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The Hazardous Waste Abatement Liability of Innocent Landowners: A Constitutional Analysis

State and federal statutes that regulate hazardous waste impose strict liability on the parties directly responsible for the creation of the waste site. The liability of these parties is triggered by affirmative conduct in creating, transporting, or disposing of hazardous waste. The California Hazardous Waste Control Act, however, like statutes in other jurisdictions, goes further than imposing liability merely upon the creators of hazardous waste sites. The California Act provides that owners of polluted land also are liable for the cost to the state of the abatement of the hazardous waste on their land. Hence, under California law, the liability of these individuals is based upon the land ownership rather than upon conduct. While placing this liability upon landowners may promote environmental interests by providing cleanup funds, this liability also may impose unreasonable hardship on a party who had nothing to do with creating the waste site. A recent application of the California abatement statute illustrates this unfairness.

In 1981, Allan and Rosalie Cooper bought a parcel of rural land in Auburn, California. The Coopers were unaware that a prior tenant

1. 42 U.S.C. §6973(a); 42 U.S.C. §9607(a), (b); CAL. HEALTH & SAFETY CODE §25187.5. See infra notes 93-119, and accompanying text.
2. See CAL. HEALTH & SAFETY CODE §25187.5(c). Under this section, liability for costs of abating hazardous waste sites is imposed upon "operators of the property where the hazardous waste is located and producers, transporters or disposers of hazardous waste." Id. See also CAL. HEALTH & SAFETY CODE §25100, expressing the legislative finding that "increasing quantities of hazardous wastes are being generated in the state, for which the generators of the hazardous waste must provide disposal." Id.; CAL. HEALTH & SAFETY CODE §25167.2, declaring that "adequate and reasonable safeguards in handling hazardous waste, particularly in transporting hazardous wastes to disposal sites, are necessary to protect the public health and environment." Id. See also United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 834 (1984), stating that by promulgating the liability sections in 42 U.S.C. §9607, Congress meant to spread the costs of hazardous waste cleanup to those who created and profited from the waste disposal, namely generators, transporters, and disposal site owner/operators.
4. See infra notes 93-119, and accompanying text.
5. CAL. HEALTH & SAFETY CODE §25187, §25187.5(c). In addition to imposing liability upon operators, producers, transporters, and generators of hazardous waste, these sections apply to "present and prior owners of the property where hazardous waste is located." Id.
6. Id.
had contaminated 2,200 square feet of the land with polychlorinated biphenyls (PCBs), chemicals known to cause impotence, gastric disorders, and other physical damage in humans. When the previous tenant could not be found, the California Department of Health Services, pursuant to statute, sent the Coopers a bill for $20,000, the amount the state would incur in cleaning the site. The Coopers were unable to pay the bill, and escaped liability only because a volunteer effort was organized to clean the land.

This author contends that charging innocent landowners with hazardous waste abatement costs also runs counter to provisions of the United States Constitution, which provide that private property cannot be taken for a public use without just compensation, and that no one may be deprived of property without due process of law. These provisions limit the power of the state to compel expenditures by landowners for public health, safety, or welfare reasons. By statutorily imposing liability upon innocent landowners for hazardous waste site abatement, the state unconstitutionally is placing the cost of public benefits upon individuals. Under the Constitution, liability for hazardous waste cleanup should be confined to the parties that create or maintain the waste site.

To reach this conclusion, this author will examine the extent to which costs can be imposed upon individuals under the police power of the state to act in furtherance of public health, safety, or welfare.

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8. Id.
9. See CAL. HEALTH & SAFETY CODE §25187. Under this section, the department may order persons who have violated the statute to clean up the waste site. Additionally, the costs to the state of cleaning the waste site can be charged to persons who have violated the statute, including owners of land upon which hazardous waste is located. CAL. HEALTH & SAFETY CODE §25187.5(c).
11. Id.
12. The Coopers do not appear able to pay the amount assessed. Mr. Cooper is employed by a beer wholesaler; Mrs. Cooper worked as a clerk in a Salvation Army Thrift Store. Id.
13. Sacramento Bee, Sept. 26, 1984, at B1, B2, col. 1-3. The volunteers, who were organized by Mr. Joel Moscowitz of the California Department of Health Services, were also employees of the department. Id.
14. An innocent landowner is defined, for the purposes of this comment, to be an owner or occupier of land upon which hazardous waste is located, who did not by any affirmative act help to create or maintain the waste site. This definition of liability is similar to the statement of landowner liability for public nuisances in the Pennsylvania case of Commonwealth v. Barnes & Tucker Co., 353 A.2d 471, 478 (1976).
15. U.S. Const. amend. V, which provides in part: "nor shall private property be taken for a public use, without just compensation." Id. This provision has been held applicable to the states through the due process clause of the fourteenth amendment. See Chicago B. & O. R. Co. v. Chicago 166 U.S. 226, 239 (1897).
16. U.S. Const. amend. XIV, §1, which provides: "nor shall any State deprive any person of...property, without due process of law." Id.
This discussion will demonstrate that, under the police power, innocent landowners cannot be held responsible for the costs of abating hazardous waste on their land. Since environmental regulations basically are codifications of the common law of public nuisance, and because this area of common law often is considered in cases involving the limits on the power of the state to regulate land use, the responsibility of a landowner for public nuisances will be discussed. Finally, a conflict of law existing among jurisdictions regarding the ability of the state to require innocent landowners to correct hazardous waste deposits on their land will be explored. Since this conflict involves differing views of the extent of the police power, the limits on this power is an appropriate subject with which to begin discussion.

THE POLICE POWER TO ABATE WASTE SITES

The police power of the state has been described as all actions necessary to promote public health, safety, and welfare. Courts have recognized that necessary state actions can affect property interests incidentally and cause substantial losses to individuals without requiring compensation by the state. Most zoning ordinances are examples of valid exercises of the police power that affect property interests. Imposing liability upon an innocent landowner for the cost of abating a hazardous waste site also is an exercise of the police power.

Although subject to great judicial deference, an exercise of the police power affecting property rights must comport with the constitutional prohibition against the taking of private property for a public use without just compensation. The United States Supreme Court has held this prohibition to be applicable to the states under the due process clause of the fourteenth amendment. The policy of

20. See notes 21-87, 121-248 and accompanying text.
22. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922), in which the United States Supreme Court recognized that: "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change..." Id. For a discussion of Supreme Court decisions involving the taking issue, see Penn Central Transp. Co. v. City of New York 438 U.S. 104, 123-28 (1977).
26. Id. at 136-37.
the taking clause is that government should be barred from forcing individuals to bear the costs of public benefits. Thus, when property is taken for a public purpose, the costs of the property must be spread among the public through the payment of compensation to the property owner by the state. In the context of hazardous waste cases, the issue becomes whether the Constitution allows the cost of abatement to be fixed upon an innocent landowner, rather than spreading the cost to the public.

The Supreme Court of the United States has had difficulty establishing a test to determine the validity of actions taken under the police power that affect property interests. In the early case of *Mugler v. Kansas*, the Court recognized that many police power actions resulting in substantial interference with property interests are nonetheless constitutional. In *Mugler*, a statute that prohibited the manufacture of intoxicating liquors within the state substantially destroyed the value of a brewery owned by the plaintiff. In determining the validity of the statute, the Court focused on the nature of the state action, noting that the state must assert a proprietary interest in the property involved before a taking can occur. Since the state had not asserted a proprietary interest in the brewery of the plaintiff, a taking had not occurred.

The *Mugler* Court, by emphasizing the character of the state action, refused to find that the loss to the individual could justify invalidating a state action affecting property rights. Nonetheless, the Court soon began to consider the extent of individual loss, in addition to the nature of the state action, when confronted with cases involving taking issues. This was recognized by the Court in a two-pronged test for determining the validity of state actions interfering with private

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29. *Id.; see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922). In this opinion, Justice Holmes wrote: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire in other than the constitutional way of paying for the change." *Id.* at 416.
31. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978). The Court stated: "The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty...this Court, quite simply, has been unable to develop any 'set formula' . . . for use in determining what is a taking." *Id.*
32. 123 U.S. 623 (1887).
33. *Id.* at 655.
34. *Id.* at 667.
35. *Id.* at 667-69.
36. *Id.*
37. *Id.* at 664-67.
property announced in *Lawton v. Steele*. In *Lawton*, the Court stated:

To justify the state in thus interposing its authority on behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.  

The first prong of this test requires the state action to be in the public interest. In reviewing the purposes involved in a state action, however, the Court has given great deference to the determination of a state legislature that the action is in the public interest. In the context of hazardous waste abatement, this author concedes that the state validly can provide for the abatement of hazardous waste sites since this action is necessary to protect public health and the environment. For this reason, this author will focus on the second prong of the *Lawton* test, which requires that the means used in a police power action be reasonably related to the accomplishment of the state purpose without being unduly oppressive to individuals.  

In cases following *Lawton*, the United States Supreme Court has been inconsistent when deciding whether the means used in a police action are reasonably related to the state purpose. Nonetheless, the decisions repeatedly have considered both the character of the state action emphasized in *Mugler*, and the extent of the loss incurred by the individual, the consideration embodied in the second prong of *Lawton*. In *Pennsylvania Coal Co. v. Mahon*, the Court indicated that the likelihood that a taking will be found increases with the extent of diminution in property value occasioned by the state action. Thus, the state action in that case, by destroying the value of the property, was invalid as unduly oppressive on the individual.  

The Court again considered the effect individual loss will have in

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39. *Id.*
40. *Id.* at 140.
41. *Id.*
42. *Id.*
43. *Id.* at 137.
44. See, e.g., Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Laws*, 1962 SUP. CT. REV. 63, 63-64, 105-06.
45. See generally Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964). The author discusses the history in Supreme Court decisions of both the character of the state action test and the diminution in value test. *Id.* at 36-46.
46. 260 U.S. 393 (1922).
47. *Id.* at 413, 415-16.
48. *Id.* at 414.
determining the validity of state interferences with property rights in *Pennsylvania Central Trans. Co. v. City of New York.* 49 In that case, the Court identified the economic impact of the state action on the individual, as well as the character of the government action, as factors of particular significance in determining whether the means used by the state are reasonably necessary to achieve the state purpose. 50 The *Penn Central* opinion also indicates that in determining the validity of state action, the court must balance the importance and necessity of the action against the resulting individual loss. 51 Thus, a great necessity for the action taken under the police power will justify even a great loss upon the individual. 52

Before applying these rules to the question of innocent owner liability in hazardous waste cases, an additional factor for determining the validity of state interferences with property interests must be discussed. This factor is the relationship between acts of the individual and the condition the state seeks to correct. The losses occasioned by the state action in *Penn Central* and *Mugler* involved a diminution in property value. 53 In contrast, a regulation imposing hazardous waste abatement liability requires an expenditure by the individual. 54 The Court, in *Nashville, C. & St. L. Ry. v. Walters,* 55 found that a state-required expenditure may be invalid if the party assessed did not cause the condition that the state action was intended to correct. 56

The *Nashville* decision followed a line of cases involving the issue of whether the state could require a railroad to pay for the building of an underpass where automobile traffic crossed railroad tracks. 57 Generally, the Court had upheld these assessments on the rationale that since the railroad created a danger to automobile traffic that was in need of correction, the state could impose the costs of the correction upon the railroad. 58 In *Nashville,* however, the Court found error in the refusal of the state supreme court to consider evidence

50. Id. at 124. The focus upon the economic impact upon the individual takes into account more than the diminution in the value of real estate, since the Court pointed out that the extent to which the regulation has interfered with "distinct investment-backed expectations" is a particularly relevant consideration in determining if a regulation is unconstitutional. Id.
51. Id. at 135-36.
52. Id.
54. See CAL. HEALTH & SAFETY CODE §25187.
55. 294 U.S. 405 (1934). See also Dunham, supra note 44, at 73-81.
57. Id. See Sax, supra note 45 at 48-49; Van Alstyne, Taking or Damaging by Police Power: the Search for Inverse Condemnation Criteria, 44 S. CAL. L. REV. 1, 48-51 (1971).
showing that a federal road building plan, rather than the activity of the railroad, would cause increased traffic. The Court stated that "when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured." Hence, under Nashville, a person must have created a condition before being required by the state to alleviate the condition. To support this ruling, the Court cited precedents which held that tax assessments for public improvements such as sidewalks are constitutional only if the assessments reflect the particular benefits that the improvements confer upon the parties assessed.

When applied to a state requirement that an innocent landowner pay to abate a hazardous waste site, Nashville indicates that mere ownership of land does not justify placing this cost upon the individual. Instead, some conduct of the individual in creating or maintaining the waste site is required. Buttressing this conclusion is the citation in Nashville to tax assessment cases. The reference to these cases indicates the possibility that in a hazardous waste case only the amount of value added to the land by the cleanup could be imposed on the landowner. This amount is likely to be far different from the cost of the cleanup.

Nashville, which involved a state required expenditure to correct a condition on land, seems analogous to hazardous waste abatement cases that similarly require payment for the correction of conditions on land. Nonetheless, cases that have considered whether the statutory imposition of waste abatement liability upon innocent landowners meets the Lawton requirement that the means used in the state action not be unduly oppressive upon individuals, have relied on cases like Penn. Coal Co. and Penn Central, rather than Nashville, when determining this question. Unfortunately, aside from involving taking issues, these
decisions are not analogous to cases involving hazardous waste abatement liability because the losses involved in the former cases came about through diminution in the value of real property rather than through a required expenditure. Further, losses resulting from diminution in the value of real property caused by an exercise of the police power often are classified as only incidental to an exercise of the police power. Unless these losses are of a great magnitude, the exercise of the police power is likely to be found valid because the loss is merely the incidental consequence of a lawful state act. In a case involving the statutorily imposed duty to abate a hazardous waste site, however, a required expenditure, rather than a diminution in property value, is involved. For this reason, reference to cases in which a diminution in property value is balanced against the state purpose is of limited usefulness. "Nashville," on the other hand, indicates that the conduct of the party required to make an expenditure must be rationally related to the condition the state seeks to correct. In the context of hazardous waste regulation, this relationship is found in cases in which liability is imposed upon generators, transporters, and disposers of hazardous waste, since these parties caused the harm that the government seeks to correct. The relationship, however, is not present in cases that impose liability upon a landowner who did not contribute to the creation of the waste site. As in "Nashville," owning land is insufficient to trigger liability for correcting a condition on land.

Other considerations support the finding that the imposition of

69. Cf. United States v. Security Industrial Bank, 459 U.S. 70 (1982). In this case, which involved a lien ordinance statute which was held to unconstitutionally destroy pre-existing creditors' rights in property, the Court noted that since the governmental action would result in a complete destruction of the plaintiff's property right, the case... "would fit but awkwardly into the analytic framework employed in "Penn Central."" Id. at 75.

70. Property is said to be held subject to the police power, so that values incident to property can be diminished to some extent by exercises of the police power. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

71. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

72. See supra note 69 and accompanying text.

73. See supra note 53-66 and accompanying text.

74. See United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984). In this case, the court stated: "It is clear that Congress intended to have the chemical industry, past and present, pay for the costs of cleaning up inactive hazardous waste sites (citations omitted). Congress rationally considered the imposition of liability for the effects of past disposal practices as a means to spread the costs of the cleanup on those who created and profited from the waste disposal-generators, transporters, and disposal site owner/operators." Id. at 840-41.

hazardous waste liability upon innocent landowners is not sufficiently related to the state purpose and thus unconstitutional. The abatement of hazardous waste sites is undoubtedly an important governmental activity, because these sites threaten to contaminate drinking water and the environment.\textsuperscript{76} The response to this problem has been hampered by a shortage of funds.\textsuperscript{77} Unavailability of financial resources alone, however, cannot justify placing the cost of a government activity upon an individual.\textsuperscript{78} Instead, the recognition that state and federal funds are inadequate to abate the hazardous waste sites spread throughout the country necessitates asking whether the costs of cleaning these sites should be placed upon the public or upon individuals. In abating the waste sites, the government plainly is acting for the benefit of the public.\textsuperscript{79} Thus, before the costs of this activity constitutionally can be placed upon property owners, these individuals should be related to the condition the government seeks to remedy by more than mere land ownership.\textsuperscript{80}

In addition to considering the relationship between the state purpose and the means used to achieve that purpose, the \textit{Penn Central} and \textit{Lawton} cases indicate that the financial impact of the action upon the individual is also an important consideration.\textsuperscript{81} Hazardous waste abatement is expensive.\textsuperscript{82} The cost of cleaning a small site often is hundreds of thousands of dollars, and the cost of abating a large site often reaches several million dollars.\textsuperscript{83} Fixing these costs on a party who did not contribute to the creation of the site would seem unduly oppressive.

In considering whether placing these costs upon individuals is an invalid exercise of the police power, however, courts often have referred to the common law of public nuisance.\textsuperscript{84} While the law of nuisance

\textsuperscript{76} See 42 U.S.C. §6901(b) (stating the Congressional finding that unsafe hazardous waste disposal practices contaminate "drinking water from underground and surface supplies").


\textsuperscript{78} The reason for prohibiting the taking of private property for a public use is to bar the government from imposing the costs of public benefits upon individuals. Armstrong \textit{v.} United States, 364 U.S. 40, 49 (1959).

\textsuperscript{79} See 42 U.S.C. §6902. This section states the Congressional objective in regulating solid waste disposal to be "to promote the protection of health and the environment and to conserve valuable material and energy resources . . . ." \textit{Id.}

\textsuperscript{80} Nashville, 294 U.S. 405, 429-30 (1934).

\textsuperscript{81} See supra notes 37-52 and accompanying text.

\textsuperscript{82} See Note, supra note 66, at 585-87.

\textsuperscript{83} \textit{Id.}

does not control the determination of this constitutional question,\textsuperscript{85} referring to liability for other types of public nuisances is helpful in ascertaining the extent to which a state may interfere with property interests pursuant to the police power.\textsuperscript{86} Similar analogies may be drawn from statutory impositions of liability for the abatement of public nuisances.\textsuperscript{87} A discussion of abatement liability under the common law and statutes, therefore, is necessary to determine the constitutionality of a statute imposing hazardous waste abatement liability upon an innocent landowner.

**LIABILITY FOR PUBLIC NUISANCES**

Environmental statutes imposing liability for hazardous waste abatement essentially are codifications of the law of public nuisance.\textsuperscript{88} Thus, courts often refer to nuisance law in deciding the liability of parties in hazardous waste cases.\textsuperscript{89} Under common law, an action can be brought by the state to abate a use of land that injures public health, safety, or welfare.\textsuperscript{90} The state also has authority, subject to constitutional limitations, to declare land uses to be public nuisances, and to provide for their abatement.\textsuperscript{91}

A number of statutes provide for the abatement of hazardous waste sites.\textsuperscript{92} A brief examination of these statutes is necessary to establish the liability these statutes impose upon innocent landowners. A comparison then will be made between the statutory liability for waste sites and the abatement liability of landowners for public nuisances at common law and under other statutes to demonstrate that the imposition of abatement liability upon innocent landowners is not supported by the law of public nuisance.

\textsuperscript{85} Cf. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926) (stating that the law of nuisance may be consulted to help determine the validity of an exercise of the police power that affects property interests).

\textsuperscript{86} Id.

\textsuperscript{87} Id.

\textsuperscript{88} See supra note 18 and accompanying text.


\textsuperscript{90} See City of Turlock v. Bristow, 103 Cal. App. 750, 752, 284 P. 962, 963 (1930).


I. Statutory Imposition of Hazardous Waste Abatement Liability

Many of the statutes regulating hazardous waste disposal impose cleanup liability upon innocent landowners. The first federal statute enacted as a response to hazardous waste disposal problems was the Resource Conservation and Recovery Act of 1976 (RCRA). RCRA primarily addresses the current generation and disposal of hazardous waste and, therefore, assigns liability for improper waste disposal to the parties causing the problem, namely, the creators and disposers of hazardous waste. Nonetheless, a key RCRA provision also applies to innocent landowners. The imminent hazard provision of RCRA permits the Environmental Protection Agency (EPA) to take necessary action to abate a waste site presenting an imminent danger to public health or to the environment. This provision has been interpreted to allow the imposition of abatement liability based solely upon land ownership.

Congress and the EPA considered RCRA inadequate in dealing with the problem of inactive or abandoned hazardous waste sites because no funds were provided for use in abating waste sites and because early federal court decisions interpreting the imminent hazard provision held the provision not to have retroactive application. For these reasons, Congress passed the Comprehensive Response, Compensation and Liability Act of 1980 (CERCLA). Also known as the Superfund legislation, CERCLA provides funds for the EPA to use in abating hazardous waste sites. The fund, which originally amounted to $1.6 billion, is composed of fees imposed on the oil and chemical industries and additional federal monies.

Two provisions in CERCLA apply to innocent landowners. One

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93. See supra note 92 and accompanying text.
97. Id.
98. Id.
99. Id.
104. Id. §9611.
105. Id. §9631.
provision allows the EPA to undertake necessary abatement actions, and another fixes liability for waste site abatement. Liability is assigned to owners of a "facility" containing hazardous waste that requires cleanup. Since the term "facility" is defined to include any land upon which hazardous waste is located, the owner of such land might be held liable for the costs of abating the waste.

Although RCRA and CERCLA impose hazardous waste abatement liability upon innocent landowners, most federal cases involving hazardous waste have involved generators, transporters, or disposers of hazardous waste rather than innocent landowners. The federal courts have not considered the constitutionality of applying these statutes to innocent landowners. State courts, however, which have handled more cases involving the waste abatement liability of innocent landowners, have considered the constitutionality of innocent owner liability under state hazardous waste statutes. States have passed or amended laws to comply with federal standards and, as a result, state statutes sometimes reflect the federal assignment of liability upon innocent landowners. Although worded differently than the federal statutes, the California statute similarly imposes abatement liability on owners of land upon which hazardous waste is sited. Statutes in other states vary from the federal scheme. The New Jersey statute, for example, provides that "responsible" parties are liable for cleanup costs of hazardous waste sites. This term has been interpreted to include only those parties who, by affirmative conduct, created or maintained the waste site.

106. Id. §9606(a).
107. Id. §9607(a), (b), (c).
108. Id. §9606(a), §9607(a).
109. Id. §9601(9).
110. Id. §§9606(a), §9607(a).
112. See infra notes and accompanying text.
114. Compare Mass. GEN. LAWS ANN. Ch. 21E, §5 (imposing liability upon "the owner or operator of a vessel or a site" where hazardous waste is located) with 42 U.S.C. §9607(a)(1) (imposing liability upon "the owner or operator of a vessel or a facility" where waste is located).
115. Compare 42 U.S.C. §§9607(a) (subjecting "the owner and operator of . . . a facility" to liability for hazardous waste abatement costs) with CAL. HEALTH & SAFETY CODE §25187.5 (in which abatement liability is imposed upon "present and prior owners, lessees, or operators of the property where the hazardous waste is located").
116. CAL. HEALTH & SAFETY CODE §§25187, 25187.5.
117. N.J. STAT. ANN. §58:10-23.11g(b), (c).
118. See infra notes 193-227 and accompanying text.
Thus, federal statutes, and the statutes of some states, including California, allow the imposition of hazardous waste abatement costs upon innocent landowners. Courts, when asked to determine the constitutionality of these statutory impositions, have considered the extent to which landowners are liable for public nuisances other than hazardous waste sites. Therefore, a determination of the extent to which a landowner is responsible for the abatement of a public nuisance at common law and under statute is necessary for an understanding of how a court may rule when faced with a challenge by an innocent landowner to a hazardous waste abatement statute.

2. Common Law and Statutory Assignments of Abatement Liability

When considering the extent of landowner abatement liability for hazardous waste, a court will inquire whether landowners are under a duty to abate a public nuisance on their land, regardless of the cost to the landowner. This duty could be employed by the court to justify the imposition of waste abatement costs upon innocent landowners. Thus, the extent to which an owner of land is under a duty to abate nuisances on the land must be determined. A duty of this type can be derived from the common law or statutory nuisance controls.

The law of nuisance is premised upon the idea that the rights of one person cannot be used in a manner that interferes with the rights of another. When this interference occurs, liability in nuisance arises. As a general rule, common law responsibility for a nuisance flows from the acts of the person in creating the nuisance, or from an affirmative act of compounding the nuisance. Within this general

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120. Id.
121. Cf. Leslie Salt Co. v. San Francisco Bay Cons. Etc. Comm., 153 Cal. App.3d 605, 200 Cal. Rptr. 575 (1984). The court found that a common law duty of landowners to abate public nuisances on their land supported a state order that a landowner remove unauthorized fill material on the land. Id. at 622, 200 Cal. Rptr. at 585-86.
124. See W. Prosser, Law of Torts, §87 at 574 (4th Ed. 1971), stating: "Today liability for nuisance may rest upon intentional invasion of the plaintiff's interest, or a negligent one, or conduct which is abnormal and out of place with its surroundings, and so falls fairly within the principle of strict liability." Id.
125. RESTATEMENT (SECOND) OF TORTS §834 (1977). This section states that "one is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on." Id.
framework, common law and the Restatement of Torts state that a possessor of land is responsible for harmful artificial conditions on the land.\textsuperscript{126} The duty does not extend to conditions that are not susceptible of abatement by reasonable means.\textsuperscript{127}

Nonetheless, an examination of case law reveals that courts are reluctant to impose abatement liability upon landowners who did not create or maintain the nuisance. For example, at common law the landowner was not responsible for nuisances occurring naturally upon the land.\textsuperscript{128} Courts also have been reluctant to impose liability when the nuisance was created by strangers or trespassers.\textsuperscript{129} In \textit{Brown v. McAllister},\textsuperscript{130} a landowner sued his uphill neighbor for nuisance when sewage passed from the neighbor's land and damaged a building upon plaintiff's land.\textsuperscript{131} The California Supreme Court found that the neighbor could not be held liable since the sewage merely had passed over his land after being discharged from a lot still further up the hill.\textsuperscript{132} Thus, the neighbor could not be held liable because he did not cause the nuisance.\textsuperscript{133}

While a landowner is under a limited duty to correct harmful artificial conditions on the land, statutes often expand this liability by requiring expenditures for which the landowner would not have been liable at common law.\textsuperscript{134} A statute of this type was challenged as unconstitutional in \textit{Thain v. City of Palo Alto}.\textsuperscript{135} The statute in \textit{Thain} provided that if the landowner failed to abate weeds thought to be a fire hazard by city officials, a city employee could enter the land and destroy the weeds.\textsuperscript{136} The city then could recoup the costs

\textsuperscript{126} See id. §839.
\textsuperscript{127} See id. at comment f. This comment states that: "the law does not require the unreasonable or fantastic, and therefore even though it might conceivably be possible to abate a particular condition, it is not 'abatable' within the meaning of this section unless its abatement can be accomplished without unreasonable hardship or expense." Id.
\textsuperscript{128} See \textit{RESTATEMENT (SECOND) OF TORTS} §840 (1977).
\textsuperscript{129} See id. §838; \textit{Brown v. McAllister}, 39 Cal. 573, 575-76 (1870).
\textsuperscript{130} 39 Cal. 573, 575-76 (1870).
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} See \textit{Thain v. City of Palo Alto}, 207 Cal. App. 2d 173, 177-80, 24 Cal. Rptr. 515, 517-18 (1962) (landowners required to abate weeds on their land); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 81-82 (1946) (owners of boarding houses required to install automatic sprinklers); People v. Greene, 264 Cal. App. 2d 774, 776-78, 70 Cal. Rptr. 818, 819-21 (1968) (owner of land required to fill excavations).
\textsuperscript{135} 207 Cal. App. 2d 173, 177, 24 Cal. Rptr. 515, 517 (1962); see also People v. Lim, 18 Cal. 2d 872, 877 (1941) (explaining that the ability of the legislature to define as public nuisances activities that were not nuisances at common law and to provide for their abatement is used as a means of enforcing public policy).
\textsuperscript{136} \textit{Thain} at 177-78, 24 Cal. Rptr. at 517.
from the landowner. Under this authority, a city employee destroyed weeds on private property, and the owner of the property was charged $64.48. The court upheld the imposition of this cost as a valid exercise of the police power. Hence, under Thain, the state can statutorily expand the common law duty of landowners to abate nuisances on the land.

People v. Greene is another California case involving a statutorily imposed abatement duty upon a landowner. In Greene, the California Court of Appeal stated that the cause of a harmful condition upon the land generally is immaterial, because "it is the existence of the condition rather than its cause which determines the nuisance." Thus, once a nuisance had been created, the state could compel landowners to make their property safe. The court recognized, however, that a statutorily imposed abatement duty was constitutionally limited to the expenditure of amounts that were reasonable in relation to the public health or safety interest being protected. Since the landowner failed to establish the costs of abating the nuisance, however, the court decided that the issue of excessive costs was irrelevant and, therefore, upheld the statute.

In Leslie Salt Co. v. San Francisco Bay Conservation, Etc. Commission, however, a California court allowed great expense to be statutorily imposed upon a landowner. The statute required the obtaining of a permit from the San Francisco Bay Conservation Commission (hereinafter referred to as Commission) before fill material could be placed on land abutting San Francisco Bay. In violation of the statute, an unknown person placed landfill material on land owned by Leslie Salt Co.

The Commission ordered Leslie Salt to remove the fill, to which

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137. Id.
138. Id.
139. Id. at 191-92, 24 Cal. Rptr. 526.
140. 264 Cal. App. 2d 774, 70 Cal. Rptr. 818 (1968).
141. Id. at 776, 70 Cal. Rptr. at 819.
142. Id. at 778, 70 Cal. Rptr. at 820.
143. Id.
144. Id.
145. Id. at 780, 70 Cal. Rptr. at 822.
146. Id.
148. The state estimated the cost imposed upon the landowner to be $60,500, but Leslie Salt placed the cost at $100,000. Id. at 610, 200 Cal. Rptr. at 577-78.
149. CAL. GOV'T CODE §§66600-66661.
150. Id. §66632.
151. Leslie Salt, 153 Cal. App. 3d at 609-11, 200 Cal. Rptr. at 577-78.
order Leslie Salt objected. In upholding the order of the Commission, the court stated that at common law responsibility for conditions on the land flow directly from the "very possession and control of the land in question." The court, however, did not consider the constitutionality of imposing large abatement costs upon the landowner. Thus, the court did not decide whether the abatement cost in the case, although large, was a reasonable cost to impose on the landowner. If Leslie Salt is harmonized with the holding in Greene that the abatement duty of landowners is limited to the expenditure of reasonable amounts, then the two cases stand for the proposition that under California law a statute can impose a duty upon landowners, based solely on land ownership, to spend reasonable amounts to abate nuisances on their land.

The Leslie Salt decision that abatement liability can be based upon landownership under the common law, however, is inconsistent with the result in Brown, in which the California Supreme Court refused to hold an innocent landowner responsible for abating a nuisance caused by another. Furthermore, a case from another jurisdiction indicates that under the common law, abatement liability does not arise from landownership alone. Commonwealth v. Barnes & Tucker, a Pennsylvania case, involved the discharge of acid drainage from an inactive coal mine owned by the defendant. The Commonwealth Court of Pennsylvania stated that owners of land cannot be held to abate nuisances on their land unless they had helped create or maintain the nuisance. Thus, the common law is unclear on the question of whether abatement liability for nuisances created by third parties can be imposed on the basis of land ownership.

In summary, the common law acknowledges a deviation from the general rule that liability for nuisance derives from the act of creating or maintaining a nuisance, and holds that a landowner can be subjected to reasonable liability for nuisances occurring on land in the possession of the landowner. A statute enacted pursuant to the police

152. Id.
153. Id. at 622, 200 Cal. Rptr. 586.
154. Id. at 583, 200 Cal. Rptr. at 618.
155. Brown, 39 Cal. at 575-76.
158. Id. at 476-78.
159. Id. The court, however, held that by creating the condition, the defendants had become responsible for abatement of the drainage. Id. at 478-80.
160. See supra notes 120-27 and accompanying text.
161. See supra notes 134-59 and accompanying text.
power can expand this landowner liability to reasonable abatement efforts for conditions upon the land for which the landowner was not responsible at common law.\textsuperscript{162} If a statute requires great expenditures by the landowner or imposes costs for public benefits, the police power authority for the statute is weakened and the requirement may be unconstitutional.\textsuperscript{163} Moreover, the \textit{Brown} decision indicates a judicial reluctance to impose common law nuisance abatement liability on landowners for nuisances created by other parties.\textsuperscript{164} Finally, although a conflict exists over whether landowner liability derives from ownership of land or from conduct in creating the nuisance,\textsuperscript{165} California cases hold the abatement liability to be incident to ownership.\textsuperscript{166}

Applying these rules to a case involving the statutory requirement that an innocent landowner abate hazardous waste, a California court is likely to follow the \textit{Leslie Salt} and \textit{Greene} cases and hold that the landowner may be required to make reasonable expenditures to abate the waste. A different result, however, easily could be reached in a case before the California Supreme Court if the court applies \textit{Brown} and the rationale of cases from other jurisdictions to decide the issue of innocent owner liability. An examination of hazardous waste decisions in jurisdictions other than California, therefore, is necessary.

\textbf{HAzARnDous WASTE DECISIONS}

Although the issue has not been resolved in California,\textsuperscript{167} the extent to which an innocent landowner can be held liable for hazardous waste abatement costs has been determined in other jurisdictions with varying results. In Pennsylvania, a state supreme court decision indicates that innocent landowners can be held liable for hazardous waste abatement on the basis of land ownership.\textsuperscript{168} In New Jersey, on the other hand, the landowner must contribute affirmatively to the creation or maintenance of the waste site before liability is triggered.\textsuperscript{169} Finally, at least one federal case has held owners of polluted land to be liable under federal law because of land ownership.\textsuperscript{170} Since the reasoning

\begin{itemize}
  \item \textsuperscript{162} \textit{Id.}
  \item \textsuperscript{163} \textit{Id.}
  \item \textsuperscript{164} See \textit{supra} notes 128-33 and accompanying text.
  \item \textsuperscript{165} See \textit{supra} notes 120-59 and accompanying text.
  \item \textsuperscript{166} See \textit{supra} notes 134-55 and accompanying text.
  \item \textsuperscript{167} See \textit{Neary}, \textit{supra} note 7, and accompanying text.
  \item \textsuperscript{168} See \textit{infra} notes 171-92 and accompanying text.
  \item \textsuperscript{169} See \textit{infra} notes 193-227 and accompanying text.
\end{itemize}
in these decisions may provide persuasive authority for a California court confronted with the issue of innocent owner liability in a hazardous waste case, these cases will be discussed in the following sections.

1. Pennsylvania Cases

Pennsylvania has enacted legislation that, like the statute in California, imposes strict liability on landowners for the abatement of hazardous waste on their land. This statute was applied in Philadelphia Chewing Gum Co. v. Commonwealth, in which landowners leased a portion of their property to a business, National Wood Preservers, which dumped chemicals into a well on the leased land. The chemicals leaked into surrounding property used by a gas station and a chewing gum company. In addition to ordering National Wood and the lessors of the property to abate the pollution, a state agency imposed liability upon the gas station and the chewing gum company. Since the latter two parties did nothing to create the nuisance, the agency imposed liability on them based on land ownership alone. The decision of the state agency was appealed to the Pennsylvania Commonwealth Court, which refused to impose liability upon all the defendants. The court held that imposing liability on the basis of land ownership alone would be to employ means that, under the Lawton test, would be unduly oppressive upon individuals and hence unconstitutional. To be constitutional, the abatement liability of an innocent landowner for hazardous waste must be based upon conduct as well as land ownership. Thus, the lessors of the waste site were liable due to their conduct of accepting rent when they should have known of the dumping. National Wood also was liable as the creator of the waste site. The possessors of neighboring properties, however, could not be held liable for abatement in the absence of conduct adding to the pollution.

171. CAL. HEALTH & SAFETY CODE §25187.5.
174. Id. at 144-46.
175. Id.
176. Id. at 144.
177. Id. at 148.
178. Id.
179. Id. at 148-52.
180. Id.
181. Id. at 150.
182. Id. at 152.
183. Id. at 151.
184. Id. at 150-51.
National Wood and the land lessors appealed to the Pennsylvania Supreme Court in *National Wood Preservers v. Commonwealth.*\(^{185}\) Although the lower court had imposed liability due to the conduct of these parties in contributing to the creation of the waste site,\(^{186}\) the appellants claimed that the liability was based solely upon land ownership and, therefore, was unduly oppressive.\(^{187}\) The supreme court, while affirming the lower court decision, held that the abatement liability could be based solely upon ownership of the land where the condition was located without being unduly oppressive.\(^{188}\) The court found that the validity of an exercise of the police power does not depend upon the responsibility of the owner for the condition the state is seeking to correct.\(^{189}\) The State appealed the lower court decision that the gas company and the chewing gum company could not be held liable absent a showing that they had contributed to the pollution. This appeal was dismissed without explanation in the majority opinion.\(^{190}\)

A concurring opinion helps to explain this inconsistency by indicating that despite language to the contrary in the majority opinion, the decision of the court to impose liability was based upon the conduct of the parties as well as land ownership.\(^{191}\) The concurring opinion then noted that imposing liability based solely upon land ownership would be to employ unconstitutionally oppressive means under the test in *Lawton v. Steele.*\(^{192}\) Thus, read in light of the concurring opinion, the *National Wood* decision holds that a landowner must act affirmatively to create or maintain the waste site before landowner abatement liability can be constitutionally imposed. An examination of New Jersey hazardous waste abatement cases reveals that New Jersey courts have reached a similar result.

2. *New Jersey Cases*

Like Pennsylvania, the New Jersey courts that have considered landowner abatement liability in hazardous waste cases have focused upon the conduct of the landowner in creating or maintaining the waste site as a basis for imposing liability.\(^{193}\) The New Jersey hazardous

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188. *Id.* at 45-47.
189. *Id.*
190. *Id.* at 47.
191. *Id.*
192. *Id.*
193. See Lansco v. Department of Environmental Resources, 350 A.2d 520, 523-26 (N.J.)
waste statute, unlike the similar statutes in California and Pennsylvania, imposes strict abatement liability upon persons who have discharged, or who are responsible for, hazardous waste,194 rather than upon landowners per se.195 The issue in the New Jersey cases, then, is whether an innocent landowner is a responsible party within the meaning of the statute. To date, the New Jersey courts have resolved this issue in favor of the innocent landowner.196

An early New Jersey case concerning the statutory abatement liability of land owners, Lansco v. Department of Environmental Resources,197 involved the liability of Lansco, a corporation that maintained tanks for the storage of asphaltic oil.198 An unknown person opened valves on the tanks one night, allowing oil to spill into the Hackensack River.199 A state agency200 informed Lansco that the corporation was required to clean the spill as a responsible person within the meaning of the pollution abatement statute.201 When Lansco sued for a declaratory judgement,202 the Superior Court of New Jersey, Chancery Division, held Lansco strictly liable, not as a landowner, but because Lansco, by storing oil on the land, had engaged in conduct that created the risk of oil spillage.203 Thus, the company was liable when the event at risk occurred.204

The same court decided Department of Environmental Resources v. Exxon,205 in which a state agency206 sought to impose abatement liability on a landowner for spilled oil under the same statute that was involved in Lansco.207 The landowner, a manufacturer,208 had purchased the land from Exxon Oil Co., which had spilled large quan-

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194. N.J. STAT. ANN. §58:10-23.llg(b),(c).
195. See supra notes 93-119 and accompanying text.
196. See infra notes 197-227 and accompanying text.
198. Id. at 521.
199. Id.
200. The state agency was the New Jersey Department of Environmental Protection. Id. at 522.
201. Id.
202. Id. at 523.
203. Id. at 523-26.
204. Id. at 526.
206. The state agency again was the New Jersey Department of Environmental Protection.
207. NEW JERSEY STAT. ANN. §§58:10-23.3(c).
208. Exxon, 376 A.2d at 1341-42.
ties of oil on the ground. The court refused to hold the owner liable, finding that the waste statute required an affirmative acceptance of the condition by the subsequent purchaser before responsibility attached. Since the manufacturer did not engage in activity resulting in an affirmative acceptance of the condition, no liability could be imposed. The state could not maintain a common law public nuisance action against the landowner for the same reason. Thus, the Exxon and Lansco cases demonstrate that, under New Jersey law, an innocent landowner cannot be required to abate hazardous waste absent a showing that the landowner affirmatively helped to create or maintain the nuisance.

Another significant New Jersey case is Environmental Protection Department v. Ventron. For many years the owners of a mercury processing plant dumped waste on the plant site and in adjacent waters, producing the worst known freshwater mercury contamination in the world. A real estate developer bought the site, unaware of the pollution. The appellate court found that the developer could not be held answerable for the abatement of the pollution on the basis of land ownership alone under either the common law or the statute. The court stated that before liability could attach, the developer would have to contribute to the pollution by an affirmative act. The former mercury processors, on the other hand, were liable for abatement of the pollution under the statute because of conduct in creating the waste site.

Upon appeal by the mercury processor, the state supreme court affirmed the lower court decision. The issue of innocent owner liability was not before the supreme court because the state agency did not appeal the decision of the lower court that the developer was not liable. Nonetheless, the supreme court decision is instructive, because the court affirmed the grounds upon which the lower court decision was based. Thus, the court indicated that ownership of

209. Id.
210. Id. at 1346-47.
211. Id.
212. Id. at 1348-50.
214. Id. at 458-59.
215. Id. at 464.
216. Id. at 463-64.
217. Id.
218. Id. at 459.
220. Id. at 903.
221. Id. at 900-03.
land alone is insufficient to trigger abatement liability for hazardous waste sites.\textsuperscript{222}

In summary, under New Jersey law, landowner abatement liability for hazardous waste cannot be based solely upon ownership of polluted land.\textsuperscript{223} Instead, the New Jersey courts have required conduct on the part of the landowner to justify the imposition of abatement liability.\textsuperscript{224} This requirement exists under both the statutory and common law of New Jersey\textsuperscript{225} and is consistent with the holding in the Pennsylvania Supreme Court case \textit{National Wood Preservers} as explained by the concurring opinion in that case.\textsuperscript{226} At least one federal court, however, in considering the hazardous waste abatement liability of innocent landowners under federal statutes, has reached a contrary result, finding that landowners can be held responsible for cleaning waste sites despite the lack of affirmative conduct in creating or maintaining the waste site.\textsuperscript{227}

3. Federal Cases

In \textit{United States v. Price},\textsuperscript{228} the EPA sought to apply the imminent hazard provision of RCRA\textsuperscript{229} to purchasers of an existing hazardous waste site.\textsuperscript{230} The landowners moved for summary judgement, arguing that the provision was inapplicable to persons who did not actually create the waste site.\textsuperscript{231} In denying the motion, the district court held that subsequent purchasers who did nothing to create a waste site could nonetheless be held liable for abatement costs under the statute simply by "virtue of their studied indifference to the hazardous condition."\textsuperscript{232} The court further stated that ownership of land carries liability for conditions on the land.\textsuperscript{233} In spite of the lack of

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\textsuperscript{222} \textit{Id.} at 908 (the court did note, however, that ownership and control of land at the time of the dumping will result in liability if the landowner has the opportunity to prevent the dumping and fails to do so).
\textsuperscript{224} See supra notes 197-222 and accompanying text.
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} \textit{National Wood Preservers}, 414 A.2d 37, 47-48 (Pa. 1980). For a discussion of this case, see supra notes 162-81 and accompanying text.
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.} at 1073.
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} \textit{Id.} at 1073-74.
\textsuperscript{232} \textit{Id.}
\textsuperscript{233} \textit{Id.}
affirmative conduct in adding to or maintaining the waste site, the
court suggested that other conduct of the purchasers justified impos-
ing liability.\textsuperscript{234} The court noted that the purchasers were sophisticated
investors.\textsuperscript{235} Thus, the purchasers were under a duty to investigate
conditions on the land, and by failing to investigate and to take action
to abate the nuisance,\textsuperscript{236} the purchasers had become liable under the
statute.\textsuperscript{237}

Other federal cases involving hazardous waste have failed to deter-
mine the abatement liability of innocent landowners. In \emph{City of
Philadelphia v. Stephan Chemical Co.},\textsuperscript{238} for instance, a disposer
illegally dumped hazardous wastes in a city landfill.\textsuperscript{239} Without deter-
mining the abatement liability of the city, the court held that possible
city liability under the abatement provisions of CERCLA\textsuperscript{240} did
not prevent the city from maintaining the action for costs against
the generator of the wastes.\textsuperscript{241} Although the issue was not decided
in \emph{Stephan Chemical}, the case indicates that innocent landowners may
be held liable for waste abatement in federal courts.

Federal law, under the \emph{Price} holding, allows innocent landowners
to be held strictly liable for the abatement of hazardous waste sites.\textsuperscript{242}
The precedential value of this decision is slight, however, because the
defendants failed to argue that imposing hazardous waste abatement
liability upon persons who did not create or maintain the the waste
site is contrary to the law of nuisance.\textsuperscript{243} More importantly, the defen-
dants failed to claim that imposing this liability upon innocent land-
owners was unconstitutionally oppressive.\textsuperscript{244} Finally, \emph{Price} imposes the
broadest abatement liability yet applied in a federal court.\textsuperscript{245} Whether
other federal courts similarly will impose this abatement liability is
uncertain.\textsuperscript{246}

The federal decisions in \emph{Price} and \emph{Stephan Chemical} clearly con-

cflict with state decisions discussed above.\textsuperscript{247} These latter decisions find

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 1139.
\item Id. at 1141.
\item Id. at 1142-43.
\item \emph{Price}, 523 F. Supp. at 1073-74.
\item Id. at 1069.
\item Id. at 1073.
\item See United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823,
  837 (E.D. Conn. 1984).
\item Id.
\item See supra notes 167-227 and accompanying text.
\end{enumerate}
\end{footnotesize}
imposition of innocent landowner abatement liability in hazardous waste cases to be unconstitutionally oppressive. To help resolve this conflict, a discussion of appropriate standards for determining landowner liability in hazardous waste cases will follow.

**Appropriate Standards for Landowner Abatement Liability in Hazardous Waste Cases**

Constitutional challenges to statutes requiring landowners to abate hazardous waste have centered on the second prong of the test announced in *Lawton v. Steele.* This part of the test requires the state action to be reasonably related to the state purpose without being unduly oppressive upon individuals. Under *Penn Central,* oppressiveness can be determined by measuring the financial impact of the state action upon the individual. While this consideration has application in hazardous waste cases, courts that have rejected the imposition of liability upon innocent landowners have focused on the absence of affirmative conduct by the landowner as the decisive factor in determining oppressiveness. This concentration upon conduct is unsurprising because the striking feature of these hazardous waste cases is the imposition of liability upon individuals who did nothing to justify the imposition of liability. Since the land of these individuals has become polluted through the acts of others, the landowner is a victim rather than a culprit. Yet, under the statutes, the landowner is treated the same as a party who created the waste site. Nonetheless, the state courts have recognized the innocence of the landowner, as demonstrated by the lack of affirmative conduct in creating or maintaining the waste site, as justification for refusing to impose abatement liability. The courts, therefore, hold that liability for hazardous waste site abatement in the absence of acts associating the landowner with the waste site is either not within the scope of the statute or is oppressive under the *Lawton* test.

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248. *Id.*
249. 152 U.S. 133, 137 (1894).
250. *Id.*
252. *Id.* at 124.
253. *See supra* notes 37-87 and accompanying text.
254. *See supra* notes 67-248 and accompanying text.
255. *See* CAL. HEALTH & SAFETY CODE §25187.5(c); 42 U.S.C. §6973(a); 42 U.S.C. §9607(a);
256. *See supra* notes 167-227 and accompanying text.
257. *Id.*
258. *Id.*
259. *Id.*
The refusal to allow hazardous waste abatement liability to be based solely upon land ownership is also supported by the law of public nuisance. The decisions of state courts in hazardous waste cases clearly have recognized that abatement liability for public nuisances cannot arise from land ownership alone. Although California public nuisance cases have imposed abatement liability based upon land ownership alone, these cases also hold that the resulting costs to the landowner must be reasonable. The imposition of hazardous waste abatement liability would seem to fall outside this rule because this imposition would subject the landowner to unreasonable expense.

A third reason for refusing to impose liability based upon land ownership alone is found in the doctrine of strict liability. Statutes imposing hazardous waste abatement, in addition to holding landowners responsible for waste abatement, impose strict liability upon parties responsible for the existence of waste sites. The imposition of liability upon parties who created the waste site is in accordance with strict liability doctrine, under which liability is imposed for harms resulting from deliberate conduct in carrying out dangerous activity. In the case of innocent landowners, however, the application of strict liability is inappropriate because the owner has not engaged in conduct justifying the imposition of strict liability.

For these reasons, an owner who did not create or maintain a hazardous waste site should not be liable for abatement costs. Conversely, a landowner who did help to create the waste site is liable under the law of nuisance and strict liability doctrine. Furthermore, because of this liability, these persons do not have the constitutional objections that innocent owners have to the imposition of waste abatement liability. Some basis is needed, however, for separating innocent landowners from non-innocent owners.
JUDICIAL AND STATUTORY STANDARDS FOR IMPOSING HAZARDOUS WASTE ABATEMENT LIABILITY

State courts considering the hazardous waste liability of innocent landowners have held that this liability may not be imposed unless the landowner has helped to create or maintain the waste site.\(^{270}\) The courts following this standard recognize that hazardous waste abatement cannot be triggered by land ownership alone.\(^{271}\) In cases involving this liability, then, the issue becomes whether the conduct of the owner was sufficient to justify imposing this liability. This question will be readily resolved against landowners who participate in creating or maintaining a waste site by activity such as running a landfill operation and accepting hazardous waste for disposal.\(^{272}\) Conversely, owners without contemporaneous knowledge of the dumping, and who do not thereafter actively maintain the dumpsite, could not be held responsible for abatement costs since these parties have not helped to create or maintain the waste site.\(^{273}\) Finally, mere knowledge of the waste site would not justify liability.\(^{274}\)

Hazardous waste abatement regulations, also must be focused upon the conduct of the parties who create waste sites in order to be constitutional. Statutes that impose hazardous waste abatement liability on the basis of land ownership alone can be modified without great difficulty, because these statutes generally also impose liability upon parties who created the waste site.\(^{275}\) The California statute, for instance, states that "present and prior owners, lessees, or operators of the property where hazardous waste is located, and producers, transporters, or disposers of the hazardous waste" are responsible for the costs of abating the waste site.\(^{276}\) Of these parties, liability is imposed upon "producers, transporters or disposers of the waste," and "operators of the property," for conduct that results in the creation or maintenance of a waste site. In contrast, the statutory imposition of liability upon "present and prior owners, and lessees," allows liability to be imposed upon land ownership alone.\(^{277}\) Since the liability of these parties is not based upon conduct, this portion

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270. See supra notes 167-227 and accompanying text.
271. See supra notes 171-227 and accompanying text.
272. See supra notes 167-257 and accompanying text.
273. Id.
275. See supra notes 93-119 and accompanying text.
276. CAL. HEALTH & SAFETY CODE §§25187, 25187.5.
277. Id. at §§25187, 25187.5
of the statute should be excised to be consistent with the Constitution. The liability of non-innocent owners would remain intact under the statute, since by virtue of their conduct these parties could be held liable either as operators of the property\textsuperscript{278} or as disposers of waste\textsuperscript{279}. To avoid confusion, the definitions of these parties could be altered to include property owners who allow dumping of hazardous waste on their land.

**Conclusion**

State and federal statutes presently impose strict liability on landowners for abating hazardous waste on their land. Since the landowner need not have participated in creating or maintaining the waste site, this liability is based upon nothing more than ownership. Imposing liability on individuals for waste dumped on their land by others without permission violates the policy of imposing liability only upon those who cause harm. This amounts to a requirement that the landowner pay for a public benefit.

Imposing this liability on innocent landowners runs counter to the constitutional guarantee that land cannot be taken for a public purpose without just compensation. The United States Supreme Court has held that an unconstitutional exercise of the police power occurs when the means used in a statute affecting property rights are not reasonably related to the purpose of the statute or are unduly oppressive upon the individual. Hazardous waste statutes that impose abatement liability on the basis of land ownership require the individual to pay the cost of a public benefit. If the property owner did not create the harm the state seeks to correct, then the state is taking property without due process of law. Liability for hazardous waste sites, therefore, should be limited to the parties creating or maintaining the site.

*Ken Purviance*

\textsuperscript{278} See notes 167-227 and accompanying text.
\textsuperscript{279} Id.