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# When the Taking Itself Is Just Compensation

*Sullivant v. City of Oklahoma City*, 940 P.2d 220 (Okla. 1997).

Litigation often arises out of a bizarre sequence of events. *Sullivant v. City of Oklahoma City*<sup>1</sup> is not one of those cases. In *Sullivant*, the Oklahoma Supreme Court considered whether an activity in which police officers routinely engage constituted a taking under the Oklahoma Constitution. During 1994, the Oklahoma City police learned that an individual was trafficking in illegal drugs. The police obtained a warrant and, in the process of searching the man's apartment, damaged an outer door and two interior doors. The police obtained evidence of drug activity and arrested the tenant. The landlord, Howard Sullivant, then sued the city, seeking \$718 in damages for the cost of repairing the doors.<sup>2</sup> By a vote of five to four, Oklahoma's high court affirmed the trial court's decision to reject Sullivant's takings claim.<sup>3</sup>

This Case Note argues that the court correctly denied compensation, but that it nevertheless should have held that a taking had occurred. The court should have reached this paradoxical result by holding that actual economic benefits accruing to property owners as a direct result of police actions offset payments due under a just compensation analysis.

## I

Four other state courts have recently considered takings cases arising from police action under their states' constitutions.<sup>4</sup> Each court interpreted its state takings clause differently. In Texas, the court reasoned that where police power was exercised "for the safety of the public," innocent third parties should be constitutionally entitled to compensation, unless a "great public necessity" had forced the state to damage the property.<sup>5</sup> The Minnesota court found that a

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1. 940 P.2d 220 (Okla. 1997).

2. *See id.* at 222.

3. *See id.* at 227.

4. *See Customer Co. v. City of Sacramento*, 895 P.2d 900, 902-04 (Cal. 1995) (involving the police's use of tear gas to apprehend a criminal who had taken refuge in a liquor store); *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 39 (Minn. 1991) (arising from the police's use of tear gas to force a fugitive out of a private residence); *Wallace v. City of Atlantic City*, 608 A.2d 480, 481 (N.J. Super. Ct. 1992) (involving damage to apartment doors caused by a police drug raid); *Steele v. City of Houston*, 603 S.W.2d 786, 789 (Tex. 1980) (arising when the police burned a residence to the ground to apprehend prison escapees).

5. *Steele*, 603 S.W.2d at 792-93.

taking had occurred and awarded compensation, rejecting the "public necessity" defense as a matter of law.<sup>6</sup> The California court held, over a vigorous dissent, that when police damaged property in an emergency situation, no compensation was required.<sup>7</sup> The fourth case, which arose in New Jersey,<sup>8</sup> involved facts almost identical to *Sullivant's*. A state superior court held that the government should bear the costs because the damage had been incurred for the benefit of the public.<sup>9</sup> This result, it reasoned, followed from the U.S. Supreme Court's analysis in *National Board of YMCA v. United States*.<sup>10</sup>

In *YMCA*, the Supreme Court articulated a "particular intended beneficiary" test for determining whether compensation was owed under the Fifth Amendment.<sup>11</sup> Under the test, when a "private party is the particular intended beneficiary of the governmental activity, fairness and justice do not require that losses which may result from the activity be borne by the public as a whole, even though the activity may also be intended incidentally to benefit the public."<sup>12</sup> The dictum that followed has fascinating implications for *Sullivant*: "Were it otherwise, governmental bodies would be liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside."<sup>13</sup> The obvious corollary of the Court's reading of the Takings Clause is that damage resulting from a police attempt to apprehend drug dealers constitutes a compensable taking when the particular intended beneficiary of the action is the public as a whole.

Yet, the *Sullivant* court, in adopting California's approach to police-induced damages,<sup>14</sup> held that because the damage to *Sullivant's* doors was a "necessity in order to protect the health or safety of the public,"<sup>15</sup> it was not compensable under the Oklahoma Constitution's takings clause. Can the federal and state takings clauses, so similar in wording,<sup>16</sup> mean completely different things?<sup>17</sup>

6. See *Wegner*, 479 N.W.2d at 42.

7. See *Customer Co.*, 895 P.2d at 912. California's emergency defense is essentially the same as Texas's public necessity defense.

8. See *Wallace*, 608 A.2d 480 (N.J. Super. Ct. 1992).

9. See *id.* at 483.

10. 395 U.S. 85 (1969) (holding that damage to private property resulting from the military's efforts to quell a riot in Panama did not constitute a taking), cited in *Wallace*, 608 A.2d at 482-83.

11. *Id.* at 92. The *YMCA* holding applies to Fifth Amendment physical invasion takings claims.

12. *Id.* (internal quotation marks omitted).

13. *Id.* The obvious implication is that removing a burglar is intended primarily to benefit the owner of the property being burglarized.

14. See *Sullivant*, 940 P.2d at 226-27 (relying also on the majority's argument in *Customer Co.* that law enforcement should not be deterred from acting swiftly to prevent crimes and on the concurrence's argument that the damage to the plaintiff's property was not a public use).

15. *Id.* at 225.

16. Compare U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation."), with OKLA. CONST. art. 2, § 24 ("Private property shall not be taken or damaged for public use without just compensation."). The federal courts have considered "damaged" property to be "taken" for the purposes of the Fifth Amendment, see, e.g., *YMCA*, 395 U.S. at 93, so the additional words in the state constitution are not of any discernible importance.

17. The Court's *YMCA* dictum notwithstanding, *Sullivant* may have lost on a Fifth Amendment takings claim as well. The police's damage to *Sullivant's* door entailed a physical invasion, but it is not clear

## II

The conflicting interpretations of the state and federal takings clauses stem in part from ambiguity over the nature of police action and from the limitations of *YMCA*'s particular intended beneficiary test. That test forces courts to decide whether the police were primarily motivated by a desire to create public benefits or private benefits. Using the type of police activity as a proxy for police intent, as courts have frequently done, can lead to curious results. For instance, the *YMCA* dictum indicates that individual homeowners are the primary intended beneficiaries of police actions to apprehend burglars in private homes.<sup>18</sup> Yet, if police respond with massive force to catch a notorious burglar who has been terrorizing a city, such a conclusion is not self-evident. Along these lines, the *Sullivant* court, in holding that "public necessity" forced the police to act, assumed that police apprehend drug dealers primarily to benefit the public at large.

This analysis and the *Sullivant* court's conclusion, even if correct, are beside the point. When a tenant sells drugs from his apartment, that generally diminishes the apartment complex's property value. The presence of such a "nuisance tenant" will often result in complaints from neighboring tenants, forcing the landlord to reduce rents. Thus, it is likely that when the Oklahoma police officers conducted the raid and removed the tenant, they left behind \$718 in damages, but they also increased the value of *Sullivant*'s property. It is as though the state instantaneously compensated *Sullivant* for his loss.<sup>19</sup>

Police actions to arrest drug dealers, in the aggregate, do create positive spillover effects in the community. Many of the benefits, however, will be localized to a small geographic area, frequently the area in which the sales

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whether that invasion would be considered temporary or permanent. Whereas permanent physical invasions are per se takings, temporary invasions are subject to a balancing test to determine if a taking has occurred. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982). In any event, even if the invasion were permanent, the government could still try to invoke the public necessity defense.

18. See *YMCA*, 395 U.S. at 92.

19. This raises the important—albeit in this case academic—question of whether, in such situations, a taking has occurred but just compensation has been paid, or no taking has occurred at all. I believe that the former approach is superior. *Sullivant*-type cases are analytically similar to a case in which the government takes a farmer's grain with a fair market value of \$100, but compensates him with \$110. If the government denies that it has ever "taken" the grain from the farmer, it will no doubt spark his exasperation. For the paradigmatic example of such an "ordinary observer" approach to takings law, see BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977). The only way to assert credibly that no taking has occurred is to point to the value of the compensation. Yet, in a legal framework, this can be done only by determining and comparing the relative values of the grain and \$110. This is exactly what would occur at the just compensation stage. Indeed, if physical takings are simplified, with defenses such as public necessity eliminated, the trial to determine whether a taking has occurred should usually become a simple and inexpensive matter. Although the Supreme Court has not issued a definitive pronouncement on this issue, Justice Scalia's recent concurrence in *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1671-72 (1997) (Scalia, J., concurring), persuasively argues that any offsetting payments to the landowner come into play only when determining whether just compensation has been provided.

occurred.<sup>20</sup> In *Sullivant*, the drug-dealing tenant lived in an apartment complex of approximately fifty units.<sup>21</sup> Because he owned all of these units, Sullivant presumably received the greatest benefit from the government's raid.<sup>22</sup> Although quantifying the special benefits flowing to litigants like Sullivant as a result of the drug raid might be complicated, such an inquiry need not place undue strain on the trier of fact.<sup>23</sup> A full accounting of the private benefits resulting from the raid probably would have exceeded \$718. In short, the taking itself would have constituted just compensation.

### III

Police actions to apprehend burglars, drug dealers, and even murderers will produce different mixes of public and private benefits, based primarily on the specific facts of the cases, rather than on the intent of the officers involved. While, at some level, police officers are not doing their jobs if they are not acting for the public's benefit, legislatures generally criminalize activities because they harm discrete *members* of society. In that sense, a judge can credibly characterize almost any legitimate police action as intended to benefit either a private party to the suit *or* society as a whole.<sup>24</sup> Accordingly, in interpreting their states' takings clauses, state tribunals should reject *YMCA's* rigid and often arbitrary distinction between public and private particular intended beneficiaries.

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20. When courts are called upon to calculate severance damages—which equal the diminution in fair market value of a privately owned land parcel after the government has taken a portion of that parcel—they distinguish between general benefits (which benefit the community as a whole) and special benefits (which benefit privately owned parcels near the site of the project). See generally 3 JULIUS L. SACKMAN & PATRICK J. ROHAN, *NICHOLS ON EMINENT DOMAIN* § 8A.04[2] (3d ed. 1997). In most states, only the special benefits will offset the severance damages and result in a commensurately reduced just compensation award. See *id.* § 8A.05.

21. Telephone Interview with Joseph C. Schubert, Counsel for Howard Sullivant (Nov. 10, 1997).

22. Conceivably, the property owner may have derived net economic benefits from the presence of the drug dealer. Perhaps the tenant was a mild-mannered individual who used his apartment only to store drugs and scrupulously paid his rent on time. According to plaintiff's counsel, Sullivant's tenant fell into this category. *Id.* If the landlord could prove that he derived a net economic harm from the drug raid, then there should be no offset to the damage to the apartment. It is not necessary, however, to carry this analysis to its logical extreme—namely, that the landlord could then sue the government for a taking of rental income—because statutes merely reducing landlords' income usually do not constitute takings. See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992) (holding that a rent control ordinance is not a per se taking). A court might alternatively disallow any such benefits flowing to the landlord as the fruits of ill-gotten gains. Cf. *Caplan & Drysdale v. United States*, 491 U.S. 617, 627-28 (1989) (allowing the government to seize proceeds of a criminal's illegal behavior even after those funds were paid to defense counsel).

23. In calculating the benefits, the *Sullivant* court, for example, might have compared rents and vacancy levels at Sullivant's complex to those at a substantially similar, but crime-free, complex. It might also have taken into account the average cost of an eviction and the value of the manager's time spent responding to complaints about the illegal activity.

24. Cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992) (arguing that it is impossible to understand government activity as preventing harms or securing benefits—long a decisive inquiry in takings cases—on an objective basis).

This reasoning suggests that an analysis of the actual beneficiaries of a police action is a better tool than *YMCA*'s particular intended beneficiary test for determining whether compensation is due. The current test emphasizes the intent of government officials, even though there may be little rationale for this approach. In the real world, government officials often act based on mixed motives. If fifty-one percent of the officers' motivation in *Sullivan* stemmed from a general desire to enforce the law and forty-nine percent stemmed from a concern that unmitigated drug activity would evoke the ire of tenants in Sullivan's complex, the *YMCA* rule would fully compensate Sullivan for the value of his doors. If those percentages were reversed, however, Sullivan would recover nothing. The purpose of such a test—to force property owners to consider the economic benefits they receive as a result of a police action, rather than the amount of the damages sustained during the action—would be better served if courts focused on the actual benefits instead of the intended beneficiaries.<sup>25</sup>

While an intended beneficiary approach to police-induced takings cases is somewhat problematic, the *Sullivan* court's approach is more so. The just compensation requirement functions as an important check on a government's temptation to provide services by expropriating private property.<sup>26</sup> The facts of the recent California case illustrate the consequences of a legal rule that provides police with little or no incentive—other than moral constraints or the fear of unfavorable press scrutiny—to mitigate private damages. There, police apprehension of a criminal resulted in over \$275,000 of property damage.<sup>27</sup> Indeed, if a fleeing shoplifter were to take refuge in the Price Tower (an Oklahoma landmark designed by Frank Lloyd Wright), and the police believed he might be armed, they would not even need to hesitate before burning the building to the ground to apprehend the suspect.<sup>28</sup>

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25. There is one respect in which the intended beneficiary rule is arguably superior to the actual beneficiary rule. The intended beneficiary test would not require compensation if police destroyed a door after a burglar had (unbeknownst to the officers) already fled a private residence with stolen goods. A simple actual beneficiary test, on the other hand, would require compensation, unless the defendant could prove that the criminal fled earlier than she otherwise would have when she heard the police coming. But even if one believes that the police should not have economic incentives to arrive at the scene more quickly or to engage in less destructive behavior if they believe that the criminal may have fled, the intended beneficiary test is not necessary. Instead, this example suggests that the actual beneficiary test should be modified to account only for *ex ante* benefits.

26. See Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 *CATH. U. L. REV.* 721, 723 (1993).

27. See *Customer Co. v. City of Sacramento*, 895 P.2d 900, 904 (Cal. 1995).

28. An Oklahoma statute immunizes the state from liability for damages when a claim results from "[e]xecution or enforcement of the lawful orders of any court," or when "[e]ntry upon any property . . . is expressly or impliedly authorized by law." *OKLA. STAT. ANN.* tit. 51, § 155(3), (9) (West 1997). Accordingly, unless the police officers improperly executed their search warrant, Sullivan cannot recover under a tort theory. See *Sullivan*, 940 P.2d at 223. Even if a state were to waive sovereign immunity when police officers use unreasonable force to apprehend a suspect, the costs of litigating such a fact-intensive claim might quickly exceed the amount of the damages. For example, the plaintiff in *Customer Co.* had to drop his negligence suit against the city because of the expense. See *Customer Co.*, 895 P.2d at 904 n.1.

In addition to providing the wrong incentives to police, the *Sullivan* rule diminishes landlord incentives to report illegal activity on their properties. If a landlord fears that police can destroy her property with impunity, then even if she consistently is losing money because of the illegal activity, she will be tempted to look the other way. In contrast, if a landlord's exposure is capped by the special economic benefits she could expect from a cessation of the illegal activity, she will have a stronger incentive to assist the police.<sup>29</sup> Assuming that transaction costs and retaliation fears are not prohibitive, landlords could not be made worse off by reporting illegal activity.

#### IV

Police departments across the country train new recruits to enter private property forcibly to apprehend criminals. Although officers sometimes will make mistakes, these police actions are usually desirable activities that society need not deter.<sup>30</sup> The police search of *Sullivan's* property almost certainly falls into this category. There is, however, some level of property destruction that is socially undesirable. A rational legal doctrine should deter undesirable property destruction, but not desirable destruction. The *Sullivan* public necessity doctrine does not do this because it ignores the magnitude of the property damage. The *YMCA* particular intended beneficiary doctrine also fails in this regard because compensation hinges on intent, rather than on the relative costs and benefits of the police action. As other jurisdictions consider whether they should expand their own constitutional protections against police invasions, adopting a legal rule that accounts for the mixed public and private benefits of government action is the best way to balance the competing interests of law enforcement and property owners.

—Lior J. Strahilevitz

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29. Admittedly, a rule that compensates the property owner for the entire value of any damage, without examining private benefits, will maximize landlords' willingness to assist the police. Essentially, this is what the *Wegner* rule does. See *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 38 (Minn. 1991); see also *supra* text accompanying note 6.

30. By "desirable," I mean that the social (private and public) benefits of the police action exceed the social costs. Undesirable activities are those for which the reverse is true. The actual beneficiary doctrine that I have proposed reduces the property owner's compensation by an amount equal to the private benefits of the police action. Therefore, my approach might not efficiently deter undesirable police actions that have large social costs. Any rule that attempts to force police officers to weigh the social costs of an action before executing it, however, will fail because it is much easier for one to estimate, *ex ante*, the private costs of police action than the social costs of such action. Moreover, in cases involving the apprehension of criminals, the private costs from property damage are likely to constitute the bulk of the cognizable social costs resulting from the police action.