65

11/30/67

STUDY RELATING TO INVERSE CONDEMNATION

PART III. DELIBERATELY INFLICTED PHYSICAL INJURY OR DESTRUCTION

by

Arvo Van Alstyne*

* This study was prepared for the California Law Revision Commission by Professor Arvo Van Alstyne, College of Law, University of Utah. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

Analytical assumptions. Each of the theoretical approaches just reviewed contributes valuable insight into the critical problem of identifying the boundary line between compensable and non-compensable governmental action. None of them however, provides a test which clearly meets the requirements of functional workability, analytical dependability, and political acceptability in sufficient degree to warrant exclusive adoption as the basis of a proposed legislative program. They all have in common, nonetheless, an underlying attitude toward the problem which greatly reduces the need for any effort at reconciliation of theoretical differences. Each appears to assume that the infliction of substantial injuries upon established economic interests, as the result of governmental activity, ordinarily calls for payment of just compensation. The function of each approach is to attempt to identify criteria which justify the exclusion of some kinds of losses from the purview of this normative obligation to compensate.

A similar point of departure is employed in the discussion which follows. Recurring factual circumstances, in which claims to constitutionally required compensation for injuries sustained have been advanced, will be examined in an effort to assess whether, on rational policy grounds, compensation should be granted or withheld. In the absence of convincing reasons to the contrary, compensability is regarded as the appropriate conclusion, consistent with the constitutional mandate.

Deliberately Inflicted Physical Injury or Destruction

(a) "Denial destruction". In times of extreme emergency or disaster, public officials may order the selective destruction of private property to protect the community from widespread and calamitous loss. Discretionary decisions of this sort, notwithstanding the magnitude of the particular

private loss, are not a basis of personal tort liability of the officer. In the early California decision Surocco v. Geary,[129] for example, a city official who commanded the blowing up of a private building to prevent the spread of a conflaration, was held immune from liability for the consequences to the owner.[130] The same result would follow today under pertinent provisions of the California Tort Claims Act of 1963.[131] The general policies urged in support of the statutory immunity for exercises of official discretion seem to be fully applicable in such cases; fear of possible personal liability surely should not be permitted to deter vigorous official action deemed essential to the safety of the community.[132]

It is not clear, however, that immunity should extend to the public entity. Destruction of private property to prevent it from falling into enemy hands in wartime or to deny its combustible elements to a raging fire - the typical instances of "denial destruction" - has all the outward earmarks of a taking of private property for public purposes, surely a legitimate public "use" within constitutional standards. Moreover, in terms of public policy, it seems apparent that "those for whose supposed benefit the sacrifice was made ought, in equity and justice, to make good the loss which the individual has sustained for the common advantage of all."[133] Withholding of just compensation in such cases thus must find its justification in overriding reasons for disregarding the literal application of the constitutional mandate.

It is generally conceded that there is no constitutional duty to compensate for property losses inflicted by combatant activities on the field of battle (i.e., so-called "battle damage").[134] Some cases of Civil War vintage, on the other hand, intimate that denial destruction in the name of military necessity, when committed away from the actual scene of battle, must be paid for.[135] At the same time, still other decisions, in which denial destruction was motivated by a desire to check the spread of fire, suggest that inverse

condemnation liability does not follow.[136] The want of an adequate theoretical discussion in any of the cases, apart from expressions of judicial reluctance to impose unforeseeable and potentially enormous liabilities upon public entities, create substantial barriers to reconciliation of these decisions.

In 1953, in the Caltex case,[137] the United States Supreme Court faced the problem of denial destruction directly, but with little doctrinal success. Certain oil companies had sued to recover just compensation for destruction of their oil terminal facilities to prevent them from falling into the hands of the invading Japanese forces in the Philippines in December, 1941. The Court of Claims awarded relief to the claimants.[138] Reversing this judgment, the Supreme Court relied heavily upon the common law doctrine that "in times of imminent peril -- such as when fire threatened a whole community -- the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved."[139] The claimants' losses were thus the kind which, in wartime, "must be attributed solely to the fortunes of war, and not to the sovereign", the safety of the state being deemed to override all considerations of private loss.[140]

The Caltex decision, unfortunately, leaves many significant problems unanswered. Some of the language of the opinion suggests that the Court construed the record as one depicting an instance of noncompensable "battle damage" or as sufficiently close to it to warrant like treatment. The majority emphasized the fact that demolition of claimants' oil depots had taken place as the Japanese armies were actually entering Manila, where they were situated, and their seizure by the enemy was imminent.

Caltex may thus be merely an example of a broad concept of "battle" which the Court deems appropriate in the context of modern "total" war. It cannot safely be assumed that like demolition, long planned as a matter of

military strategy, and not undertaken as a emergent tactical move, would necessarily be accorded the same legal consequences. The latter situation illustrates the point that some kinds of denial destruction are closely similar, functionally, to the commandeering or summary requisition of material and supplies, a kind of "taking" for which Caltex concedes that just compensation is constitutionally required.[141] It is significant that the British House of Lords, in circumstances comparable to Caltex, involving denial destruction by British forces of oil facilities in Burma, refused to apply the "battle damage" rule, and held that the private losses in question were required to be made whole by the Crown under common law principles.[142]

The exact status of inverse condemnation law with respect to the compensability of private losses sustained through denial destruction is thus somewhat conjectural. In Caltex, the Court admitted that "No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts."[143] Moreover, although an occassional statute has imposed liability upon the state in the fire cases,[144] no general pattern of legislative policy exists.[145] Clarification by statute would surely be appropriate.

Cases of wartime denial destruction do not seem to be of major concern as a focus for state legislative activity since the conduct of military operations is confided principally to the national government. However, peacetime analogies of state interest are not difficult to imagine. In a hotly fought urban riot, for example, destruction of a privately owned inventory of guns and ammunition in a sporting goods store might be regarded as essential to prevent bloodshed at the hands of looters.[146] In the context of fire-fighting, of course, demolition of property to create a fire break remains a potential preventive move. Similarly, the release of artificially

impounded waters by destruction of private property may help to reduce the damage from a serious flood. Possible events of this sort indicate that the problem of compensability for denial destruction is not one which can lightly be dismissed as of little consequence.

Destruction of private property to prevent the spread of a major fire, it can be argued, involves losses already adequately distributed through the community in the form of fire insurance premiums, thus supporting the view that a further redistribution of the same losses by taxation, under a statutory rule of public liability, is not warranted.[147] It is, however, not clear that all instancesof denial destruction are covered by existing standard form fire policies.[148] Moreover, the widely publicized fact that most fire insurance coverage is substantially less than the value of the insured property suggests that most property owners are willing to assume a measure of self-insurance responsibility, presumably in the expectation that if a fire does develop (or some other source of loss within the policy terms occurs), the damage realized will probably be only partial and within policy limits. On the other hand, deprivation destruction, a source of loss unlikely to enter into the calculations of insurance buyers, ordinarily entails total loss, thus visiting substantial and unanticipated fiscal detriment even upon the insured property owner. The argument against assumption of statutory liability, based on risk distribution considerations, is thus not strongly persuasive.

A further argument opposed to acceptance of general liability for denial destruction emphasizes the point that the scope and magnitude of potential liability are entirely unpredictable, and thus are best left to the discretion of the legislative body, on an ad hoc basis, after the event.[149] This argument has considerable appeal as applied to wartime cases; but its relevence to the limited and infrequent instances of peacetime denial destruction is questionable.

It may also be argued that denial destruction involves an essentially discretionary decision by public officials under circumstances of practical urgency and duress which should not be influenced by the possibility of pecuniary liability. Preclusion of personal liability, already provided by existing statutes, serves to minimize the impact of the suggested deterrence. In addition, it seems somewhat unrealistic to assume that the prospect of relatively limited liability would seriously deter a responsible public official from taking vigorous action to prevent much greater, possibly catastrophic, losses to the community.

Both of the policy objections indicated, moreover, would be greatly minimized by a realistic rule of damages, limiting the owner's recovery to the value of the destroyed property as measured under the circumstances existing at the moment of destruction. Surely, the market value of a private home which is in imminent danger of being consumed by flames, and for that reason is destroyed to check the fire, is not very great. In Caltex, for example, had the Supreme Court recognized the recoverability of just compensation, it could have reached substantially the same result by a strict rule limiting damages to the value at the moment of destruction,an amount which surely was little more than nominal.[150]

A rule of damages along the lines suggested also would serve effectively to give appropriate practical recognition to the factors of time and degree that characterize the denial destruction cases. When denial destruction is ordered despite the fact that loss from natural forces is not imminent (although it presumably is fairly anticipated), the jury's decision on damages could appropriately incorporate its judgment as to how much the danger as well as extent of natural loss would have been discounted by reasonably prudent and informed sellers and buyers under the circumstances. Alternatively,

the measure of damages might be limited to the value of that portion of the destroyed property which, in the exercise of ordinary care, would have been preserved had its denial destruction not been ordered.[151] Either formulation would accord at least a minimum level of protection to private interests against the danger of a needless or premature demolition order by a zealous but overly apprehensive public official, and yet avoid substantial recovery for loss of property that was doomed in any event.

(b) Requisitioning of private property. Under emergency circumstances, private property needed by government to carry out its responsibilities may sometimes be summarily seized, requisitioned or commandeered. It is generally accepted that just compensation for property so taken must be paid,[153] although the problem of ascertaining what amount of compensation is "just" has been a source of judicial dispute.[154] Since legislative and administrative practice has ordinarily been consistent with the understanding that requisitioning involves a compensable taking,[155] there is relatively little decisional law exploring the outer limits of the rule. Two areas of uncertainty in the law, however, are identifiable.

First, it is apparent that the factual circumstances which distinguish a compensable "taking" from a noncompensable destruction of private property are not susceptible of precise definition. In the Caltex case,[156] for example, the United States voluntarily accepted financial responsibility for destruction of unused petroleum supplies and transportation equipment at the claimants' oil terminals in the Philippines, but disclaimed liability for destruction of the physical properties of the terminals.

The former properties had been "requisitioned" by the Army as potentially useful in conducting military operations against the invading Japanese armies, and were destroyed only to the extent they could not be actually removed and employed for that purpose.[157] The fixed installations,

on the other hand, were taken over by the military solely for the purpose of denial destruction, and not for military operations. Yet both types of private assets were destroyed as part of the same demolition program to prevent the enemy from acquiring them; the sacrifice of both types of private assets contributed to the general welfare in precisely the same way. Loss distribution policy surely tends to support a rule of compensability in both instances, and the emphasis seemingly placed upon contemplated "use" as a distinguishing feature overlooks the fact that deliberate destruction is simply one way to "use" tangible property.

Second, it is apparent that in certain circumstances the objects or requisitioning may be achieved as well by other means. For example, the Government's purpose to conserve manpower during World War II by forcing personnel engaged in mining gold to shift to defense employment could have been accomplished by physical requisitioning of all gold mining facilities, or, alternatively, by issuance of a regulatory order directing termination of gold mining operations.[158] Accepted legal principles would have required payment of compensation had the first technique been employed;[159] by following the alternate route, the Government succeeded in avoiding liability entirely.[160]

It is submitted that the consequences to the property owner, rather than the means employed, should in general determine the right to compensation. A rule of law under which the private property owner's rights depend upon the fortuities of administrative selection of alternative means is not likely to enhance the reliability of investment-backed expectations nor promote general respect for fairness of either law or public administration.[161]

The California Disaster Act suggests an appropriate legislative approach to problems of requisitioning in emergencies. In the exercise of the broad emergency powers vested in him, the Governor, in a state of extreme emergency or disaster, "is authorized to commandeer or utilize any private property

or personnel deemed by him necessary in carrying out the responsibility . . . vested in him as Chief Executive of the State and the State shall pay the reasonable value thereof."[163]

Although this provision appears to codify the rule of constitutional law which would obtain in any event, it has several deficiencies which should be remedied. Its application, for example, is limited to those narrow situation which meet the technical definitions of a "state of extreme emergency" or a "state of disaster".[163] It is uncertain whether, or how extensively, the Governor may delgate his authority to commandeer, and whether that authority can be validly delegated in advance of a state of emergency or disaster, without departing from the statutory language which seemingly empowers only the Governor to act.[164] Finally, the quoted language fails to indicate the pecuniary extent of the State's liability when private property is "utilized" by the Governor and ultimately returned to the owner either undamaged or damaged but still in salvagable condition.[165]

California law, it is submitted, would be made more certain and predictable by enactment of a general statutory provision governing the responsibility for payment of just compensation when private property is summarily commandeered or requisitioned for usein meeting a public emergency. For example, if a city police officer commandeers a private automobile to chase a suspected felon the owner surely should have the same right to payment of compensation for resulting destruction of the vehicle as he would under analogous circumstances in a state of disaster.[166] Moreover, by statute the owner's right to reimbursement for the reasonable use of his property, incidental damage (e.g. loss of earnings or profits; cost of rental of other transportation; personal inconvenience or annoyance) could be fully defined in advance, thus avoiding uncertainty and potential litigation as to scope of compensation.[169]

Finally, the statute could include general guidelines defining the circumstances under which a commandeering of private property is authorized, thus avoiding the wholly unjustifiable and inequitable position, occasionally taken by the courts,[168] under which compensability is denied for taking or destruction of private property by public officials acting in good faith but in excess of their legal authority.

(c) Destruction of health and safety menaces. In a leading California decision sustaining inverse condemnation liability for damage resulting from a negligently planned flood control project, the Supreme Court purposefully distinguished situations in which, "under the pressure of public necessity and to avert pending peril", the police power may inflict not only avoidable damage but total destruction of private property without incurring liability for compensation.[169] "In such cases calling for immediate action," the court observed, "the emergency constitutes full justification for the measures taken to control the menacing condition".[170] Illustrations cited by the court included "the destruction of diseased animals, of rotten fruit, or infected trees where life or health is jeopardized."[171]

The operational premises of existing statutory law are in sharp contrast, in large part, with the rationale of the stated distinction. Destruction of private property deemed to pose a potential threat to public health, safety, or welfare is frequently authorized, without compensation, in the absence of any pressing emergency calling for immediate action.[172] The existence or absence of an emergency, under current statutory patterns, seems to be largely irrelevant to the issue of compensability; existing legislation, moreover, authorizes uncompensated destruction, in a variety

of circumstances, of private property which is admittedly not diseased, rotten, or infected.[173] The validity of practices of this type is generally predicated, in court decisions, upon the "police power" to eliminate "public nuisances" and other conditions deemed inimical to the public welfare.[174] This basis for decision, however, is obviously inadequate; its terminology provides only a circular explanation.[175] The problem, at root, is whether the courts have given appropriate weight to the private interests threatened by statutory nuisance abatement authorizations, or have deferred too readily to the legislative judgment subordinating those interests to the demands of the public welfare.[176]

A surprisingly large body of California statutes presently authorizes the destruction of animals, plants, or agricultural products when found to be affected by specified conditions that threaten public health and safety or the productivity of agriculture. These provisions appear to have been enacted in piecemeal fashion, with little consistency of either substance or procedure. For convenience, they may be classified into five groups:

First: The statutes which most directly suggest the existence of problems of inverse condemnation liability are those which authorize summary destruction. Under some provisions, a general quarantine or other equivalent proclamation may precede destruction of the proscribed animals, plants, or other property;[177] and, in a few instances, an ex parte court order may be a prerequisite to abatement.[178] In general, however, these statutes authorize public officers to seize and destroy private property having potential economic value[179] without notifying the owner or providing an opportunity for a hearing in advance, either

administrative or judicial, with respect to the factual justification for the action taken. Table 1 lists current statutory provisions of this type:

180

Table 1: Summary Destruction

Agric. Code §5763	Plants, objects, and premises infected with, exposed to or constituting hosts for agricultural pests for which pest eradication area has been proclaimed
Agric. Code §5906	Host plants of citrus white fly
Agric. Code §5933	Host plants of oriental fruit fly
Agric. Code §5952	Black current plants (host plants of white pine blister rust)
Agric. Code §5986	Meyer lemon trees (host plants of quick decline citrus virus)
Agric. Code §6305	Insects or other pests deemed dangerous to California agriculture being shipped into state without a permit
Agric. Code §6323	Host plants of fruit fly Tephritidae being imported without permit
Agric. Code §6461	Plants being imported which are found, or for reasonable cause are presumed to be, infected or infested with pests detrimental to California agriculture
Agric. Code §6521	Nursery stock or plants shipped within state, which are found, or for reasonable cause are presumed, to be infected or infested with pests detrimental to California agriculture
Agric. Code §§8551(f), 8552	Citrus pests generally (abatement within powers of Citrous Pest Districts)
Agric. Code §9621	Horses, mules, and other animals affected with dourine
Agric. Code §11381	Unconfined nutria (South American beaver) not under control of owner or keeper

Agric. Code §18975	Meat or meat products not bearing required inspection stamp or mark
Agric. Code §28121	Egg products not conforming to sanitation, health standards, and other requirements; destruction authorized on ex parte court order after seizure
Agric. Code §29127	Diseased bees, hives, combs, or colonies unlawfully moved within state
Agric. Code §§31102, 31152	Dogs found in act of killing, wounding, or worrying livestock or poultry
Agric. Code §§31103, 31153	Dogs found entering property where livestock or poultry are confined
Fish & G. Code §2186	Wild animals shipped into state with disease detrimental to agriculture, native wildlife, or public health
Fish & G. Code §2187	Wild animals imported under permit, but later found to be diseased or held in violation of permit conditions
Fish & G. Code §2189	Forbidden wild animals possessed in state without a permit
Fish & G. Code §2191	Forbidden wild animals found at large
Fish & G. Code §2250	Muskrats (in specified areasof state)
Fish & G. Code §6302	Infected, diseased, or parasite infested fish, amphibians, or aquatic plants
Health & S. Code §1907	Unrestrained animals found in rabies quarantine areas
Health & S. Code §§3052, 3114(b)	Bedding, carpets, household goods, furnishings, materials, clothing, or animals determined by health officers to be imminent menace to public health and incapable of being safely disinfected
Health & S. Code §26590	Impure, unwholesome, and unsafe foodstuffs

Health & S. Code §28298	Foodstuffs processed or stored in unsanitary food processing plants

Second: A number of California statutes authorizing official destruction of described health menaces, without prior adjudication, contemplate the giving of a form of notice to the owner, including in some instances notice by seizure or quarantine of the offending property, before actual destruction. Occasionally, the statutory procedure authorizes an administrative appeal from the initial decision to abate the condition; more often, however, the initial decision of the enforcement officers is treated as a final one. Typically, the owner is notified to terminate the alleged nuisance by destroying the offending property, processing or treating it to eliminate the offending condition, or (in some cases) by removing the property from the state. Official destruction ordinarily follows upon the owner's failure voluntarily to take the requisite action within the time allowed. In the meanwhile, however, the preliminary notice and ensuing time interval may provide an opportunity for the owner to institute judicial proceedings to restrain the impending destruction of his property, and thereby obtain an adjudication of the underlying factual assumptions upon which the abatement decision rests. Statutes of this sort
[181]
are collected in Table 2:

Table 2: Destruction After Notice
But Without Prior Adjudication

Agric. Code §§5401-5404	Premises, plants, conveyances or things infected or infested with agricultural pests; abatement authorized on owner's default after notice
Agric. Code §6175	Capri fig trees (host plants of certain fig pests); abatement authorized on owner's default after notice

Agric. Code §6304	Wild rabbit, flying fox, mongoose, or other animals detrimental to agriculture; destruction or shipment out of state authorized at option and expense of owner or bailee (notice implied) within 48 hours
Agric. Code §6305	Wild insects being imported without permit, but not immediately dangerous to agriculture; destruction or shipment out of state authorized at option and expense of owner or bailee (notice implied) within time fixed by inspector
Agric. Code §§6462-6465	Plants being imported which are found, or for reasonable cause are presumed, to be infected with agricultural pest, but not immediately dangerous to agriculture; destruction, treatment, or shipment out of state authorized at option and expense of owner or bailee after notice
Agric. Code §§6521-6524	Nursery stock or plants shipped within state which are found, or for reasonable cause are presumed, to be infected or infested with agricultural pest, but not immediately dangerous to agriculture; destruction, treatment, or shipment out of state authorized at option and expense of owner or bailee after notice
Agric. Code §§9568, 9569(d), 9591-9594	Domestic animals affected by or exposed to foot and mouth disease, rinderpest, surra, contagious pleuropneumonia, or other infectious animal disease; destruction authorized after quarantine established, and after appraisal for indemnification purposes
Agric. Code §10063	Cattle infected with tuberculosis; destruction required within 30 days after appraisal for indemnification purposes
Agric. Code §10401-10403	Cattle infected with brucellosis in brucellosis control area; destruction required within 30 days after identification and appraisal for indemnification purposes

Agric. Code §11201	Animals detrimental to agriculture; destruction or shipment out of state authorized at option and expense of owner or bailee (notice implied)
Agric. Code §29095	Imported bees or used hives not accompanied by required health certificate; destruction or return to shipper authorized at option and expense of person in charge of shipment (notice implied)
Agric. Code §29153	Unmovable or stationary comb hives for bees; destruction authorized on default of beekeeper after notice to transfer bees to movable frame hive capable of being inspected for disease
Agric. Code §§29155-29163	Bees infected with American foulbrood disease; destruction of bees, hives, and appliances authorized within 72 hours after owner's default following notice to abate
Agric. Code §29218	Neglected or abandoned hives containing comb attractive to bees and exposed to robbing by bees; destruction authorized within 72 hours after owner's default after notice to abate
Agric. Code §§31101, 31105-31108	Unlicensed dogs running loose; destruction authorized following seizure and notice to owner
Agric. Code §§32761-32764	Impure, adulterated, or tainted milk or cream; destruction or return to producer authorized, at producer's option, after notice
Agric. Code §§32765-32767	Impure, adulterated, unwholesome, or stale milk or cream products, or imitation milk products; destruction authorized after notice to owner and administrative hearing
Fish and G. Code §2188	Specified species of wild animals brought into state without permit; destruction or shipment out of state authorized at owner's option and expense within time set in notice

Fish & G. Code §6303	Infected, diseased, or infested fish, amphibia, or aquatic plants deemed deleterious, but not immediately dangerous, to aquatic life; destruction or shipment out of state authorized at owner's option and expense within time set in notice
Health & S. Code §§12350-12352	Illegal explosives; seizure followed by destruction or other disposal after 10 days authorized, subject to final outcome of administrative and judicial review proceedings
Health & S. Code §12711	Illegal fireworks; seizure followed by destruction after 30 days authorized subject to final outcome of administrative and judicial review proceedings
Health & S. Code §19814	Dangerously inflammable fabrics; seizure followed by destruction after 30 days authorized subject to final outcome of administrative and judicial review proceedings
Health & S. Code §25861	Radioactive substances or objects; seizure followed by disposition as radioactive waste material authorized, if owner fails to decontaminate within 15 days after notice

Third: Certain other statutory provisions designed to further health and safety objectives require an appropriate enforcement officer to institute a formal abatement proceeding in a court of competent jurisdiction, and obtain a judgment requiring destruction of the alleged nuisance as a prerequisite to actual abatement. In situations where the offending property is readily movable or subject to being concealed, the statutes often authorize physical seizure and quarantine of, or constructive detention by notification or by attaching an appropriate tag to the property pending the judicial proceedings. Unlike the abatement procedures authorized by the statutes cited in Tables

1 and 2, actual destruction of the property is permitted by these provisions only when, in an adversary proceeding, the enforcement officer (usually either an agricultural officer or the district attorney acting on an official complaint) succeeds in convincing the court that the statutory prerequisites in fact exist. The owner not only is afforded a full opportunity to contest the public entity's factual contentions, but also to persuade the court that the alleged nuisance is capable of being effectively abated by some remedy short of destruction.

182

Table 3 lists statutes of this sort:

Table 3: Destruction Pursuant to Court Order After Notice and Adversary Hearing

Agric. Code §§5551, 5571-5605	Neglected or abandoned crops constituting a menace to agriculture as a host for pests, or because of pest infestation; abatement action by district attorney authorized
Agric. Code §§5552, 5571-5605	Cotton plants left uncultivated or left from previous growing season, and not destroyed by March 1 (or earlier date as proclaimed by director of agriculture), are presumed to harbor pests; abatement action by district attorney authorized
Agric. Code §§7571-7581	Seed Screenings or cleanings containing seeds of plant pests; abatement action by district attorney authorized upon failure of owner or bailee to process or destroy after notice
Agric. Code §§12641-12647	Produce found to carry spray residue in excess of permissible amounts; abatement action by district attorney authorized
Agric. Code §§14701-14712	Fertilizers, soil chemicals, and soil additives which are injurious or detrimental to plants when applied as directed; abatement action by district attorney authorized upon failure of owner or bailee to abate after notice

Agric. Code §15113	Commercial feeding stuffs for livestock or poultry mixed or adulterated with substances injurous to health of livestock or poultry; condemnation and sale of feedstuffs authorized as penalty to be applied by court in addition to criminal fine for violation
Agric. Code §§52484, 52485, 52511-52514	Agricultural seeds treated after harvest with substances toxic to humans or animals, which are either not labeled with appropriate warning or contain toxic residues in excess of permitted tolerances; abatement action by district attorney authorized
Health & S. Code §§26361-26369	Adulterated drugs or drugs which, because of misleading or inaccurate labeling, may be dangerous to health; abatement action by State Board of Public Health authorized
Health & S. Code §§26580-26589	Poisonous, contaminated, impure, and unsafe foodstuffs; abatement action by State Board of Public Health authorized.
Health & S. Code §28298	Foodstuffs processed or stored in unsanitary food processing plants; abatement action by State Board of Public Health or by local health board authorized
Health & S. Code §§28782-28788	Toxic, corrosive, irritant, inflammable, radioactive, and other types of hazardous substances which are "banned" or so misbranded as to be dangerous; forfeiture proceeding by State Department of Public Health authorized

Fourth: A few statutory measures with similar purposes classify specified harmful conditions as public nuisances, but fail to prescribe an explicit remedy. For example, they simply provide that the described nuisance "is subject to all the laws which relate to the abatement of such nuisance",

183

or words of equivalent generality. Nuisance abatement, in general, is governed by provisions of the Civil Code which authorize abatement by either a civil action in the courts, or by "removing, or, if necessary, destroying the thing which constitutes the [public nuisance] . . . without committing a breach of the peace, or doing unnecessary injury."[184] The statutory provisions here listed in Table 4 thus appear to authorize either judicial proceedings for, or summary abatement, with the choice of remedy left to the discretion of the enforcement officer:

Table 4: General Nuisance Law Declared Applicable

Agric. Code §5552	Uncultivated cotton plants, or cotton plants left from a previous season and not destroyed by March 1 (or earlier date as proclaimed by director of agriculture), which are presumed to harbor pests
Agric. Code §5554	Neglected or abandoned crops which are infested with, or constitute a host for, agricultural pests
Agric. Code §5762	Plants, objects, and premises infected with, exposed to, or constituting hosts for agricultural pests for which pest eradication area has been proclaimed
Agric. Code §5782	Host plants of agricultural pests planted, growing, or being cultivated within proclaimed host-free period or district

Fifth: At least four statutes may be found that simply authorize official confiscation, seizure, or quarantine of objects violating statutory standards, without meaningful specification of the consequences of the seizure or of either substantive or procedural criteria for subsequent disposition of the

property:[185]

Table 5: Summary Seizure Without Provision For Subsequent Disposition

Agric. Code §12961	Economic poisons (i.e., insecticides, defoliants, growth regulators, fungicides, pest eradicators, etc.) which are adulterated, misbranded, or detrimental to agriculture of the public health; seizure and quarantine authorized
Agric. Code §14294	Livestock remedies which are not registered or which do not conform to registration requirements; quarantine and removal from sale authorized
Agric. Code §§18971-18972	Meat and meat food products slaughtered in violation of sanitation and inspection laws; seizure and retention authorized until otherwise ordered by court of competent jurisdiction
Bus. § Prof. Code §4313	Prophylactic devices not conforming to legal standards established for disease prevention; seizure by State Board of Pharmacy authorized

The "police power" rationale advanced by the courts in support of statutory provisions similar to those collected in Tables 1-5 has been articulated principally in the context of communicable disease prevention programs.[186] The same reasoning, however, has been extended to programs for eradicating agricultural pests that impair economic productivity but are not otherwise a menace to public health or safety.[187] On this ground, the Supreme Court unanimously sustained the validity of a Virginia statute authorizing uncompensated destruction of ornamental red cedar trees that were hosts of a rust disease destructive of apple trees.[188] The preponderant public interest in the economic success of the important apple growing industry in Virginia justified a legislative

choice to sacrifice the private, and relatively less important, interests in ornamental cedar trees. This deliberate preferment of one property interest over another did not, in the court's judgment, violate due process or constitute an invalid taking of private property, since the choice had been "controlled by considerations of public policy which [were] not unreasonable."[189]

Review of the 71 statutory provisions listed above, authorizing destruction of property deemed to threaten public health or agricultural wellbeing, suggests the existence of substantial problems of public policy to the solution of which the accepted constitutional rationale provides no clear guidance. These problems relate to (1) the desirability of more flexible compensation policies, (2) availability of effective remedies for mistakes in statutory enforcement, and (3) the need for uniformity of procedural safeguards.

Compensation policy, as reflected in the statutes here being considered, seems haphazard in both scope and impact. Payment of compensation for the property destroyed is mandatory in a few instances,[190] although the amount paid is limited by law to less than full reimbursement,[191] and the duty of payment is subject to significant exceptions.[192] Permissive authorization for reimbursement of private losses is provided by some provisions, although frequently it is conditioned upon securing consent to destruction, in advance, from the property owner.[194] In general, however, statutory provisions for payment of compensation in whole or in part are the exceptions, not the rule; no authority for reimbursement of private losses is found in connection with most of the statutes being considered.

The paucity of authority for compensation cannot be attributed to doubt

as to its validity. It is thoroughly established that such payments do not constitute an illegal gift of public funds, but represent a reasonable means, within legislative discretion, for inducing cooperation or at least lack of overt resistence to the underlying health and safety program.[195]

The widespread absence of a compensation policy arguably might reflect a legislative conviction that diseased plants, animals, or trees have little or no actual value, and, indeed, may be an economic liability to their owner.[196] In some situations, this explanation seems to have potential merit;[197] but, in reviewing the statutory provisions at hand, it fails to account for the many situations in which property subject to destruction by public officials undoubtedly retains substantial market value even in its diseased, infested, or otherwise deficient condition.[198] An attempt to justify noncompensability on the ground[199] that the owner of diseased or disease-inducing property realizes a net economic benefit, at least in the long term sense, from the destruction of the source of the disease is similarly unpersuasive, since the compelled sacrifice of one man's assets solely for the protection of economic interests of <u>others</u> is characteristic of many of the measures in question.[200] The killing of escaped nutria, for example, as a protection against damage to crops of nearby farmers, is scarcely an act beneficial to the owner-breeder of these valuable fur-bearing creatures.[201]

Perhaps the most plausible explanation for the general failure of the Legislature to authorize compensation may be found in the realities of the legislative process. Enactment of nuisance abatement measures of this type ordinarily is sponsored by individuals and organizations concerned about the

threat of impairment of public or agricultural health and safety; opposition by persons likely to be adversely affected by a proposed abatement is seldom voiced, and if heard, is generally discounted as the pleading of self-interest. Absent substantial organized opposition, the appropriateness of reimbursement for destroyed property is not likely to receive serious legislative attention. Considerations of public economy, reinforced by judicial acceptance of abatement without compensation, suggest avoidance of the reimbursement issue as a politically prudent and less controversial approach for the legislative sponsors and spokesmen.

Here, as elsewhere, however, political realities may breed legal anomalies. Compensation may be authorized in one situation and denied in another, with seeming indifference to their inherent similarities. On the face of the statutes, for example, it is difficult if not impossible to perceive the kinds of factual differences, administrative practicalities, or technical considerations that might warrant authorization of compensation for destruction of host plants of oriental fruit flies, but not for like destruction of hosts of other agricultural pests;[202] for slaughter of diseased cattle but not for destruction of valuable honey bees or other domestic animals;[203] for disposition of disease-infected household goods and furnishings but not for destruction of contaminated foodstuffs, dangerously adulterated drugs, and other hazardous materials;[204] for removal of citrus trees affected by quick decline disease but not for destruction of host plants of this disease or adulterated fertilizers and soil chemicals whose use would produce an even quicker decline.[205] Existing disparities of compensation policy, such as these, appear to be the

product of ad hoc legislative responses to particularized problems rather than a reflection of rational appraisal of the economic consequences of prevailing nuisance abatement programs.

A preliminary analysis suggests that consideration should be given to the development of more uniform legal standards governing compensability in these matters. For example, general statutory authorization permitting indemnification by local public entities, in connection with designated programs, would supply a legal basis for voluntary compensation, contingent upon local appropriations responsive to community political pressures.[206] More effective enforcement of the basic statutory policy, which is the accepted legal basis of the few compensation authorizations now in the statutes,[207] might be improved by expanded reimbursement programs on a local option basis.

Another approach would be to develop acceptable general statutory criteria for the mandatory awarding of full or partial compensation, in designated situations where voluntary compliance and public cooperation induced by such payments would be beneficial to the statutory purposes. For example, compensation could be related to the degree of culpable responsibility of the owner of the property for the existence of the menacing condition,[208] the extent to which the owner's losses are or will be offset by reciprocal economic benefits,[209] the extent of the owner's loss in proportion to the threatened detriment which the community might sustain if destruction were withheld,[210] the degree to which the owner's losses could be mitigated by some disposition other than destruction but equally protective of the public interest,[211] and the magnitude of the loss sustained in proportion to the owner's wealth and ability to absorb or amortize it.[212] Criteria of this type admittedly are not generally characteristic

of existing legislative patterns; yet they seem to represent the kinds of practical considerations which have motivated discrete legislative appropriations for the adjustment of otherwise legally unenforceable claims in specific circumstances in the past.[213] No apparent reason exists why such considerations may not be postulated as the basis for a general system of compensation in circumstances deemed by the legislature to promote the public advantage.

A third view, supported by the general interest in equitable distribution of private losses resulting from unforeseeable disruption of reasonable economic expectations, indicates the need for a careful statute-by-statute consideration and revision of compensation policy in light of the competing interests implicitly balanced by the respective authorizations for destruction of private property. Such a review may also have useful collateral advantages. In situations where uncompensated destruction appears to be unduly harsh in the light of statutory objectives or wasteful in light of possible alternative techniques of effective abatement short of destruction, termination (or a carefully circumscribed conditioning) of the power to destroy may be feasible. Salvaging of values that would otherwise be lost, by use of modern techniques of treatment, in lieu of destruction, might prove to be an acceptable alternative to payment of compensation, with an attendant net gain in both public and private resources. A number of the statutes cited above incorporate a legislative policy suggestive of this approach, permitting destruction of the offending property only as a last resort after notice to the owner and an opportunity for him to take less damaging abatement action satisfactory to enforcement officers.[214] In some instances, the enforcement officers themselves are required to employ techniques of pest eradication which do not entail total destruction, when such

techniques are deemed sufficient to protect the public welfare, with the cost being chargeable to the owner.[215] Provisions of this sort, however, are more notable for their scarcity than for their prevalence; their broader utilization would be an appropriate objective for legislative consideration.

A second major problem relating to the health menace statutes concerns the possibility of mistakes in the course of enforcement.[216] A valuable shade tree may be destroyed on the basis of an erroneous finding by an agricultural inspector that it is infected with an agricultural pest. Healthy livestock may be slaughtered in the mistaken belief that the animals are diseased. Sound and wholesome foodstuffs may be dumped or burned because a public officer concludes, contrary to fact, that they are contaminated. Rarely do these statutes purport to authorize destruction of property which is not itself a menace of some sort,[217] and the California courts have indicated that the owner of sound, healthy, and wholesome property which is summarily destroyed without authority of law is entitled to recover for his loss.[218] In the absence of statute, his remedy is a tort action against the enforcement officer who exceeded his authority.[219]

This aspect of California law is unsatisfactory.[220] It exposes a public official charged with the enforcement of health and safety provisions to the risk of personal tort liability even when he acts in good faith and with reasonable care. Damages may be awarded if the trier of fact subsequently determines that a nuisance as defined in the statute did not exist and that the officer mistakenly decided that it did.[221] In effect, the determination of the officer - often based upon special training, expertise, skill, and experience - is

permitted to be disregarded and superseded by the later, ex post facto determination, of a non-expert judge or jury. The practical disadvantages of this view, as accepted by the California decisions, were revealed in cogent terms in an early Connecticut decision rejecting it: "If the [enforcement officers] are to decide at their peril, they will not decide at all . . . .[D]uty, hampered by a liability for damages for errors committed in its discharge, would become a motive of very little power."[222]

The reliability of the officer's initial determination to abate, moreover, is partially a consequence of the degree of specificity with which the legislature has defined the offensive condition to be abated. Statutory authority to seize and destroy dressed meat which does not bear an inspection stamp,[223] for example, affords far narrower opportunities for challenging a particular act of abatement than authority to destroy cattle found, by physical examination or chemical test, to be tubercular,[224] or foodstuffs determined by inspection to be contaminated.[225] By making authority to destroy dependent upon the officer's evaluation of observed data, the latter kind of statute provides greater margin for subsequent disagreement by a jury than the strictly objective standards of the former type. Narrowly drawn criteria, on the other hand, tend to eliminate consideration of special circumstances and extenuating facts which, in the sound exercise of discretion, might mitigate the severity of an abatement program. For example, the destruction of milk from uninspected cows may be an efficient and constitutional means for safeguarding a city's milk supply; but, since all such milk is not unwholesome, destruction solely on the basis of lack of prior inspection of the herd may be regarded, from a broader policy

viewpoint, as an unduly wasteful use of community resources as well as an unnecessary financial loss for the producer.[226]

Traditional legal principles developed by the courts for resolution of the mistake problem in health abatement proceedings tend to discourage both the development of appropriately flexible jurisdictional criteria governing abatement powers, and vigorous and diligent use of those powers. The inhibiting factor is the threat of personal liability of the enforcement officer if he should mistakenly exceed his statutory jurisdiction. The courts have said repeatedly that the availability of this remedy to the property owner is essential to the validity of the abatement program; since the police power permits only the uncompensated destruction of property in a condition that threatens the public welfare, a remedy for compelled destruction of innocuous property is regarded as constitutionally required.[227] The ruling decisional law, in this connection, was developed at a time when the doctrine of governmental immunity generally barred tort actions against public entities engaged in public health and safety functions.[228] Accordingly, a tort action for damages against the mistaken enforcement officer was identified as an appropriate remedy to satisfy the doctrinal requirement.

Under present California statutory law, however, the remedy against the officer no longer exists, or is very substantially limited, in most cases in which, prior to 1963, it conceivably was available.[229] Tort Claims Act of 1963 created a series of general and specific immunities from tort liability, inuring to the benefit of both public employees and public entities, which are applicable to nuisance abatement, official inspection, and public health and

safety programs.[230] Under these provisions, an enforcement officer, acting with due care, who mistakenly destroys innocuous private property in the justifiable belief that it constitutes a statutory nuisance, is not liable in tort.[231] The officer's public entity employer is equally immune.[232]

The present statutory law of public tort liability is thus contrary to the implications of the nuisance abatement decisions. Although an occasional judicial comment may be found,[233] intimating that inverse condemnation liability might be imposed, if necessary, to protect against unauthorized and improvident destruction of private property, the actual availability of the inverse remedy is conjectural and uncertain.[234] Yet, the absence of an appropriate remedy casts doubt upon the validity of health and safety abatement programs that are entirely devoid of statutory provisions for payment of compensation. The need for legislation correcting the existing deficiency seems apparent.

The suggested legislation might take the form of (1) statutory authorization for payment of compensation for unauthorized destruction of private property, based on administrative determinations subject to judicial review; (2) statutory authorization for suit against the responsible public entity, in the nature of an inverse condemnation suit; or (3) modification of the statutory standards governing tort liability of public officers and employees, to authorize a remedy by tort action. Whatever its form, the legislation should provide an adequate remedy not only for negligent or malicious exercise of abatement powers, but also for good faith actions taken with due care but erroneously.[235]

The "mistake" problem, as a practical matter, can arise only in those cases in which property destruction is not preceded by an adversary hearing

leading to a judicial abatement decree. Under the doctrine of res judicata, the judicial determination that the statutory grounds for destruction exist in fact would preclude later litigation of an alleged error in application of the statutory authority.

Even in the judicial abatement cases, however, a closely analogous problem can arise. Ordinarily, in these situations, institution of judicial proceedings by enforcement officers follows closely upon, or is contemporaneous with, a seizure or quarantine of the allegedly offending property.[236] The owner's powers of use, disposition and sale are suspended during the pendency of the proceedings; loss of profitable markets, spoilage, depreciation, and financial losses due to the freezing of the capital investment in the goods, are all potential collateral consequences of seizure pendente lite. In some circumstances, these collateral costs could be so great in light of the anticipated duration of the proceedings that sound business judgment may dictate abandonment of formal opposition, even where evidentiary support for such opposition is available. Yet, the initiation and prosecution of the abatement action may be predicated upon a mistaken assessment of the factual data, or an unduly severe interpretation of the statutory abatement authorization, just as in the summary abatement cases.[237] Ultimate exoneration of the property, and its return to the owner, may be entirely inadequate to make him whole. Yet here, as in the summary cases, tort liability is not an available remedy; statutory immunity prevails even though the enforcement officers acted maliciously.[238] Moreover, no provisions have been found which authorize a recovery of statutory damages for detention analogous to the damages recoverable for

wrongful attachment.[239] The reasoning and policy considerations discussed above[239a] suggest the need for remedial statutes in this connection as well.

Procedural fairness and uniformity is a third major objective that would be appropriate for legislative consideration in relation to the foregoing statutes. In constitutional theory, summary abatement by destruction is justified by emergency conditions calling for immediate steps to be taken that do not admit of the delay that would be required by judicial proceedings.[240] The concept of "emergency", in this context, however, is applied loosely; it includes situations in which the necessities of practical administration reasonably support a legislative decision to authorize immediate destruction rather than more costly or protracted abatement procedures.[241]

Administrative expedience should not be regarded as a conclusive justification for summary destruction. In the absence of compelling necessity for dispensing with judicial proceedings in advance, the interest in efficient enforcement should be balanced against countervailing considerations of fairness and objectivity. Summary destruction, in many cases, may make unavailable the best evidence of the condition which is assertedly an abatable nuisance; the owner's remedy of a tort suit for damages, predicated upon his ability to prove that the alleged condition was not present, may thus be illusory.[242] A judicial hearing in advance of destruction, where feasible, would afford greater fairness in the production of evidence on the crucial issue of fact. A previous hearing, in addition, might permit objective consideration of the availability of less damaging techniques of abatement that would adequately protect the public welfare in the particular circumstances.[243]

Authorizing judicial control over choice of abatement techniques, and limiting destruction to cases in which less drastic alternatives are not shown to be available, would be more protective to private property rights, and more consistent with accepted notions of procedural fairness, than mandatory destruction or the vesting of uncontrolled discretion in the enforcement officer to choose between destruction and other remedies.[244] Finally, the res judicata effect of a preliminary determination by a court in adversary proceedings would provide greater assurance against unwarranted fiscal liabilities for wrongful or mistaken destruction (assuming a system of liability is authorized in some form) than less reliable ex post facto review.

A judicial hearing requirement, of course, would presumably result in some court decisions refusing to approve abatement by destruction. Such decisions could, under appropriate statutory standards, entail carefully designed collateral consequences calculated to minimize the danger of interference with important public welfare objectives. If the court was authorized merely to determine that the alleged offending condition had not been established by the evidence presented (e.g., a form of "Scotch verdict"), its judgment might be required to be in conditional form: the enforcement officials must either abide by the court's decision and refrain from destruction, or proceed with the proposed destruction subject to the continuing jurisdiction of the court on motion to enter a judgment against the enforcing public entity for the reasonable value of the property (less salvage values realized by the owner). In effect, in borderline cases, the public entity could still abate what it regards as a menace to the public health or welfare, but payment of compensation would be the price of its inability to satisfy judicial doubts as to the underlying facts.

Similarly, if the enforcement officers elected to challenge the trial court's adverse determination by appeal or extraordinary writ, the continuation of a quarantine or other equivalent restraint upon disposition of the property by the owner pending the outcome of the appellate proceedings could be made contingent upon payment of damages for detention in the event the trial court is affirmed.

The suggestion that preliminary adjudication, before abatement of health and safety menaces by destruction, should be required more widely may be opposed as an unnecessary and time-consuming imposition of additional administrative and judicial burdens. If the added judicial load is justified by improved reliability of fact-finding and increased protection against arbitrary official action, the burden argument becomes unpersuasive. The issue is whether such justification does exist, at least in some, if not all, cases.

In connection with certain statutory provisions, the added burden on the courts would be relatively slight, for ex parte adjudication is already required;[245] a short additional delay to provide for notice and hearing to the owner under an expedited procedure would be unlikely to harm the public welfare in most of these cases.[246] Other statutory provisions already authorize substantial delays before ultimate destruction of the offending property,[247] thereby implicitly incorporating a legislative determination that urgency of abatement is not required; a preliminary adjudication, perhaps in a proceeding enjoying a high order of calendar preference, might well be consistent with public health and safety objectives in such cases.[248]

A number of statutes authorize the temporary seizure of the offending property, notice to the owner to abate its noxious condition, and destruction

only after the owner's failure to remedy the defect within the time allowed.[249] The range of statutory options open to the owner under this approach, however, may be narrower than the available practical alternatives that would fulfill the public welfare object of the law. Treatment (e.g., fumigation, spraying, dipping, etc.) or processing (e.g., pasteurization, manufacturing, refining, etc.) may, just as effectively as destruction or removal from the state, eliminate an agricultural pest or destroy a health menace and may do so without total loss of economic value of the property in question.[250] More flexibility of disposition, with enhanced protection against arbitrary decision-making, might be secured in cases of this sort by a mandatory hearing in which impartial judicial evaluation and rejection of the proposed alternatives would be required before the more drastic technique of destruction is employed. The time required might be limited by law to a period not substantially longer than that presently prescribed in connection with the notice to abate.

The objection against adding to the burdens of enforcement officers and the courts may also be minimized by carefully drawn procedural provisions. For example, more general use might be made of the procedures already embodied in some nuisance abatement provisions,[251] under which the offending property is seized and held for a specified period of time, followed by abatement by destruction unless a prescribed administrative or judicial proceeding to review the proposed destruction is timely initiated after notice to the owner. In effect, the burden of commencing the judicial proceeding is placed upon the owner rather than the public entity, and the owner's (presumably not infrequent) failure to pursue his rights in this regard is treated as a waiver. On the other hand, although the present statutes are

not clear, the burden of proving the existence of facts sufficient to warrant abatement appears to remain upon the enforcement agency when review is sought.[252]

A final procedural safeguard that deserves study, and is responsive to the need for assurance that the least drastic means of abatement be employed, relates to the practical effect of abatement by destruction. Depending on the nature of the property and the technique of destruction employed, salvage values may be recoverable. Some of the statutes here being considered expressly require these salvage values to be returned to the owner of the property, after deduction of costs of destruction;[253] most of the statutes, however, are silent on the subject. Consideration should be given to requiring that methods of destruction be adopted, perhaps through administrative rule-making procedures, which are most likely to maximize net salvage values that may be employed at least partially to reimburse the owner for his losses.

(d) Building and safety code enforcement.

An additional group of legal provisions, presenting issues of inverse condemnation policy closely similar to those suggested by the foregoing statutes, relate to destruction of private property as a means of enforcement of building and safety regulations. The California State Housing Law authorizes state-wide administrative regulations prescribing minimum standards relating to the construction, alteration, maintenance, repair, sanitation, occupancy, and use of all forms of housing.[254] City and county ordinances or regulations imposing requirements equal to or stricter than the state regulations are expressly permitted,[255] and enforcement of the state-wide regulations is made a duty of county and city enforcement officers.[256] Enforcement generally functions through inspection and abatement procedures; failure of the owner of a building to comply with a notice to correct a violation constitutes grounds for institution of a superior court abatement action to compel compliance.[257]

The enforcement of building and safety regulations, in a period of time characterized by increasing public concern about slums, urban blight, and community redevelopment, poses a number of sharply defined issues of inverse condemnation policy. Strict enforcement of structural requirements aimed at promoting the health and safety of occupants, and preventing destruction by fire, may impose substantial economic burdens upon the owners of the buildings. The upgrading and modernization of building and safety regulations over the years, to reflect the changing technology of the construction industry as well as increased understanding of the nature of

structural, fire and health hazards, has left vast numbers of aging buildings, erected under earlier and less stringent requirements, still in existence and use but not in conformity with current standards.[258] By hypothesis, these nonconforming structures expose their occupants and the community to the very health and safety hazards which the building regulations seek to prevent. Correction of existing deficiencies to eliminate or reduce these hazards can be exceedingly costly, since they may require major structural alterations or even substantial reconstruction.

To the extent that governmental entities seek to compel the needed corrective measures to be taken at the expense of the private owner, the question of compensability of the economic burden thus imposed is squarely raised. Elimination of nonconforming buildings, to promote public health and safety, has the normal outward manifestations of a "police power" program, since it aims to eliminate sources of community harm rather than to appropriate private property because of its usefulness.[259] At the same time, the public realizes substantial benefits in the form of improved safety, aesthetic enhancement, increased property values, and diminished tax burdens for police, fire, and health services. These community advantages arguably comprise an identifiable "public use" for which the property owner's resources have been compelled to contribute (i.e., have been "taken") in disproportionate degree, and for which compensation should be paid.[260] Even when compensation is not constitutionally required, however, the question remains whether considerations of equitable policy and distributive justice justify statutory authorization for compensation.

In at least one aspect of building code enforcement practices, inverse condemnation liability appears to be reasonably well established. In general, fully retroactive application of newly promulgated building and safety regulations to preexisting nonconforming structures is regarded as impermissible,[261] although discrete phases of such regulations may be enforced, when justified by urgent health and safety objectives.[262] A blanket rule of retroactivity would pervasively impair established economic values predicated upon good faith compliance with building regulations extant at the time of construction, and thus constitute an unconstitutional taking.[263] This view, however, has by no means confined enforcement practices in general to strictly prospective violations. Two doctrinal devices have been invoked, often in conjunction, to circumvent the retroactivity barrier.

The most prevalent technique is a vigorous utilization of the doctrinal resources inherent in the concept of nuisance. Decayed and dilapidated buildings devoid of structural attributes and mechanical features currently regarded as essential to health and safety can readily be characterized as "injurious to the health, or . . . indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . .",[264] and thus an abatable public nuisance. Moreover, under the broad constitutional delegation of power to cities and counties to enact local police and sanitary measures,[265] local entities in California have not been slow to devise comprehensive legislative definitions of structural "nuisances," invoking the sanction of demolition to induce owners of preexisting structures to repair or remodel them in conformity with current building and safety requirements.[266] On the whole, the courts

have accorded a considerable degree of deference to legislative measures of this sort.[267] In addition, while insisting that abatement of nonconforming buildings (which, of course, may range from mandatory minor repairs to total demolition[268]) cannot be predicated upon violations of present regulations unless the structure in question is in fact a public nuisance,[269] the rules governing the scope of judicial review ordinarily accord like deference to the administrative determination of local enforcement officers that a particular building is in a sufficiently dilapidated condition to be regarded as a nuisance.[270] Compelled demolition of buildings conceded to be of substantial value, without payment of compensation, has repeatedly been approved by California appellate courts under this rationale.[271]

A second, and somewhat more sophisticated technique, is postulated upon the practical need for voluntary maintenance,alteration, and repair work, from time to time, by the owner of a nonconforming structure in order to maximize its economic potential or remedy damage from fire or other causes. If engaged in extensively enough, such alteration and repair work may amount to a substantial reconstruction of the entire building. If this is the case, existing laws often require that present-day building and safety regulations must be complied with; otherwise the health and safety objectives of the building requirements could readily be subverted under the guise of re-modeling. This approach, then, requires the drawing of a line which fairly and reasonably distinguishes between alterations and repairs which do, and those which do not, amount to substantial reconstruction. In California and elsewhere, prevailing legislative policy postulates the distinction upon a comparison between repair costs and reproduction costs, generally requiring

full compliance with present code requirements if the total cost of repairs exceeds 50% of the present cost of replacement of the structure in its nonconforming state.[272]

The 50% rule seems to be most strongly justified on policy grounds when invoked as a test of when voluntary repairs or alterations must conform to present building requirements.[273] It has sometimes been extended, however, to other situations. For example, some ordinances ban any voluntary repair of a structure if the estimated repair costs exceed the 50% standard, unless the entire building (not merely the portion under repair) is brought up to present standards.[274] Others employ the 50% test as a criterion for adjudging when a building has become dilapidated to such a degree as to constitute a public nuisance; if the estimated cost of modifications to conform the structure to present restrictions exceeds the 50% figure, the building is regarded as one which cannot feasibly be repaired and is thus a nuisance to be abated by demolition.[275] The validity, under California law, of measures employing these techniques is not entirely clear.[276]

The application of building and safety regulations to nonconforming structures necessarily requires the exercise of judgment, by enforcement officials and the courts, regarding difficult questions of degree that touch directly upon inverse condemnation considerations. To be sure, the policies supporting slum clearance and the eradication of fire and health hazards represent significant interests of the public welfare to which property rights may sometimes be subordinated.[277] But the property owner's good-faith investment-backed expectations grounded on standards applicable at the time of construction of a building which, because of subsequent changes

in the law, is now non-conforming likewise appear to be deserving of a degree of legal protection.[278] The problem of balancing these competing interests, in light of the somewhat inconclusive and undeveloped state of the decisionallaw, constitutes a running invitation to litigation in nearly every case. The development of statutory guidelines designed to provide statewide uniformity of policy in building and safety code enforcement, clarify the rights of public entities and property owneres, and promote building and safety enforcement programs would thus be an appropriate legislative objective.

One topic for stat utory development is suggested by the settled proposition that certain types of basic health and safety requirements necessitating structural alterations may, constitutionally, be enforced with respect to nonconforming structures if the cost of compliance is reasonable in relation to the public benefit obtained.[279] The utility of this balancing process is, however, diminished to the extent that building and safety regulations tend to treat fundamentally different requirements alike. A minimum cubic footage standard for hotel or apartment sleeping quarters, for example, seems on its face to be a valid means of assuring adequate ventilation in the interest of comfort and health; yet, it surely is less important, judged by police power criteria, than a rule in the interest of sanitation that forbids maintenance of toilet and cooking equipment in the same room, but more important than a requirement that separate men's and women's rest room facilities be properly identified with signs.[280] The order of public significance of the several requirements should be determined primarily by the legislature and not the courts. A statutory classification

scheme, assigning differing levels of public urgency to various types of building requirements, would substantially improve the administration of these laws by providing a more rational basis for assessing the reasonableness of the impositions upon property owners and the sanctions invoked to enforce them.

A second avenue of suggested legislative interest relates to the procedural aspects of building code enforcement. Under existing practices, enforcement officials sometimes seek total demolition of nonconforming and dilapidated structures as the exclusive remedy for their deficiencies; moreover, where the prevalent 50% formula is used, it seems clear that demolition may result in substantial financial loss to the property owner despite his good faith willingness and ability to mitigate the loss by undertaking the necessary alteration and repair work. Policy considerations disfavoring compelled destruction of private property values in the absence of overriding necessity suggest the desirability of a more protective statutory rule. For example, it could be required that in every such case, unless the defects in the building are physically incapable of being conformed to present standards at a cost less than the cost of demolition and reconstruction of a new conforming building, demolition may be required only after the owner has been given a period of time specified by law within which to undertake and complete the required repairs.[281]

Moreover, since a building altered to conform to applicable code standards may well be deemed less desirable than an entirely new structure from the viewpoint of public policy, consideration might be given to authorizing public subsidization of demolition and reconstruction as an alternative to alteration or repair.[282]

California decisions further suggest the need for legislation to prevent the arbitrary or discriminatory use of building code enforcement practices to reduce the costs of condemnation of private property scheduled for acquisition for public purposes.[283] In slum or blighted areas, for example, vigorous, selective enforcement of a building inspection program, designed to compel property owners to demolish buildings found to contain code defieiencies extensive enough to be classified as statutory nuisances, may result in the gratuitous razing of improvements having substantial residual values. Absent private abatement, these values would ultimately be reflected in higher condemnation awards in the planned eminent domain proceedings, as well as additional public costs for demolition and site clearance for the planned improvement. Judicial disapproval of suspected practices of this sort has frequently been voiced.[284] Their vice lies in the discriminatory and inequitable impact of selective enforcement policies not applied as part of a uniformly administered program constrained by the practical limits of political acceptability, together with the potential tendency of cost reduction objectives to operate as an incentive, incapable of effective judicial control, for employment of unnecessarily harsh and strict enforcement practices. Actual use of nuisance abatement authority for this purpose, however, is obviously difficult for an aggrieved property owner to establish. Not only is the burden of overcoming the usual presumption of official regularity a heavy one,[285] but direct evidence of abusive intent is usually lacking, difficult to locate, or subject to official manipulation.

A possible partial remedy, that might assist in exposing this feature of building code enforcement practices to more exacting judicial examination,

would be a statutory shifting of the burden of proof. For example, legislation might provide that compulsory demolition of a building as a statutory nuisance is presumed to be intended to reduce taking costs whenever a resolution of necessity for the taking was adopted by the public entity prior to the service of the abatement order, or a resolution is subsequently adopted within a specified period of time (e.g., two years) thereafter. Unless the presumption is effectively rebutted by the condemning entity, the residual values inherent in the destroyed building (defined, perhaps, as its market value before demolition less the cost of rehabilitating it to a condition permitting its occupancy without hazard to the health or safety of its occupants [286]) could be included in the subsequent condemnation award. A legislative standard of rebuttal would also be appropriate; for example, it could be provided that the presumption is dispelled for all purposes if the condemning entity proves, to the satisfaction of the trier of fact, that the building demolition order was the product of a generally conceived, impartially administered, and uniformly applied program of building code enforcement that was unrelated to and not intended to further the purposes of the condemnation proceeding.

Finally, consideration might be given to the development of uniform state-wide standards governing the determination of when a building may be required to be demolished without payment of compensation to the owner. It seems clear that noncompliance with some types of building, safety, and health regulations would provide an inadequate basis, judged by prevailing constitutional standards, for a demolition order, even though the conditions resulting from such noncompliance concededly may constitute a public nuisance.[287] The courts have typically insisted that demolition is a remedy

of last resort; its validity, relative to constitutional safeguards for property interests, is questionable if any less drastic means of correction are reasonably available.[288] The various forms of the currently employed 50% formula,[289] from this viewpoint, appear to be lacking in both uniformity and the flexibility of approach which the judicial decisions and enlightened compensation policy appear to contemplate. Moreover, it is doubtful whether the criteria embodied in the formula should govern the permissibility, nature and quality of structural alteration and repair work, as well as the determination that an abatable nuisance exists.[290]

Equitable legislative policy, it is suggested, should also seek to devise different forms of sanctions for varying levels of building nonconformities which are rationally related to the comparative consequences to the owner of the practical alternatives. For example, under certain developmental and market conditions in the community, compulsory demolition may be regarded by the owner as economically preferable to relatively inexpensive alterations of an existing but unprofitable structure; a cleared building site is sometimes more valuable than one encumbered by a dilapidated structure. Under other conditions the converse may be true. The range of variation in the economic imponderables suggests that it may be inequitable to compel the owner to choose, unvaryingly, between the extreme of modernization in full compliance with current building requirements, on the one hand, and demolition on the other. Partial alterations which conform to standards deemed essential to public health and safety, although falling short of full compliance with other current requirements, may constitute a feasible intermediate solution where resort to the more extreme sanctions would impose unnecessary hardship

upon the owner.

Statutory criteria could thus serve not only to eliminate the "all-or-nothing" quality of some existing building enforcement practices, but could introduce new elements into a more flexible balancing process. The 50% formula, for example, fails to give appropriate consideration to the practical economic impact of code enforcement, since replacement cost rather than economic viability is the applicable reference for judgment. From a practical business viewpoint, conforming alterations and repairs costing substantially more than 50% of current building value may be quite acceptable if financial arrangements, grounded upon hardheaded appraisals of the increased earning s potential of the remodeled building, are available to amortize the cost over a reasonable period of time. Similarly, if the profit-making potential of site development after demolition significantly exceeds that of the existing structure after permitted alteration, presumably good business judgment would dictate voluntary demolition as the preferred course of action. In either of these situations, then, compulsory application of current building standards arguably would result in little or no private detriment demanding recognition on grounds of inverse condemnation policy. Conversely, in other circumstances readily conceivable, enforcement of building requirements of like magnitude and expense could well entail fiscal hardships not readily, or at all, capable of being assimilated in or mitigated by normal business arrangements. Disparities of this sort may conceivably be provided for in the new and more flexible statutory guidelines here suggested.

(e) Confiscation, forfeiture and destruction to enforce regulatory policies. A substantial number of California statutes authorize the uncompensated seizure, forfeiture, or destruction of private property as an enforcement measure in aid of regulatory policies calculated to prevent harmful activities involving the present or prospective use of the property. Unlike the provisions authorizing destruction of menaces to public health and safety, these measures are not concerned with inherently harmful physical or biological qualities of the property, but with their usefulness for antisocial purposes. Their rationale is that of contraband; specific kinds of private property used, or capable of being used, for certain illegal purposes are outlawed and declared subject to official confiscation in described circumstances. The technique of seizure and forfeiture is thus employed, among other reasons, as a penal sanction to enforce legislative policies designed to prevent fraud and deception,[292] improve the economic welfare of the state,[293] standardize business practices in the processing and distribution of goods,[294] promote conservation of natural resources,[295] and discourage particular kinds of criminal activity.[296] In general terms, these statutes incorporate a legislative judgment that a forfeiture of private property rights expediently supplements the more usual sanctions for violations of legislative policy.

Regulatory confiscation poses sharply defined issues of inverse condemnation policy. It may be assumed that the courts would declare invalid a statute which purported to authorize forfeiture of a motor vehicle used by its owner in violating ordinary vehicular parking regulations;[297] in light of the value and relative importance of vehicle ownership in our

modern mobile society, the sanction of confiscation seems so grossly disproportionate to the traffic offenses in question as to warrant a conclusion of unconstitutionality. Conversely, the forfeiture of automobiles in other contexts--such as in the enforcement of the narcotics laws--is routinely accepted as perfectly permissible.[298] The familiar problem of line-drawing is thus suggested: how far may the legislature constitutionally extend the practice of confiscation of private property as a penalty for violations of regulatory policy?

The California statutory provisions relevant to this problem incorporate the same diversity of procedural approach as do the measures, discussed above, dealing with health and safety hazards.[299] Summary seizure, destruction or forfeiture is sometimes authorized; other provisions require a form of notice, and an interval of time in which remedial proceedings may be instituted by the owner; still others require formal judicial proceedings as a prerequisite to forfeiture; and a few provisions are ambiguous or uncertain:[300]

First: Statutes authorizing regulatory confiscation or destruction of a summary nature, without notice or hearing, include:

Agric. Code §18973	Meat or meat products containing preservatives, chemicals, or other substances not permitted by meat inspection regulations (including substances, such as dyes or coloring matter, harmless to health)
Agric. Code §18974	Meat or meat products for human consumption to which horse meat has been added
Agric. Code §28121	Improperly labeled or packed egg products or egg product containers

Bus. & Prof. Code §5312	Temporary advertising displays maintained in violation of statutory regulations
Bus & Prof. Code §12506	Inaccurate weighing and measuring devices which, in the sealer's "best judgment", are not susceptible of repair
Bus.& Prof. Code §12605	Containers with false bottoms or other deceptive or fraudulent features, used for commercial purposes
Bus. & Prof. Code §25354	Alcoholic beverages produced by unlicensed persons
Sts. & Hwys. Code §§670(c) 721	Advertising devices and other highway obstructions placed or maintained in a state highway, without a permit
Sts. & Hwys. Code §754	Junkyards illegally maintained within 1000 feet of interstate or federal-aid highway
Sts. & Hwys. Code §1460(c)	Advertising signs or devices placed or maintained in a county highway without a permit

Second: Regulatory forfeiture or destruction, after notice but without a prior judicial hearing, is authorized by these provisions:

Agric. Code §25564	Perishable poultry meat not classified, packed or labeled in accordance with legal requirements; destruction on ex parte court order authorized after notice of noncompliance given to owner
Agric. Code §29731	Honey and honey containers not packed or labeled in accordance with legal requirements; seizure and destruction on ex parte court order authorized
Agric. Code §32761	Adulterated (although not impure, unclean, or unwholesome) milk or cream; destruction or return to producer authorized at option and expense of producer after notice

Agric. Code §32765	Products of milk or cream, and imitation milk products, which are adulterated (although not unwholesome) or improperly labeled; destruction authorized after notice to owner and administrative hearing
Agric. Code §43039	Fruits, nuts, and vegetables not conforming to legal standards governing grading, quality, condition, packing, and labeling; which are perishable or subject to rapid deterioration; destruction on ex parte court order authorized after notice of noncompliance given owner
Bus. & Prof. Code §5312	Advertising displays of a permanent nature maintained or placed in violation of statutory regulations; destruction authorized after 10 days written notice
Bus. & Prof. Code §§12025.5, 12211, 12606.1	Commodities offered for sale without net quantity indicated, or containing less weight than indicated; destruction on ex parte court order authorized after "off-sale" order given by sealer of weights and measures
Bus. & Prof. Code §12507	Weighing and measuring devices marked "out of order" by sealer and not corrected within 30 days; seizure authorized, followed by destruction if no court order to contrary issued within four years on owner's initiative
Bus. & Prof. Code §25355	Unlicensed stills, implements, materials, and supplies, and illegal alcoholic beverages; seizure and destruction authorized, on order of Department of Alcoholic Beverage Control, 15 or more days after seizure
Rev. & Tax. Code §30475	Untaxed cigarettes; seizure authorized, followed by forfeiture and public sale after notice, subject to owner's right to redeem on payment of taxes,

	penalties, and costs within 20 days after seizure
Sts. & Hwys, Code §§721(a), 722	Highway encroachments; removal authorized after five days written notice
Sts. & Hwys. Code §755	Junkyards illegally maintained within 1000 feet of interstate or federal-aid highway; removal at owner's expense authorized after 30 days notice

Third: The following statutory provisions authorize confiscation, forfeiture, or destruction of private property, for regulatory purposes, only after adversary judicial proceedings and formal judgment of condemnation:

Agric. Code §§14701-14712	Fertilizing materials improperly or inaccurately labeled or adulterated (but not harmful to plants when applied as directed); abatement action by district attorney authorized
Agric. Code §15113	Commercial feeding stuffs improperly or inaccurately labeled (but not harmful to livestock or poultry); condemnation and sale authorized as additional penalty in criminal prosecution
Agric. Code §25565	Poultry meat, not or subject to rapid deterioration, not classified, packed, or labeled in accordance with legal requirements; abatement action by Director of Agriculture authorized
Agric. Code §27801	Eggs not packed or labeled in accordance with applicable standards of size, quality, or consumer information; abatement action by district attorney authorized
Agric. Code §§41332,41581	Canned fruits, vegetables, and olives packed, shipped, or sold in violation

	of legal standardsof quality, condition, fill of container, and labeling; abatement action by State Board of Health authorized within 90 days after seizure
Agric. Code §43040	Fruits, nuts, and vegetables not conforming to legal standards for grading, quality, condition, packing, and labeling, which are not perishable or subject to rapid deterioration; abatement action by Director of Agriculture authorized
Agric. Code §52511	Agricultural and vegetable seeds not conforming to legal standards of quality, freedom from weed seeds, and labeling; abatement action by district attorney authorized
Agric. Code §52981	Cotton plants other than "Alcala" in a one-variety cotton district; abatement action by district attorney authorized
Agric. Code §53561	Nursery stock not in compliance with legal standards of grade sizes, quality, or labeling; abatement action by district attorney authorized
Agric. Code §59289	Agricultural commodities governed by marketing orders or agreements, but not in compliance with requirements relating to quality, condition, size, maturity pack, labeling, or marking; abatement action authorized on owner's failure to correct condition after notice of noncompliance
Bus. & Prof. Code §§25360-25370	Vehicles, stills, and other property used to produce or transport illegal alcoholic beverages; judicial proceeding for forfeiture to State authorized
Fish & G. Code §7891	Fishing vessels operating in California waters without permit, and delivering fish outside of state; seizure of boat, nets, and gear, authorized, followed by judicial forfeiture suit

Fish & G. Code §8630	Fishing nets used in violation of statute; judicial forfeiture proceeding authorized
Fish & G. Code §12157	Equipment (e.g., guns, traps, nets, fishing tackle) used in committing violation of fish and game laws; forfeiture authorized as additional penalty which court, in its discretion, may order on criminal conviction or bail forfeiture in prosecution for violation
Fish & G. Code §12159-12161	Birds, mammals, fish, or amphibia taken, possessed, sold or transported illegally; seizure and sale authorized subject to forfeiture as additional penalty on criminal conviction, or return of proceeds of sale on acquittal
Fish & G. Code §12164	Birds or mammals taken while trespassing; forfeiture authorized as additional penalty on criminal trespass conviction
Health & S. Code §§11610-11629	Motor vehicles used unlawfully to transport, secrete, or keep narcotics; judicial proceedings for forfeiture to State authorized
Health & S. Code §§11780-11797	Buildings in which narcotics are unlawfully sold, stored, or served; court action to abate by removal and sale of furnishings and by padlocking of building for one year authorized.
Health & S. Code §§26580-26589	Foods which are adulterated (although not harmful to health) or misbranded so as to be fraudulent; abatement action seeking destruction or reprocessing order (where feasible)
Pen. Code §§11225-11235	Buildings used for purpose of lewdness or prostitution; court action to abate by removal and sale of furnishings and by padlocking for one year authorized

Sts. & Hwys. Code §723	Highway encroachments; abatement action authorized when owner denies or refuses to remove after notice

Fourth: A number of the statutes authorizing confiscation of private property for regulatory purposes are incomplete or ambiguous, either declaring a particular condition to be a nuisance subject to all legal modes of abatement (seemingly including both summary destruction and judicial abatement proceedings, at the option of the enforcement officer), or authorizing seizure by public officers without providing for any subsequent proceedings or disposition of the property seized. The principal provisions of this kind are:

Agric. Code §12961	Economic poisons which are improperly labeled or packaged, adulterated, or misbranded, but not detrimental to either agriculture or public health; seizure by Director of Agriculture authorized
Agric. Code §14294	Livestock remedies offered for sale without registration pursuant to statute, or which do not conform to registration; quarantine and removal from sale authorized
Agric. Code §18971	Meat and meat food products produced in violation of slaughterhouse, sanitation, inspection, and labeling requirements; seizure and retention by Director of Agriculture authorized, until release ordered by Director or court (no provision indicating grounds for release, time elements, or nature and scope of proceedings leading to court order)
Bus. & Prof. Code §4323	Vending machines for sale of prophylactics in violation of statute limiting sale to licensed pharmacists; seizure by State Board of Pharmacy authorized

Bus. & Prof. Code §21880.5	Brake fluid which is misbranded or does not conform to legal standards; confiscation and impounding by State Bureau of Weights and Measures or local sealer, until court orders final disposition (no provision indicating time elements, scope, or nature of proceedings leading to court order)
Bus. & Prof. Code §21931	Automatic transmission fluid which is misbranded or does not conform to legal standards; confiscation and impounding by State Bureau of Weights and Measures or local sealer authorized, until court orders final disposition (no provision indicating time elements, scope, or nature of proceedings leading to court order)
Sts. & Hwys. Code §§754,757	Junkyards located within 1000 feet of interstate or federal aid highway; removal or disposal authorized by invocation of any remedies provided by law

The use of uncompensated confiscation, forfeiture, and destruction of private property as a means of enforcing regulatory policies has been repeatedly sustained as consistent with constitutional standards.[301] The courts ordinarily accord substantial weight to the legislative judgment that seizure of property used to further socially harmful purposes is an appropriate and reasonable sanction in aid of law enforcement.[302] The power to enact the underlying regulatory policy is deemed to include the power to make that policy effective by all rational means available, including the destruction of property rights. As Justice Stone epitomized it, forfeiture constitutes a "secondary defense against a forbidden use."[303] The conclusion that loss of property is a "reasonable" sanction, moreover,

is often buttressed by reference to the long historical acceptance of the practice.[304]

The decisional law, however, cannot be characterized accurately as extending blanket constitutional approval to all statutes of this kind.[305] The leading case of Lawton v. Steele,[306] declared the applicable rules in carefully guarded language. In upholding the validity of a statute providing for summary seizure and destruction, without compensation, of fish nets being used in violation of the fish and game laws of the state, the Supreme Court rejected the argument that destruction was an unconstitutional infringement upon rights in useful articles normally employed for legal purposes.[307] In the words of Justice Brown:

> Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose . . . . but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them.

The thrust of the quoted passage, and of the opinion at length, is that the constitutional validity of uncompensated confiscation or destruction rests upon a judicial assessment of the reasonableness of the legislative

decision to destroy the private property interests at stake in order to promote more effective law enforcement.[308] In this balancing process, the courts necessarily allow the legislature a considerable latitude of choice, and only invoke constitutional limitations in extreme cases.[309]

The judicially declared outer contours of constitutionality, however, are by no means the soundest guides for legislative policy; they represent only the minimum levels of governmental action, bordering upon the arbitrary, that will survive judicial review. Optimal rationality of public policy is more likely to be achieved by a painstaking consideration of the interests affected by the implementation of specific statutes, in light of the social and economic values sought to be furthered. A review of the statutory provisions cited above discloses certain significant distinctions between the various types of confiscation and destruction measures that are relevant to such consideration.

First, many of these provisions are explicitly designed as preventive measures to implement a legislative policy that pervasively outlaws a particular kind of harmful conduct characterized by the possession or use of property that is not readily usable for innocent or non-harmful purposes. The offense of possession, consumption, or sale of illegally produced liquor, for example, necessitates the physical existence of such liquor.[310]

A prohibition on use of false bottomed or fraudulently designed containers for the sale of commodities can be violated only by actual use of nonconforming containers.[311] The public policy favoring one-variety cotton districts can be frustrated only by the growing of cotton other than Alcala.[312]

Destruction of the offending property, when authorized by statutes of this sort, is justified, in part, by the relatively high degree of correspondence between the statutory objective and the destructive means employed to achieve it. Destruction prevents, in a physical sense, the continuation or repetition of the banned conduct. Conversely, the impact of destruction upon private property interests is generally minimized by the relatively low probability of loss of significant economic or social values that might be deemed attributable to the usefulness of the property for lawful purposes.[313] The legislature could reasonably have determined that illegally produced alcohol may not be lawfully used for any private purpose; that false bottomed containers are of no significant commercial value or utility except for the fraudulent purposes which the law seeks to prevent; that unauthorized varieties of cotton plants ordinarily cannot profitably be transplanted elsewhere and, in their existing location, are valuable only to the extent they defeat the beneficial objectives of the one-variety cotton statute. Since the economic values for which constitutionally required compensation is otherwise payable are here principally, if not exclusively, derived from the illegal use capabilities of the property, the policy arguments supporting uncompensated confiscation or destruction are at their maximum and those supporting compensability at their minimum.

The persuasiveness of this rationale, it will be observed, depends largely upon the assumption, usually defensible, that the underlying legislative objective is itself a sufficiently reasonable and appropriate occasion for invocation of the police power to withstand constitutional attack. Despite the general abdication by the Supreme Court of judicial

responsibility for due process review of business a nd property regulations,[314] the continuing possibility that an overextended regulation may be judicially classified as a "taking"[315] cautions against uncritical acceptance of the assumption. For example, it is far from clear - and the legislature itself has seemingly conceded the point - that junkyards may be summarily removed or destroyed without compensation (as now authorized by California statute) merely because they are situated within 1000 feet of an interstate highway, and are thus esthetically offensive, and perhaps a distraction, to motorists.[316] Significantly, in providing for removal of previously erected non-conforming billboards located near interstate highways, for combined aesthetic and safety purposes, similar doubts as to constitutionality[317] have been avoided by express authority for payment of "just compensation" to the landowner and billboard owner.[318]

A different range of policy considerations is identifiable with respect to a second category of regulatory destruction provisions. These statutes authorize the uncompensated destruction or confiscation of private property the principal intended or designed use of which could be either legal or illegal depending upon the conditions of use, and which in fact is being used, or held or prepared for use, for an illegal purpose. Unlike the provisions discussed immediately above, the objects here destroyed are readily capable of use for admittedly lawful and profitable purposes.

Fishing boats and nets, hunting rifles, and other types of sporting equipment are subject to seizure and destruction when used for the illegal taking of fish and game;[319] yet, they are equally capable of being employed

for lawful activities. Similarly, public officers may destroy foodstuffs that are adulterated or misbranded, although they are not necessarily unwholesome:[320] Moreover, even if regarded as unfit for human consumption, the destroyed foodstuffs may have substantial market value for the feeding of pets or domestic animals, or, at relatively slight expense, may be capable of being processed or repackaged to conform to legal standards so that they may be sold for human consumption.[321] Again, a building regularly used as a house of prostitution or as an opium den is subject to a padlock decree for one year, although it may readily be employed for innocuous purposes.[322]

Legislative authority for destruction of private property in the kinds of circumstances illustrated appears to indicate a merger of preventive and punitive policies. Destruction of the instrumentalities of harmful activities prevents their further use for socially inimical purposes; but, by also preventing use for socially acceptable purposes, destruction tends to constitute a form of punishment of the owner for deterrent or retributive reasons.[323] This punitive element introduces the need for a somewhat different ordering of relative values from those pertinent to statutory authorizations for preventive destruction of property not generally usable for any but illegal purposes.The social values represented by constitutional policies requiring reasonable proportionality between offense and sanction,[324] for example, are more clearly relevant.

The destruction of the fishing nets in Lawton v. Steele, supra, was deemed constitutionally permissible, according to the court's opinion, largely because they were "minor" articles of personal property, having

only "trifling value"; the same result it was suggested, would not necessarily obtain if the property were of great economic worth, such as a substantial house.[325] Other decisions have also intimated that the degree of financial detriment to the owner is a relevant aspect of the judicial equation.[326] Additional elements undoubtedly warranting judicial evaluation include the nature of and degree of threat to the public welfare that would result from use of sanctions other than destruction, the relative cost and feasibility of shifting from an illegal to a lawful alternate use of the property, the estimated capacity of other sanctions to deter unlawful use of the property if its possession and ownership is not disturbed, and the practical problems of effective administrative enforcement within acceptable fiscal budgetary limits.[327]

It seems apparent from a preliminary review of the California statutory provisions that a careful section-by-section consideration of the propriety, desirability, and fairness of uncompensated destruction authorizations could lead to revisions that would substantially improve the rationality and uniformity of the statutory pattern. In a number of instances, for example, summary seizure and destruction of foodstuffs has been authorized, without differentiation, both where they are contaminated and unwholesome[328] as well as where they are wholesome and edible but merely misleadingly packaged or labeled.[329] In analogous circumstances, however, destruction is not authorized except as an ultimate method of disposition when the owner of the nonconforming goods, after notice, fails to reprocess, repackage, relabel, or otherwise remedy the deficiency.[330] Further lack of complete consistency is suggested by statutes that impose

the same sanction of destruction for violations of the entirely disparate policies of preventing physical illness,[331] discouraging violations of conservation measures,[332] avoiding potentially misleading or fraudulent marketing practices,[333] and standardizing the quality and container standards of selected agricultural commodities in the interest of stabilizing prices and preventing market demoralization induced by unfair competitive practices.[334] The availability of alternate sanctions short of destruction but consistent with effectuation of the statutory purposes (often present with respect to the lawfully usable objects under discussion), is explicitly required to be considered in the enforcement process under some statutory provisions,[335] but is wholly ignored by others.[336]

The inconsistencies in the existing statutory pattern strongly suggest the desirability of more uniform legislative standards governing the use of confiscation and destructive sanctions. It might be desirable, for example, to undertake legislative prescription of general criteria designed to limit the seizure and destruction of socially useful and economically valuable property to circumstances in which pragmatic requirements of preventive and punitive policy or of administrative efficiency clearly outweigh the wasteful loss of resources and potentially severe financial impact resulting from use of this sanction.[337] Legislative precedents also suggest the possibility that the general criteria may include guidelines for payment of compensation, in whole or in part, where the private detriment is disproportionate to the public advantage to be secured by destruction of the owner's property, where the owner's culpability is minimized or mitigated by special circumstances, or where compensation will facilitate

effective enforcement.[338] A third distinguishable pattern discernible in these statutes emphasizes punishment, coupled with a deterrence objective, as the principal purpose of forfeiture or destruction. The private property which is seized is generally innocuous, usually of substantial value, and ordinarily usable and used for lawful activities. Subordination of preventive policy to the punishment-deterrence rationale is revealed by the fact that the property taken and destroyed is not an essential instrumentality of the conduct proscribed by the statute, but is only incidentally involved in it. Motor vehicles, for example, are not essential to the illegal possession or transportation of narcotics in the same sense that the use of fish nets are necessary to violation of a law forbidding fishing with nets; unlawful possession of narcotics in an automobile, however, may subject the car to forfeiture to the state.[339] Vehicles and other implements found at the location of an unlicensed still are subject to seizure and forfeiture even though not shown to be used in producing illegal alcohol.[340] Wholesome and valuable commodities offered for sale may be destroyed, not because of potential harm foreseeable from their anticipated consumption, but because the container or labels thereon fail to conform to legal requirements.[341] Illegally taken fish and game, although perfectly edible and of substantial value, may be confiscated as a penalty for violation of laws governing the conditions under which they were taken, not to prevent or deter their future consumption per se.[342]

A careful objective review of the penal policies reflected in this group of statutes, in relation to the constitutional policies supporting inverse condemnation liability, seems to be a desirable avenue of potential

legislative revision. Confiscation of the trophies of an illegal hunt, for example, may reflect both pragmatic administrative considerations (e.g., experience may indicate that only nominal fines for violation of fish and game laws may normally be expected to result in criminal prosecutions) and a sophisticated selection of the most efficacious deterrent to both deliberate and inadvertent violations (e.g., "that fifty dollar fine was no fun, but what really hurt was when they took away my ten point buck"). The threat of loss of an automobile through narcotics forfeiture proceedings may represent a more effective deterrent to recidivism among certain marginal operators in the narcotics traffic than "doing time", and, by making motor vehicles less available to narcotics violators through normal marketing channels,[343] may hamper the kind of free mobility that is conducive to success in the illicit narcotics trade. Pragmatic justifications of this sort, however, are not readily discernible with respect to all such destruction authorizations. It is dubious, for example, whether persuasive practical reasons can be advanced for the destruction of valuable, harmless, and socially useful merchandise merely because the quantity is not stated on the label on the container in which it is offered for sale,[344] or because it is not packed in a manner approved by the law.[345] Effectiveness and efficiency, it must be remembered, have only limited utility as sources of constitutional justification; seizure and forfeiture or destruction of a multi-million dollar jet airliner in which narcotics are found could scarcely be supported by the same rationale that sustains the forfeiture of an automobile under analogous circumstances.[346] The legislative choice of sanctions must be a reasonable one to meet constitutional standards.

The present statutory array discloses inconsistencies and incongruities in the authorization of destructive sanctions that present substantial issues of reasonableness deserving of legislative reconsideration.

Turning away from the substantive aspects of the regulatory destruction statutes, it is also apparent that a need exists for adoption of more consistent standards of procedural administration of seizure, forfeiture, and destruction sanctions. The California courts have repeatedly underscored the constitutional need for adequate notice and judicial hearing procedures as a prerequisite to forfeiture of "innocent" property (i.e., property not inherently a threat to health or safety, such as infected or diseased matter, but inimical to the public welfare only in its prospective illegal use).[347] Many of the statutory provisions being studied, however, make no provision for procedural safeguards of this sort;[348] and those which do provide for judicial proceedings contain substantial and largely inexplicable variations of procedural requirements.[349] In a few instances the statutes are deliberately equivocal: both summary destruction and judicial proceedings to abate are sometimes authorized under identical circumstances, without any legislative guidelines to condition the uncontrolled discretion of enforcement officers to pursue either procedural avenue.[350]

Absence of notice and hearing provisions in many instances, it seems clear, cannot be explained merely as a legislative implementation of the invitation extended by the Supreme Court; "where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, . . . it is within the power of the legislature to order its summary abatement."[351] The statutory provisions dispensing

with hearing include within their terms situations in which extremely valuable property may be at stake as well as property of "trifling value", where the expense and practical difficulties of enforcement would almost surely not be disproportionate to the worth of the property sought to be condemned.[352] And, since by definition the statutes in question do not involve threats of imminent peril in which expeditious abatement is essential to the protection of public health or safety, recourse to the "emergency" rationale is equally unavailing.[353]

The development of uniform and efficient procedural techniques for advance adjudication of the existence of facts justifying destruction would, of course, minimize the danger of mistaken, improvident, or over-zealous exercise of statutory powers by enforcement officers. To be sure, the summary seizure and destruction of Lawton's fish nets, according to the Supreme Court, did not leave him without an effective remedy against Steele if the latter had mistakenly exercised his statutory authority, If, in fact, Lawton's nets had not been used in violation of the act and were thus not liable to seizure and destruction, "he may replevy [them] from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute."[354]

The logical fallacy and practical incongruity of this position have already been examined.[355] It bears repeating, however, that the tort remedy hypothesized by the court is no longer available under existing California statutory law, and that no clear judicial approval of inverse condemnation as an alternate remedy has been discovered; it follows that

the current validity of summary destruction, at least in theory, is dubious.[356] In any event, the greater assurance of fairness and reliable fact finding, together with enhanced protection against unwarranted liability, that would ensue from a prior hearing argues in favor of that procedure rather than ex post facto liability suits as a general legislative policy.

Departures from the general policy of previous hearings may be warranted, of course, in special circumstances; but even here, sophisticated techniques that balance the competing interests more equitably may be capable of development. A useful illustration is found in existing legislation. Fish or game illegally taken is authorized to be confiscated for punitive purposes; but, considering its perishable nature, and the circumstances in which seizure is often likely to occur, it might well be impracticable or unduly expensive to require the state to process the seized property and hold it in cold storage pending a subsequent trial of the criminal charge, on the chance that the accused may be acquitted. Uncompensated destruction, however, would be unfair in the event of acquittal.[357] The Fish and Game Code provides a solution to this dilemma which, administered in good faith, strikes a workable balance between the object of fair treatment for the accused and the need for immediate disposition of the perishable property taken from him. Under Section 12160 the seized fish or game is sold by the enforcement officers, and the proceeds of sale are held to await the outcome of the prosecution, being forfeited in the event of conviction and returned to the defendant if he is acquitted.[358]

It may be conceded that the reported cases seldom mention - let alone discuss - the balancing process which is at the heart of legislative and judicial acceptance of regulatory destruction as a technique of government. For the most part, the courts have been content to inquire whether a legislative authorization to confiscate or destroy private property is within the range of allowable legislative discretion, not being so arbitrary as to justify judicial invalidation on constitutional grounds. That a statute meets the minimum standards of due process, however, should scarcely conclude a legislative judgment as to its reasonableness and, obviously, does not foreclose continuing legislative responsibility for the initial judgment and its periodic reappraisal. It is thus cause for concern that all too many of the statutory provisions here being considered are wholly devoid of even the slightest suggestion that they represent a consistent and thorough legislative assessment of the competing interests affected by their terms, or that their procedural incidents constitute an objectively rational effort to accommodate the demands of both administrative practicality and protection of citizens against arbitrary enforcement. The general pattern is one of indiscriminate authorization of confiscatory and destructive sanctions in distinguishable but undifferentiated factual circumstances.

(f) Exploratory surveys and investigations. Many California statutes authorize public officers, in the performance of their duties, to enter private property for the purpose of inspection, examination, or survey.[359] The courts have long recognized that such entry and related activity, when limited to conduct reasonably related and incidental to the carrying out of validly authorized public duties, does not constitute a trespass or other basis for liability of the public employee, but is privileged.[360] On the other hand, if the officer conducting the survey engages in a tortious act, negligent or intentional, that constitutes an abuse of the privilege, the common law deemed him personally liable ab initio for the initial trespass as well as all resulting injuries sustained by the property owner.[361]

The applicable decisional law, in this regard, was modified by the California Tort Claims Act of 1963. Public entities and public employees are declared immune from tort liability for injuries arising out of an entry on private property which is expressly or impledly authorized by law, but this immunity does not apply to injuries caused by the employee's "own negligent or wrongful act or omission".[362] As long as the employee remains within the scope of the authorization under which the entry was made, and acts with reasonable care and in good faith, neither he nor the employing entity are responsible in tort.

Freedom from tort liability, however, does not absolve the public entity from inverse condemnation liability. While it is clear that statutes authorizing privileged trespasses on private property in the furtherance of legitimate public business are generally valid,[363] their constitutionality

is predicated chiefly upon the judicial view that the alleged interference with private property rights is ordinarily slight in extent, temporary in duration, and de minimis in amount.[364] As the leading California case of Jacobsen v Superior Court[365] declares, a privilege of entry for official purposes will be construed to extend only to "such innocous entry and superficial examination . . . as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property"[366]. Minor and trivial injuries, in effect, are noncompensable; the public purpose to be served by the entry requires subordination of private property rights to this limited extent, at least.

The proposed entry before the court in Jacobsen, however, contemplated the occupation of parts of the owner's ranch for some two months by employees of a municipal water district, and their use of power machinery to make a number of test borings and excavations of the soil to determine the suitability of the premises for use as a possible water reservoir. Recognizing that the resulting damages would not be a basis of tort liability, absent negligence, wantonness, or malice, the Supreme Court nevertheless concluded that they would constitute an unconstitutional damaging of the owner's right to possession and enjoyment of his property. An order of the trial court enjoining the owner from interfering with the district's proposed entry and exploratory survey was annulled by writ of prohibition, since no condemnation proceedings had been commenced and compensation had not been "first made to or paid into court" for the owner, as required by section 14 of article 1 of the state constitution. The district's argument grounded on necessity was rejected;

the fact that extensive soil testing, to depths up to 150 feet, was deemed essential to an intelligent evaluation of the suitability of the site for reservoir purposes - a determination that necessarily must precede any decision to institute condemnation proceedings - was insufficient to justify the substantial interference with private property rights that was required.

The restrictive holding in the Jacobsen case has been obviated by a special statutory procedure, enacted in 1959, as Section 1242.5 of the Code of Civil Procedure. Public entities with power to condemn land for reservoir purposes are authorized to petition the superior court for an order permitting an exploratory survey of private lands to determine their suitability for reservoir use, when the owner's consent cannot be obtained by agreement. The order, however, must be conditioned upon the deposit with the court of cash security, in an amount fixed by the court, sufficient to compensate the owner for damage resulting from the entry, survey, and exploration, plus costs and attorneys fees incurred by the owner.

Section 1242.5 is a useful starting point for consideration of a more generalized legislative approach to the compensation of property owners who incur substantial damage from privileged official entries upon their property. It seems evident that reservoir site investigations are not the only type of privileged official entry that may cause significant private detriment.[367] As a model for remedial legislation, however, Section 1242.5 is somewhat defective in several respects. For example, even if its scope were expanded by amendment to include entries for purposes other than reservoir surveys, Section 1242.5 would probably be

unnecessarily broad. As the Supreme Court in the Jacobsen case
368
recognized, there are many types of surveys that can readily be made without major interference with ownership rights or physical injury to the land other than incidental and superficial disturbance to grass, shrubs, or other vegetation; actual damages in such cases are usually purely nominal and, at best de minimis. To require the formality of a preliminary court order in all such cases would be unduly burdensome,
369
time-consuming, and unrewarding, as well as constitutionally unnecessary.

What is required, it is suggested, are general statutory criteria limiting invocation of the Section 1242.5 procedure to those cases in which its safeguards are most urgently required, but dispensing with the procedure in other instances. The legislature, for instance, might make the procedure mandatory only when (as now) the owner's consent is not obtainable through negotiations, and the planned survey includes the digging of excavations, drilling of test holes or borings, extensive cutting of trees, clearing of land areas, moving of quantities of earth, use of explosives, or employment of vehicles or mechanized equipment.

Consideration should also be given to the development of inducements to private agreements that would avoid the necessity for invoking the formal statutory procedure. Public entities seeking authority to survey, for example, might be in a better position to obtain the owner's consent if the statute expressly required the entity at its sole expense to repair
370
and restore the property, so far as possible, after the survey is concluded and, in addition, to compensate the owner for damages incurred by reason of its inability to fully restore the premises to their previous condition.

Contrary to the prevailing pattern of California laws (other than Section 1242.5), which limit liability in such cases to tortiously inflicted damages,[371] the statutes of other states, which authorize official entries upon private property for survey and investigational purposes, typically require the entity to reimburse the owner for "any actual damage" resulting therefrom.[372] Moreover, since the owner may fear that some injuries will occur despite the entity's assurances to the contrary, authority for the entity to pay the owner a reasonable amount as compensation for prospective apprehension and annoyance (in addition to assurance of payment of actual damages) may also usefully assist in promoting owner cooperation through negotiation.

Section 1242.5 has additional minor defects that should be corrected if it is to be employed more widely. It is not entirely clear whether the court proceedings preliminary to the order for the survey are ex parte[373] or on notice to the owner; assurance of a fully informed decision with respect to the amount of the security to be required strongly argues the need for a noticed hearing with opportunity for presentation of evidence by the owner. If in the course of the survey, the deposit becomes inadequate because of unforeseen injuries inflicted, the court should be authorized to require deposit of additional security and the statute should indicate the procedures open to the owner to obtain such an order. Furthermore, Section 1242.5 is silent on the scope of the court's authority to investigate the techniques of exploration and survey that are contemplated, and its power to impose limitations and restrictions upon their use in the interest of reducing the prospective damages or requiring utilization of the least

detrimental techniques where alternatives are technologically feasible. It also fails to provide for remedies available to the owner when a public entity fails to invoke the statutory procedure, whether inadvertently or by design. Finally, although Section 1242.5 expressly authorizes the landowner to recover, out of the deposited security, compensation for the damages caused by the survey, plus court costs and a reasonable attorney fee "incurred in the proceeding before the court", it is not clear what "proceeding" is referred to - the initial proceeding leading to the order permitting the survey, or the subsequent proceeding to obtain compensation for the damages incurred, or both. Ambiguities of this sort should be clarified in any new legislation based on Section 1242.5.

129. 3 Cal. 69 (1853).

130. Accord, Dunbar v. The Alcalde & Ayuntamiento of San Francisco, 1 Cal. 355 (1850); 1 Harper & James, The Law of Torts §2.42, 202-03 (1956); Annot. 14 A.L.R. 2d 79 (1950).

131. Cal. Govt. Code §§ 820.2, 850 - 50.4. See Van Alstyne, California Government Tort Liability § 7.29 (1964).

132. The California statutory provisions granting broad immunity to fire fighting officials, supra note 131, were predicated upon this policy rationale: "[F]iremen should not be deterred from any action they may desire to take in combatting fires by a fear that liability might be imposed if a jury believes such action to be unreasonable." Cal. Law Rev. Comm'n Recommendation Relating to Sovereign Immunity: Number 1 - Tort Liability of Public Entities and Public Employees, 4 Reports, Recommendations and Studies 801, 862 (1963).

133. Bishop & Parsons v. Mayor and City Council of Macon, 7 Ga. 200, 202 (1849) (Lumpkin, J.). The present California statutes extend tort immunity for "any injury caused in fighting fires", Cal. Govt. Code § 850.4, to both public entities and public employees. The policy arguments favoring immunity for the employee, however, are not persuasive as a basis for immunizing the employing public entity, for the policy reasons supporting the former rule do not necessarily justify the latter. See Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 11 Cal. Rptr. 97 (1961); 3 Davis, Administrative Law

Treatise § 25.17 (Supp. 1965); Van Alstyne, Governmental Tort Liability: A Public Policy Prospectus, 10 U.C.L.A. L. Rev. 463, 483-91 (1963). Moreover, it is clear that the existing statutory tort immunity of public entities would not preclude liability on an inverse condemnation theory where mandated by constitutional provision. See Rose v. State of California, 19 Cal. 2d 713, 123 P.2d 505 (1942); Van Alstyne, California Governmental Tort Liability § 5.9 (1964).

134. See, e.g., Juragua Iron Co. v. United States, 212 U.S. 297 (1909); Annot., 97 L. Ed. 164 (1953). Cf. United States v. Pacific R. Co., 120 U.S. 227, 234 (1887) (dictum); Perrin v. United States, 79 U.S. (12 Wall.) 315 (1871). See also, Vattel, Law of Nations, Book III, c. 232 (1792); Brown, Eminent Domain in Anglo-American Law, 18 Current Legal Prob. 169 (1965); Note, 51 Mich. L. Rev. 739 (1953).

135. See, e.g., United States v. Russell, 80 U.S. (13 Wall.) 623, 628 (1871) (dictum); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1852) (dictum). Cf. note 138, infra.

136. Surocco v. Geary, 3 Cal. 69 (1853) (dictum); Russell v. Mayor etc. of New York, 2 Denio 461 (N.Y. 1844); Keller v. City of Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613 (1879). See 1 P. Nichols, Eminent Domain § 1.43 (rev. 3d ed. 1964); Annot. 14 A.L.R. 2d 73 (1950). Bowditch v. City of Boston, 101 U.S. 16 (1879), often cited as the leading case denying inverse compensability of property destruction to prevent a conflagration from spreading, was decided

before it had been established that the Due Process Clause of the Fourteenth Amendment imposed substantive limitations upon the states. See W. Lockhart, Y. Kamisar and J. Choper, Constitutional Law 486-88 (2d ed. 1967); E. Corwin, Liberty Against Government 129-53 (1948). It was not until twenty years later that the United States Supreme Court first interpreted the Fourteenth Amendment as a prohibition against state "takings" of private property without just compensation. See Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897); Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896). Certain other decisions, also often cited as denying the compensability of denial destruction in fire suppression settings, appear to be based not on constitutional principles but on common law concepts. See, e.g., Respublica v. Sparhawk, 1 Dall. 357, 1 L. Ed. 174 (Pa. 1788); Parham v. Justices of Inferior Court, 9 Ga. 341 (1851) (dictum).

137. United States v. Caltex (Phillippines), Inc., 344 U.S. 149 (1952).

138. Caltex (Philippines), Inc. v. United States, 100 F. Supp. 970 Ct. Cl. 1951). The claimed losses related to (1) permanent buildings, fixed equipment, and other terminal facilities, (2) movable equipment, and (3) supplies of petroleum products. The United States voluntarily paid compensation for destruction of items (2) and (3), presumably in reliance upon the dicta in the Russell and Mitchell cases, supra note 135; payment was refused and liability contested only with respect to items in category (1). Id. at 973.

139. United States v. Caltex (Philippines), Inc., supra note 137, at 154.

140. Id, at 155-56.

141. Much of the Caltex opinion is devoted to an elaboration of the court's reasons for rejecting the argument that the government's actions in taking the terminal facilities for denial destruction purposes should be deemed a form of "requisitioning" for which just compensation must be paid. The conclusion of the majority was that the facts of record indicated that the claimant's property "was destroyed, not appropriated for subsequent use", id at 155, and the requisitioning cases, infra at note 153 , were thus inapplicable.'

142. Burmah Oil Co. Ltd. v. The Lord Advocate, [1965] A.C. 75. See Note, The Burmah Oil Affair, 79 Harv. L. Rev. 614 (1966).

143. United States v. Caltex (Philippines), Inc., supra note 137, at 156.

144. See, e.g, Ga. Code Ann. § 88-401 (1937); Mass. Ann. Laws, ch. 48 § 5 (1966); Va. Code §§ 27-20 - 27-22 (1949). See also the statutory provisions for compensation discussed in Russell v. Mayor etc. of New York, supra note 136, and Keller v. City of Corpus Christi, supra note 136.

145. California legislative policy concededly denies liability for discretionary acts generally, Cal. Govt. Code §§ 815.2(b), 820.2, as well as for injuries caused in fighting fires. Cal. Govt. Code § 850.4. These statutes, however, were devised as limitations upon

tort liability, including damages for personal injuries as well as property losses; they are not necessarily a reflection of fully considered legislative policy on compensability of property losses where denial destruction is employed to protect the community. On the other hand, the California Legislature has accepted the principle that compensation should be paid for economic losses resulting from emergency requisitioning of private property by the state. Cal. Mil. & Vet. Code § 1585. As the Caltex case supra note 137, indicates, the line between denial destruction and requisitioning is far from a clear one.

146. In some states, by statute, liability may be imposed upon governmental entities for injuries resulting from mob violence or riots. See, e.g., Ill. Ann. Stat. ch. 38, § 25-3 (1964); Kan. Stat. Ann. § 12-201 (1964); N. J. Stat. Ann., tit. 2A, § 48-8 (1952); Note, 5 DePaul L. Rev. 312 (1956); 18 McQuillin Law of Municipal Corporations §§ 53.145 et seq. (3d ed. 1949). It is conceivable that some instances of denial destruction may be within the purview of these statutes in particular circumstances. The California mob violence statute, originally enacted in 1868, Cal. Stat. 1867-68, ch. 344, p. 418, was repealed in 1963. Cal. Stat. 1963, ch. 1681, § 17, p. 3286.

147. Compare Cal. Law Rev. Comm'n, Recommendation Relating to Sovereign Immunity: Number 1 - Tort Liability of Public Entities and Public Employees, 4 Reports, Recommendations and Studies 801, 828

(1963): "The incentive to diligence in providing fire protection that might be provided by [governmental tort] liability is already provided because fire insurance rates rise where the fire protection provided is inadequate. Moreover, the risk-spreading function of tort liability is performed to a large extent by fire insurance."

148. Under Cal. Ins. Code § 2071, the standard form fire insurance policy in California excludes liability for losses caused by "order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy". Emphasis added. Excluded perils include, inter alia, fires caused by "rebellion", "usurped power", and neglect of the insured to use "all reasonable means" to preserve the property when endangered by fire in neighboring premises. See Hall and Wigmore, Compensation for Property Destroyed to Stop the Spread of a Conflagration, 1 Ill. L. Rev. 501, 505-13 (1907).

149. See, e.g., Brown, Eminent Domain in Anglo-American Law, 18 Current Legal Problems 169 (1965).

150. See Note, 79 Harv. L. Rev. 614, 631-32 (1966). Cf. Dillon v. Turn State Gas and Electric Co., 85 N.H. 449, 163 A & 1. 111 (1932) (damages for wrongful death depend on future expectancy of decedent under special circumstances at time of death).

151. The Virginia statute, after generally authorizing the owner of

a building destroyed to prevent the spread of fire to recover the "amount of actual damage which he may have sustained", Va. Code § 27-21 (1949), limits that recovery by declaring that its authorization "shall not enable any one to recover compensation for property which would have been destroyed by the fire . . . but only for what could have been saved with ordinary care and diligence". To the same effect, see Ga. Code Ann. § 88-401 (1937) (authorizing recovery only of "any damages . . . which would not otherwise have been sustained").

153. United States v. Peewee Coal Co., 341 U.S. 114 (1951); Seaboard Air Line R. Co. v. United States, 261 U.S. 299 (1923) (by implication); United States v. Russell, 80 U.S. (13 Wall.) 623 (1871); Annot. 137 A.L.R. 1290 (1942). Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 680 (1952) (dissenting opinion).

154. See, e.g., United States v. Commodities Trading Corp., 339 U.S. 121 (1950), and United States v. John J. Felin & Co., 334 U.S. 624 (1948) (effect of government price controls upon value of requisitioned commodities); United States v. Cors, 337 U.S. 325 (1949) (effect of artifical inflation of market value due to heavy government requisitioning program).

155. See, generally, Tresolini, Eminent Domain and the Requisition of Property During Emergencies, 7 Western Pol. Q. 570 (1954).

156. United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1953).

157. Id. at 150-51. For a full statement of the facts, see the opinion below. Caltex (Philippines), Inc. v. United States, 100 F. Supp. 970 (Ct. Cl. 1951).

158. See United States v. Central Eureka Mining Co., 357 U.S. 155, 181-84 (1958) (Harlan, J., dissenting). For a brief but incisive analysis of the relationship between the kind of governmental power being asserted and the right of the affected property owners to compensation, see Waite, Governmental Power and Private Property, 16 Catholic U. L. Rev. 283, 284-86 (1967).

159. United States v. Peewee Coal Co., supra note 153.

160. United States v. Central Eureka Mining Co., supra note 158. See also, Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) (loss of profits due to frustration of contract rights by governmental action for military defense procurement purposes held noncompensable).

161. See Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation Law", 80 Harv. L. Rev. 1165 (1967). Compare Delaware, Lackawanna & Westwern R. Co., 276 U.S. 182, 193 (1928): "The police power may be and frequently it is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or means employed to accomplish it, the owner is entitled to compensation for what is taken." (Emphasis added.)

162. Cal. Mil. & Vet. Code § 1585. See also, Cal. Mil. & Vet. Code § 1535.3(f) (semble).

163. See Cal. Mil. & Vet. Code § 1505. The definitions of "state of extreme emergency" and "state of disaster" overlap substantially; both include natural calamities (e.g., fire, flood, earthquake, epidemic) and riots, but the former additionally relates to conditions of extreme peril from enemy attack or threat of attack.

164. Cal. Mil. & Vet. Code § 1585 authorizes "the Governor" to comandeer or utilize private property "deemed by him" necessary in carrying out his "the responsibility . . . vested in him" by the California Disaster Act. Although the Governor has broad power to promulgate rules and regulations for the protection of life and property during an emergency or disaster, Cal. Mil. & Vet. Code § 1581, no express authority for delegation of authority to comandeer is contained in the code. The general statutory power of deputies to perform the duties of public officers under whom they serve, Cal. Mil. & Vet. Code § 7, does not seem applicable, since it would permit others to exercise the Governor's statutory powers only when they have been so "authorized pursuant to law" - a phrase apparently requiring some other affirmative statutory provision pursuant to which such authority may be delegated. Cf. Cal. Const. art. V § 9.

165. Compare Cal. Mil. & Vet. Code § 1587, which imposes liability upon the State for damage to or destruction of local government equipment used by the State for emergency or disaster purposes beyond the local entity's territorial limits, but expressly withholds any duty of the State to compensate for rental value or ordinary

wear and tear.

166. But see Blackman v. City of Cincinnati, 66 Ohio App. 495 , 35 N.E.2d 164 (1941), affirmed 140 Ohio St. 25, 42 N.E.2d 158 (1942), criticized in Broeder, Torts and Just Compensation: Some Personal Reflections, 17 Hastings L. J. 217, 249-50 (1965).

167. The constitutional duty to pay just compensation, already includes reimbursement for incidental, conditional, and collateral losses under some circumstances. See, e.g., Cities Service Co. v. McGrath, 342 U.S. 330 (1952); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924).

168. E.g., Hughes v. United States, 230 U.S. 24 (1913); Hooe v. United States, 218 U.S. 322 (1910). But see International Paper Co. v. United States, 282 U.S. 399, 406 (1931), rejecting government contention that wartime requisitioning in question was unauthorized; opinion suggests that such power is inherent aspect of general war powers. California law has developed a broad view of the scope of an employee's authority for the purposes of imputing tort liability to the employer. See, e.g., Ruppe v. City of Los Angeles, 186 Cal. 400, 199 Pac. 496 (1921) (city held liable for assault by employee in violation of explicit instructions). An equally broad view seems fully justified for purposes of inverse condemnation liability for comandeering or requisitioning. The citizen is in no position to

question the authority of the requisitioning officer. Moreover, since the decision to requisition appears to involve an exercise of discretionary powers, the officer would be personally immune from tort liability even if he abused his authority. See Cal. Govt. Code § 820.2. A narrow view could conceivably result in denial of compensation on both tort and inverse condemnation grounds, leaving the injured property owner without remedy.

169. House v. Los Angeles County Flood Control Dist. 25 Cal. 2d 384, 153 P.2d 950, 953 (1944). See also, Archer v. City of Los Angeles, 19 Cal.2d 19, 23-24, 119 P.2d 1,4,(1941).

170. Ibid.

171. Ibid.

172. See, e.g., Cal. Health & S. Code §§ 26580-89 (ninety day period allowed for institution of abatement action following seizure and quarantine of adulterated foods). Compare People v. 2,624 Thirty-Pound Cans of Frozen Eggs, 224 Cal. App. 2d 134, 36 Cal. Rptr. 427 (2d Dist. 1964) (Successive quarantines of allegedly contaminated foods extending over period of years).

173. See, e.g., Cal. Agric. Code § 43039 (fruits, nuts, and vegetables not conforming to legal standards relating to grading, packing, and labeling); Cal. Health & S. Code § 25861 (radioactive substances).

174. Miller v. Schoene, 276 U.S. 272 (1928); Adams v. Milwaukee, 228

U.S. 572 (1913); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

175. A legislative declaration that a described condition constitutes a "nuisance" is not regarded as binding upon the courts, but is subject to judicial review under normal due process standards. See, e.g., City of Bakersfield v. Miller, 64 Cal. 2d 93, 48 Cal. Rptr. 889, 410 P.2d 393 (1966), cert. denied, 384 U.S. 988 (1966). The legislative declaration may help to define, but not to decide, the basic question whether abatement, under the circumstances, constitutes a reasonable exercise of state "police power". See 1 P. Nichols, Eminent Domain § 1.42[15], pp. 146-47 (3d ed. 1964).

176. The term, "nuisance", has no concrete and fixed content; accordingly, the definition of the conditions to be considered in law as nuisances is primarily a task for the legislature. People v. Lim, 18 Cal.2d 872, 118 P.2d 472 (1941). However, even though a legislative definition meets due process standards on its face, the constitutionality of its application to particular factual circumstances, as well as whether the statutory definition extends to those facts as a matter of interpretation, are also issues open for judicial examination. See City of Bakersfield v. Miller, supra note 175; Thain v. City of Palo Alto, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515 1st Dist. (1962); Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (2d Dist. 1957). At each of these levels in inquiry, the crucial issue involves in some degree the proper balance to be struck between public and

private interests. Cf. Miller v. Schoene, supra note 174.

177. E.g., Cal. Agric. Code §§ 5761-63 (proclamation of pest eradication area as prerequisite to summary destruction of premises, host plants, and things infested or infected with designated pest).

178. E.g., Cal. Agric. Code § 28121 (contaminated egg products declared public nuisances that "may be seized . . . and by order of . . . court . . . shall be condemned or destroyed"). See People v. 2,624 Thirty-Pound Cans of Frozen Eggs, 224 Cal. App. 2d 134, 36 Cal. Rptr. 427 (2d Dist. 1964) (dictum; predecessor statute to section 28121 said to require only ex parte court order). In Table 1 in the text, infra, statutory provisions requiring a court order for destruction of property, but which do not explicitly provide for notice and hearing, are treated as measures that contemplate only an ex parte order.

179. In most instances, the possibility of residual economic values of significance is readily apparent, despite the existence of harmful conditions, infestation, or contamination. Contaminated foodstuffs, for example, may be salvaged by reprocessing; infested plants may be saved by fumigation or application of insecticides; animals unlawful to possess in California may be salable in other states or for zoological exhibition; uninspected meat may be regarded as dangerous for human consumption, but may be acceptable for consumption by animals or for certain processing or manufacturing purposes.

The statutes cited in the text, infra, exclude all provisions in

which the object of destruction is regarded as having no possible commercial value, such as harmful insects (see Cal. Health & S. Code § 2270), field rodents (see Cal. Agric. Code §§ 6021-24), and noxious weeds (see Cal. Agric. Code §§ 7201-305).

180. The statutes cited in Table 1 are limited to measures that purport to authorize destruction of property presenting a threat to public health or safety, or to the welfare of agriculture. Some of them, however, have a broader purview than this, additionally authorizing destruction as a sanction to induce compliance with regulatory policies not concerned primarily with physical well-being of persons, animals, or plant life. See e.g., Cal. Agric. Code § 28121 (destruction of egg products authorized both for non-compliance with sanitary and health standards, and also for improper labeling). In addition, classification of a statute as one authorizing summary abatement does not necessarily imply that more formal abatement procedures are improper; some statutes authorize enforcement officers to decide, in their discretion, whether to employ summary or judicial procedures. See, e.g., Cal. Health & S. Code §§ 26580 - 90 (destruction of impure, unwholesome, or unsafe foodstuffs; both summary and judicial abatement authorized); Cal. Fish & G. Code §§ 2188-90 (semble).

Some of the listed code sections authorize payment of compensation, at least in part, for the property destroyed. Since the purpose of the listing is to illustrate the diversity of situations in which official destruction has been authorized by law, no attempt is here made to distinguish between those in which compensation is provided

by statute and those which are noncompensable.

181. The practical availability of judicial review on the owner's initiative, in cases covered by the statutes listed in Table 2, is partly a reflection of the diligence with which enforcement officers may proceed in abatement cases. In a few cases, specific time limits are fixed by statute. See, e.g., Cal. Agric. Code §§ 29156, 29161-63 (owner of bees infected with foulbrood disease must be given at least 24 hours notice to abate hive, subject to extension if administrative appeal is prosecuted). The statutes listed in Table 2 also include many that afford the owner a reasonable period of time to preserve the property from destruction by removing it from the state or otherwise remedying the deficiency; election to pursue this option, in lieu of litigation, is undoubtedly a frequent consequence of notice to abate.

182. Judicial abatement proceedings do not necessarily result in judgments authorizing destruction of the offending property, even where successfully prosecuted. Alternative, and less injurious, abatement remedies are sometimes expressly authorized, See Cal. Agric. Code § 12644 (produce with excessive insecticide residues; court may order destruction, denaturing, processing, or release on conditions calculated to remove the danger), and, in any event, are probably within the scope of the court's sound discretion. See Cal. Civ. Code § 3495; Morton v. Superior Court, 124 Cal. App. 2d 577, 269 P.2d 81 (1954) (complete prohibition of continuance of nuisance held improper if lesser measure of restraint will effectively afford relief).

183. Cal. Agric. Code § 5782.

184. Cal. Civ. Code § 3495.

185. Included in Table 5 is one statute (Cal. Agric. Code §§ 18971-72) that authorizes seizure and retention of meat and meat food products not produced in accordance with statutory regulations "until released by the director or by a court of competent jurisdiction". Since no subsequent judicial proceedings are expressly authorized or required, the seized meat could conceivably be retained under state control indefinitely, absent an action initiated by the owner. The resulting uncertainty as to the ultimate consequence of seizure justifies inclusion of these sections at this point.

186. 1 P. Nichols, Eminent Domain § 1.42[15] (rev. 3d ed. 1964).

187. Miller v. Schoene, 276 U.S. 272 (1928) (cedar rust disease of apple trees); Skinner v. Coy, 13 Cal. 2d 407, 90 P.2d 296 (1939) (disease of peach trees); Graham v. Kingwell, 218 Cal. 658, 24 P.2d 488 (1933) (American Foulbrood disease in honey bees); Irvine v. Citrus Pest Dist. No. 2, 62 Cal. App. 2d 378, 144 P.2d 857 (1944) (citrus diseases). See Annot., 70 A.L.R.2d 852 (1960).

188. Miller v. Schoene, supra note 187.

189. Id. at 280.

190. Cal. Agric. Code §§ 5933-35 (host plants of oriental fruit fly); Cal. Agric. Code §§ 8553-55 (citrus trees affected with quick decline

in citrus pest control district); Cal. Agric. Code §§ 9591-94 (animals in quarantire district infected with or exposed to infectious diseases); Cal. Agric. Code §§ 1067-71 (cattle infected with tuberculosis); Cal. Agric. Code && 10405-07 (cattle infected with brucellosis).

191. Compensation payable for destruction of host plants of the oriental fruit fly is limited to the amount established by the Director of Agriculture in a table of values promulgated by him. Cal. Agric. Code § 5934. The reimbursement authorized for removal of citrus trees infected with quick decline is declared by statute to be a "limited compensation" and is subject to statutory maximums per tree, Cal. Agric. Code § 8553, and per acre. Cal. Agric. Code § 8555. Payment for destroyed cattle infected with tuberculosis or brucellosis is subject to express dollar maximums. Cal. Agric. Code §§ 10067, 10405. Only in the case of animals in quarantine districts that are destroyed to control infectious diseases is reimbursement authorized for the appraisel "value of the animal . . . prior to its destruction". Cal. Agric. Code § 9593. This seemingly means the value of the diseased animal.

192. Statutory compensation is not payable for destruction of cattle with brucellosis or tuberculosis in the case of any grade bull or steer, animals that prove to be reactors within thirty days after arrival within a tuberculosis control area, cattle not slaughtered within thirty days after appraisement for compensation purposes, and

cattle whose owner failed to comply with applicable disease control regulations. Cal. Agric. Code §§ 10068, 10406.

193. Cal. Health & S. Code §§ 3052, 3114(b) (local governing body authorized to provide compensation for destruction of household goods to prevent spread of contagious disease). See also, statutory provisions cited infra, note 194.

194. Cal. Agric. Code § 5405 (agreements with owners of premises infested or infected with agricultural pests for abatement work; payment of consideration authorized by implication); Cal. Agric. Code § 5764 (agreements for removal of host plants of fruit flies and replacement with suitable nursery stock); Cal. Agric. Code § 8554 (agreements for compensating owners for removal of citrus trees not determined to be infected with quick decline disease where removal deemed an effective and less expensive method for checking the disease); Cal. Agric. Code § 10081 (agreement for compensation for slaughter of nonreacting cattle in herd infected with tuberculosis); Cal. Agric. Code § 10421 (agreement for compensation for slaughter of nonreacting cattle in herd infected with brucellosis).

195. Patrick v. Riley, 209 Cal. 350, 287 Pac. 455 (1930).

196. See Affonso Bros. v. Brock, 29 Cal. App. 2d 26, 84 P.2d 515 (1938); State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959).

197. Occasionally the statutes expressly authorize an enforcement officer summarily to destroy property that constitutes a statutory nuisance,

but only after obtaining the consent of the owner. See, e.g., Cal. Health & S. Code § 26584 (adulterated or misbranded food). In other instances, the enforcing officer is required to give notice to the owner of the prohibited condition of the property, so that the owner may exercise a statutory option to have the property returned to him or to request that it be destroyed. See, e.g., Cal. Agric. Code § 32764 (impure, tainted, unclean, adulterated, or unwholesome milk or cream). These measures suggest the practical reality that under some circumstances efforts at salvage or reclamation of the offending property may be uneconomical and immediate destruction more prudent fiscally.

198. See, e.g., Skinner v. Coy, 13 Cal.2d 407, 90 P.2d 296 (1939) (uncompensated destruction of infected peach trees that were still producing marketable fruit held valid); State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959) (citrus trees under attack by soil nematodes but still producing commercial fruit).

199. See City of Bakersfield v. Miller, 64 Cal. 2d 93, 48 Cal. Rptr. 889, 410 P.2d 393 (1966), cert. denied 384 U.S. 988 (1966). Compare Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417-19 (1922) (Brandeis, J., dissenting).

200. See Miller v. Schoene, 276 U.S. 272, 279-80 (1928): "Where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every

exercise of the police power which affects property." (Stone, J.)

201. See Cal. Agric. Code § 11381. The nutria (also known as the South American beaver or coypu) has proven to be a menace to growers of sugarcane, rice, and vegetables wherever it has become established in the United States in a wild condition. See U.S. Dept. Agriculture, Protecting Our Food: The Yearbook of Agriculture, H.R. Doc. No. 349, 89th Cong., 2d Sess. 70 (1966).

202. Compare Cal. Agric. Code §§ 5933-35 (host plants of oriental fruit fly) with Cal. Agric. Code § 5906 (host plants of citrus white fly) and Cal. Agric. Code § 6323 (host plants of fruit fly Tephritidae).

203. Compare Cal. Agric. Code §§ 10067, 10405 (diseased cattle) with Cal. Agric. Code § 29159 (diseased bees) and Cal. Health & S. Code § 1907 (any animals found at large in rabies quarantine area).

204. Compare Cal. Health & S. Code § 3052 (household furnishings and animals) with Cal. Health & S. Code § 26584 (adulterated and misbranded food) and Cal. Health & S. Code § 26364 (adulterated and misbranded drugs).

205. Compare Cal. Agric. Code § 8553 (citrus trees with quick decline) with Cal. Agric. Code § 5401 (host plants of agricultural pests) and Cal. Agric. Code § 14702 (injurious chemicals and fertilizers).

206. Equitable considerations not readily susceptible to rigidification as constitutional doctrine may well be more amenable to political

settlement in this context. Compare Holmes, J., in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922): "In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders." To the same effect, see Stanislaus County Dairymen's Protective Ass'n v. Stanislaus County, 8 Cal. 2d 378, 65 P.2d 1305, 1313 (1937), intimating that while uncompensated destructions may be valid, payment of compensation for losses so incurred "is the safe and just method" for eliminating health menaces.

207. See Patrick v. Riley, supra note 195.

208. Some of the abatement laws already incorporate, to some degree, notions of culpability. For example, a milk inspection law that authorizes destruction of milk from a dairy herd that is not in compliance with tuberculosis testing requirements in effect imposes a penalty for culpable conduct of the milk producer in failing to conform to the testing standards. See Adams v. Milwaukee, 228 U.S. 572 (1913). Similarly, the statutory provisions for payment of partial reimbursement to owners of cattle destroyed to control disease expressly withhold any such payments from owners who have violated applicable disease control regulations or have failed to maintain their premises in sanitary condition. See Calif. Agric. Code §§ 10068(g), 10069, 10406(h), 10407.

209. The inducement of potential long-range benefits appears to be part

of the rationale of statutory authorizations for voluntary abatement agreements between owners and enforcement agencies. See the statutes cited supra, note 194. The economic value of pest and disease abatement programs to agricultural producers is measured in billions of dollars nationwide. See U.S. Dept. of Agriculture, Animal Diseases: The Yearbook of Agriculture, H.R. Doc. No. 344, 84th Cong., 2d Sess. 11-14 (1956); U.S. Dept. of Agriculture, Plant Diseases: The Yearbook of Agriculture 1-9 (1953).

210. Some existing statutory provisions appear to reflect considerations of relative community detriment. For example, certain types of statutory nuisances are subject to summary destruction if found to be in a condition imminently dangerous, but not if merely deleterious, to the community. See, e.g., Cal. Fish & G. Code §§ 6302, 6303. See also Cal. Agric. Code §§ 6305, 6462, 6521.

211. The availability of reasonably effective, administratively feasible, and economically acceptable alternative means for abating a public nuisance, short of actual destruction, has often been indicated by the courts to be a rational basis for withholding judicial approval to destruction. See, e.g., Forney v. Mounger, 210 S.W. 240 (Tex. Civ. App. 1919) (destruction held unnecessary to abate unsanitary stable nuisance, where offensive use could be eliminated by removal of manure and dirt); Sings v. Joliet, 237 Ill. 300, 86 N.E. 663 (1908) (destruction of house to eradicate smallpox infection held unnecessary where disinfection of contents of house shown to be

equally effective remedy); Prichard v. Comm'rs of Morgantown, 126 N.C. 908, 36 S.E. 353 (1900) (semble). See also, West v. Borger, 309 S.W.2d 250 (Tex. Civ. App. 1958); Childs v. Anderson, 344 Mich. 90, 73 N.W.2d 280 (1955). A number of the existing statutes reflect this principle. See, e.g., Cal. Agric. Code §§ 6462-65, 6521-24 (infested plants authorized to be destroyed only after owner given opportunity to eliminate pest by treatment or to ship plants out of state).

212. Relative ability to absorb the loss is, of course, a judicially approved policy consideration relevant to inverse liability. See Albers v. County of Los Angeles, 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965). The program of partial compensation to farmers when diseased cattle or other animals are slaughtered, see statutes cited supra note 190, reflects a political assessment of relative fiscal repercussions and resulting administrative difficulties for enforcement officers. See Patrick v. Riley, supra note 195. Compare the relationship between the prevalence of fire insurance and the recommendations of the California Law Revision Commission that there be enacted broad statutory immunities of public entities from tort liability in connection with fire protection activities of government. Cal. Law Rev. Comm'n, Recommendation Relating to Sovereign Immunity: Number 1 - Tort Liability of Public Entities and Public Employees, in 4 Reports, Recommendations and Studies 801, 828 (Cal. Law Revision Comm'n ed. 1963) (" . . . the risk-spreading function of tort liability is performed to a large extent by fire insurance").

213. See, e.g., Dittus v. Cranston, 53 Cal.2d 284, 1 Cal. Rptr. 327, 347 P.2d 671 (1959) (legislative appropriation for payment of compensation to fishermen for nets and other fishing equipment made valueless by recently enacted anti-netting legislation held constitutionally valid and not a prohibited gift of public funds). Cf. Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 329 P.2d 289 (1958). See also note 212, supra.

214. Many of the statutory provisions cited in the text in Table 2, supra, are of this type. See, e.g., Cal. Agric. Code §§ 6175, 6304, 6305, 6462-65, 6521-24, 11201, 29095, 32761-64; Cal. Fish & G. Code §§ 2188, 6303; Cal. Health & S. Code § 25861.

215. See, e.g., Cal. Agric. Code §§ 6464-65, 6523-24 (treatment or processing to destroy plant pests authorized, under supervision of enforcement officers, if the nature of the pest is determined to be such that no danger to agriculture can be caused thereby).

216. See, generally, 3 K. Davis, Administrative Law Treatise § 26.05, pp. 531-36 (1958); 2 F. Harper and F. James, The Law of Torts § 29.10, pp. 1624-46 (1956); W. Prosser, Torts 1017-19 (3d ed. 1964). Compare Spillman v. Beauchamp, 362 S.W.2d 33 (Ky. 1962) (no liability of public officer for mistake in slaughtering healthy cattle believed in good faith to be diseased) with Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891) (officer deemed liable even for reasonable mistake where statute authorized only destruction of diseased animals).

217. But see Cal. Agric. Code §18975 (meat not bearing required inspection stamp) and Cal. Health & S. Code § 28298 (foodstuffs stored in unsanitary food processing plant). Statutes of this type authorize destruction without any determination that the condemned commodities are unwholesome or contaminated. Their purpose is to avoid a potential rather than established danger by creating a sanction to induce compliance with preventive regulations. They are generally sustained on the same police power rationale that supports destruction of diseased or contaminated property. See Adams v. Milwaukee, 228 U.S. 572 (1913).

218. Affonso Bros. v. Brock, 29 Cal. App. 2d 26, 84 P.2d 515 (3d Dist. 1938); Corneal v. State Plant Board, 95 So.2d. 1 (Fla. 1957).

219. Lertora v. Riley, 6 Cal. 2d 171, 57 P.2d 140 (1936); Graham v. Kingwell, 218 Cal. 658, 24 P.2d 488 (1933); Los Angeles County v. Spencer, 126 Cal. 670, 59 Pac. 202 (1899); Affonso Bros. v. Brock, supra note 218. Accord: North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

220. See authorities cited supra, note 216.

221. See K. Davis, Administrative Law Text 477 (1959); "The officer's action may be reasonable, prudent, and careful, and the officer still may be liable for damages if he makes a reasonable mistake. Furthermore, the officer may be personally liable even if his finding [that the property was diseased and thus subject to destruction under the statute] is entirely correct, for, in a practical sense,

the test of the officer's liability is not the existence of the disease but what the court finds afterwards." Cf. Silva v. MacAuley, 135 Cal. App. 249, 26 P.2d 887, 27 P.2d 791 (3d Dist. 1933) (officers held liable for confiscation of crabs under misinterpretation of their statutory authority).

222. Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3 (1883), quoted in Davis, op. cit, supra, note 221, at 477. See also, Spillman v. Beauchamp, 362 S.W.2d 33 (ky. 1962).

223. Cal. Agric. Code § 18975.

224. Cal. Agric. Code § 10063. The requirement that an appropriate test or examination, by qualified officials, must precede the determination to destroy supports the view that a bovine disease eradication program involving uncompensated destruction of diseased cattle is constitutionally valid, for such testing provides reasonable assurance that only dangerously diseased animals will be destroyed. See Stanislaus County Dairymen's Protective Ass'n v. Stanislaus County, 8 Cal.2d 378, 65 P.2d 1305 (1937). Moreover, at present, statutory compensation is not authorized for destruction of healthy animals. Lertora v. Riley, 6 Cal. 2d 171, 57 P.2d 140 (1936).

The relevant statutes authorize destruction of and partial compensation for cattle that react positively to a tuberculin test or are "adjudged tuberculous upon physical examination". Cal. Agric. Code § 10061. The brucellosis control program requires in every case a chemical test of the animal's blood or milk and a

positive reaction before slaughter is authorized. Cal. Agric. Code § 10401. Both statutes, however, authorize destruction without compensation in a variety of cases within their purview. See note 192, supra. The California courts, in discussing the tort liability of enforcement officers for destruction of cattle that are subsequently found not to have been diseased, see note 219, supra, have failed to note any distinctions between situations in which (a) no test or examination was made of the animals selected for destruction, (b) a chemical test was administered, and the animals destroyed were then found (correctly) to be nonreactors, (c) a chemical test was administered, and the animals destroyed were then found (erroneously) to be reactors, (d) a physical examination was conducted and the animals destroyed were then determined (correctly) to be non-tubercular, or (e) a physical examination was conducted and the animals destroyed were then determined (erroneously) to be tubercular. See, e.g., Lertora v. Riley, 6 Cal. 2d 171, 57 P.2d 140 (1936) (dictum treating liability issue as identical in cases (a) and (b); no analysis of other situations). The reliability and objectivity of a chemical test, as compared with a physical examination, would appear to be considerations relevant to development of rational rules of liability of enforcement personnel. For example, a decision to slaughter an animal based on a physical examination might be regarded as a discretionary determination for which official tort immunity obtains. See Cal. Govt. Code § 855.4. On the other hand, the greater risk of mistake where a physical examination rather than a chemical test is employed would tend

to support a rule requiring reimbursement of the owner in such cases, unless the public agency successfully assumed the burden of proving the animal was in fact diseased . A decision to slaughter without administering any test or examination, or to slaughter a nonreactor following a chemical test, would appear to exceed the discretion vested in the enforcement officer and, in effect, to constitute a negligent failure to discharge a mandatory duty to refrain from such destruction, and thus a basis of liability. See Cal. Govt. Code § 815.6.

225. Legislative recognition that the initial determination to seize and condemn foodstuffs as adulterated or misbranded may be a mistaken one is implicit in the statutory procedures. See Cal. Health & S. Code §§ 26580 - 89.5 (quarantined foodstuffs to be destroyed only on successful outcome of condemnation proceeding instituted within 90 days, or in event owner does not prevail in earlier action for release).

226. Adams v. Milwaukee, 228 U.S. 572 (1913). But cf. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

227. See cases cited supra, notes 218-19.

228. See Lertora v. Riley, 6 Cal.2d 171, 57 P.2d 140 (1936). It has been suggested that the immunity of the public agency was perhaps the chief reason for judicial willingness to impose the liability upon the enforcement officer. See Spillman v. Beauchamp,

362 S.W.2d 33 (ky. 1962).

229. The doctrine of official discretionary immunity in California has experienced major enlargement in scope during the years following World War II. See Van Alstyne, A Study Relating to Sovereign Immunity, in 5 Reports, Recommendations and Studies 1, 248-51 (Cal. Law Revision Comm'n ed. 1963); Gray, Private Wrongs of Public Servants, 47 Calif. L. Rev. 303, 346 (1950). The principal California authorities supporting the enforcement officer's liability were decided before these recent developments, and either failed to consider the discretionary immunity rule or regarded it as inapplicable. See, e.g., Los Angeles County v. Spencer, 126 Cal. 670, , 59 Pac. 202, 203 (1899) (" . . . the acts of the commissioner [in carrying on pest abatement duties] are not clothed with that sanctity and protection which accompanies the judicial acts of courts and judges, and the commissioner would be liable officially and personally for wrongful acts done under the color of his office."). Accord: Graham v. Kingwell, 218 Cal. 658, 24 P.2d 488 (1933). Cf. Affonso Bros. v. Brock, 29 Cal. App. 2d 26, 84 P.2d 515 (3d Dist. 1938); Silva v. MacAuley, 135 Cal. App. 249, 26 P.2d 887, 27 P.2d 791 (3d Dist. 1933).

230. See Calif. Govt. Code §§ 815.6 (no liability for failure to discharge mandatory duty imposed by law if reasonable diligence exercised), 818.2 (no liability for failure to enforce any law), 818.4 (no liability in connection with issuance, denial, suspension, or

revocation of permits, licenses, certificates, approvals, or other authorizations), 818.6 (no liability for failure to make an inspection, or for making an inadequate or negligent inspection, for health or safety hazards), 820.2 (no liability for discretionary acts or omissions), 855.4 (no liability for discretionary decisions to perform or not perform acts to control spread of disease).

231. In most cases, there would be no liability of the officer even if he acts negligently or abused his discretion in reaching the decision to destroy the property. Govt. Code §§ 820.2, 855.4. See Jones v. Czapkay, 182 Cal. App. 2d 182, 158 N.Y.S.2d 277 (Ct. Cl. 1956). Once the decision to destroy is reached by competent authority, the public employee charged with the duty of actual abatement is absolved from liability provided he employs reasonable care. Cal. Govt. C. § 855.4(b)

232. Cal. Govt. Code § 815.2(b).

233. See Rhyne v. Mount Holly, 251 N.C. 521, 112 S.E.2d 40 (1960); State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959). But cf. Lertora v. Riley, 6 Cal. 2d 171, 57 P.2d 140 (1936).

234. The California decisions have emphasized the availability of a tort remedy against the officer, and , concurrently, have intimated that the public entity is not liable. See Lertora v. Riley, 6 Cal. 2d 171, , 57 P.2d 140, 141 (1936) (" . . . the state is not liable [for wrongful destruction of cattle for tuberculosis control purposes]

. . . unless expressly provided by statute"); Affonso Bros. v. Brock, 29 Cal. App. 2d 26, 84 P.2d 515 (3d Dist. 1938). Judicial intimations that inverse condemnation might be a feasible theory have been, at best, tenuous and guarded. See, e.g., House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950 (1944) (dictum).

235. Compare Silva v. MacAuley, 135 Cal. App. 249, 26 P.2d 887, 27 P.2d 791 (3d Dist. 1933) (fish and game commissioners held personally liable for mistaken seizure of crabs lawfully being transported through county, under apparently good faith but erroneous interpretation of statutory prohibition upon certain crab shipments). Imposition of personal liability, under circumstances of this kind, may be an acceptable solution in view of the present statutory rule that requires payment of the judgment against the employee by the employing entity, without recourse against the employee provided the latter acted in good faith and in the scope of his employment. See Cal. Govt. Code §§ 825-25.6; Van Alstyne, California Government Tort Liability §§ 10.21 - .26 (1964). Statutory indemnification precludes undue interference, based on fear of personal liability, with the vigorous execution of the officer's duties in the field, and at the same time provides assurance of the validity of the nuisance abatement program. See text at note 227, supra.

236. See, e.g., Cal. Health & S. Code §§ 26361, 26366 (seizure and institution of condemnation proceeding for adulterated or mis-

branded drugs).

237. Had Silva v. MacAuley, supra note 235, involved judicial abatement proceedings rather than summary seizure, the loss to the owner, due to the perishable nature of his property (fresh crabs), would probably have been just as complete. Moreover, a quarantine pending ultimate judicial exoneration may extend over a very prolonged period of time. See, e.g., People v. 2,624 Thirty-Pound Cans of Frozen Eggs, 224 Cal. App. 2d 134, 36 Cal. Rptr. 427 (2d Dist. 1964) (abatement proceedings extending over period of several years).

238. See Cal. Govt. Code § 821.6 (public employee immune from liability for institution or prosecution of judicial or administrative proceeding, even when he acts maliciously and without probable cause).

239. See Cal. Code Civ. Proc. § 539 (liability for damages on attachment undertaking conditioned upon recovery of judgment of defendant); Reachi v. National Auto & Cas. Ins. Co., 37 Cal. 2d 808, 236 P.2d 151 (1951). See also, Russell v. United Pacific Ins. Co., 214 Cal. App. 2d 78, 29 Cal. Rptr. 346 (5th Dist. 1963) (liability on injunction bond where party enjoined ultimately prevails).

239a. Relevant statutory policy, already in existence, is found in Cal. Code Civ. Proc. § 1095, which authorizes the successful petitioner

in a mandamus action against a public officer or employee to recover "the damages he has sustained" by judgment against the public entity employing the officer. See Adams v. Wolff, 84 Cal. App. 2d 435, 190 P.2d 665 (1st Dist. 1948). Under limited circumstances, the remedy of mandamus may already be available at least in theory, to persons threatened with abatement proceedings; for example, mandamus might lie to compel the enforcement officer to give notice or undertake required tests that are prerequisites to destruction. A more generalized policy of allowing damages in addition to exoneration of the property, where the owner ultimately prevails in challenging the official decision to abate, appears to be a logical extension of the principle embodied in Section 1095.

240. North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); Affonso Bros. v. Brock, 29 Cal. App. 2d 26, 84 P.2d 515 (3d Dist. 1938). See also, Thain v. City of Palo Alto, 207 Cal. App.2d 173, 24 Cal. Rptr. 515 (1st Dist. 1962) (dictum).

241. Adams v. Milwaukee, 228 U.S. 572 (1913) (summary destruction of milk from uninspected and untested herds justified, in part, by impracticability of delay in light of capacity of milk for spoilage and rapid bacterial growth); North American Cold Storage Co. v. Chicago, supra note 241 (summary abatement of meat in cold storage plant justified, in part, by danger that such meat might enter commercial channels unless continuously guarded by

enforcement officers at exhorbitant public expense). Cf. Lawton v. Steele, 152 U.S. 133 (1894) (need for inexpensive enforcement practices justifies, in part, destruction of illegally used fishing nets).

242. See, e.g., State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959); Oglesby v. Town of Winnfield, 27 So.2d 137 (La. App. 1946).

243. See note 211, supra.

244. A few statutory authorizations presently vest explicit discretion in the court, in judicial abatement proceedings, to require abatement by the least detrimental method available. See, e.g., Cal. Agric. Code § 7578 (abatement order to specify whether contaminated seed screenings or cleanings shall be destroyed, denatured, processed, or released on specified conditions); Cal. Agric. Code § 15113 (adulterated commercial feeds to be seized and sold, or, in court's discretion, released upon compliance with all legal requirements).

245. See note 178, supra.

246. Whether a plenary hearing, in lieu of ex parte proceedings, would be administratively feasible would depend, in part, upon extra-legal considerations, such as availability of storage space to hold quarantined goods, practicability of temporary precautionary techniques other than seizure that would safeguard

the public interest pending hearing, problems of spoilage and deterioration of perishables, etc.

247. See statutes cited in Table 2, text supra.

248. Procedures carefully adapted to the necessities of particular types of abatement problems would presumably be necessary. The time element in dealing with highly perishable commodities, such as fresh milk or farm produce, for example, may preclude anything but summary abatement. See Adams v. Milwaukee, 228 U.S. 572 (1913). Expeditious procedures, where necessary, have respectable legislative precedents. See, e.g., Cal. Code Civ. Proc. §§ 1159-79a (unlawful detainer proceedings). See also, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) (rapid procedure for suppressing pornographic publications).

249. Numerous examples are included in the statutes cited in Table 2, text supra.

250. Some of the statutes under discussion provide for a variety of alternative techniques of abatement, usually at the owner's option and expense. See, e.g., Cal. Agric. Code §§ 6462-65, 6521-24 (plants and nursery stock infested with pests); Cal. Agric. Code §§ 32761-64 (adulterated or impure milk). Other statutes, however, are less flexible, permitting only the options of destruction or removal from the state. See, e.g., Cal. Fish & G. Code § 6303 (infected or diseased fish, amphibia, or aquatic plants).

251. See Cal. Health & S. Code §§ 12350-52 (illegal explosives); Cal. Health & S. Code § 12711 (illegal fireworks); Cal. Health & S. Code § 19814 (dangerously inflammable fabrics).

252. See Lawton v. Steele 152 U.S. 133, 142 (1894) (dictum). Cf. People v. 2,624 Thirty-Pound Cans of Frozen Eggs, 224 Cal. App. 2d 134, 36 Cal. Rptr. 427 (2d Dist. 1964) (by implication); People v. 237 Thirty-Pound Cans of Whole Hen Eggs, 23 Cal. App. 2d 292, 72 P.2d 929 (2d Dist. 1937) (semble).

253. See, e.g., Cal. Agric. Code §§ 10067(a), 10405(a) (statutory indemnification for destruction of diseased cattle includes proceeds of sale of the salvage of the destroyed animals). Cf. Cal. Agric. Code § 7580 (where contaminated seed screenings are abated, pursuant to court order, by sale, net proceeds to be paid into court for owner).

254. Cal. Health & S. Code § 17921. Mobilehomes are still governed by statutory provisions rather than the state housing regulations. Cal. Health & S. Code §17911. See Also, Cal. Health & S. Code § 18010.

255. Cal. Health & S. Code & 17951.

256. Cal. Health & S. Code §§ 17960-66.

257. Cal. Health & S. Code §§ 17980-89. Insistence upon judicial abatement proceedings may reflect the impact of case law indicating that demolition of a building as a nuisance, absent a court order,

exposes the enforcing agency to inverse condemnation liability on proof by the owner that the structure was not, in fact, a nuisance. See Albert v. City of Mountain Home, 81 Idaho 74, 337 P.2d 377 (1959); McMahon v. City of Telluride, 79 Colo. 281, 244 Pac. 1017 (1926).

258. See, e.g., Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (2d Dist. 1957); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937). Disparities between standards imposed by local building, fire, and other structural codes also tends to contribute to the prevalence of nonconformities. See, generally, Advisory Comm'n on Intergovernmental Relations, Building Codes: A Program for Intergovernmental Reform (1966).

259. See Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964); Dunham, A Legal and Economic Basis for City Planning, 58 Colum. L. Rev. 650 (1958).

260. See Clement v. State Reclamation Board, 35 Cal.2d 628, 642, 220 P.2d 897, 905 (1950): "The decisive consideration is whether the owner of the damaged property would contribute more than his proper share to the public undertaking." (Traynor, J.) To the same effect, see Albers v. County of Los Angeles, 62 Cal.2d 250, , 42 Cal. Rptr. 89, 96, 398 P.2d 129, 136 (1965); House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 397, 153 P.2d 950, 956 (1944) (concurring opinion by Traynor, J.)

261. Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (2d Dist. 1959); Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (2d Dist. 1957); City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871 (1949); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937). The California State Housing Law is expressly declared not retroactive so far as authorized regulations relate to erection or construction, but is retroactive with respect to regulations governing use, maintenance, and change of occupancy. Cal. Health & S. Code §§17912, 17913. See City & County of San Francisco v. Meyer, 208 Cal. App. 2d 125, 25 Cal. Rptr. 99 (1st Dist. 1962).

262. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946) (automatic fire extinguishing sprinkler system in lodging house); City of Bakersfield v. Miller, 64 Cal. 2d 93, 48 Cal. Rptr. 889, 410 P.2d 393 (1966), cert. denied, 384 U.S. 988 (1966) (nonconformities in hotel that created fire hazards); Kaukas v. City of Chicago, 27 Ill.2d 197, 188 N.E.2d 700 (1963) (fire exits in multiple dwellings).

263. Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (2d Dist. 1957). See Annot., 14 A.L.R. 2d 73, 76-78 (1950).

264. Cal. Civ. Code § 3479. See County of San Diego v. Carlstrom, 196 Cal. App. 2d 485, 16 Cal. Rptr. 667 (4th Dist. 1961); Moton v. City of Phoenix, 100 Ariz. 23, 410 P.2d 93 (1966); cases cited infra, note 271.

265. Cal. Const. art. XI § 11.

266. The Los Angeles ordinance is described in Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (2d Dist. 1959). For the Porterville ordinance, see Baird v. Bradley, 109 Cal. App. 2d 365, 240 P.2d 1016 (4th Dist. 1952). The Santa Barbara building code is reflected in People v. Morehouse, 74 Cal. App. 2d 870, 169 P.2d 983 (2d Dist. 1946).

267. See City of Bakersfield v. Miller, 64 Cal.2d 93, 48 Cal. Rptr. 889, 410 P.2d 393 (1966) (Bakersfield ordinance).

268. See Cal. Civ. Code § 3495.

269. Armistead v. City of Los Angeles, supra note 263; City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871 (1949); 1 P. Nichols, Eminent Domain § 1.42[15], pp. 142-47 (rev. 3d ed. 1964).

270. See Takata v. City of Los Angeles, 184 Cal. App. 2d 154, 7 Cal. Rptr. 516 (2d Dist. 1960) (demolition order held not an abuse of discretion vested in city Board of Building and Safety Commissioners); Stoetzner v. City of Los Angeles, 170 Cal. App. 2d 394, 338 P.2d 971 (2d Dist. 1959). To the extent that review of an administrative demolition order is by mandamus proceedings, see Cal. Code Civ. Proc. § 1094.5, deference to the initial determination, if supported by evidence, is required by statute.

271. Yen Eng v. Board of Building & Safety Comm'rs, 184 Cal. App. 2d

514, 7 Cal. Rptr. 564 (2d Dist. 1960); Takata v. City of Los Angeles, supra note 270; Perepletchikoff v. City of Los Angeles, supra note 266; Stoetzner v. City of Los Angeles, supra note 270; Baird v. Bradley, 109 Cal. App. 2d 365, 240 P.2d 1016 (4th Dist. 1952).

272. See Perepletchikoff v. City of Los Angeles, supra note 266; West Realty Co. v. Ennis, 147 Conn. 602, 164 A.2d 409 (1960); Soderfelt v. City of Drayton, 79 N. D. 742, 59 N.W.2d 502 (1953); Hill Military Academy v. City of Portland, 152 Ore. 272, 53 P.2d 55 (1936); West v. Borger, 309 S.W.2d 250 (Tex. Civ. App. 1958).

273. Major repairs are often necessary, for example, when a structure is damaged by fire, flood, or storm, When damages are extensive, the repairs may approach the status of reconstruction. See former Cal. Health & S. Code § 15157 (repealed in 1961), which provided that repair and reconstruction work on any building "which has been damaged by fire or the elements to an extent in excess of 60 percent of its physical proportion, shall conform to all of the provisions of [the former State Housing Act]"; Baird v. Bradley, 109 Cal. App. 2d 365, 240 P.2d 1016 (4th Dist. 1952) (statute held valid). Compare the Los Angeles ordinance described in note 274, infra.

274. The Los Angeles ordinance, as described in Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (2d Dist.

1959), establishes a three-step set of criteria: (1) Alterations and repairs to nonconforming structures may be made in conformity with original material and construction standards if the cost does not exceed 10% of replacement cost in any one year. (2) Alterations or repairs costing more than 10% of replacement cost must conform to present requirements for materials and type of construction for new buildings of like area, height, and occupancy. (3) If proposed alterations and repairs will cost more than 50% of replacement cost, the entire building must either be conformed to present requirements or be demolished.

275. This form of "50% rule" has often been employed as the test of when a wooden building located within a later established fire district, within which new wooden structures are forbidden, has deteriorated to the point that it may be classified as a public nuisance abatable by demolition. See West Realty Co. v. Ennis, 147 Conn. 602, 164 A.2d 409 (1960); Soderfelt v. City of Drayton, 79 N.D. 742, 59 N.W.2d 502 (1953); Russell v. City of Fargo, 28 N. D. 300, 148 N.W. 610 (1914). Cf. Takata v. City of Los Angeles, 184 Cal. App. 2d 154, 7 Cal. Rptr. 516 (2d Dist. 1960).

276. Compare Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (2d Dist. 1957) (dictum suggesting possible invalidity) with Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (2d Dist. 1959) (50% rule held validly applicable only to buildings constructed after its effective

date, or to pre-existing nonconforming structures that have deteriorated in fact to the status of a nuisance as tested by common law standards). But cf. City of Bakersfield v. Miller, 64 Cal.2d 93, 48 Cal. Rptr. 889, 410 P.2d 393 (1966) (suggesting, by implication, that result turns on balancing of interests revealed by individual circumstances).

277. See Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); Maguire v. Reardon, 255 U.S. 271 (1921); City of Bakersfield v. Miller, 64 Cal.2d 93, 48 Cal. Rptr. 889, 410 P.2d 393 (1966). Cf. Berman v. Parker, 348 U.S. 26 (1954). But see Armistead v. City of Los Angeles, 152 Cal. App.2d 319, ,313 P.2d 127, 132 (2d Dist. 1957), rejecting the view that mere nonconformity with present building and safety standards is enough to warrant abatement as a public nuisance: "While such a test may be one element in determining this question of fact, it can never be the sole controlling one. Otherwise every house and building built before enactment of the latest changes in a municipal building code would be in jeopardy . . . . For repairs to old buildings under present-day building standards and legal requirements generally would be economically unsound, and would in most cases exceed the 50% limitation in the municipal code - assuming that that limitation is not contrary to due process." To the same effect, see City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871 (1949).

278. The possibility of tort liability as a remedy for over-zealous, mistaken, or even malicious enforcement of building regulations is foreclosed under present law. See Cal. Govt. Code §820.2; Knapp v. City of Newport Beach, 186 Cal. App. 2d 669, 9 Cal. Rptr. 90 (4th Dist. 1960); Baker v. Mueller, 222 F.2d 180 (7th Cir. 1955); Van Alstyne, California Government Tort Liability §§5.53-5.55 (1964).

279. City of Bakersfield v. Miller, 64 Cal. 2d 93, 48 Cal. Rptr. 889, 410 P.2d 393 (1966); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937). See also, cases cited supra note 277.

280. The tendency to treat alike code violations of essentially dissimilar gravity is illustrated by decisions such as City & County of San Francisco v. Meyer, 208 Cal. App. 2d 125, 25 Cal. Rptr. 99 (1st Dist. 1962) and People v. Morehouse, 74 Cal. App. 2d 870, 169 P.2d 983 (2d Dist 1946). Cf. Richards v. City of Columbia, 227 S.C. 538, 535, 88 S.E.2d 683, 696 (1955) (dissenting opinion).

281. Some courts have indicated that a demolition order ordinarily cannot be sustained if the building in question is capable of being repaired or altered to conform to code requirements, until the owner has been given an opportunity to make the necessary repairs or alterations and thus protect his investment. See Birch v. Ward, 200 Ala. 118, 75 So. 566 (1917); Echave v. City of Grand Junction,

118 Colo. 165, 193 P.2d 277 (1948); Bloomfield v. West, 68 Ind. App. 568, 121 N.E. 4 (1918); Childs v. Anderson, 344 Mich. 90, 73 N.W.2d 280 (1955); State Fire Marshall v. Fitzpatrick, 149 Minn. 203, 183 N.W. 141 (1921); Abraham v. City of Warren, 67 Ohio App. 492, 37 N.E.2d 390 (1940); West v. Borber, 309 S.W. 2d 250 (Tex. Civ. App. 1958). This position is especially persuasive in cases where demolition would result in substantial economic loss to the owner, and the cost of remedying the deficiencies is relatively slight. See Childs v. Anderson, supra; City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871 (1949); Forney v. Mounger, 210 S.W. 240 (Tex. Civ. App. 1919). Cf. Albert v. City of Mountain Home, 81 Idaho 74, 337 P.2d 377 (1959) (city held liable in inverse condemnation action for demolition of building where code deficiencies could have been remedied by minor repairs and maintenance work).

282. Public subsidization in the interest of aesthetics, as well as slum clearance, elimination of blight, and other public health, safety, and welfare objectives, is already implicit in urban renewal and community redevelopment legislation. See Berman v. Parker, 348 U.S. 26 (1954); G. Lefcoe, Land Development Law 76-103 (1966). Payment of compensation or extension of low-cost long-term loans as an inducement to demolition and redevelopment in lieu of repair seems to be supportable, both legally and policywise, on the same rationale that sustains the long-established program

of voluntary reimbursement of farmers whose cattle are slaughtered in aid of bovine disease control. See text, supra, at note 195. Moreover, public subsidies may relieve, in part, the tendency of over-strict enforcement of building codes to reduce the availability of low-cost housing by increasing landlords' costs, thereby exacerbating the social and economic problems of the low-income groups residing in sub-standard dwellings. See D. Mandelker, Managing Our Urban Environment 665-70 (1966); Comment, 31 U. Chi.L.Rev. 180, 186-87 (1963). The need for public assistance toward the cost of demolition, at least in some instances, is reflected in the Housing and Urban Development Act of 1965, under which two-thirds matching grants are available from the federal government toward municipal costs of demolishing dilapidated structures, both within and outside of urban renewal projects, that constitute serious health or safety hazards. 42 U.S.C. § 1467 (Supp. 1966). Rent subsidies are another approach to the same basic problem. Note, 78 Harv. L. Rev. 801, 856-57 (1965).'

283. Strict code enforcement is sometimes urged as a device for reducing the costs of urban renewal and redevelopment projects. See, e.g., Dunham, From Rural Enclosure to Re-Enclosure of Urban Land, 35 N.Y.U. L. Rev. 1238, 1250-52 (1960). The collateral consequences of strict enforcement policies using demolition as the ultimate sanction, however, often offset the advantages claimed for this technique. See Note, 78 Harv. L. Rev. 801, 832-33 (1965).

284. See Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, , 313 P.2d 127, 131 (2d Dist. 1957) (dictum) (intimation that enforcement program designed to reduce urban renewal costs "would come perilously close to passing fair bounds of limitation of the police power"). Cf. Yen Eng v. Board of Building & Safety Comm'rs, 184 Cal. App. 2d 514, 7 Cal. Rptr. 594 (2d Dist. 1960). This judicial reaction seems analogous to the view that spot zoning for the purpose of reducing the future costs of anticipated condemnation proceedings involving the same property is invalid. See Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (2d Dist. 1958); Long v. City of Highland Park, 329 Mich. 146, 45 N. W. 2d 10 (1950); Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945).

285. See Yen Eng v. Board of Building & Safety Comm'rs, supra note 284. Cf. Knapp v. City of Newport Beach, 186 Cal. App. 2d 669, 9 Cal. Rptr. 90 (4th Dist. 1960).

286. The cost of rehabilitation to the minimum extent necessary to eliminate substantial health and safety hazards may be substantially less than the cost of conforming the structure in all respects to present code standards. See Childs v. Anderson, 344 Mich. 90, 73 N.W.2d 280 (1955); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937). Compare Yen Eng v. Board of Building & Safety Comm'rs, supra note 284 (cost of fully conforming 50 year old building to present standards estimated to be $470,000; cost

of repairs to conform to minimum standards of safe occupancy estimated at $165,000). The relevance of rehabilitation costs to the determination of just compensation, where nonconforming structures are taken for public use, has been judicially approved, see Research Associates, Inc. v. New Haven Development Agency, 152 Conn. 137, 204 A.2d 833 (1964) (zero valuation approved where cost of compliance exceeded value of structure); 1 P. Nichols, Eminent Domain § 1.42[15], p. 146 (rev. 3d ed. 1964), and is reflected in some statutes. See Ill. Rev. Stat. ch. 47 § 9.5 (Supp. 1966) N.Y. Pub. Housing Law § 125[4] (e) (1955).

287. Demolition cannot be sustained as a sanction for nonstructural defects or minor departures from code standards that are readily repairable at moderate expense. West v. Borger, 309 S.W.2d 250 (Tex. Civ. App. 1958); Annot., 14 A.L.R.2d 73, 92-97 (1950).

288. See, e.g., Aronoff v. City of St. Louis, 327 S.W.2d 171 (Mo. 1959); Appeal of Branham, 128 N.E.2d 671 (Ohio Ct. App. 1953). See also, note 221, supra.

289. See text supra at notes 272-76.

290. Present building code formulas reflect the judicially approved view that minor or routine maintenance work to preserve a building against obsolescence and decay should be permitted without necessarily conforming the structure or the repair work to current standards. See Armistead v. City of Los Angeles, 152 Cal. App.

and which might represent more acceptable accommodations of the competing social and economic policy considerations involved in the promulgation and enforcement of housing standards. See, generally, Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801 (1965); Note, Municipal Housing Codes, 69 Harv. L. Rev. 115 (1956). An examination of these broader aspects of the problem is beyond the scope of the present study.

291. This approach, from the viewpoint of the owner's property interests, seems to be constitutionally necessary in any event. See City of Bakersfield v. Miller, 64 Cal. 2d 93, 48 Cal. Rptr. 889, 410 P.2d 393 (1966), cert. denied, 384 U.S. 988 (1966). See also, authorities cited supra, notes 287-88; Note, 78 Harv. L. Rev. 801, 832-33 (1965).

292. See, e.g., Cal. Bus. & Prof. Code § 12605 (confiscation of containers with false bottoms or other deceptive features). See, generally, Barber, Government and the Consumer, 64 Mich. L. Rev. 1203 (1966); Hensel, Importance of Uniformity in the Weights and Measures Field, 19 Food Drug Cosm. L.J. 274 (1964).

293. See, e.g., Cal. Agric. Code § 43039 (destruction of perishable foods, nuts, and vegetables not conforming to legal standards). Agricultural marketing controls, designed to stabilize prices, conserve agricultural wealth, and prevent economic waste in marketing of commodities, through establishment of standards

of quality, maturity, condition, packing, and labeling, have been sustained as within the police powers of the states. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (California avocado maturity regulations); Parker v. Brown, 317 U.S. 341 (1943) (California raisin marketing controls). See Rubel and Holt, Marketing Agreements, in U.S. Dept. Agric., Marketing: The Yearbook of Agriculture 357 (1954); Note, 17 Hastings L.J. 619 (1966).

294. See, e.g., Cal. Agric. Code §29731 (seizure of honey not packed or labelled properly). The interrelationship between the objectives of protecting public health and discouraging fraud and deception, through development and enforcement of legal standards relating to contents, quality, packaging, and labeling of goods, is revealed in Duffy, California's Food and Drug Laws - And Some Historical Aspects, 10 Food Drug Cosm. L.J. 20 (1955). See also, Grange, Grading-Assurance of Quality, in U.S. Dept. Agric., Protecting Our Food: The Yearbook of Agriculture, H.R. Doc. No. 349, 89th Cong., 2d Sess. 297 (1966); Holeman, The Role of the States in Establishing Food Standards, 20 Food Drug Cosm. L.J. 159 (1965). The prevention of fraud on the consumer through federal enforcement of food standards restricting economic adulteration is discussed in detail in Forte, The Food and Drug Administration and the Economic Adulteration of Foods, 21 Food Drug Cosm. L.J. (pts. 1-2) 533, 552 (1966). On the general

problem of regulatory quality control of foodstuffs, See U.S. Dept. Agric., Food: The Yearbook of Agriculture 327-458 (1959).

295. See, e.g.,Cal. Fish & G. Code §12157 (forfeiture of equipment used to hunt or fish illegally). As to the general importance of wildlife conservation measures, see, generally, G. Smith, Conservation of Natural Resources 341-59, 361-81 (2d ed. 1958).

296. See, e.g., Cal. Health & S. Code §§ 11610-29 (forfeiture of vehicles used to transport or secrete narcotics). Forfeiture of property employed as the "operating tools" of law breakers is extensively employed in federal statutes, also, as a sanction designed to "strike at commercialized crime . . . through the pocketbooks of the criminals engaged in it". H. R. Rep. No. 1054, 76th Cong., 1st Sess. 2 (1939). See also, H.R. Rep. No. 2751, 81st Cong., 2d Sess., U.S. Code Cong. & Ad. News 2952 (1950); Note, Forfeiture of Property Used in Illegal Acts, 38 Notre Dame Law. 727 (1963).

297. See Toepleman v. United States, 263 F.2d 697 (4th Cir. 1959) (dictum suggesting that Eighth Amendment prohibition against cruel and unusual punishments may limit scope of forfeiture power). Cf. Lawton v. Steele, 152 U.S. 133 (1894)

298. See Van Oster v. Kansas, 272 U.S. 465 (1926); Goldsmith Jr. - Grant Co. v. United States, 254 U.S. 505 (1921); Associates Investment Co. v. United States, 220 F.2d 885 (5th Cir. 1955);

United States v. One 1962 Ford Thunderbird, 232 F. Supp. 1019 (N.D. Ill. 1964); United States v. One 1961 Cadillac Hardtop, 207 F. Supp. 693 (E. D. Tenn. 1962).

299. See text, supra, at pp. _____.

300. Some of the statutory provisions listed in the text are also cited in the lists of statutes authorizing destruction to prevent hazards to health and safety, discussed supra, pp._____. This duplication arises from the fact that the same statutory provisions sometimes authorize destruction of particular types of property as either health nuisances or "economic" nuisances i.e., either where a hazard to health or safety is present, or where possible fraud or deception or other adverse economic consequences are deemed likely, although no direct threat to health or safety is perceived. See e.g., Cal. Agric. Code § 28121 (destruction of egg products that are either contaminated or improperly labeled or packed); Cal. Agric. Code § 32761 (condemnation of milk and cream which is either impure and unwholesome or adulterated but not unwholesome); Cal. Health & S. Code § 26581 (seizure of food that is either injurious to health or misbranded and likely to be a source of fraud). The statutory terminology, in this connection, is somewhat ambiguous. For example, "adulterated" in some contexts connotes unwholesomeness or injurious to health. See Cal. Health & S. Code § 26470. In other contexts, it apparently connotes principally the addition of foreign substances,

even though unwholesomeness does not result. See, Cal. Agric. Code §§ 32761, 32901-02, 32909-10.

Some additional duplication and overlapping of citations is also based upon the fact that the legislature has sometimes authorized alternative techniques for abating the same statutory nuisance. See, e.g., Cal. Sts. & Hwys. Code §§ 754-57 (authorization to remove nonconforming junkyards located near interstate and federal aid highways by summary abatement, or by state action and at the owner's expense after 30 days notice, or by any other lawful remedies, including judicial abatement proceedings).

Excluded from the statutory provisions here listed are measures banning possession and authorizing destruction of objects that are principally intended for use in connection with illegal activities, and thus have little or no potential economic value for lawful private purposes that warrants consideration in light of inverse condemnation policy. See, e.g., Cal. Pen. Code §§ 12251 (machine guns), 12307 (bombs, missiles, and other devices).

301. Samuels v. McCurdy, 267 U.S. 188 (1925); Barbour v. Georgia, 249 U.S. 454 (1919); Santa Cruz Oil Co. v. Milnor, 55 Cal. App. 2d 56, 130 P.2d 256 (1st Dist. 1942). See also cases cited supra, note 298.

302. See Note, Forfeiture of Property Used in Illegal Acts, 38 Notre Dame Law. 727 (1963).

303. Van Oster v. Kansas, 272 U.S. 465, 467 (1926).

304. See, e.g., J. W. Goldsmith, Jr. - Grant Co. v. United States, 254 U.S. 505 (1921) (tracing forfeiture procedures to the ancient law of deodands); United States v. One 1940 Packard Coupe, 36 F. Supp. 788 (D. Mass. 1941); Moore v. Purse Seine Net, 18 Cal. 2d 835, 118 P.2d 1 (1941), aff'd 318 U.S. 133 (1943). The prevalence of statutory forfeitures in aid of regulatory policy in England during the 18th and 19th centuries is reviewed in People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832 (1951).

305. See People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932) (narcotics forfeiture statute held unconstitutional in absence of provision for notice and hearing); Ieck (Hey Sing) v. Anderson, 57 Cal. 251, 40 Am. Rep. 115 (1881) (statute authorizing forfeiture of illegal fishing equipment held invalid in absence of provision for notice and hearing). Cf. Note, Forfeiture of Property Used in Illegal Acts, 38 Notre Dame Law. 727 (1963).

306. 152 U.S. 133 (1894).

307. Id. at 142-43.

308. Accord: Samuels v. McCurdy, 267 U.S. 188 (1925); Hamilton v. Kentucky Distillers Co., 251 U.S. 146 (1919); People v. Barbiere, 33 Cal. App. 770, 166 Pac. 812 (1917). See also, cases cited supra, note 298.

309. See People v. One 1933 Plymouth Sedan, 13 Cal. 2d 565, 90 P.2d 799 (1939) (forfeiture of vehicle used with consent of owner, but without knowledge of illegal use, held valid); cases cited supra, note 305. Cf. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

310. See Cal. Bus.& Prof. Code § 25355.

311. See Cal. Bus & Prof. Code § 12605.

312. See Cal. Agric. Code § 52981.

313. Judicial decisions sometimes justify destruction of property used for illegal purposes on the theory that such property is incapable of use for any lawful purpose. See, e.g., Lawton v. Steele, 152 U.S. 133, 140 (1894) (dictum) (summary destruction said to be permissible with respect to "obscene books or pictures, or instruments which can only be used for illegal purposes"); People v. Broad, 216 Cal. 1, , 12 P.2d 941, 943-44 (1932) (dictum) ("property kept in violation of law which is incapable of lawful use").

314. See, generally, McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 Sup. Ct. Rev. 34. Due process in matters relating to property and economic regulations still has some vitality in the state courts. See Hetherington, State Economic Regulation and Substantive Due

Process of Law, 53 Nw. U.L. Rev. 13, 226 (1958)

315. Uncompensated "takings" represent the most likely area today for federal Due Process challenges to state regulations affecting property interests. Compare Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) with Griggs v. Allegheny County, 369 U.S. 84 (1962). See, generally, Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

316. Cal. Sts. & Hwys. Code § 752 (authorizing payment of compensation for removal or disposal of nonconforming junkyards only "If federal law should be interpreted as requiring the states to pay just compensation" in such cases). The Federal Highway Beautification Act of 1965 § 201 (j), 79 Stat. 1028 (1965), 23 U.S.C.A. § 136 (j) (1966) requires payment of "just compensation", with the federal government contributing 75% of the cost, where removal or relocation is effected after July 1, 1970. The state is authorized to accept allotments of federal funds for this purpose. Cal. Sts. & Hwys. Code § 758. It is not clear whether payment of compensation is mandatory by the state in the absence of the federal government's 75% matching contribution.

317. California decisions have generally upheld anti-billboard regulations where a police power objective other than mere aesthetics has been discerned, and a reasonable period for amortization of non-conforming signs is provided. County of Santa Barbara

v. Purcell, Inc., 251 A.C.A. 173, 59 Cal. Rptr. 345 (2d Dist. 1967); Metromedia, Inc. v. City of Pasadena, 216 Cal. App. 2d 270, 30 Cal. Rptr. 731 (2d Dist. 1963); National Advertising Co. v. County of Monterey, 211 Cal. App. 2d 375, 27 Cal. Rptr. 136 (1st Dist. 1962). In the absence of these factors, however, existing cases suggest that uncompensated destruction or removal of existing advertising displays originally erected in conformity with the law would be held unconstitutional. See Varney & Green v. Williams, 155 Cal. 318, 100 Pac. 867 (1909); City of Santa Barbara v. Modern Neon Sign Co., 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (2d Dist. 1961). Cases in other jurisdictions are divided. Compare Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964) (valid) with State Highway Dept. v. Branch, 152 S.E.2d 372 (Ga. 1966) (unconstitutional). See annot. 58 A.L.R.2d 1314 (1958).

318. Cal. Bus. & Prof. Code § 5288.3 (authorizing payment of just compensation for compelled removals of nonconforming advertising displays). This authorization for payment was apparently enacted primarily to qualify California for the 75% federal grant-in-aid program relating to billboard removals along interstate highways, as provided by the Federal Highway Beautification Act of 1965 § 101(g), 79 Stat. 1028 (1965), 23 U.S.C.A. § 131(g) (1966). That avoidance of constitutional doubts may have also been a factor in its enactment, however, may be inferred from

the fact that the state standards appear to be stricter than the federal requirements. The federal act, for example, authorizes a 5 year amortization period for nonconforming signs, ending on July 1, 1970 (ibid.; see H.R. Rep. No. 1084, 89th Cong., 1st Sess. (1965), 1965 U.S. Code Cong. & Ad. News 3710-21) while the state amortization period ends on July 1, 1969. Cal. Bus. & Prof. Code § 5288.3 (prohibition on billboards first enacted in 1964, but operative May 15, 1965). But see Cal. Bus. & Prof. Code §§ 5291-92 (three year amortization period for nonconforming billboards following completion of freeway landscaping projects; no compensation authorized). The federal legislative history indicates that payment of compensation was required in the interest of "equity and fairness" and to avoid "economic distress" to outdoor advertising companies. H.R. Rep. No. 1084, supra at 3717.

319. Cal. Fish & G. Code §§ 7891, 8630, 12157.

320. See note 300, supra.

321. The possibility of reprocessing, relabeling, or otherwise correcting the deficiency is recognized by the statutes in some instances. See Cal. Health & S. Code § 26588 (court authorized to permit processing or labeling, as alternative to destruction, to correct existing adulteration or misbranding, on posting of bond by owner, subject to state supervision). In other seemingly analogous

instances, however, this flexibility of disposition is not authorized. See, e.g., Cal. Agric. Code §§ 18973-74 (meat or meat products adulterated with preservatives, harmless additives not permitted by meat inspection regulations, or horse meat).

322. Cal. Pen. Code §§ 11225-35. See also, the "padlock" procedure for buildings used for sale or consumption of narcotics. Cal. Health & S. Code §§ 11780-97.

323. See Note, Forfeiture of Property Used in Illegal Acts, 38 Notre Dame Law. 727 (1963).

324. Weems v. United States, 217 U.S. 349, 367 (1910). See also, Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86, 100-02 (1958) (opinion of Warren, C.J.); id. at 110-13 (opinion of Brennan, J.); Black v. United States, 269 F.2d 38, 43 (9th Cir. 1959) (dictum), cert. denied, 361 U.S. 938 (1960).

325. See Lawton v. Steele, 152 U.S. 133, 142-43 (1894): "A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose . . . but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them."

326. See, e.g., J. W. Goldsmith, Jr. - Grant Co. v. United

States, 254 U.S. 505, 512; California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905). Cf. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

327. See Kratovil and Harrison, Eminent Domain - Policy and Concept, 42 Calif. L. Rev. 596, 626-36 (1954). The relevance of less drastic but reasonably available alternatives, as an element influencing the scope of judicial review of legislation, is discussed generally in Wormuth and Mirkin, The Doctrine of the Reasonable Alternative, 9 Utah L. Rev. 254 (1964). Legislatures, of course, may attach controlling significance to practical factors, such as administrative efficiency, which may have little or no bearing on a judicial determination of constitutionality. See, e.g., Dittus v. Cranston, 53 Cal. 2d 284, 1 Cal. Rptr. 327, 347 P.2d 671 (1959); Patrick v. Riley, 209 Cal. 350, 287 Pac. 455 (1930).

328. See Cal. Health & S. Code § 26590 (foodstuffs that are "unsound", or contain "any filthy, decomposed or putrid substance", or which may be "poisonous or deleterious to health or otherwise unsafe").

329. See Cal. Agric. Code § 28121 (food products containing imported egg products, and any egg product or its containers, packed, stored, delivered, shipped or sold in violation of statutory requirements, including requirements relating to

packing and labeling).

330. See Cal. Agric. Code §§ 43031-41 (judicial abatement proceedings relating to lots of fruits, nuts, or vegetables not in conformity with legal requirements, including packing and labeling provisions, authorized only after notice to owner and failure to recondition or otherwise correct the deficiency within the time stated in the notice).

331. See note 328, supra.

332. See statutes cited notes 295, 319, supra.

333. See authorities cited notes 292, 294 supra.

334. See statutes and authorities cited note 293, supra.

335. See Cal. Bus. & Prof. Code § 12507 (defective weighing and measuring devices). See also, note 321, supra. Cf. Wormuth and Mirkin, supra note 327.

336. See Cal. Agric. Code § 32765 (destruction authorized as sole mode of disposition of adulterated or mislabeled milk, cream, or imitation milk products). See also, note 329, supra.

337. See the similar suggestion advanced in the text accompanying notes 214-15, supra.

338. See the suggestions made in the text accompanying notes 206-13, supra.

339. Cal. Health & S. Code §§ 11610-29.

340. Cal. Bus. & Prof. Code §§ 25360-70. In general, absent clear statutory directions to the contrary, conviction of the criminal offense is not a prerequisite to a valid forfeiture of property used in connection therewith. See Annot., 3 A.L.R. 2d 738 (1949).

341. See, e.g., Cal. Agric. Code § 29731 (nonconforming or improperly labeled honey containers). See also, statutes cited in notes 329, 330, 336, supra.

342. Cal. Fish & G. Code §§ 12159-61, 12164.

343. See People v. One 1957 Ford 2-Door Sedan, 160 Cal. App. 2d 797, 801, 325 P.2d 676, 678 (2d Dist. 1958) (purpose of narcotics forfeitures of lienholders' interests in vehicles "is to require one who finances the purchase of an automobile to aid in the prevention of crime"). This purpose was furthered by permitting the lienholder to establish, as a defense, that a reasonable investigation of the buyer's character and reputation had been made before the sale was concluded. See former Cal. Health & S. Code § 11620, repealed by Cal. Stat. 1959, ch. 2085, § 5, p. 4817; Dooley, Position of Lienholders Under California's Narcotics Law, 6 Hastings L. J. 218 (1955).

Concurrently with the repeal of Section 11620, the rights of lienholders were strengthened considerably by substitution of a "no actual knowledge" defense. See People v. One 1953 Buick 2-Door, 57 Cal.2d 358, 19 Cal. Rptr. 488, 369 P.2d 16 (1962). The basic function of the forfeiture technique, however, remains unchanged. See note 296, supra.

344. See Bus. § Prof. Code §§ 12025.5, 12211, 12606.1.

345. See Cal. Agric. Code §§ 41332, 41581, 43040.

346. Cf. J. W. Goldsmith, Jr. - Grant Co. v. United States, 254 U.S. 505, 512 (1921). See also text accompanying notes 324-25, and notes 324-25, supra.

347. See People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932); Ieck (Hey Sing) v. Anderson, 57 Cal. 251, 40 Am. Rep. 115 (1881). Under the California Constitution, the owner of property subject to a statutory forefeiture proceeding is entitled to a jury trial. People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832 (1951).

348. See the statutory provisions cited in the ("First" and "Second") accompanying note 300, supra.

349. Three patterns of judicial procedures are commonly employed: (1) Proceedings in the civil courts for abatement, adhering to the normal procedures for abatement of public nuisances.

2d 319, 313 P.2d 127 (2d Dist. 1957); City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871 (1949). The Los Angeles ordinance, for example, has set the permissible maximum for this kind of nonconforming repair work at 10% of replacement cost per year. See Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (2d Dist. 1959). The applicable policy considerations suggest the advisability of fixing the figure at a relatively low point. On the other hand, the rationale for requiring that an old and nonconforming structure be either demolished or fully conformed to current standards when it is being remodeled is postulated on the assumption that at some appropriate point (generally fixed at the point where the cost of the work exceeds 50% of the replacement value) the repair and alteration activities amount to substantial reconstruction or replacement of the old structure with what is essentially a new building. See Russell v. City of Fargo, 28 N.D. 300, 148 N.W. 610 (1914); Behrend v. Town of Pe Ell, 136 Wash. 364, 240 Pac. 12 (1925). Intermediate between these extremes, repair work may be deemed so substantial that it must conform to present standards, even though it would be arbitrary to demand that the entire structure be so conformed. Demolition, as a sanction for noncompliance with building code rules of this sort, involves policy issues that may differ sharply as other variables implicit in the legislative objectives and particular facts change. Moreover, there are many other types of sanctions that could serve as alternatives to demolition,

See, e.g., Cal. Agric. Code § 52981 (abatement of nonconforming cotton plants in one-variety district). (2) Authorization for forfeiture of property as an additional penalty to be imposed by court upon conviction in criminal prosecution. See, e.g., Cal. Fish & G. Code § 12157 (equipment used in violating game laws). (3) Preliminary confiscation, followed by judicial forfeiture proceedings to affect actual change of title. See, e.g., Cal. Health & S. Code §§ 11610-29 (automobiles carrying narcotics); People v. Broad, supra note 347. See also, Cal. Bus. & Prof. Code §§ 4323, 21880.5, 21931 (seizure and impounding of prophylactic vending machines, misbranded or nonconforming brake fluid, and misbranded or nonconforming automatic transmission fluid, respectively, authorized until court orders final disposition; no provision requiring enforcement officers to institute judicial proceedings).

350. See note 300, supra.

351. Lawton v. Steele, 152 U.S. 133, 141 (1894).

352. An automobile "graveyard" located close to an interstate highway may be a valuable and profitable business; a sign advertising the business, and illegally located in the highway right-of-way, may, on the other hand, be of merely nominal value. The present statutory law, however,

authorizes summary destruction of both. See Cal. Sts. & Hwys. Code §§ 670(c) (forbidden signs), 754 (automobile "graveyards").

353. See People v. Broad, 216 Cal. 1, , 12 P.2d 941, 943-44 (1932): " . . . while it is a proper exercise of legislative power to provide for the destruction of property without notice when the public welfare demands summary action -- instances of this kind being the power to destroy diseased meat or decayed fruit, to kill diseased cattle, or to destroy property kept in violation of law which is incapable of lawful use . . . -- nevertheless, where the property involved is what is sometimes termed innocent property, threatening no danger to the public welfare, the owner must be afforded a fair opportunity to be heard." To the same effect, see Lawton v. Steele, supra note 351.

354. Lawton v. Steele, supra note 351, at 142.

355. See text accompanying notes 216-21, supra.

356. See authorities cited notes 218-19, supra.

357. Where the statutes do not declare that forfeiture is an additional penalty to be imposed as part of the sentence upon conviction in a criminal prosecution, but separately authorize it as a sanction independent of criminal proceedings, conviction is not a prerequisite nor is criminal acquittal a bar

to forfeiture. Annot. 3 A.L.R.2d 738 (1949). The California statutes, however, expressly condition the forfeiture of fish and game alleged to have been illegally taken upon ultimate conviction of the offense itself. See Cal. Fish & G. Code §§ 12159-61, 12164.

358. See also, Cal. Agric. Code §§ 25564, 25566 (allegedly nonconforming poultry meat subject to deterioration; sale on ex parte court order authorized, with net proceeds held by court for owner's account); Cal. Agric. Code §§ 43039, 43041 (semble; allegedly nonconforming fruits, nuts, and vegetables subject to deterioration). A possible deficiency in these procedures is the absence of adequate assurances that the forced sale will take place under conditions conducive to realization of a fair market price.

359. See, e.g., Cal. Code Civ. Proc. §1242 (surveys of land required for public use); Cal. Health & S. Code § 2270(f) (investigations and nuisance abatement work by mosquito abatement district); Cal. Water Code § 2229 (surveys for irrigation district purposes). For a comprehensive list of citations, see Van Alstyne, A Study Relating to Sovereign Immunity, in 5 Reports, Recommendations and Studies 1, 110-19 (Cal. Law Revision Comm'n ed. 1963).

360. Onick v. Long, 154 Cal. App. 2d 381, 316 P.2d 427 (1st Dist. 1957) (by implication); Giacona v. United States, 257 F.2d 450 (5th Cir. 1958); Johnson v. Steele County, 240 Minn. 154, 60 N.W.2d 32 (1953); Commonwealth v. Carr, 312 Ky. 393, 227 S.W.2d 904 (1950); Restatement, Torts § 211 (1934); 1 Harper & James, The Law of Torts §1.20, pp. 56-57 (1956).

361. Restatement, Torts § 214 (1934), apparently approved as the California rule in Reichhold v. Sommarstrom Inv. Co., 83 Cal. App. 2d 173, 256 Pac. 592 (1927) and Onick v. Long, supra note 360. See also, Heinze v. Murphy, 180 Md. 423, 24 A.2d 917 (1942); 1 Harper & James, The Law of Torts § 1.21, pp. 58-59 (1956).

362. Cal. Govt. Code § 821.8. See Van Alstyne, California Government Tort Liability § 5.62 (1964).

363. Irvine v. Citrus Pest Dist. No. 2 of San Bernardino County, 62 Cal. App. 2d 378, 144 P.2d 857 (4th Dist. 1944); County of Contra Costa v. Cowell Portland Cement Co., 126 Cal. App. 267, 14 P.2d

606 (1st Dist. 1932) (by implication). See Annot., 29 A.L.R. 1409 (1924).

364. Jacobsen v. Superior Court, 192 Cal. 319, 219 Pac. 986 (1923); Dancy v. Alabama Power Co., 198 Ala. 504, 73 So. 901 (1916). See also, Litchfield v. Bond, 186 N.Y. 66, 78 N.E. 719 (1906).

365. 192 Cal. 319, 219 Pac. 986 (1923).

366. Id. at , 219 Pac. at 991. Accord, Dancy v. Alabama Power Co., supra note 364.

367. The possibility that substantial injuries may result from official entries upon private property for purposes other than reservoir site investigations is well illustrated in reported cases. See, e.g., Onorato Bros. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142 N.E.2d 389 (1957) (highway route survey); Wood v. Mississippi Power Co., 245 Miss. 103, 146 So.2d 546 (1962) (utility line route survey); Rhyne v. Town of Mt. Holly, 251 N.C. 521, 112 S.E. 2d 40 (1960) (weed abatement work).

368. Jacobsen v. Superior Court, supra note 366.

369. See 2 P. Nichols, Eminent Domain § 6.11 (rev. 3d ed. 1963); Annot., 29 A.L.R. 1409 (1924). Disproportionate costs of administering a system for settlement of nominal inverse condemnation claims is a rational basis for withholding compensation for trivial injuries. See Michelman, Property, Utility, and

Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1214 (1967). Cf. Bacich v. Board of Control, 23 Cal. 2d 343, , 144 P.2d 818, 839 (1943) (Traynor, J., dissenting).

370. Precedent for imposition of a duty to restore the previous condition of the premises is found in numerous statutes providing, in connection with authorization for the construction of public improvements and facilities in or across streets, rivers, railroad lines, and the like, that the public entity "shall restore" the intersection, street, or other location to its former state. See, e.g., Cal. Health & S. Code § 6518 (sanitary districts); Cal. Pub. Util. Code § 16466 (public utility districts); Cal. Water Code § 71695 (municipal water districts). Statutory provisions to this effect are collected in Van Alstyne. A Study Relating to Sovereign Immunity, in 5 Reports, Recommendations and Studies 1, 91-96 (Cal. Law Rev. Comm'n ed. 1963).

371. Van Alstyne, California Government Tort Liability § 5.62 (1964).

372. See, e. g., Kans. Stat. Ann § 68-2005 (1964) (entry by turnpike authority to make "surveys, soundings, drillings and examinations" authorized; authority required to make reimbursement for "any actual damages"); Mass. Laws Ann. c. 81 § 7F (1964) (entry by highway department for "surveys, soundings, drillings or examinations" authorized; department required to restore lands to previous

373. In analogous situations, absent an express statutory requirement for notice and hearing, the courts have required only ex parte proceedings. See, e.g., People v. 2,624 Thirty-Pound Cans of Frozen Eggs, 224 Cal. App. 2d 134, 36 Cal. Rptr. 427 (2d Dist. 1964), construing Cal. Agric. Code § 1145b (court order for abatement of contaminated egg products). The interest in urgency and efficiency of administrative action to eradicate health menaces, however, has generally been deemed to justify dispensing with notice and hearing before abatement in such cases. North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908). Since no elements of emergency exist in cases of entries for survey and testing purposes, however, it is doubtful that ex parte proceedings would meet the requirements of procedural due process. Cf. People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932) (notice and hearing required before narcotics forfeiture of vehicle is effective); Thain v. City of Palo Alto, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515 (1st Dist. 1962) (notice and hearing required, absent emergency, before weed abatement action taken on private property). Compare City of Los Angeles v. Schweitzer, 200 Cal. App. 2d 448, 19 Cal. Rptr. 429 (2d Dist. 1962) (on appeal from order for reservoir survey made under Cal. Code Civ. Proc. § 1242.5, report fails to indicate whether owner received notice and hearing; interlocutory order held nonappealable).

374. Compare City of Los Angeles v. Schweitzer, 200 Cal. App. 2d 448, 19 Cal. Rptr. 429 (2d Dist. 1962). By motion, the owner of

land subject to a reservoir-survey order granted under Cal. Code Civ. Proc. § 1242.5 sought modification of the order to increase the amount of the city's security deposit, and to impose specific limitations (e.g., time limits, maximum number of test holes and trenches authorized to be excavated) and other conditions (e.g., city to supply owner with geological, survey, and topographical data, to hold owner harmless from liability for any injuries to third persons resulting from city's activities during survey, and to restore premises to previous condition on termination of survey) upon the city's activities. The trial court ordered an increase in the security deposit, but denied the other requested modifications. The grounds of the denial are not stated in the appellate report, and the owner's appeal was dismissed for want of jurisdiction, the order being deemed interlocutory.