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DUE PROCESS AND POLLUTION: 
THE RIGHT TO A REMEDY

FERDINAND F. FERNANDEZ†

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."1

I. INTRODUCTION

NOW THAT THE LUSTROUS FINISH of our affluent society is starting to tarnish we find that part of the problem is caused by the wastes with which we are polluting the environment. The most obvious assaults have been made upon air2 and water.3 There are others.4 The earth is reeling from attacks by pesticide pollution,5 heat pollution,6 noise pollution,7 and general chemical pollution (from the use of, for example, virulent defoliants8 and detergents9).

This degradation of the environment raises more than questions of aesthetics or longings for primeval days. At its root it is the very question of survival. Pollution is destroying our property. It may also be destroying us. We have been told that pollution of the air

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7. See, e.g., AMBASSADOR COLLEGE RESEARCH DEPARTMENT, OUR POLLUTED PLANET 50 (1968).


9. See, e.g., Pollution Percentages in Detergents Listed, Progress-Bulletin (Pomona), September 6, 1970, at 1, col. 1.

(789)
is contributing to the increase of lung diseases, such as lung cancer, emphysema, bronchitis, and asthma. The cost of air pollution was estimated to run as high as eleven billion dollars per year in 1967. Surely it has increased! The cost of crop losses on the eastern seaboard alone, in 1967, was estimated at eighteen million dollars per year. News services recently reported that some citrus trees in California are now being placed in oxygen tents so that they can survive. It has been estimated in testimony before Congress that an average family of four could easily be spending eight hundred dollars per year because of air pollution, while even a poor family could be spending at least two hundred and fifty dollars per year.

Water resources are being ravaged and destroyed. They are being attacked by infectious agents, fertilizers, chemical and mineral wastes, insecticides, petroleum pollutants, lead poisons, radioactive material, and trash. The result is that rivers have turned into open sewers and lakes into cesspools. A recent analysis of water from the Ohio River near Cincinnati revealed content of, among other things, coliform organisms from sewage, viruses (including hepatitis and polio), inorganic chemicals, cyanide, D.D.T., heptachlor, and radioactive substances. The Cuyahoga River in Cleveland, Ohio, recently burst into flames. Even the oceans, from which many envision bountiful harvests to feed the starving masses of the world, are being polluted. The estuaries, which are the most important areas of the sea for food production, are also the most polluted areas. Heat pollution poses a further threat to our waters and their productivity.

Pesticides, particularly the hard pesticides, present additional dangers. It is well known that they are destroying some of our finest birds through their effect on eggshell production. For example, in

12. Id. at 1585.
14. See note 11 supra.
16. See Bylinsky, supra note 3, at 103.
17. Id.
19. See Graham, supra note 6.
20. Peakall, supra note 5, at 73.
California there were almost no successful hatchings of brown pelican chicks during the last nesting season.\textsuperscript{21} In addition, such pesticides may destroy the oceanic organisms which produce most of our oxygen,\textsuperscript{22} a matter over which we should show some concern. More immediately, studies have suggested that these pesticides are causing brain and liver diseases in human beings.\textsuperscript{23}

The above comments are rather cryptic, since this is not intended to be a scientific disquisition. Nor is it intended to convince the reader that property and lives are being destroyed by reason of pollution. The referenced works, and countless others, carry that burden. It is herein assumed that injuries are caused by pollution and that the various toxicants to which we are subjected may well bring about later illnesses, though their effects upon any particular person may not be obvious at this time. The question is: What can be done about it? This article will suggest one possible answer to that question.

Many solutions have been proposed to the average man. They range from “stop having children,”\textsuperscript{24} to “take shorter showers.”\textsuperscript{25} Legislation is also an obvious possibility, and some laws have been passed.\textsuperscript{26} Unfortunately, it is often ingenious to place one’s hope in the legislative process, since legislators are subjected to lobbying pressures and often find it necessary to compromise and avoid enacting real solutions.\textsuperscript{27} Executive enforcement, likewise, has often been rather lax. The people may therefore find it unwise to sit and wait for solutions from these sources, and may instead turn to the courts for help. When the courts are turned to the common and statutory law they should be able to find a remedy for the aggrieved citizen. Certainly the common law is viable and resilient enough to fashion effective remedies from its historic materials. But here again, as will

\textsuperscript{21} Laycock, supra note 5, at 16.
\textsuperscript{22} See note 18 supra; Wurster, DDT Reduces Photosynthesis by Marine Phytoplankton, 159 Science 1474 (1968).
\textsuperscript{23} Radomski, Diechmann & Clizer, Pesticide Concentrations in the Liver, Brain and Adipose Tissue of Terminal Hospital Patients, 6 Food & Cosm. Toxicology 209 (1968). See also Peakall, supra note 5, at 78.
\textsuperscript{24} E.g., Ehrlich, People Pollution, 72 Audubon, May 1970, at 4.
\textsuperscript{25} CAILLIET & SETZER, EVERYMAN’S GUIDE TO CONSERVATIONAL LIVING 11 (1970). While the shower suggestion may sound somewhat whimsical this booklet is an extremely valuable reference, and all of its suggestions, taken together, would eliminate a good deal of pollution and waste at the personal level. The booklet is available from Santa Barbara Underseas Foundation, P.O. Box 4815, Santa Barbara, California 93103.
be noted below, most scholars have not predicted great success. Many of the rules and approaches of law developed during the relatively recent industrial past seem to present almost insurmountable obstacles. If neither the common law nor the legislature seems capable of solving these serious problems, either because of political pressures, balancing of interests, or just plain rigidity, we would do well to look to the United States Constitution and to the constitutions of the various states. Constitutions with their immutable principles and promises of the good life are the final source of comfort and aid. This article will show that those who look to the constitutions will not look in vain. The "due process" clauses of the fifth and fourteenth amendments to the Constitution of the United States, as well as similar clauses in state constitutions, supply the needed relief if it cannot be found elsewhere.

II. THE EXISTING COMMON LAW

The great resources of the common law should provide remedies to solve our pollution problems. One thinks of the law of negligence, strict liability, trespass, nuisance, riparian rights, and admiralty.

Negligence law appears to present an appropriate sort of remedy. It seems particularly inviting since it has long been established that a manufacturer may be liable to secondary purchasers, and, even to those who are not within the chain of title. If a wheel which flies off of an automobile and injures a bystander can be a source of liability for negligence, should not poison gases be treated in the same fashion? A manufacturer should likewise be held liable for direct physical injuries or property damage caused by negligent use of his facilities.

Another useful negligence concept is the theory that a manufacturer who places dangerous articles on the market will be liable to persons injured therefrom, notwithstanding a lack of present means to make the articles safe or the general custom in the industry. The negligence remedy has been suggested before. However, it has been pointed out that it is often an illusory remedy because of the kind of balancing test used in defining duty, and because of the causation problems presented when an illness develops over a long period of time. There is


Cf. Claude v. Weaver Constr. Co., 261 Iowa 1223, 158 N.W.2d 139 (1968), where punitive damages were allowed in an air pollution case, despite claims of good faith and use of modern equipment.

32. See Juergensmeyer, Control of Air Pollution Through the Assertion of Private Rights, 1967 DUKE L.J. 1126, 1142; Sweeney, supra note 26, at 171.

33. Juergensmeyer, supra note 32.
also a problem with damages. If a citizen must wait for lung cancer to strike before he sues, the remedy, obviously, will come too late.

Strict liability in tort would also seem to be a useful concept in states that have adopted it in general form. The concept imposes liability upon a manufacturer in the absence of proof of negligence. This applies to personal injuries, property damage, and even protects non-purchasing third parties. Again, being saturated with poison gases from exhaust emissions should create liability just as being struck by a defective part of an automobile creates it. However, this concept suffers from some of the same problems as the negligence remedy.

Where the pollution has become so great as to cause particulate matter to settle upon and injure property, a trespass action against the polluter would seem appropriate. The mere fact that the particles are invisible to the naked eye should be irrelevant; the intrusion of particles upon the property of the plaintiff should be sufficient. Radiation can be treated in the same manner. Injunctive relief ought to be available to prevent this type of injury, but if a balancing test is used, the hoped-for remedy may be rendered entirely ineffective.

The remedy provided by the law of nuisance could be particularly effective in dealing with pollution. Air pollution, for example, has been treated as a nuisance for centuries, for nothing in the world should require people to abide filthy air. Furthermore, distinctions between public and private nuisance, the former not creating liability to private parties, should not present a significant stumbling block in this area. The mere fact that the wrongdoer is injuring many people should not deprive any single individual of an effective remedy against him. The public nuisance doctrine should be founded on invasion of a common right rather than a wholesale invasion of private

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35. Id.
38. See Juergensmeyer, supra note 32, at 1148; Rheingold, Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere, 33 Brooklyn L. Rev. 17 (1966).
41. For a detailed discussion of the law of nuisance and pollution, see Comment, The Use of Private Actions to Control Environmental Pollution in Pennsylvania, 16 Vill. L. Rev. 920 (1971).
The latter is simply a private nuisance injuring many persons. Each man surely has a private and personal right to clean, or at least non-toxic, air. As one court said long ago: "If a man commits an assault on every person in a town or poisons the town’s reservoir, he will not be permitted to defend an individual’s action against him by claiming that he did the same thing to everyone else." Pollution poisons our reservoir of air and the same theory should apply. Even the presence of many different polluting sources should not present an obstacle to suit. Nevertheless, many authors believe that because of the apparent public-private nuisance dichotomy, the sometimes required need for special injury, prescriptive rights, and balancing tests, private nuisance law will not be useful in combating pollution.

Assertions of riparian rights and bringing of libels in admiralty are rather special situations which will not be discussed in detail. Suffice it to say that they appear to have the same defects as the other remedies described above.

The many aforementioned defects have caused commentators to complain that the common law, designed in a simpler age, cannot cope with our present problems. This has generated calls for more special legislation and for new remedies. Legislation has been enacted and new tools are being fashioned. This is all to the good. However, we should not lose sight of the fact that the old law and the ancient concepts can do an admirable job of solving many of the present problems. Some courts, for example, rejected balancing tests long ago on the well-reasoned ground that balancing simply puts the little

44. Id.
48. See, e.g., Juergensmeyer, supra note 32, at 1134-37; Porter, The Role of Private Nuisance Law in the Control of Air Pollution, 10 ARIZ. L. REV. 107, 113-14 (1968); Reitze, supra note 15, at 62.
51. See notes 49 & 50 supra.
52. See, e.g., Reitze, supra note 15, at 65.
53. See note 26 supra; United States v. Standard Oil Co., 384 U.S. 224 (1966); Comment, Federal Pollution Control: Participation by States and Individuals Enhances the National Pollution Control Effort, 16 VILL. L. REV. 827 (1971).
person at the mercy of the more powerful. Many of the solutions have already been found; a resort to them would be most helpful.

In the meantime, if there is a tendency to refuse to reach for the tools at hand or to rapidly fashion new ones, we can look to the constitutions to help speed the process.

III. MISCELLANEOUS FEDERAL CONSTITUTIONAL PROVISIONS

In addition to due process — the major source of constitutional rights — there are at least two other sources which can be relied upon. They are not discussed here in depth because, to a large extent, remedies based upon them must be fashioned out of whole cloth, and lengthy historical analysis would merely be a form of self-justification.

One is tempted to look to the Preamble to the United States Constitution, with its generally stated purpose to secure the welfare of the people and the blessings of liberty. It might well be argued that welfare and liberty are not provided unless the citizen is given the power to eliminate pollution’s threat to his very existence. Certainly each man must have the right to do away with things that will destroy his health and property. A rather extensive argument might be built around this central concept, but while the Supreme Court has often referred to the Preamble as showing that all power comes from the people, it has also indicated that the Preamble itself is not a source of rights and powers which are not found elsewhere in the Constitution.

Another source of protection might be the ninth amendment, which states that the enumeration “of certain rights, shall not be construed to deny or disparage others retained by the people.” Just as this amendment contains the germ of the right of privacy, it might well be argued that it contains the right of the citizen to protect his health from pollution-induced disease, to live in basic dignity without filth, and to preserve his property from slow destruction.

57. Similar statements can be found in state constitutions, see, e.g., CAL. CONST. art. I, § 1; PA. CONST. art. I, § 25.
60. U.S. CONST. amend. IX.
62. Rathwell, Air Pollution, Pre-Emption, Local Problems and the Constitution — Some Pigeonholes and Hatracks, 10 ARIZ. L. REV. 97, 105 (1968). See also
The above approaches, and particularly the appeal to the ninth amendment, may well be sufficient to spell out a constitutional right to be free from pollution, and it is not the purpose of this article to denigrate them. Indeed, some of the cases outlined below might help those who wish to spell out rights under the ninth amendment.

IV. DUE PROCESS

The due process clause of the fourteenth amendment declares that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ." The fifth amendment, of course, contains a similar provision regarding the federal government, and state constitutions bind their governments to the same principle.

It is the thesis of this article that due process requires each state (and the federal government when it has jurisdiction) to provide the people with remedies for injuries caused to their persons or property by pollution, and that when the polluting agent threatens to cause damage over a long period by reason of its chronic presence, injunctive or some similar form of relief must be provided. This is a declaration that effective redress for the wrongs caused by pollution is not merely a desideratum, but a right.

Some might object and argue that while due process can be traced to chapter 39 of the Magna Charta of 1215, the right to a remedy stems from a separate section — chapter 40 — of that document. Indeed, while forty-nine of the states include a due process provision in their constitutions, only thirty-two states also declare the right of every man to a remedy by due course of law for his injuries. But such an historical approach would be entirely too formalistic. In the first place, both of these chapters were unified into chapter 29 when the Magna Charta was reissued in 1229, and have remained together since. More importantly, the right to an appropriate remedy has always been considered such an integral part of our concepts of ordered liberty that courts have treated this right as part and parcel of due process. While it may sometimes be rather loosely believed that a state can take away remedies for wrongs not yet committed, or otherwise use the principle of damnum absque injuria to deny relief where a substantial wrong has been perpetrated, that simply is not the case.

64. Id. at 479-87. Note that remedy and due process clauses entirely overlap in four states since "remedy by due course of law" is their due process clause. Id. at 481.
65. Id. at 284.
The Supreme Court has declared that all state legislation must adhere to fundamental principles of right and justice, and that an attempt to strip a person of his remedy is the equivalent of sanctioning an invasion of his rights. Nor was that an isolated statement made in the heat of judicial rhetoric. Courts have often recognized that the removal of the safeguards protecting us from wrongful injuries may well result in the destruction of life and liberty, and may subject a citizen to unlawful imprisonment, dismemberment, or even death.

For example, when the Supreme Judicial Court of Massachusetts was asked to express an opinion on a proposed statute which would prevent the courts from entertaining actions against any trade union or officer or member thereof for any tortious act, it answered that such a law would deprive individuals of the safety, liberty, and property which must be secured to all subjects of a free government. For this reason, and others, the court declared that such a statute would violate the constitutions of the United States and Massachusetts. In a similar vein, a federal district court has refused to hold that an alien, who is in the country illegally, is stripped of his right to bring a negligence action. While the decision rested upon equal protection, the court referred to the defendant's position as one permitting the alien to be despoiled of his property and assaulted without redress, a position the court, in common justice, could not accept. Permitting injury without a right of recovery is simply abhorrent to our whole concept of ordered justice and will not be tolerated.

It might be argued that where no remedy is supplied, or where a wrong is only "permitted," there is no state action and no violation of fourteenth amendment requirements. However, it has been held that by repealing certain laws, the state might well be a partner in the discriminatory actions of private individuals, and thereby be in violation of the Constitution. The act of withholding remedies consti-


70. Id. at 619-20, 98 N.E. at 337-38.


72. Id. at 577.


74. Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), aff'd, 387 U.S. 369 (1967). Indeed, merely applying the state's long standing common
stitutes state action, whether they are withdrawn by a legislative body or by the courts. Perhaps more importantly, we are not concerned here with a claim that the state is failing to eliminate some merely private impropriety, which, if committed by the government, would be a violation of due process or equal protection concepts. That is, we are not trying to apply an interdiction against state wrong to private persons by using the bootstrap “inaction is action” argument. In this discussion we are at the very core of due process itself. It is the thesis of this article that the state is under a clear affirmative obligation to supply a remedy for wrongs to the individual caused by pollution, and failure to supply that remedy is an ipso facto denial of due process to those who make complaints in the state courts. If the aggrieved individual is sent away from the courts with the message that he must suffer the loss of life, liberty, or property with no chance of recovery, he has been deprived of these through the action of the state. In practical effect the state will have affirmatively declared that his life, liberty, or property can be taken without redress. To return to the earlier equivalency, due process means, among other things, that every individual is entitled to a remedy for injuries done to his person or property. The failure to grant that remedy constitutes the violation, without further disputation.

In the discussion which follows, cases dealing with property and those dealing with life and liberty are considered separately. All divisions into categories of this type tend to be somewhat arbitrary. This is particularly true in the due process area, for the courts have made it clear that the rights in question are co-extensive and equally important. It has been said that destruction of one may well extinguish the others, and that there is no reason in logic or policy to give any one of these rights less protection than another. Thus, the principles developed in the two separate parts should not be considered separate weapons. They are congruent.

law principles may involve the state in various violations of constitutional rights. Edwards v. Habib, 397 F.2d 687, 694 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969), and cases cited therein.

77. For example, libel and negligence actions, as well as privacy, might be considered within one's property rights. However, since they are so often concerned with a person's physical or moral integrity they are treated here as aspects of life and liberty.
78. See, e.g., Clark v. Mitchell, 64 Mo. 564, 577 (1877), rev'd on other grounds, 110 U.S. 633 (1884).
A. Due Process and Property

Due process obviously precludes a governmental entity from directly seizing a citizen's property for its own use without compensation. However, it does much more than that — the operative verb is not "take" it is "deprive," which is much broader. The Supreme Court has held that Congress may not simply legislate a contract out of existence, for valid contracts are property rights. Nor may the executive unilaterally cancel a patent, even on grounds of fraud, for that would violate due process of law. If the government, by any means, gave one man's rightful property to another, a gross violation of due process would occur. It would not matter if this were accomplished by taxing the former in order to support the latter's private enterprise. Such "robbery" will not be permitted. A law which turns an existing property right into a cause of action and then imposes a statute of limitations thereby forfeiting that property right is equally obnoxious. As one court said, the legislature cannot Don Quixote-like set up an imaginary windmill and then order the property owner to demolish it by legal procedures on pain of losing his property. Similarly, the courts have prevented religious organizations and lodges from depriving members or member lodges of their property without approval of the affected parties. To permit such deprivation would unconstitutionally convert one man's property to another's use, without the former's consent. Retroactive liability has the same effect and is also execrable.

While all of the above abuses involve some aspect of taking, the Constitution is equally violated if an individual is merely deprived of the use or benefit of his property without a fair hearing. An ordinance which would have driven the Chinese in the City of San Francisco from their homes was treated as an arbitrary confiscation of property. The same result was reached when a city tried to destroy

83. Ochoa v. Hernandez y Morales, 230 U.S. 139, 161 (1913). Cf. the following early state cases, where the due process provisions of Magna Charta were directly relied upon: Hooper v. Burges, 57 ARCHIVES OF MARYLAND 571 (C. Hall ed. 1940) and 34 ARCHIVES OF MARYLAND 676 (C. Hall ed. 1914) (Provincial Ct. 1670); and Bowman v. Middleton, 1 S.C. 101 (1792).
84. Savings & Loan Ass'n v. Topeka City, 87 U.S. (20 Wall.) 655, 664 (1875).
85. Id. at 664.
90. In re Lee Sing, 43 F. 359 (C.C.N.D. Cal. 1890).
the value of property through a zoning ordinance which unreasonably restricted the property's use and transferability.\textsuperscript{91} And while preventing a man from using his property may be permitted in special circumstances,\textsuperscript{92} all of the historical and commercial justifications for attachments were insufficient to support them against the claim that they deprived a wage earner of property without due process of law.\textsuperscript{93} The deprivation was the use of his property during pendency of the suit.\textsuperscript{94}

If taking, shifting ownership of, and preventing owners' use of property are all prohibited, it should follow that removing the remedies which protect the owners' property interests is also prohibited. After all, the result would be the same. This prohibition does indeed exist. It requires an available and effective remedy for the present and prospective harm caused by pollution. There is nothing radical about this assertion, as will now appear.

In 1852, some citizens of Massachusetts sent rum into Maine for storage. Defendant took the rum and the plaintiffs sued him.\textsuperscript{95} Defendant defended on the basis of a Maine statute which provided that no action could be maintained for the recovery of spiritous liquors or their value.\textsuperscript{96} The court first referred to the provision of the Maine Constitution that guaranteed a remedy for damage to property.\textsuperscript{97} It went on to declare that while the state could determine that possession of liquor was illegal, it had not done so.\textsuperscript{98} Under the circumstances, said the court, plaintiffs had a property interest in the rum and it was unconstitutional to deny them a remedy when the rum was taken from them.\textsuperscript{99} The defense failed. When the opinion of the Justices of the New Hampshire Superior Court of Judicature was requested on a similar statute, they also declared that the statute would violate the constitutional provisions requiring a remedy for wrongs.\textsuperscript{100}

In 1885, the Massachusetts Supreme Judicial Court was asked to construe a law found in the Provincial Statutes for 1692–1693.\textsuperscript{101} The owner of certain property had agreed that plaintiff could build a wall on the lot line, placing one-half on the plaintiff's property and one-half on the owner's. He further agreed that he would pay one-

\begin{itemize}
\item[\textsuperscript{91}] Sanderson v. City of Willmar, 282 Minn. 1, 162 N.W.2d 494 (1968).
\item[\textsuperscript{94}] Id. See especially the concurring opinion of Justice Harlan, id. at 342.
\item[\textsuperscript{95}] Preston v. Drew, 33 Me. 558 (1852).
\item[\textsuperscript{96}] Id. at 559.
\item[\textsuperscript{97}] Id. at 560.
\item[\textsuperscript{98}] Id. at 560–61.
\item[\textsuperscript{99}] Id. at 562–63.
\item[\textsuperscript{100}] Opinion of the Justices, 25 N.H. 537 (1852).
\item[\textsuperscript{101}] Wilkins v. Jewett, 139 Mass. 29, 29 N.E. 214 (1885).
\end{itemize}
half of the cost when he used the wall. The land was then subject to a mortgage, which was later foreclosed, and defendant came into possession. It was clear that the agreement could not bind the defendant. However, since the Massachusetts Constitution continued in force all the provincial laws not repugnant thereto, plaintiff argued that a provincial statute should apply. That statute permitted an owner to build a wall, and to put half on his own land and half on his neighbor’s land. The neighbor then had to pay one-half of the cost of the wall if he tied into it. The court stated that this law could not help the plaintiff, because it was repugnant to the constitution: “It assumes to take private property without due process of law, and without compensation.”

The courts have been just as adamant about laws designed to interfere with a person’s exclusive possession of his own land. In *Smith v. Bivens*, the plaintiff owned 8,000 acres of grazing land in South Carolina and leased grazing privileges to others. In 1891, the General Assembly passed a law revoking the rule which required owners of livestock to keep their animals fenced, and also revoking the rule which granted the right of distraint to those whose land was trespassed upon. Thereafter, cattle came upon plaintiff’s land. Plaintiff sued and claimed that the statute in question violated the United States Constitution. The court stated that while due process had not received any exact definition

[i]n the case at bar the complainant, owner of a tract of land, and as such owner entitled to its exclusive use and enjoyment, is by an act of the legislature, and without more, deprived of this exclusive use and enjoyment. By the stroke of a pen, it is gone. This seems a clear illustration of what is forbidden in the constitution.

The same result was reached in the South Carolina courts that same year. Ohio is no more friendly to such laws. It has held that a statute which prohibited a landowner from cutting off intruding branches of a neighbor’s tree would violate the Ohio Constitution and the fourteenth amendment. Such a statute would, in effect, permit the neighbor to use the owner’s land and would violate due process of law. Even when presented with hard cases, the courts have pre-

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102. *Id.* at 29, 29 N.E. at 215.
104. 56 F. 352 (C.C.D.S.C. 1893).
105. *Id.* at 353.
106. *Id.* at 353-54.
107. *Id.* at 356.
110. *Id.* at 136, 74 N.E.2d at 649. Cf. Belden v. Franklin, 28 Ohio C.C.R. 373 (8th Cir. 1905).
served the owner's right to hold his property free from interference of others. The Michigan Supreme Court faced such a case in 1931.\textsuperscript{111} The plaintiff and defendant owned adjoining properties with a strip of land seven feet wide between their buildings. Half of the strip belonged to plaintiff and half to defendant. Plaintiff absolutely needed both halves if he was to continue running his theater. However, defendant became annoyed at him and put a fence down the center. Plaintiff, who did not have an easement, took down the fence and sued. The court recognized plaintiff's plight but declared that defendant had an exclusive right to possession of his property and could not be deprived of it without due process of law.\textsuperscript{112} An important aspect of this was the right to defend possession and to protect the property from trespass.\textsuperscript{113} Thus, plaintiff lost his case and, presumably, his business.

The courts have shown no less zeal in protecting other types of property rights. In 1970, a Texas court declared that it would violate due process of law if it prohibited collection of interest on a contract made in Mexico, even though the contract would be usurious under the law of Texas.\textsuperscript{114} A similar attitude has been evidenced towards claims for compensation.\textsuperscript{115}

While it is usually held that constitutional requirements will be satisfied as long as a remedy is granted against someone, some courts have expressed dislike of provisions which shift liability from the liability-causing person to another. Thus, a statute granting a sheriff the right to substitute himself with indemnitors when he is sued for wrongfully levying upon property has been invalidated on due process grounds. Such a provision permits the taking of property without granting the owner an effective remedy for the injury done thereby.\textsuperscript{116} Pursuing rights against the indemnitor may be different, more difficult, and have less deterrent effect than suing the sheriff himself.

These due process decisions do not prohibit interference with a person's use of property when that use will cause harm to others,\textsuperscript{117}
unless the harm is merely the frustration that comes from hopelessly lusting after another's belongings. The decisions should not give the polluter or manufacturer of polluting products any cause for joy. They do offer relief to injured persons.

**B. Due Process, Life and Liberty**

Due process considerations of life need not be treated in detail. Life is, of course, ultimately involved in cases of personal injury, and some of these will be discussed below. It should also be noted that the question of a mother's right to life is rather clearly presented in abortion cases, and the California Supreme Court has stated that abortion laws may not require her to seriously jeopardize her life. She may not be stripped of her ability to seek relief from a dangerous situation; she may not be forced to go without medical remedy. Liberty is also involved in abortion questions, just as it is involved when the issue is contraception.

Liberty forms the very nucleus of the concepts that keep us free. It is more than the right to be free from physical restraint, but embraces the right to be free in the use of all of our faculties, the right to live and work anywhere at all, and the right to strike. It includes the right to bring up children and to acquire useful knowledge; the right to use one's own property, the right to travel, the right to grow a beard or long hair, and "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." While liberty does not mean unrestrained license to do whatever one desires, it does require that laws which limit freedom of action be reasonable. Restraints which

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118. See, e.g., Zabowski v. Loerch, 255 Mich. 125, 237 N.W. 386 (1931), which is discussed at notes 111-13 and accompanying text supra.
120. Id. at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.
122. See Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897); State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949). Those who claim that people who do not like pollution should just move away would do well to consider the right of each person to live and work where he pleases. Cf. In re Lee Sing, 43 F. 359 (C.C.N.D. Cal. 1890).
123. See Fairview Hosp. Ass'n v. Public Employees Local 113, 241 Minn. 523, 64 N.W.2d 16 (1954). The court treated this as a property question, but this writer considers it to be a question of personal liberty.
125. See Wall v. King, 206 F.2d 878 (1st Cir.), cert. denied, 346 U.S. 915 (1953).
do not bear a reasonable relation to some reasonable objective will be invalidated.\textsuperscript{130}

If liberty seeks to preserve the happiness of free men it may be expected to assure them redress for wrongs committed against them, including the assaults on their lungs, eyes, brains, livers and other body parts which are perpetrated by pollution.\textsuperscript{131}

Among the greatest safeguards of bodily integrity are tort laws, which generally grant relief against the wrongdoer. Many courts have found that these laws are not only desirable but essential in a free society. In 1863, an army officer arrested a citizen, and the citizen, believing the arrest was wrongful, sued the officer for false imprisonment.\textsuperscript{132} The officer defended on the ground that since he was acting under the authority of the President, an act of Congress gave him a complete defense to the suit.\textsuperscript{133} The court stated that the statute deprived the citizen of all redress for illegal arrests, and went on to declare that the statute would not bar the action.\textsuperscript{134} It concluded that Congress had attempted to deprive the citizen of liberty without due process of law, and that the statute was unconstitutional.\textsuperscript{135} In \textit{Herkey v. Agar Mfg. Co.},\textsuperscript{136} the court clearly stated that the passage of laws which did not permit a remedy for false imprisonment, assault, and similar torts would deprive the citizen of life and liberty, just as surely as if the legislature declared that such wrongs could be committed.\textsuperscript{137} It also declared that the same rule must apply to injuries caused by negligence,\textsuperscript{138} a view which has often been expressed.

On April 4, 1868, the Pennsylvania legislature passed an act which provided that recovery for injuries incurred in railroad accidents would be limited to $3,000.00. This act was set up defensively in an 1875 case involving a passenger who was injured in a train derailment.\textsuperscript{139} The Pennsylvania Supreme Court, in a per curiam opinion, affirmed the holding of the court of common pleas, which


\textsuperscript{132} Griffin v. Wilcox, 21 Ind. 370 (1863).

\textsuperscript{133} Id. at 371-72.

\textsuperscript{134} Id. at 372-73.

\textsuperscript{135} In a concurring opinion, Justice Hanna stated that Congress could no more shield an offender from liability than it could pass a law directly depriving the citizen of liberty. Id. at 397.

\textsuperscript{136} 90 Misc. 457, 153 N.Y.S. 369 (Sup. Ct. 1915).

\textsuperscript{137} Id. at 461, 153 N.Y.S. at 371.


\textsuperscript{139} Central Ry. of N.J. v. Cook, 1 W.N.C. 319 (Sup. Ct. Pa. 1875).
had declared the law unconstitutional. The exact ground of the court's holding was not clear, but a few years later it declared that the statute was unconstitutional because it attempted to limit the plaintiff's right to recover the full amount of the pecuniary damages caused by the defendant's wrongdoing. The court said that the constitutional provision guaranteeing a remedy by due course of law means a full remedy and not merely a portion of the actual damages.

New York has taken the same approach. In Williams v. Port Chester, plaintiff was injured when he slipped on a sidewalk. Due to his injuries the plaintiff was unable to file an action within the short (thirty day) claim period and the village asserted that his action was barred. The court stated that due process required a remedy:

The purpose sought to be accomplished [by the constitutional provision] was to afford protection to all rights of mankind, and it is not material that we should be able to say precisely what right is violated — whether of life, liberty or property; but any encroachment upon the fundamental rights of the individual was to find a certain remedy in the law.

Therefore, since the limitation ordinance was unreasonable under these circumstances, it was unconstitutional to apply it to the plaintiff.

The same sort of view was expressed in Gallegger v. Davis. In discussing a typical guest statute, the court stated that the legislature cannot declare a substantial injury to be no injury at all, nor may it abolish the right to recover damages for negligent injury without substituting another remedy in its place, for the right to an action is founded in natural justice, and is fundamental and essential. The court went on to find the guest statute constitutional, because of the special relation between guest and host, and because of the prevalence of fraudulent suits in this area.

The final result of the Gallegger case perhaps leaves the impression that causes of action or remedies can be abolished at will if the legislature decides it would be a good idea to do so. That has not been

140. Id. at 319.
142. Id. at 482, where the court said: "A limitation of recovery to a sum less than the actual damage, is palpably in conflict with the right to remedy by the due course of law."
144. Id. at 510, 76 N.Y.S. at 634.
145. 37 Del. 380, 183 A. 620 (1936).
146. That is, a statute which prevents a guest in an automobile from suing his host for injuries caused by negligent operation of the vehicle.
148. Accord, Silver v. Silver, 280 U.S. 117 (1929). Guest statute cases are an anomaly in the law. The statutes are a virtual licensing of host negligence, a type of law the courts normally reject out of hand.
the rule. Libel actions present an interesting case study. Here the public's interest in free communication clashes with the individual's interest in having his reputation unblemished by untrue publications. Over the years many states have passed laws which, in varying ways, preclude an injured person from recovering general damages on account of a libel by newspaper, if the newspaper publishes a retraction. As early as 1888, the Michigan Supreme Court declared that such an attempt to remove the citizen's reputation from the protection of the law would be unconstitutional. The same result has been reached in other cases. In striking down a statute of this type, the New Jersey Supreme Court has declared that the right to protect oneself from an unwarranted attack on reputation is a part of the right to enjoy life and obtain safety and happiness. Two of the cases referred to above arose in states which have a constitutional provision expressly protecting reputation. To that extent they may not appear to be authority for the general due process proposition. Still, they show how careful many courts have been when it comes to denying a remedy for wrongs against the citizen. Even the courts that have sustained this sort of statute have emphasized the unique interest in free communication as a justification for the different remedy, or have suggested that retraction is as good a remedy as general damages, since the effect of each is speculative at best. The very attitude of the courts when they struggle with a statute which seems to deny a remedy for injury reinforces the original proposition that justice and due process demand remedies. Strong public policy, such as preservation of family life, or removal of grave frauds and abuses, must be shown before the elimination of an effective remedy for a possible wrong will be allowed. Meanwhile, courts continue to find that constitutional provisions require granting of a cause of action.
and remedy where they have not previously been thought to exist; for example, for loss of consortium, and for privacy.

Surely the legislature's hands are not tied and it may prospectively adjust the definition of wrongs and change or replace remedies. This does not give it the right or power to deny entirely effective remedies for the serious personal injuries inflicted upon the individual by those who directly cause degradation of the environment, or who indirectly do so by selling goods which will clearly have that effect. Our constitutional right to life, liberty, and property is not too puny to withstand these assaults upon us.

C. Sovereign Immunity and Eminent Domain

These two concepts will be examined because while they subtend slightly different issues from those discussed above, they support the major thesis by analogy. Sovereign immunity is one method of cutting off the individual's right to a remedy for wrongs committed against him. Eminent domain, on the other hand, insists that takings of property, which would be a wrong if uncompensated, be accompanied with just compensation. The latter concept is of interest here because of its explication of what constitutes taking or damaging of an individual's property.

1. Sovereign Immunity

The purpose of this article is not to indulge in a lengthy discussion of sovereign immunity and the justifications, if indeed there are any, for the doctrine. That has been done elsewhere. Sovereign immunity is discussed here only to demonstrate the attitude of a number of courts when faced with the prospect of denying the individual a remedy for a wrong committed against him.

An important distinction in this area is highlighted by two Oregon cases, *Mattson v. City of Astoria* and *Pullen v. City of Eugene*. In

1. **Sovereign Immunity**


161. 39 Ore. 577, 65 P. 1066 (1901).

162. 77 Ore. 320, 146 P. 822 (1915).
Mattson, the plaintiff sustained injury on a public street which was in disrepair. The city charter purported to relieve the city itself and the common counsel from liability for such injuries. The court declared that while the city could exempt itself from liability, it could not, at the same time, grant an exemption to those who were charged with the duty of repair.\textsuperscript{163} If it were permitted to do so, the injured party would be denied all remedy and the constitutional requirement of a remedy for all wrongs would be violated.\textsuperscript{164} In Pullen, on the other hand, the plaintiff was injured on a defective sidewalk and the city charter exempted only the city from liability. The court found that the constitution was complied with since the provision did not exempt the responsible officers.\textsuperscript{165} So while respondeat superior might have been done away with, the actual wrongdoer could be sued. Other courts have gone further and have declared that a city cannot abolish\textsuperscript{166} or unreasonably limit\textsuperscript{167} a cause of action against itself since that would deprive the citizen of a remedy for a wrong committed against him.

The same theory has been applied to laws which would give both the government and the tax collector immunity from an action for alleged improper tax assessment or collection. Such a statute would deprive the individual of property without due process of law.\textsuperscript{168}

The Florida Supreme Court adopted a slightly different approach in Maxwell v. City of Miami.\textsuperscript{169} When sovereign immunity was asserted as a defense to an action against the city arising out of the negligent operation of a fire department vehicle, the court held that due process of law would not permit such immunity.\textsuperscript{170} The court stated that any unnecessary interference with the private rights of the citizens denied them due process, and that there was no reasonable necessity for operating city vehicles in a negligent manner.\textsuperscript{172} Thus, it reasoned, to deny a remedy for the negligence would unreasonably impair the private rights of those lawfully on the streets.\textsuperscript{172} This holding is somewhat reminiscent of the eminent domain requirement that

\textsuperscript{163} 39 Ore. at 580-81, 65 P. at 1067.
\textsuperscript{164} Id. at 580, 65 P. at 1067.
\textsuperscript{165} 77 Ore. at 326, 146 P. at 824.
\textsuperscript{166} Lebohm v. City of Galveston, 154 Tex. 192, 275 S.W.2d 951 (1955). See also Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919), overruled sub nom., Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922).
\textsuperscript{169} 87 Fla. 107, 100 So. 147 (1924).
\textsuperscript{170} Id. at 113-14, 100 So. at 149.
\textsuperscript{171} Id. at 114, 100 So. at 149.
\textsuperscript{172} Id. Cf. Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970).
property may only be taken for public purposes and then only if just compensation is paid. It suggests the rather close connection between all of the concepts under consideration. That is not surprising; the catalyst for all of them is basic justice.

2. Eminent Domain

The eminent domain clause of the fifth amendment directs that private property shall not "be taken for public use, without just compensation." The companion provisions in many state constitutions expand this to read "taken or damaged." \(^{173}\)

It is clear enough that a seizure of a person's land will be a taking. \(^{174}\) Similarly, where the land is entirely flooded with water it is taken, \(^{175}\) and occasional flooding will constitute a partial taking. \(^{176}\) Even if the thing taken seems insignificant, such as the tops of a person's trees, a taking exists and must be compensated. \(^{177}\) Nor may an indirect taking be accomplished by means of a zoning ordinance that destroys value and prevents transfer, except to the city. \(^{178}\)

But what of more intangible things, such as noise and vibrations? What of things that merely pass over the property without touching it? What of water or air pollution?

Noise and vibrations may cause a taking of property. It has been held that it is quite proper to give an owner damages in condemnation for depreciation in the value of his property from the whistles, bells, and rattling of trains. \(^{179}\) The same has been declared when airplane flights over private land are frequent and interfere with its use on account of the noise and vibrations they cause. \(^{180}\) The fact that the surface of the land is never entered upon is irrelevant.

Governmental agencies may send things other than airplanes across private property. They may decide to fire guns across it for the purpose of target practice. Even if none of the projectiles land

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173. E.g., CAL. CONST. art. 1, § 14.
177. Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867 (Ky. Ct. App. 1968), cert. denied, 393 U.S. 1088 (1969). One tree was to be cut from 50.9 feet down to 20 feet, and the other from 39.7 feet to 20 feet.
upon the property itself and even if the guns are not fired frequently, the owner and his guests might well become nervous. Such activity constitutes a taking and must be compensated. Stringing wires over the land is no less obnoxious, and must also be compensated. Again, the fact that the surface of the land is never entered upon is not significant. The activity is basically trespassory and is a taking.

When invasion comes in small particles rather than in the form of projectiles the result may be the same. Thus, when road work caused sand, clay, and other materials to deposit in the plaintiff's lake during a rain, a taking resulted, and the plaintiff was entitled to just compensation. Air pollution cases have often reached the same result.

Writing with copious citations on eminent domain theory, John Lewis stated: "The owner of land has a right that the air which comes upon his premises shall come in its natural condition, free from artificial impurities." He later stated: "The impregnation of the atmosphere with noxious mixtures that pass over my land is an invasion of a natural right, a right incident to the land itself, and essential to its beneficial enjoyment."

When a sewer district operated a septic tank in such a way that noxious and offensive odors wafted onto the plaintiff's land, the court found that a taking had occurred. The operation of a cremator that gave off a stench which caused the plaintiff discomfort, and the building of a sewer that permitted gas to escape have been similarly treated.

It has also been held that when smoke, dirt, and cinders from trains are carried through the air to the plaintiff's property, he has sustained a compensable injury, for he need not suffer this form of pollution. The Supreme Court reached a similar conclusion in Richards v. Washington Terminal Company. In that case the plaintiff lived about 114 feet away from the defendant's railroad

181. See Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922); Peabody v. United States, 231 U.S. 530 (1913); Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965); Atwater v. United States, 106 Ct. Cl. 196 (1946).
185. Id. at 452.
186. Sewer Improvement Dist. No. 1 v. Fiscus, 128 Ark. 250, 193 S.W. 521 (1917).
190. 233 U.S. 546 (1914).
tunnel. Gases, smoke, cinders, dust, and dirt were emitted from the tunnel. Particles settled upon the plaintiff's property and the air was polluted. The Court stated that the plaintiff would not be able to recover if the injury were simply the general type that comes from the operation of the trains, but found that the damage to this plaintiff was more extensive. The defendant was directed to either acquire the plaintiff's property or cease damaging it. While the Court did prevent this pollution of plaintiff's air, it also included a balancing or public nuisance theory in its decision. This sort of theory is quite useful when non-virulent conditions are involved and the injury to the public in general is negligible, while the plaintiff at bar is suffering great detriment. As suggested earlier, however, it is not at all useful or proper if measurable wrongs are being inflicted upon the public, even if the number of injured people is quite large.

People and their property can be injured without using artillery shells or airplanes. Molecules will do as well. When these injuries occur, or are threatened, an effective remedy must be given. Anything less is a taking, a destruction, or a deprivation of life, liberty, or property without due process of law.

**D. Injunction — The Effective Remedy**

If a remedy for wrongs is required, that remedy should also be effective. It is generally said that a person will not be heard to complain about the type of remedy granted, because no one has a right to any particular form of remedy. Nevertheless, the generality should not be permitted to swallow the basic principle. Plainly, a statute which fixed the maximum recovery for negligence or for intentional torts at one dollar would destroy the remedy itself. And one court has stated that where it is obvious that the only truly effective remedy is injunctive relief, impairment of the remedy will offend fundamental principles of justice and will be improper.

The long term continuing damage caused by pollution is a classic example of a situation where injunctive relief ought to be permitted. In pesticide pollution, for example, our bodies may be invaded daily by small quantities of hard pesticides, such as D.D.T. While each
intrusion of this long-lived chemical may be a wrong, it will seem minor. Even if damages were granted day-by-day, each day's damage would be slight. Indeed, in the absence of a trespass or strict liability theory which declared that the intrusion of the chemical, and not the harm caused, was the injury, it might not be possible to show daily damage. But when the concentrations of the pesticide finally reach a critical level, liver cancer or a brain hemorrhage may be precipitated. Under such circumstances, telling the citizen to wait for the ultimate disease is not only callous, it also deprives him of an effective remedy. It may even deprive him of his life. If it does, he will have lost his life without due process of law. Damages will not afford him adequate relief. The only effective relief would have been an injunction or other restraint when the accumulation of the deadly chemical began. The same can be said of lead poisoning from gasoline or the damage caused by air pollution. No man should be required to contract lung cancer or emphysema before he is granted his remedy. Just as the state could not order that he be poisoned on condition that his family be given a payment from the state treasury, it should not be permitted to effectively license others to do the same thing.

These conditions of irreparable harm, insufficiency of pecuniary relief, multiplicity of actions, and difficulty of ascertaining the amount of adequate compensation are some of the factors which have historically supported injunctive relief. The point made here is that they may, in certain instances, rise to a constitutional level.

The courts have not, apparently, seen fit to declare that an injunction must be granted where personal injuries are involved. However, they have often issued such declarations in the area of property damage, and principles which apply to property should also be applied to the protection of life and liberty.

In Wilmarth v. Woodcock, the defendant intentionally permitted the cornice of his barn to extend over the plaintiff's property,

199. This does not mean that injunctions for personal torts are improper; it only means that this writer has not located any cases stating that they are constitutionally required, though one case comes very close. Hanks v. Yancey, 263 S.W. 233 (Tex. Civ. App. 1924). Many courts have said that injunctions will not usually be given to restrain commission of personal torts. E.g., Alberti v. Cruise, 383 F.2d 268 (4th Cir. 1967); United States v. Marine Eng'rs' Bene. Ass'n, No. 38, 277 F. 830 (W.D. Wash. 1921). Nevertheless, such injunctions are often granted. See, e.g., Harris Stanley Coal Co. v. Chesapeake & O. Ry. Co., 154 F.2d 450 (6th Cir.), cert. denied, 329 U.S. 761 (1946); Machado v. Machado, 58 Cal. 2d 501, 375 P.2d 55, 25 Cal. Rptr. 87 (1962); Hanks v. Yancey, 265 S.W. 233 (Tex. Civ. App. 1924).
201. 58 Mich. 482, 25 N.W. 475 (1885).
and when the plaintiff sued him the defendant suggested that she be limited to an action at law for damages. The Michigan Supreme Court rejected this proposition and declared that to so hold would permit the defendant to deprive plaintiff of her property without condemnation and without due process of law. 202 Seventy-one years later the Michigan court was asked to pass on a very similar fact situation. This time a building and not merely a cornice was encroaching. 203 The intervening years had not changed the court's position. It again declined to permit the defendant to pay damages and remain. It again stated that it would not allow the taking of plaintiff's property without compensation as such action would be a violation of the demands of due process. 204

When faced with a type of air pollution in 1911, the California Supreme Court expressed the same point of view. 205 Dust escaping from the defendant's cement plant settled upon the plaintiffs' property, damaged their orange groves, and made life in plaintiffs' homes uncomfortable. Defendant showed that it had spent eight hundred thousand dollars developing its property, that it had a large payroll, and that it could only operate profitably in that particular place. It asked that it be permitted to give a bond for any damage it might cause to plaintiffs, but the court rejected the request. Even a bond for the full value of the plaintiffs' property was no substitute for injunctive relief. Said the court:

To permit the cement company to continue its operations, even to the extent of destroying the property of the two plaintiffs and requiring payment of the full value thereof, would be, in effect, allowing the seizure of private property for a use other than a public one — something unheard of and totally unauthorized in the law. 206

Defendant asked that a balancing test be applied and the court rejected the suggestion, while noting that balancing was simply a way of putting the weak at the mercy of the powerful. 207 This comment, unfortunately, explains the crux of our present environmental problems. Resources, beauty, cleanliness, and even our personal health and welfare have often been sacrificed to the powerful by the use of various balancing tests.

202. Id. at 485, 25 N.W. at 476.
204. Id. at 152, 79 N.W.2d at 488. In 1963, Maryland applied this principle to prevent defendant from misappropriating a right of way. Columbia Hills Corp. v. Mercantile-Safe Deposit & Trust Co., 231 Md. 379, 190 A.2d 635 (1963).
206. Id. at 245, 118 P. at 930. See also Anderson v. American Smelting & Refining Co., 265 F. 928 (D. Utah 1919).
207. 161 Cal. at 247-48, 118 P. at 931-32.
A dissenting judge in a recent case, which also involved cement plants, expressed the same view.\textsuperscript{208} He pointed out that to permit such a plant to continue operating and to continue putting dust and smoke into the air was, in effect, granting a license for a continuing wrong. It permitted the company to destroy property, and to contribute to cancer, emphysema, bronchitis and asthma, if it would pay damages. Not only was a wrong licensed, but the result also permitted the taking of property for a private use and violated due process.\textsuperscript{209}

Injunctive relief or its equivalent may be the only effective remedy. When it is, justice demands that it be granted.\textsuperscript{210}

**CONCLUSION**

We are faced with a serious environmental crisis. While the common law has sufficient tools to answer the need, we have often lost sight of that fact. We have forgotten that many of its principles are not merely matters of convenience, but are based on the requirements of fundamental justice.

Those requirements find their constitutional expression in the concept of "due process," the very touchstone of our freedom.\textsuperscript{211} If the law of a particular state seems to leave the citizen without a remedy for the enormous harms perpetrated by the various forms of pollution, he should call this clause to the attention of the courts. He should note that the government cannot fail to provide him with an effective remedy for the destruction of his property and injury to his health. Failure would assail one of the most salutary requirements of our constitutional system, the inexorable command that no man shall be deprived of life, liberty, or property without due process of law.

Destructive pollution must be eliminated. Through the constitutions, our forebears have given us the puissance; we must supply the will.


\textsuperscript{209} The majority of the Boomer court, in a most regressive opinion, abrogated New York's non-balancing test. The court, while claiming its inability to decide such matters, decided them. It favored the polluter and granted private condemnation damages only, without injunctive relief.

\textsuperscript{210} This portion of the discussion is not intended to deny the possibility or desirability of additional relief. Damages for harm already done, or to be expected from what has been done, should also be available. This portion of the article has concentrated on injunctive relief, since the requirement that it be a part of the remedy may not otherwise have seemed obvious.

\textsuperscript{211} See A. Howard, The Road From Runnymede (1968); 4 W. Blackstone, Commentaries * 423-24; 1 Coke's Institutes, Second Institute 45-56 (1797).