Me. 120 (1874); State v. Mayor of Knoxville, 80 Tenn. 146 (1883). But cf. Jarvis v. Pinckney, 10 S.C. 62 (1836) (no need to destroy goods taken from cholera-infested ship).


11 Surocco v. Geary, 3 Cal. 69 (Ct. Err. & App. 1853); Russell v. Mayor of New York, 2 Denio 461 (N.Y. 1845); Beach v. Trudgian, 43 Va. (2 Gratt.) 219 (1845).

12 See Stocking v. Johnson Flying Serv., 143 Mont. 61, 387 P.2d 312 (1963), where no liability was found when defendant, fighting a forest fire that threatened an entire county, sprayed fire-retardant chemicals onto plaintiff's land, damaging plaintiff's timber.


See generally 3 E. Vattel, LAW OF NATIONS ch. 232 (1792).

liability if the property is destroyed by the enemy rather than by defendant-government, even though the destruction may be laid partly to defendant's actions.\textsuperscript{15}

Thus, the privilege of necessity, resting largely on very old cases, has found its recent use mostly in situations of military combat.\textsuperscript{16} Over the past century, another significant development has occurred: the defense has definitely split in two. While recognized in situations where a person acts merely to save himself or his own property, it is in these instances called "private necessity" and is a very limited defense. It excuses a technical trespass and thus relieves from liability for nominal damages, but it does not relieve from liability for compensatory damages to the extent that actual harm is done.\textsuperscript{17} The total defense, relieving defendant of any liability whatsoever, has come to be called "public necessity" and is applied only where, as in the military cases, the otherwise tortious act was committed to protect the public, not just for the private benefit of the actor.\textsuperscript{18}

It is, then, this defense of public necessity that is clearly the more sweeping

\textsuperscript{15} Respublica v. Sparhawk, 1 U.S. 174 (1 Dall.) 357 (1788) (state agency not liable for carrying out Continental Congress' order to remove plaintiff's flour, which was ultimately destroyed by enemy). The case also notes the need for the necessity privilege to prevent the spread of fire, blaming the destruction of London by the Great Fire on official timidity in destroying houses in the fire's path.

\textsuperscript{16} Another notable case is Aleutian Livestock Co. v. United States, 96 F. Supp. 626 (Ct. Cl. 1951), where no liability was found for the United States Army's forcing inhabitants of the Aleutian Islands to leave their sheep behind when evacuating the islands due to threat of Japanese invasion.


Against an unprivileged trespass to property, force can be used; this is the privilege known as "defense of property." But it is a limited privilege, and even where a trespass is not excused, the land occupier can use only reasonable force and never force calculated to cause death or serious bodily harm, to expel the trespasser. \textit{See Katko v. Briney, 183 N.W.2d 657 (Iowa 1971)}; Chesapeake & O.R.R. v. Ryan, 183 Ky. 428, 209 S.W. 538 (1919). Thus, there may be no right at all to expel an ill or helpless trespasser. \textit{Depue v. Plateau, 100 Minn. 299, 111 N.W. 1 (1907).} \textit{But cf.} Tucker v. Burt, 152 Mich. 68, 115 N.W. 722 (1908) (right to expel trespasser whose illness threatens others). \textit{See generally} Hart, \textit{Injuries to Trespassers}, 47 L.Q. REV. 92, 101-105 (1931).

\textsuperscript{18} Newcomb v. Tisdale, 62 Cal. 575 (1881). \textit{ Cf.} Whalley v. Lancashire & Yorkshire Ry., 13 Q.B.D. 131 (1884) (defendant had no privilege to protect own property from flooding at expense of plaintiff's property; must pay for damage).
in scope, the one subject to possible grave abuse, and the one that requires careful investigation.

The limits on the privilege are far from well-defined. It appears that the defense is available only against intentional torts, not negligence. It has been applied only where the harm was to property, and its possible use to justify personal harm or taking of human life has merely been raised analogously or in speculative writing. Its requirement that defendant's conduct must have been of some use or benefit to the public has been noted as defying precise definition. And the employment of a standard of "necessity" presents the most difficulties of all: "A thing may be necessary, very necessary, absolutely or indispensably necessary." In the law of eminent domain, it has been recognized that a taking of property is justified only by "necessity," yet the courts have largely thrown up their hands and refused to define this standard. Only a showing of fraud or bad faith, or

19 See Phillips v. Pickwick Stages, 85 Cal. App. 571, 259 P. 968 (1927) (to avoid running into child when brakes failed, bus driver ran into others; negligent in not sounding horn or taking other means to stop bus). Perhaps the necessity defense is not needed in negligence because the reasonableness of the actor's conduct will be judged in light of all circumstances, including the presence of any emergency. See Evans, The Standard of Care in Emergencies, 31 Ky. L.J. 207 (1943). The actor may prefer his own safety to that of others. Thurmond v. Pepper, 119 S.W.2d 900 (Tex. Civ. App. 1938). Cf. Commercial Union Assur. Co. v. Pacific Gas & Elec. Co., 220 Cal. 515, 31 P.2d 793 (1934). The "emergency rule" in negligence is often more favorable to defendant than would be the necessity defense because the emergency may justify finding defendant nonnegligent and thus not liable, while the private necessity rule would require him to pay for actual harm done. See C. MILUS, TORTS 44-46 (1953) [hereinafter cited as MILUS] where he notes that nonliability to plaintiff is generally found (coughed in negligence terms) when plaintiff's cooperation was not needed to prevent harm, but liability is found (often in intentional tort language) where plaintiff's help was needed.

20 United States v. Holmes, 1 Wall. Jr. 1 (Fed. Cas. No. 15,383) (C.C.E.D. Pa. 1842), indicated a privilege could exist to throw some persons out of an overcrowded lifeboat in order to save the rest, but found no privilege there since lots had not been drawn. Regina v. Dudley, 14 Q.B.D. 273, 15 Cox C.C. 273 (1884), found no privilege to kill a human and eat his flesh to save one's own life. Both cases, however, deal with criminal liability, and with situations that might call forth no more than the privilege of private, not public, necessity. See Fuller, The Case of the Spelucean Explorers, 62 Harv. L. Rev. 616 (1949). Cf. Arp v. State, 97 Ala. 5, 12 So. 301 (1893); Brewer v. State, 72 Ark. 145, 78 S.W. 773 (1904); State v. Capaci, 179 La. 462, 154 So. 419 (1934), finding criminal liability on the part of one who, under threat of death himself if he fails to comply, is ordered to kill another and does so.


24 Even these allegations were held not to make the question of necessity justiciable in People ex rel. Dep't of Pub. Works v. Chevalier, 52 Cal. 2d 299, 340 P.2d 598 (1959).
possibly a showing that the proposed project cannot be constructed,\(^{25}\) seems to establish lack of such necessity. It may be suggested that in regard to the defense of "public necessity," these difficulties can be avoided by requiring some real emergency, and authority supports this limitation.\(^{26}\) But "emergency" has also been subject to more than ordinary problems of definition,\(^{27}\) and tort cases have often become confused when trying to describe its scope.\(^{28}\)

Borrowing from the law of public nuisance, we may reason that "public" requires a considerable number of people,\(^{29}\) and thus that public necessity applies only where a grave emergency imperils such a group. Who then may act to avert the peril? To be completely privileged, any act must advance the public interest,\(^{30}\) but need the actor be a public servant? Often the privilege has been invoked to provide immunity to government employees, such as firemen dynamiting a building.\(^{31}\) There is some authority

\(^{25}\) City of Helena v. DeWolf, 503 P.2d 122 (Mont. 1973) (requisite necessity not shown where was no reasonably foreseeable ability to complete project). The court agreed with the general rule that the necessity for each individual property need not be established. See Velishka v. City of Nashua, 99 N.H. 161, 105 A.2d 571 (1954). Under particular statutes, a greater degree of judicial review of necessity may occur. Thus, in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 401 (1971), the Court interpreted the Federal Aid Highway Act of 1968, 23 U.S.C. § 138, prohibiting the Secretary of Transportation from authorizing the use of federal funds to finance the construction of highways through public parks if a feasible and prudent alternative route exists, and prohibiting federal aid to a park route in all cases unless planning to minimize harm to the park has occurred. The case was sent back for further consideration, the Court determining that protection of green space must, under this legislation, be given paramount importance. Cf. Named Ind. Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971).


\(^{29}\) See Boudinot v. State, 340 P.2d 268 (Okla. 1959); Ballenger v. City of Grand Saline, 276 S.W.2d 874 (Tex. Civ. App. 1955). Of course, public nuisance is normally based on statute, and thus these cases and others turn on the statutory requirements of the particular jurisdiction. See generally W. PROSSER, TORTS 585-86 (4th ed. 1971). See also J. SALMOND, TORTS 233 (8th ed. 1934).

\(^{30}\) See Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality, 39 HARV. L. REV. 307, 314 (1926), where it is observed that "an act is privileged only if done to protect or advance a public interest or interest of the actor"—and if only an interest of the actor is involved, this must be of value greater than or equal to that of the interest invaded.

that a private individual does not even enjoy the right to enter another's land without the owner's permission in order to recover the individual's chattels,\textsuperscript{32} nor to cut a neighbor's trees that endanger his own premises,\textsuperscript{38} but most such authority seems based on the lack of real emergency and the presence of time to pursue other remedies. Where a true crisis is present, it seems the privileges of public necessity can be enjoyed by private citizens as well as government employees. Thus, private citizens may destroy their community's liquor supply without liability in order to prevent its falling into the hands of an invading army where there is danger of the army becoming intoxicated and harming the town.\textsuperscript{34} There is a similar privilege in a private person to enter the property of another to fight a fire that threatens the community,\textsuperscript{85} or to kill a trespassing dog on his own property threatening farm animals.\textsuperscript{38} In some instances, the privilege (not always clearly identified) may be no more than \textit{private} necessity. In some opinions, the right of entry on another's property to protect one's own is based on

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\item \textsuperscript{32} Kearbey v. Douglas, 215 Ark. 523, 221 S.W.2d 426 (1949). Most modern authority, however, allows a person to enter the land of another to recover his chattels placed there through the wrongful conduct of the landowner. Arlowski v. Foglio, 105 Conn. 342, 135 A. 397 (1926). Reasonable force may be used to enter. Madden v. Brown, 8 App. Div. 454, 40 N.Y.S. 714 (1896). But no force against a person is justified unless there has been fresh pursuit, or unless some additional privilege such as self-defense comes into play.
\item Where goods come onto land without fault on the part of the landowner, as by force of nature or through act of a third party where the landowner is unaware of any wrongdoing, the chattel-owner has a privilege to enter and recover. See Salisbury v. Green, 17 R.I. 758, 24 A. 787 (1892); Polebitzke v. John Week Lumber Co., 173 Wis. 509, 181 N.W. 730 (1921). But the privilege \textit{then} is, or resembles, that of private necessity, and compensation must be paid by the entrant for actual harm done. Sheldon v. Sherman, 42 N.Y. 484 (1870).
\item Fick v. Nilson, 98 Cal. App. 2d 683, 220 P.2d 752 (1950) (may cut offending parts, or may sue for damages and/or injunction, but may not enter neighbor's land). If any privilege were recognized in such a case, it could probably be no more than \textit{private} necessity, excusing the bare trespass but not excusing actual harm. From the viewpoint of one defending his actions, the privileges of "defense of property" (see note 17 \textsuperscript{supra}) and "recapture of chattels" (note 32 \textsuperscript{supra}) are thus preferable to private necessity because they also may be defenses as to actual damage.
\item \textsuperscript{34} Harrison v. Wisdom, 54 Tenn. 83, 7 Heisk. 99 (1872).
\item Stocking v. Johnson Flying Serv., 143 Mont. 61, 387 P.2d 312 (1963) (airplane sprayed chemical on plaintiff's land; privileged). See Northern Assur. Co. v. New York Cent. R.R., 271 Mich. 569, 260 N.W. 763 (1935) (dictum that person is privileged to lay fire hose across another's land in order to save own property). \textit{Cf.} Larco Drilling & Exploration Corp. v. Brown, 267 So. 2d 308 (Miss. 1972) (private person fighting fire on another's land is licensee). Note that although one fighting a fire, even a professional fireman, is normally no \textit{more} than a licensee on another's property, a volunteer fireman may actually be treated as an invitee. See Clinkscales v. Mundkowski, 183 Okla. 12, 79 P.2d 562 (1938).
\item \textsuperscript{36} Ex \textit{parte} Minor, 203 Ala. 481, 83 So. 475 (1919); McDonald v. Bauman, 199 Kan. 528, 433 P.2d 437 (1967) (implied consent also found).
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consent inferred by the law in the absence of contrary evidence. But the general rule has also been stated that, quite apart from consent, there is a privilege to enter another's land to save valuable goods if they are in imminent danger of loss or destruction. That the privilege arises only from an emergency is indicated by authority that once the imminent danger is past, the right terminates. Thus, where a substantial number of people are threatened by an emergency, any citizen may, under the privilege of public necessity, take reasonable steps to avert the peril, and there is no liability for property destroyed in the process except as provided by statute. Legislation has sometimes modified this law, but in no consistent pattern. Compensation may sometimes be required for property destroyed to protect the public, but often this encompasses only government compensation for situations in which governmental action can be found. Some statutes actually expand the privilege to destroy property without compensation, as by allowing a landowner to kill an animal after it has trespassed on his premises and injured or threatened property. The scope of the public necessity privilege, as that of some other defenses to intentional torts, is expanded by judicial application of the privilege wherever defendant's actions seemed at the time justified by a reasonable interpretation of appearances, even if he is later shown to have been mistaken.

38 See Proctor v. Adams, 113 Mass. 376 (1873).
39 Allen v. Camp, 14 Ala. App. 341, 70 So. 290 (1915) (plaintiff's dog had bitten defendant's little girl; defendant not privileged to break into plaintiff's house and kill dog in order to get dog's head for examination).
40 Bowditch v. Boston, 101 U.S. 16, 18, 19 (1879) (at common law, "every one" has right to destroy property to prevent spread of fire).
41 See Taylor v. Inhabitants of Plymouth, 49 Mass. (3 Metc.) 462 (1844) (statute inapplicable if property would have been destroyed anyway); Mayor of New York v. Lord, 17 Wend. 285 (N.Y. 1837), aff'd, 18 Wend. 126 (N.Y. 1837). See generally Hall & Wigmore, Compensation for Property Destroyed to Stop the Spread of a Conflagration, 1 Ill. L. Rev. 501 (1907), noting the moral obligation to make compensation to those harmed and proposing that such compensation be provided by statute.
43 Harrison v. Wisdom, 54 Tenn. 83, 7 Heisk. 99 (1872) (reasonable ground will justify). See Surocco v. Geary, 3 Cal. 69 (1853), indicating that either apparent or actual necessity will justify destruction of property. Cf. Cope v. Sharpe, 1 K.B. 496 (1912); Conwell v. Emrie, 2 Ind. 35 (1850). See generally Morris, supra note 19, at 42-43. But cf. Beach v. Trudgain, 43 Va. (2 Gratt.) 219 (1845), saying that a house may be torn down without compensation to the owners only if it is inevitable that it would, if permitted to stand, take fire and spread the fire to other structures. Some cases, however, specifically say that the privilege may exist although the destroyed property would not inevitably have taken fire. Dunbar v. The Alcalde of San Francisco, 1 Cal. 355 (1850) (municipal corporation not liable in absence of statute); McDonald v. City of Red Wing, 13 Minn. 38, 13 Gilfillan 25 (1868) (city not liable for destruction by its officers or others).
One limitation to the privilege has been suggested by some modern authority. The Supreme Court has indicated\(^4\) that, at least in the military necessity cases, the privilege may lie only if the property is *destroyed* for the government's self-preservation, not if the benefits of use are diverted from the individual owner to the public good. Some early authority had seemed to find liability even in the destruction situations,\(^5\) and it is surely arguable that if mere diversion of profits by the government requires compensation, total demolition of the profit-producing property should do so, too. But it is also true that Supreme Court cases allowing compensation for property taken in war have generally involved property impressed into service, not destroyed;\(^6\) that ancient doctrine supports the rule that destruction of property in war by friendly or enemy forces is noncompensable,\(^7\) and that a rule of compensation for wartime destruction could impose financial burdens that would jeopardize national self-defense.\(^8\) Thus,

Most defenses to the intentional torts do apply wherever a reasonable appearance of need existed at the time the asserted privilege was exercised. This is true of self-defense, for instance. Courvoisier v. Raymond, 23 Colo. 113, 47 P. 284 (1896); Laffin v. Apalucci, 130 Conn. 153, 32 A.2d 648 (1943). See also State v. Daw, 99 Mont. 232, 43 P.2d 240 (1935) (self-defense asserted in criminal prosecution for assault; apparent danger in judgment of reasonable person is test). It is also true of defense of property. Bunten v. Davis, 82 N.H. 304, 133 A. 16 (1926). Here, however, there is the qualification that a reasonable mistake will not protect the actor if the mistake relates to the other party's own privilege or property right, as where the attacker does not realize that his victim is the true owner of the property involved. See Stuyvesant v. Wilcox, 92 Mich. 233, 52 N.W. 465 (1882). But cf. Leach v. Francis, 41 Vt. 670 (1868) (privilege excuses despite assailed party's true ownership where victim was responsible for his attacker's mistake). As to the privilege of defense of others, most authority takes the position that the actor assumes the risk that the party he defends is privileged to defend himself. Robinson v. City of Decatur, 32 Ala. App. 654, 29 So. 2d 429 (1947). Cf. People v. Young, 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962) (same rule applied in criminal case). Contra, Sloan v. Pierce, 74 Kan. 65, 85 P. 812 (1906). And in recapture-of-chattels situations, it is reasoned that because the one asserting the privilege is acting as an aggressor and disturbing the status quo, the actor assumes the risk and is liable if he is mistaken as to his rights. Binder v. General Motors Acceptance Corp., 222 N.C. 512, 23 S.E.2d 894 (1943). It might be reasoned that a person asserting the necessity privilege is similarly a disturber of the status quo and should bear the burden of possible mistake, at least where the sweeping defense of public necessity is involved.


\(^5\) Grant v. United States, 1 Ct. Cl. 41 (1863) (Army officer set fire to mill to prevent its use by Confederate forces); Wiggins v. United States, 3 Ct. Cl. 412 (1867) (gunpowder blown up to prevent use by enemy).


\(^7\) E. VATTEL, LAW OF NATIONS ch. 232 (1792). See also as to possible claims under international law, Hanna, Legal Liability for War Damage, 43 Mich. L. Rev. 1057 (1945); Symposium, War Claims, 16 L. & CONTEMP. PROB. 345-553 (1951).

\(^8\) Note, Constitutional Law—Under the Fifth Amendment, the Government Is Not Obliged to Pay for Property Destroyed to Prevent Its Use to the Enemy, 41 Geo. L.J. 422 (1953).
although a taking over and using of an individual’s property for the public good may require compensation, a complete wiping out of it without payment can be justified in the name of averting military or natural calamity.

**General Rules on Government “Takings”**

How does this privilege fit with other rules on government takings of property? It has been said that the requirement of payment for property taken by the government is a “basic tenet” of our freedom. Most such takings are carried out under the power of eminent domain, and at least three main limitations are recognized: any taking must be for public use; it must be necessary; and it requires fair compensation to anyone whose property is taken. As to the public-use requirement, the story recently has been one of increasing governmental power; actual use by the public now is seldom required, but only some use beneficial to the public. It has already been noted that the “necessity” requirement has been so narrowly construed as to have little current meaning. But where the compensation requirement is concerned, increased limitations on the government are found in the form of increasingly frequent rulings that compensation must be paid. This has come about in two ways.

First, there has been an expansion of what is considered a “taking” of property so as to require compensation. This trend particularly received impetus from United States Supreme Court holdings that repeated low-level flights over private land by government aircraft, or in and out of a government-operated airport, amounted to such taking. Other activities...
short of full dispossession of the owner have likewise been found to amount
to a taking that requires compensation—for instance, designation of an
area for a future governmental clearance project.54 It has been held that a
taking may be less than acquisition of any title or occupancy and may simply
involve depriving the owner, even temporarily, of some interest or right.55 It has been observed that “taking” is now, in general, broadly con-
strued to include but not be limited to destruction.56 Such taking has been
found in governmental acts causing an unnatural amount of foraging of land by waterfowl,57 causing flooding of property,58 preventing owners of
lakeside property from bathing in the lake,59 and restricting the filling of
wetlands.60 Some appropriation or destruction of a property interest is
required, not mere expense or injury to the owner,61 but a “taking” can
clearly be found despite the absence of full-fledged governmental use or
possession. Surely, from this it could be reasoned that an act of confiscation
by the government would require payment, despite the presence of any
degree of “public necessity.”62

Second, there has been steady expansion of what is termed a “property
interest” for which, assuming there is a taking, compensation must be paid.
Equitable servitudes and restrictive covenants,63 water rights,64 and paving
assessment liens have all been held property rights so that if they are destroyed or otherwise taken by government action, payment is necessary. If access to property is cut off, a taking of the property right to ingress and egress is found. Even if some access remains, compensation may be required for the burden of circuitous travel if this affects land value in a substantial manner. Often such payment is required under the recently expanding doctrine of "inverse (sometimes called 'reverse') condemnation." Of course, in regard to takings, the government has, and will no doubt continue to enjoy, special powers, but subject to the general requirement of compensation. Where allegedly tortious or otherwise wrongful acts of government are concerned, there is also apparent a trend to require payment for harm done by simply treating the governmental entity the same as a private individual.

been noted that under this majority view a landowner might enter into a restrictive agreement as soon as a government project becomes known, and the owner of the servitude could then claim compensation. State Highway Comm'n v. McNeil, 238 Ark. 244, 381 S.W.2d 425 (1964). The minority view against compensation is discussed and applied in Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080 (1930).


67 Breidert v. Southern Pac. Co., 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964). See Note, The Landowner's Right of Access to the Abutting Street—A Damaging for the Public Use, 20 Sw. L.J. 393 (1966). Mere circuitry of travel is often called noncompensable because not special in nature but shared by the public in general. Cavanaugh v. Gerk, 313 Mo. 375, 280 S.W. 51 (1926); Lindley v. Oklahoma Turnpike Auth., 262 P.2d 159 (Okla. 1953). Thus, it has been held that if an owner abuts two streets, the city can, under the police power, deny all access to one street; there is no taking if the owner is left reasonable access by way of the other street. San Antonio v. Pigeonhole Parking, 158 Tex. 318, 311 S.W.2d 218 (1958). See generally Comment, Eminent Domain—Damages—Recovery for Interference with the Right of Access, 18 S. Cal. L. Rev. 42 (1944).


69 Thus, in Rayonier v. United States, 352 U.S. 315 (1957), the Court emphasized that the test of the United States' liability under the Federal Tort Claims Act is whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred. In one respect, however, the United States is still not treated like other parties so far as tort liability is concerned—the government has not been held strictly liable under the Tort Claims Act. Laird v. Nelms, 406 U.S. 797 (1972). A number of writers have urged that such liability should be possible. Peck, Absolute Liability and the Federal Tort Claims Act, 9 Stan. L. Rev. 433
Aside from eminent domain takings, for which compensation is required, governments in the United States enjoy another special power—the police power—which allows governmental affecting of property values without the need for payment. Thus, such zoning ordinances as restrictions on building in a flood plain have been upheld despite the lack of compensation to affected property owners so long as the restrictions are reasonable and do not totally destroy the property’s utility. But if such limitations leave no practical use for the property, or benefit solely the government at the expense of the zoned land, a taking will be found for which payment is required. Varying tests have been suggested as to where to draw the line between noncompensable police power restrictions and compensable “condemnation-type” takings. Early authority often required payment only if a “substantial” appropriation or invasion of property interests were found. Later, it was held that compensation was required if the diminution in property value reached a certain magnitude. And it has been suggested that payment should be made wherever a governmental act enhances the economic value of a government enterprise to the detriment of private interests. Most cases in modern times seem to look to the

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74 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

75 Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964). The author modifies his views somewhat in a later article; Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971). The question of whether a taking has occurred, or merely an exercise of the police power, has also arisen in connection with subdivision controls. See the test proposed in Reps & Smith, Control of Urban Land Subdivision, 14 Syracuse L. Rev. 405, 407-408 (1963). See generally Heyman & Gilhool, The Constitutionality of Imposing Increased Community Costs of New Suburban Residents Through Subdivision Exactions, 73 Yale L.J. 1119 (1964).
degree of economic harm, finding no taking if the harm is not great and there is no actual physical invasion, but finding a compensable taking if property values are greatly diminished. It has been observed, too, that courts are less likely to require government payment where restrictions are imposed on land uses often considered nuisances or quasi-nuisances, and where any limitations are part of a plan for regional development.

The generalization can be made that the police power is exercised where a use of property is found harmful to the public, and eminent domain where the property may be beneficial to the public. Under such a purpose-test, public necessity might seem to come within the police power, thus justifying the rule of no compensation, since the property’s continued existence is found harmful. But as the zoning cases illustrate, even in police power areas, compensation is required if property value is totally destroyed. The police power is thus not an exception to the rule that there must be payment for all governmental takings, for once a taking is found to occur, here as elsewhere, payment must be made.

The question of what constitutes a taking has also often arisen in the context of determining the timing of payment. For instance, when the government announces, prepares, and finally executes an urban renewal or comparable project, when has the activity advanced so far as to amount to a taking of the property involved? Mere announcement of plans for such

76 See Sayre v. City of Cleveland, 493 F.2d 64 (6th Cir. 1974). Cf. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), where the Court, though finding no taking, seemed to reiterate the test of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), that a police power ordinance becomes an unconstitutional taking according to the extent of economic harm.


78 F. Bosselman et al., The Taking Issue 322-23 (Council on Environmental Quality 1973). This work contains a good analysis of the issues involved in eminent domain and the problems of when to individualize by regulation and when to socialize by condemnation the cost of public land arrangements Cf. Michaelman, Property, Utility, and Fairness: Comment on Ethical Foundations of “Just Condemnation” Law, 80 Harv. L. Rev. 1165 (1967).


a project does not amount to taking, but denial of building permits or other actions that hinder the sale or improvement of the property may. It has been asserted that taking occurs when there is some direct legal restraint on use, or when there is public use of, or intent to use, the right allegedly taken. But it is clear that less than physical invasion will suffice, and that the key consideration is usually the degree of interference with use and enjoyment. The government has powers, within reasonable limits, to condemn prior to the moment of immediate need and in excess of the bare minimum of land required, but there is a requirement of compensation, measured as of the time of taking. Again, destruction is clearly a taking, and much less will often suffice.

Public necessity is thus seen as a defense to intentional torts to property that arose in an early time. It originally was applied largely to situations of natural catastrophe, but has found modern use in wartime conditions. Its limits are not clearly marked, but it can apparently be asserted by even a private individual if acting, under reasonable appearance of need, in the public interest. It allows total destruction of property without payment and is thus out of line with recent developments in the law requiring compensation for all government takings of property and, generally, under tort law or "inverse condemnation," for damage to property, at least if substantial. It cannot be considered to fall within the usual purview of the police power because a basic tenet of police power law is that once an actual taking occurs, payment must be made. Public necessity is, then, an exception to other rules on government power or an expansion of such power beyond its normal limits. Does it have a valid place in the law?

**Arguments for Retaining the Rule**

Public necessity is an exceptional doctrine to be applied only on ex-

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86 Note, Excess Condemnation—To Take or Not to Take—Functional Analysis, 15 N.Y.L.
IS "PUBLIC NECESSITY" NECESSARY?

ceptional occasions. It was born largely out of natural disasters—pestilence, fires, etc.—that were perhaps less controllable and more terrifying in a former time than they are today. Still, such threats remain grave, and our own time has added new horrors such as the possibility of nuclear holocaust. At least three reasons for some continued degree of protection from liability for destruction of property in the face of public calamity may be asserted. First, there is a need for swift action in the face of an impending disaster; there is no time to resort to the often lengthy procedures followed in condemnation by eminent domain. Thus, the law of public necessity may be considered a special exercise of police power that allows the law of a particular time and place to overcome the normal rules.  

However, this consideration of speed would seem to go only part way in justifying the necessity privilege, i.e., it excuses the circumvention of the usual procedure for the duration of the emergency, but it does not explain the failure to award any compensation once the crisis has passed. Early authority supports the view that after the danger is over, the owner of any injured property should be restored to his prior status. The urgency of the situation supports a privilege such as private necessity under which a technical trespass is excused, but there must be compensation for all actual harm. The urgency does not justify a failure to pay once the threat has passed. Any privilege of necessity depends on the existence of emergency; it is logical that the life and effects of the necessity should not outlast the emergency. If the danger is over, there is time to apply once again, to the extent possible, the constitutional guarantees against taking property without a fair hearing—that is, time now exists in which to determine the value of what has been destroyed and award compensation accordingly.

The second consideration in support of public necessity is the need

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88 Harrison v. Wisdom, 7 Heisk. 99 (Tenn. 1872).

89 The Case of the King's Prerogative in Saltpetre, 12 Co. Rep. 12, 77 Eng. Rep. 1294 (All the Judges of England 1607) (after danger is over, bulwarks should be removed so that landowner's inheritance not injured).

90 See Toledo, S.L. & K.C.R.R. v. Loop, 139 Ind. 542, 39 N.E. 306 (1894) (railroad had no right to enter plaintiff's land and cut trees close to railroad's tracks where there was no imminent danger).

91 See Holt v. Brown, 334 F. Supp. 2 (W.D. Ky. 1971), holding unconstitutional a statute allowing a tenant's property to be seized and sold to satisfy a landlord's claim for back rent, where the tenant was given no opportunity to be heard.
to offer protection to public employees. The government normally can act only through individuals. It is arguable that if a public servant acts reasonably in taking precautions against a calamity, he should not be held personally liable for property destroyed in the process.\footnote{See Jennings, 
_Tort Liability of Administrative Officers_, 21 _MINN. L. REV._ 263 (1937).} Otherwise, the risk of financial ruin would be such as to discourage persons from accepting public employment, or at least from taking certain necessary steps, once having assumed such employment, to ward off a catastrophe. But the public necessity privilege is not the only defense available to protect the reasonable public servant; the need for such protection has long been recognized, and there is thus a cloak of immunity protecting governmental employees from liability for all their discretionary acts.\footnote{Cf., as to justifying conduct that appears reasonably necessary at the time, Coxe v. Sharpe, 1 K.B. 496 (1912).} It is true that the immunity of lower administrative officers does not extend to mere "ministerial" (i.e., routine, day-to-day, nonpolicy-making) chores,\footnote{Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), aff'd per curiam, 275 U.S. 503 (1927). See Note, _Public Officers—Federal Officer's Liability for Damages Done to Property Pursuant to Statutory Authorization_, 38 _MICH. L. REV._ 1344 (1940).} but surely decisions, even hurried ones made by relatively low-level government officers, on steps to take against an impending disaster involve sufficient judgment and balancing of interests to be readily classified as discretionary and, hence, immune. If any residue of possible liability remains, it could be readily assumed by the government through legislation, as has been done by the federal government in regard to automobile accident liability of the government's drivers.\footnote{First Nat'l Bank v. Filer, 107 Fla. 526, 145 So. 204 (1933). See Hicks v. Dorn, 42 N.Y. 47 (1870), where a superintendent of canal repairs was held to be acting ministerially in restoring navigation, so that he would be liable for destroying private property if he acted without great public necessity. _See generally James, Tort Liability of Governmental Units and Their Officers_, 22 _CAL. L. REV._ 610 (1955).} The current pattern of the law in regard to governmental

\footnote{See generally Note, _Federal Tort Claims Act—Certification by Attorney Held Prerequisite to Government Employees' Immunity_, 113 _U. PA. L. REV._ 450 (1965).}
immunity is largely a legislative one in any event,\(^9\) because the judge-made rules have often proved outdated, inflexible, and/or lacking a comprehensive plan. Courts have not hesitated to abolish the old judicially created rules of complete immunity, but such overruling has often been followed quickly by legislative adoption of a thoroughgoing scheme that provides immunity in, and only in, those areas where there is still strong reason for it.\(^9\)

A third reason that may be asserted for public necessity is the need for special power in wartime. Exceptional powers have often been justified during military emergency in the name of national self-preservation, and it has been seen that “public necessity” is an exceptional privilege sometimes invoked to justify destruction of property during war. Again, the need for haste would appear only to justify the elimination of usual procedures, and personal liability of officers would normally be within the usual immunity. But government liability might, in the absence of the necessity privilege, exist. It may be contended that it could be overwhelming—bankrupting in amount.\(^9\) This, in turn, could impose on military forces the absurd dilemma of trying to win a war but still keep property destruction to a minimum because of possible government liability. “If a field commander has to keep one eye on the government’s liabilities and the other on the advancing enemy, vital facilities may never be destroyed in time and there may be no government from which the citizen can obtain compensation.”

Thus, a huge burden of liability could be imagined. And, in the absence of any defense, a basis for liability could be found in tort, even if not in quasi-contract.\(^10\)


\(^9\) As happened in California, as described in Covey, The New California Governmental Tort Liability Statutes, 1 HARV. J. LEGIS. 16 (1964).

\(^9\) Note, Destruction of Private Property—Crown Prerogative—Duty to Compensate, 39 TUL. L. REV. 133 (1964). Of course, the amount of damage might often be slight if the value of property were determined in light of the advance of enemy forces at the time of destruction. Id. at 137 n.26. Cf. Taylor v. Inhabitants of Plymouth, 49 Mass. (8 Metc.) 452 (1844), holding that statute providing compensation to owner of destroyed property did not apply where it would have been impossible to save the property from the oncoming fire anyway.


\(^10\) Thus, in Juragua Iron Co. v. United States, 212 U.S. 297 (1909), no implied contract
But once again, public necessity is not the only available defense. Governmental immunity provided a total shield from liability in the past. That shield has now been considerably reduced; but such statutory schemes of liability as provided by the Federal Tort Claims Act invariably provide exceptions (and thus continuing immunity) as to claims based on military activities. Other, less specific exceptions, as for “discretionary functions,” would also often be applicable. As part of the increasingly statutory scheme of government immunity, this immunity can and should be retained as to military activities, both in regard to individual officers and

was found to pay for property destroyed during U.S. military operations in the Spanish-American War. But it was noted that if a military order is not justified by the rules of war, it amounts to a tort. If an express or implied contract were found, recovery could be obtained under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1970). But such a contractual obligation can seldom be found in military operations. See Kirk v. United States, 451 F.2d 590 (10th Cir. 1971).

The Federal Tort Claims Act exception is found in 28 U.S.C. § 2680(j) and exempts from the Act's coverage “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.” See United States v. Marks, 187 F.2d 724 (9th Cir. 1951). It also has been held that members of the armed forces on active duty do not acquire a tort claim against the United States for injuries arising out of or in the course of their military service. Feres v. United States, 340 U.S. 135 (1950); United States v. De Quevedo, 375 F.2d 72 (3d Cir. 1967). Cf. Mattos v. United States, 412 F.2d 793 (9th Cir. 1969) (reservist on weekend duty). This has been extended to property damage suffered as an incident to active service. Zoula v. United States, 217 F.2d 81 (5th Cir. 1954). Similarly, any federal employee injured in the course of his duties has been held barred from a Tort Claims Act remedy. Gilliam v. United States, 407 F.2d 818 (6th Cir. 1969). The denial of such a claim to service personnel and other employees is based on the existence of other remedies of an administrative nature, such as the Federal Employee Compensation Act, 5 U.S.C. §§ 8101-8173 (1967). See Paterson v. United States, 359 U.S. 495 (1959); Johansen v. United States, 343 U.S. 427 (1952); Vantrease v. United States, 400 F.2d 853 (5th Cir. 1968).

Where the Tort Claims Act exception for combatant activities applies, there may sometimes be relief, usually of an administrative nature and with a monetary limitation, under other legislation. See Military Claims Act, 10 U.S.C. §§ 2733 (1970) ($10,000 limit); Nonscope Claims Act, 10 U.S.C. § 2737 (1970) (claim must have arisen on government installation or been caused by government vehicle ($1,000 limit)). Occasionally a taking of property may be found from military activities so that a condemnation theory will succeed where a tort theory does not. Grant v. United States, 326 F. Supp. 843 (W.D. Okla. 1970).

A foreign citizen may sue under the Federal Tort Claims Act unless he is an alien enemy in time of war. See United States v. South Carolina Highway Dep't, 171 F.2d 893, 899 (4th Cir. 1948).

to the government itself. This affords no reason, however, to clutter
the law with yet another privilege that would simply add an unnecessary second
level of immunity in the military cases and can be used to justify nonpay-
ment for injury suffered by individuals in cases unrelated to national de-
fense.

The Case Against the Doctrine

If immunity can be retained as to individuals and in all military situ-
ations without public necessity, and if the need for haste to avert disaster in
other cases does not justify so sweeping a privilege, what is to be said for
retaining the doctrine? It has been noted that, on the surface at least,
spreading the loss among the benefited public would seem far more fair than
letting an individual property owner bear the entire loss where his property
has been sacrificed for the common good, as to stop the spread of fire.104
Surely where the privilege of public necessity has been exercised by the
government, the loss could be placed on it and thus spread among the citi-
zenry.105 This would be in accord with maritime law providing for spread-
ing loss among the saved vessel and cargo where some cargo is jettisoned;106
it would bring the law of public necessity into line with the rule of private
necessity, and it would take proper note of the nonaggressor status of the
injured party in most necessity cases.107 Furthermore, recognizing a need
for government compensation in what are now called “public necessity
cases” would be in line with the trend toward limiting governmental pre-
rogatives and treating the state the same as other private parties where it
harms personal or property interests of individuals.108 It has been observed
that it would be wise, in anticipation of any future military or other wide-
spread calamity, for the government to have prepared a plan, such as for
emergency taxation, that would provide for spreading the pecuniary loss.109

104 Note, Constitutional Law—Destruction of Property to Prevent Capture by the
Enemy, 14 U. Pitt. L. REV. 441 (1953).
105 The loss-spreading abilities of the federal government are specifically noted in
where no public necessity privilege was recognized in the city. See also, as to private businesses
bearing their costs of operation, Enos Coal Mining Co. v. Schuchart, 243 Ind. 692, 188 N.E.2d
106 See Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Prop-
erty and Personality, 39 Harv. L. Rev. 307, 317 (1926).
107 Williams, The Defence of Necessity, (1953) CURRENT LEG. PROB. 216.
"Discretionary Function" Exception of the Federal Tort Claims Act: Some Reflections on
109 Recent Decisions, Constitutional Law—The Destruction of Private Property During
War by Military Forces as a Non-Compensable Loss, 37 MARQ. L. REV. 82, 84 (1953).
Otherwise, grave suffering might fall on some group of individuals with others escaping relatively unscathed despite their having been spared at the expense of others.

It can be urged, however, that the widespread existence of insurance means that loss can as well be born initially by a property owner, who then shifts it to his insurer, as it can be by society in general. It is true that in urban areas the great percentage of property is insured against fire and many other types of loss, that a property owner is in the best position to determine the worth of his own property and insure accordingly, and that (as so frequently stated in support of no-fault plans) an insured can generally deal more easily with his own insurance company than with the government or other third parties. Fire insurance policies often provide coverage for destruction of property to prevent spread of fire, or have been so construed. This does not necessarily mean that common and readily available types of insurance would cover all the variety of losses that might be incurred in "public necessity" cases; the vagueness and possible breadth of the doctrine have been noted. Destruction to prevent flood, spread of disease, or sinking of a vessel may be more difficult to bring within the terms of many policies. Claims based on damage caused by war or military activities are very commonly excepted from coverage. As to these military claims, there may also be government immunity, as has been noted. However, under the statutory waivers of immunity, there is often possible some relief within monetary limits. This prevents any threat of government bankruptcy, yet shifts at least a portion of the burden from the injured individual and is thus preferable to forcing him to assume the whole of a loss against which he may be unable to insure. The suggestion of a contingency plan in case of foreign attack or other national disaster is worth considering, and the national government, not individual property owners or their insurers, is in the best position to formulate this. Where governmental immunity has been found to remain, it has sometimes been expedient, as with the Texas City disaster, for the government to step in with aid and compensation. This is now normal procedure where the weather strikes disastrously at some part of the nation.

110 Morris, supra note 19, at 42-43.

111 Id. at 43 n.14.

112 See supra note 102. Where immunity and the necessity privilege are waived, a claimant by statute may be limited to recovering his loss in excess of his insurance. See Morris, supra note 19, at 43.

113 See supra note 109 and accompanying text.

114 Liability under the Federal Tort Claims Act was denied, largely due to the Act's "discretionary function" exception, in Dalehite v. United States, 346 U.S. 15 (1953). Thereafter, the House Committee on the Judiciary was authorized to investigate other possible means of
Increasingly, it is recognized that all accidents and disasters are problems of society; proposals are common that would treat automobile accidents, possibly all injury-producing events, as costs to be spread by the government through the whole society.\textsuperscript{116} Certainly if this contention can be seriously urged as to individual occurrences not directly connected with any government activity, it can be considered as to losses directly produced by government action undertaken for the good of a community. Such action must be allowed where reasonable to protect that community; the community should respond with compensation for what has been destroyed.

