

1971

Noise Pollution and the Law

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Recommended Citation

James L. Hildebrand, *Noise Pollution and the Law*, 37 J. AIR L. & COM. 415 (1971)
<https://scholar.smu.edu/jalc/vol37/iss3/13>

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Current Literature

BOOK REVIEW

NOISE POLLUTION AND THE LAW. Edited by James L. Hildebrand. Buffalo, N.Y.: William S. Hein. 1970. Pp. 354. \$18.75.

As America begins to struggle on so many fronts with the conflicts between economy and ecology, it is instructive to see how that struggle has progressed on the front with the longest campaign history to date—the problem of aircraft noise. If de Tocqueville could only see us now.¹ We have a difficult problem of physics, engineering, architecture and city planning, and so we go to court. Since Mr. Causby's chickens crashed into his wall in fright when the planes came over, Americans in ever greater numbers have been bringing law suits on a variety of theories. First, it was that strange breed of action known as inverse condemnation. This was all right when the federal government owned and operated the planes, owned the airport and directed the traffic,² though what Mr. Causby recovered six years after the event was about \$1500.³ It became harder as the airport, flight path and plane were controlled by different bodies;⁴ the noise did not come straight down but moved sideways or at an angle⁵ or the loss in property values was not easily demonstrable.⁶ A number of these suits succeeded—in the sense that plaintiffs recovered a sum of money. None, so far as I know, succeeded in the sense that they shut down an airport.⁷ But while the *Causby*, *Griggs*, *Batten*, *Thornburg* series of cases is fun to read in that it reminds most of us of first year law school, they have been a diversion, rather than a direct approach, to the aircraft noise problem. Whether an overflight is direct or indirect, a nuisance, taking or a discretionary gov-

¹ Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence, all parties are obliged to borrow, in their daily conversations, the ideas and even the language peculiar to judicial proceedings. As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 280 (P. Bradley Ed., 1945).

² *United States v. Causby*, 328 U.S. 256 (1946).

³ *See Causby v. United States*, 75 F. Supp. 262 (Ct. Cl. 1948) (on remand to the court of claims).

⁴ *Griggs v. Allegheny County*, 379 U.S. 84 (1962).

⁵ *See, e.g., Batten v. United States*, 306 F.2d 580 (10th Cir. 1962).

⁶ *See, e.g., City of Los Angeles v. Mattson*, 10 Av. Cas. ¶ 17, 632 (1967).

⁷ The closest case seems to be *Township of Hanover v. The Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969), in which the New Jersey Superior Court ordered restrictions on the use of an airport by jet aircraft except during specified hours.

ernmental activity really has very little to do with the technical and economic trade-offs that the problem demands.

A number of the papers in this collection essentially make this point, and chide the courts for not being more candid about it. But of the thirteen articles in the volume, eight deal with these early cases, plus in some instances the somewhat more relevant local regulation suits—*Cedarhurst*, *Hempstead* and *Loma Portal*. Many of the papers are quite well done. George A. Spater, now President of American Airlines, for instance, has done an excellent job of assembling and analyzing the court cases through 1965, and so has Lyman M. Tondel, Jr. But it is a byway, and I must say that I cannot agree with the editor's preface that each of the authors presents "quite a different perspective." Only Professor Baxter's paper on the SST contributes in a real sense to the resolution of the conflict. Despite its bleeding heart title ("The SST: From Harlem to Watts in Two Hours") the paper is very much hard goods; I would not be surprised if it influenced a number of votes in the Congress when it first appeared in the *Stanford Law Review*.

This reviewer would like to have seen a very different kind of book. First, I would like to see a really thorough but comprehensible explanation of the problem of noise measurement and in particular of the disagreements between the FAA and the Port of New York Authority on this point. Perhaps one of the pieces by Karl Kryter might have done the job.⁸ The paper by Donald F. Anthrop reproduced here makes a start, but it focuses on dB's and dB(A)'s, whereas the issue today turns on PNdB's vs. EPNdB.

Second, I would like to have seen some professional discussion of the flight operating procedures introduced for noise abatement purposes, and what the pilots' objection to them is.

Third, I would like to have seen a discussion of the legislative tensions surrounding the 1968 federal noise legislation, instead of just a reprint of the bill and the Senate report. It is interesting, for example, that the ATA successfully pushed for an amendment to the administration bill delegating the noise certification function directly to the Administrator, FAA, rather than to the Secretary of Transportation, who is now formally charged with all other functions previously vested in the head of the FAA.⁹ It is also interesting that the procedural safeguards properly applicable to revocation of individual personnel licenses, including appeal to the National Transportation Safety Board, were made ap-

⁸ See, e.g., Kryter, *Evaluation of Psychological Reactions of People to Aircraft Noise*, in OFFICE OF SCIENCE AND TECHNOLOGY ALLEVIATION OF JET AIRCRAFT NOISE NEAR AIRPORTS 13 (1966). See also K. KRYTER, *THE EFFECTS OF NOISE ON MAN* (1970).

⁹ See Department of Transportation Act, § 5, 49 U.S.C. § 1654 (Supp. 1970).

plicable to aircraft type certificates. This too was not in the administration bill and would seem to discourage, if not insure against, action with respect to previously approved aircraft—even those planes not yet out of the assembly line.

Fourth, a real service would be performed for the legal community by an analysis of the issues faced and the decisions made by the FAA's noise regulations issued in implementation of the 1968 statute.¹⁰ A start on such an effort was made by Paul B. Larsen in the *Iowa Law Review*,¹¹ but (perhaps because it came out too late) that piece was not included here. It is worth noting that at the special meeting on aircraft noise convened by the International Civil Aviation Organization in 1969, the United States was the only country ready with a comprehensive program, and the FAA regulations (duly translated into the metric system) were adopted almost verbatim as the proposed new international standards under the Chicago Convention.¹²

Fifth, and related to both domestic and international approaches to noise, I would like to have seen a discussion to the retrofit problem, which was deliberately avoided by the FAA in its 1969 regulations but is, at this writing (September 1971), the subject of an advanced notice of proposed rule-making¹³ in the United States and of a good deal of controversy in Europe.

Sixth, the experience in Europe, which has had many of the problems of both litigation and legislation though with a somewhat different outcome, would be worth reading about.

Finally, the consequence of the airplane noise problem, not just for the aviation industry and the communities under the flight path but for the entire traveling public, could be brought home with a discussion of the shortage of airports and the difficulty of finding sites that the public will accept. On this topic I recommend a paper by Michael M. Berger in the *Southern California Law Review*,¹⁴ which also may have arrived just too late for inclusion in the volume under review.

Perhaps it is unfair to review a book on the basis of what it did not do, rather than on the basis of what it did. But it seems to me that in this area, as in so many others, it is time that the lawyers stopped talking only to one another and only about appellate cases in familiar courts. And I would hope that a book about a serious problem—even if

¹⁰ 14 C.F.R. Part 36 (1970).

¹¹ Larsen, *Improving the Airport Environment: Effect of the 1969 FAA Regulations on Noise*, 55 IOWA L. REV. 808 (1970).

¹² See *Report of Special Meeting on Aircraft Noise in the Vicinity of Aerodromes*, ICAO Doc. 8857 (1969).

¹³ See 35 Fed. Reg. 16980 (1970).

¹⁴ Berger, *Nobody Loves an Airport*, 43 SO. CAL. L. REV. 631 (1970).