

Case Notes

This Is Not a Crèche

ACLU v. Schundler, 104 F.3d 1435 (3d Cir.), *cert. denied*, 117 S. Ct. 2434 (1997).

In December of 1995, small children admiring Jersey City's four-foot tall figures of Santa and Frosty might have been surprised to learn that the two were in fact the indispensable guardians of the menorah and crèche nearby. Had either of the figures left the scene for a single day, the entire display would have been dismantled by the force of federal law.

The previous year, the American Civil Liberties Union of New Jersey and four citizens of Jersey City had sought declaratory and injunctive relief against a city-sponsored display of a menorah and crèche on the City Hall Plaza.¹ The district court granted a permanent injunction against the display, finding that it violated the establishment clauses of the U.S. and New Jersey constitutions.²

Lacking neither chutzpah nor Christmas spirit, the undaunted city reinstalled the menorah and crèche in front of city hall the next winter. This time, however, the city added a red wooden sled and figures of Santa Claus and Frosty the Snowman to the display.³ In response to the ACLU's predictable challenge, the district court concluded that the additions "sufficiently demystified the [holy], . . . sufficiently desanctified sacred symbols, and . . . sufficiently deconsecrated the sacred to escape the confines

1. See *ACLU v. Schundler*, 931 F. Supp. 1180 (D.N.J. 1995), *aff'd in part, vacated in part*, 104 F.3d 1435 (3d Cir.), *cert. denied*, 117 S. Ct. 2434 (1997). The plaintiffs filed a complaint based on alleged violations of the Establishment Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and their counterparts in the New Jersey Constitution. See *id.* at 1182, 1186.

2. See *id.* at 1185-87. The injunction also prohibited "any substantially similar scene or display at the front entrance of the City of Jersey City City Hall." *ACLU v. Schundler*, No. 95-206 (D.N.J. Nov. 28, 1995) (order granting permanent injunction). The district court held that the display did not violate the equal protection clauses of the federal and state constitutions. See *Schundler*, 931 F. Supp. at 1186, 1187.

3. The city also added Kwanzaa symbols to a nearby Christmas tree. See *Schundler*, 104 F.3d at 1439. Though the tree and its decorations were not directly at issue in these cases, the district court noted in its modified order that the Kwanzaa symbols contributed to the secular character of the 1995 display. See *id.* Both the 1994 and 1995 displays were accompanied by signs that read: "Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its peoples." *Id.* at 1438.

of the injunctive order in this case."⁴ The court's modified injunction required Jersey City to maintain the additional secular figures and to replace them within twenty-four hours if they were stolen or destroyed.⁵ On appeal, the Court of Appeals for the Third Circuit vacated the holding that the 1995 display did not violate the U.S. Constitution and remanded the case for further consideration of the modified display in accordance with the standards outlined in the majority opinion.⁶

I

The disposition of holiday display cases under the Establishment Clause is controlled by *County of Allegheny v. ACLU*.⁷ Under *Allegheny*, a display is unconstitutional if, in its "particular physical setting[],' [it] has the effect of endorsing or disapproving religious beliefs."⁸ In his opinion for the *Allegheny* majority, Justice Blackmun undertook a fact-specific, contextual analysis. His evaluation of the "context" of Allegheny County's display entailed an inquiry into a variety of factors—the city's other holiday festivities, the location and arrangement of the display, the availability of secular alternative symbols,⁹ and the message of an explanatory sign—in addition to the display's physical setting. In his analysis, none of these factors was alone dispositive. The standard was that of the oft-invoked "reasonable observer"¹⁰ or, more precisely, the "reasonable non-adherent."¹¹

In *Allegheny*, the Supreme Court outlined a methodology and a standard for lower courts to follow, rather than a bright-line rule of decisionmaking.¹² But the plentiful scholarship criticizing *Allegheny* and calling for a clear test indicates that there is significant academic pressure for the creation of a

4. *Id.* at 1450.

5. See *ACLU v. Schundler*, No. 95-206 (D.N.J. Dec. 21, 1995) (order modifying permanent injunction of Nov. 28, 1995).

6. See *Schundler*, 104 F.3d at 1452. The New Jersey district court has not yet reconsidered the case.

7. 492 U.S. 573 (1989).

8. *Id.* at 597 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)). In general, the Court finds endorsement or disapproval when "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Id.* (quoting *School Dist. v. Ball*, 473 U.S. 373, 390 (1985)).

9. Justice Blackmun noted that while the menorah used by the city to represent Chanukah is a religious symbol, "[a]n 18-foot dreidel would look out of place and might be interpreted by some as mocking the celebration of Chanukah." *Id.* at 618. Justice Blackmun concluded that "[t]he absence of a more secular alternative symbol is itself part of the context in which the city's actions must be judged in determining the likely effect of its use of the menorah." *Id.*

10. *Id.* (quoting *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment)).

11. *Id.* at 620 (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-15, at 1296 (2d ed. 1988)).

12. Justice Blackmun cited and adopted Justice O'Connor's position in *Lynch* that "[e]very government practice must be judged in its unique circumstances to determine whether it [endorses] religion." *Id.* at 595 (quoting *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring)).

holiday display rule,¹³ and cases such as *Schundler* reveal judicial pressure in the same direction.¹⁴ The methodology of the Third Circuit reveals a subtle but inexorable formalization of the decisionmaking process, as *Schundler* seeks to replace the subjectivity of case-by-case adjudication with a jurisprudence of strict rules.

II

The *Schundler* court drew generalized rules from the fact-specific precedents of *Lynch v. Donnelly*,¹⁵ *Allegheny*, and *Capitol Square Review & Advisory Board v. Pinette*.¹⁶ For example, after observing that the *Allegheny* Court found a privately owned crèche on the staircase of the county courthouse to constitute a violation of the Establishment Clause, the Third Circuit determined that the government may not place a crèche on government property.¹⁷ The court further stated that the government may not use public funds to erect and maintain a religious display because such expenditures, like religious symbols on government property, "directly implicate[] the Establishment Clause."¹⁸ These two rules confuse the law by equating an *implication* with a *violation*.¹⁹ The Third Circuit ruled, in effect, that the sponsorship and location of a display cannot pose potential Establishment Clause problems without necessarily violating constitutional constraints. The court thereby collapsed the space between inquiry and conclusion that contextual analysis had occupied in *Allegheny*.

13. See, e.g., George M. Janocsko, *Beyond the "Plastic Reindeer" Rule: The Curtous Case of County of Allegheny v. American Civil Liberties Union*, 28 DUQ. L. REV. 445 (1990); Carole F. Kagan, *Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621 (1995); Shahin Rezai, Note, *County of Allegheny v. American Civil Liberties Union: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503 (1990); Barbara S. Barrett, Recent Development, *Religious Displays and the First Amendment: County of Allegheny v. American Civil Liberties Union*, 13 HARV. J.L. & PUB. POL'Y 399 (1990).

14. Another case illustrating this tension is *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir.), *petition for cert. filed*, 66 U.S.L.W. 3474 (U.S. Dec. 30, 1997) (No. 97-1103). The majority in *Elewski* upheld the display of a city-owned crèche in a public park through a purely contextual analysis, without reference to the facts and holdings of prior cases. But there is a stark methodological contrast between the opinion of the court and the dissent of Judge Cabranes. Unlike the majority, Judge Cabranes quoted lengthy descriptions of the facts from *Allegheny* and *Lynch* to conclude that the crèche violated the Establishment Clause. See *id.* at 56-57 (Cabranes, J., dissenting). His dissent thus participates in the process of formalization that this Case Note attempts to unveil. Though still in dissent in the Second Circuit, this pressure for clarity predominates in the Third Circuit's *Schundler*.

15. 465 U.S. 668 (1984).

16. 515 U.S. 753 (1995).

17. See *Schundler*, 104 F.3d at 1445. Judge Lewis, writing for the majority, reasoned that if a privately sponsored crèche violates the Establishment Clause, then a government sponsored crèche sends an even "stronger message of endorsement." *Id.*

18. *Id.*

19. See *id.* Quoting Justice O'Connor's concurrence in *Allegheny* for the proposition that "'the display of religious symbols in public areas runs a special risk of making religion relevant . . . to status in the political community,'" *id.* (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 626 (1989) (O'Connor, J., concurring)), the Third Circuit concluded that Jersey City's display of a crèche on City Hall Plaza "conveyed a message of religious endorsement," *id.*

The functional definition of "context" lies at the heart of the methodological difference between *Allegheny* and *Schundler*. The Third Circuit dramatically curtailed the scope of the challenged display's context, ruling first that "context" could not include Jersey City's other celebrations throughout the year.²⁰ The court rejected the city's "time lapse photograph" argument, which presumed that a reasonable observer would be familiar with the city's festivities in other seasons.²¹ It focused instead on an observer's literal view of the menorah and crèche at a given moment.²² Accordingly, it held that secular figures cannot "demystify]" religious symbols.²³ The court considered Santa, Frosty, and the sled to be merely "token additions of . . . secular symbols"²⁴ and summarily concluded that they "do little to alter the 'context' or the focal points of the City's display."²⁵

Unlike Justice Blackmun, who implied through his analysis that a display's "context" may include any and all relevant factors, the Third Circuit analyzed only the specific arrangement of the display.²⁶ Eviscerating the expansive standard of *Allegheny* with an extremely narrow interpretation of the word "context," the court concluded that the significance of an object cannot be contextually determined: An object must have intrinsic meaning if it is to have any meaning at all. In the Third Circuit's conceptual landscape, a crèche is "an

20. *See id.* at 1449.

21. *Id.*

22. *See id.* This interpretation of the "reasonable observer" conflicts with that of the majority in *Elewski*, which held that "[a] reasonable observer is not one who wears blinders and is frozen in a position focusing solely on the crèche." *Elewski v. City of Syracuse*, 123 F.3d 51, 54 (2d Cir. 1997). The *Elewski* court's reasonable observer "would also know that downtown Syracuse merchants encourage the holiday display" and "would be aware that the City actively attempts to accommodate all groups' reasonable requests for additional displays and events during the holiday season." *Id.* at 54-55. Underlying the Second Circuit's notion of a reasonable observer is a flexible interpretation of "context" of the sort that informed Justice Blackmun's *Allegheny* analysis.

23. *Schundler*, 104 F.3d at 1451, 1452.

24. *Id.* at 1452.

25. *Id.* The conclusion that these secular symbols are not relevant to the contextual analysis of the display runs counter to the implication of Justice Blackmun. In describing the unconstitutional crèche at issue in *Allegheny*, he noted specifically that "[i]n]o figures of Santa Claus or other decorations appeared on the Grand Staircase." *County of Allegheny v. ACLU*, 492 U.S. 573, 580-81 (1989).

26. Justice Blackmun did not outline any standards for the meaning or scope of "context" in *Allegheny*. Instead, he considered a multitude of relevant factors beyond the display's physical setting and arrangement without ever explaining his rationale. *See supra* note 9 and accompanying text. By contrast, Judge Lewis's functional definition of "context" entailed the reductive "Art 101" exercise that he himself derided in a footnote. *See Schundler*, 104 F.3d at 1448 n.12 ("I shudder to think that the only "reasonable observer" is one who shares the particular views on perspective, spacing, and accent expressed in Justice Blackmun's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law." (quoting *County of Allegheny v. ACLU*, 492 U.S. at 642-43 (Brennan, J., concurring in part and dissenting in part)). The Third Circuit's analysis proceeded thus:

The context of Jersey City's second display is as follows: on one side, a large menorah stands about ten feet from a four-foot plastic Santa and a Christmas tree decorated with lights and Kwanzaa symbols; on the other side, the characters of the crèche are huddled off to the side of a manger, with Frosty in the background bearing witness and separated from the crèche by a red sled. . . . We reiterate that Jersey City's display of the crèche at the seat of City government power impermissibly conveyed a message of government endorsement of religion.

Id. at 1451-52.

unambiguous religious symbol,"²⁷ a status that, more importantly, can never change.²⁸

Yet unambiguous symbols with fixed meanings are not what Justice Blackmun imagined in *Allegheny*. He noted specifically that "the effect of a crèche display turns on its setting."²⁹ Instead of crafting a formal test for the evaluation of holiday displays, Justice Blackmun allowed the relevant contextual considerations to be themselves contextually determined. His notion of contextual meaning resonates with First Amendment obscenity jurisprudence and Justice Stewart's famous phrase, "I know it when I see it."³⁰ The Third Circuit's rather uncharitable characterization of the district court's approach as "an ad hoc, arbitrary, constitutional guessing game over the relative secularizing 'power' of individual symbols"³¹ reveals its impatience with the nonrational elements of judicial decisionmaking.³²

By functionally defining "context" as, in Justice Kennedy's words, a "jurisprudence of minutiae,"³³ and then understanding the meaning of the display as independent from that context, the Third Circuit rendered useless and effectively repudiated the fact-specific methodology mandated by the Supreme Court. Its syllogistic reasoning thus complete, the court vacated the district court's finding that in conjunction with Santa, Frosty, and the sled, Jersey City's menorah and crèche were no longer religious symbols, but secular holiday decorations.³⁴

27. *Id.* at 1445.

28. The disagreement between the district court and the Third Circuit over the possibility of contextually determined meaning echoes the old formalist-realist debate over language. In the first half of the 20th century, legal realists argued that the words of a rule cannot be understood without reference to the rule's purpose and that words themselves lack fixed, intrinsic content. See LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960*, at 4 (1986). Legal formalists, by contrast, attempted "to reduce law to a set of rules and principles, which they insisted guided judges to their decisions." *Id.* at 3.

As the descendant of the formalist-realist debate, the positivist-subjectivist debate of the early 1980s offers more recent answers to the question of contextual meaning. The Third Circuit seems to argue, like Owen Fiss, that subjectivist interpretation can and should be constrained by "disciplining rules." Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 744 (1982). Yet the district court might counter, along with Stanley Fish, that the only way to produce and understand such rules is to be already "deeply inside—indeed, [to be] part of—the context in which they become intelligible." Stanley Fish, *Fish v. Fiss*, 36 *STAN. L. REV.* 1325, 1332 (1984).

29. *County of Allegheny v. ACLU*, 492 U.S. at 598.

30. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). In the same vein, Justice Stevens later said of "a picture or a sentence" that it "cannot be judged in the abstract, but rather only in the context of its setting, its use, and its audience." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 427 (1992) (Stevens, J., concurring).

31. *Schundler*, 104 F.3d at 1451 n.17. This characterization highlights the formalist nature of the Third Circuit's methodology. Judge Lewis no doubt would agree with Grant Gilmore's description of realist jurisprudence as "an *ad hoc* response to a unique state of facts, rationalized . . . and fitted willy-nilly into the Procrustean bed of approved doctrine. The motivations of the judicial response are buried, obscure, unconscious and—even to the judge—unknownable." Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 *YALE L.J.* 1037, 1038 (1961).

32. Cf. Paul Gewirtz, *On "I Know It When I See It,"* 105 *YALE L.J.* 1023, 1028-38 (1996) (suggesting that nonrational elements have an appropriate place in judicial decisionmaking).

33. *County of Allegheny v. ACLU*, 492 U.S. at 674 (Kennedy, J., concurring in the judgment in part and dissenting in part).

34. See *Schundler*, 104 F.3d at 1452.

III

Limiting the functional definition of "context" is central to the methodology by which the Third Circuit distilled clarity from *Allegheny's* murky waters.³⁵ Following *Schundler*, lower courts in the Third Circuit may implement the realist jurisprudence of *Allegheny* only through a formalist methodology.

This development perhaps would come as no surprise to Justice Blackmun. With reluctant prescience, he observed in *Allegheny* that "[i]t is perhaps unfortunate, but nonetheless inevitable, that the broad language of many clauses within the Bill of Rights must be translated into adjudicatory principles that realize their full meaning only after their application to a series of concrete cases."³⁶ Through the Third Circuit's interpretation and application, the development of the "full meaning" of the *Allegheny* principle has become synonymous with its formalization.³⁷

The methodology of *Schundler* reveals an unacknowledged pressure for clarity in holiday display jurisprudence. But the final judgment on this case has yet to be delivered. On remand to the district court, Santa, Frosty, and the facts of the case may slip defiantly between the Third Circuit's narrow rules.³⁸ As subsequent cases continue to develop the full meaning of the *Allegheny* principle, proponents of clear rules may find their best efforts frustrated by the sheer variety of factual situations in holiday display cases. In the end, the legacy of *Allegheny* may remain its interpretive enterprise, a project embodying a beauty and a subtlety that rule-based jurisprudence can never attain.

—Laura Ahn

35. Ironically, the Third Circuit's relentless use of factual precedents can be understood as creating a new contextual dimension, one that neither Judge Lewis nor Justice Blackmun seems to have imagined. Under the Third Circuit's rigorous application of precedential facts to those at issue, the fact patterns of prior cases become, in effect, a metacontext for the fact pattern of the instant case. The details of the displays in *Lynch* and *Allegheny* become part of the legal landscape against which Santa, Frosty, and their hapless charges must be evaluated.

36. *County of Allegheny v. ACLU*, 492 U.S. at 606. A student of the law once observed that "[i]o be understood, judicial doctrines, like royal families, must usually be traced through a long line of antecedents." Note, *Of Lawyers and Laymen: A Study of Federalism, the Judicial Process, and Erie*, 71 *YALE L.J.* 344, 345 (1961). Here, Justice Blackmun seems to suggest the corollary: To be implemented, judicial principles must usually be developed through a long line of descendants. In response to Justice Kennedy's criticism of the contextual analysis adopted by the Court, Justice Blackmun acknowledged that "the Court would have to decide a series of cases with particular fact patterns that fall along the spectrum of government references to religion." *County of Allegheny v. ACLU*, 492 U.S. at 607-08. This concretization through fact patterns may serve simply to clarify principles that were formulated as strict rules from the outset, but it may tend to make rules out of principles originally promulgated as flexible standards.

37. Like the alternating periods of classicism and romanticism in the arts, pressures for rules and standards may develop cyclically in the law. See GRANT GILMORE, *THE DEATH OF CONTRACT* 111-12 (2d ed. 1995); Carol M. Rose, *Crystals and Mud in Property Law*, 40 *STAN. L. REV.* 577 *passim* (1988).

38. Cf. GILMORE, *supra* note 37, at 70 (describing the 1920s debate between Professors Williston and Corbin that resulted in sections 75 and 90 of the *Restatement of Contracts*).

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*¹ 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.² By a vote of five to four, Oklahoma's high court affirmed the trial court's decision to reject Sullivant's takings claim.³

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.⁴ 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.⁵ The Minnesota court found that a

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.⁶ The California court held, over a vigorous dissent, that when police damaged property in an emergency situation, no compensation was required.⁷ The fourth case, which arose in New Jersey,⁸ 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.⁹ This result, it reasoned, followed from the U.S. Supreme Court's analysis in *National Board of YMCA v. United States*.¹⁰

In *YMCA*, the Supreme Court articulated a "particular intended beneficiary" test for determining whether compensation was owed under the Fifth Amendment.¹¹ 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."¹² 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."¹³ 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,¹⁴ held that because the damage to *Sullivant's* doors was a "necessity in order to protect the health or safety of the public,"¹⁵ it was not compensable under the Oklahoma Constitution's takings clause. Can the federal and state takings clauses, so similar in wording,¹⁶ mean completely different things?¹⁷

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.¹⁸ 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.¹⁹

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

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.²⁰ In *Sullivant*, the drug-dealing tenant lived in an apartment complex of approximately fifty units.²¹ Because he owned all of these units, Sullivant presumably received the greatest benefit from the government's raid.²² 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.²³ 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.²⁴ 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.

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.²⁵

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.²⁶ 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.²⁷ 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.²⁸

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 *Sullivant* 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.²⁹ 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.³⁰ The police search of *Sullivant'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 *Sullivant* 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

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.