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CIVIL RIGHTS AND PROPERTY RIGHTS: A CONFLICT

By

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## Civil Rights and Property Rights: A Conflict\*

By Joseph B. Bugliari

My purpose in this talk tonight is to discuss with you who represent business, the professions and agriculture the continuing and a growing conflict in this country between the expanding concept of civil or personal rights on the one hand and our traditional property rights and values on the other. I will not comment directly on the propriety or correctness of either side of the conflict. I will leave the individual value judgments up to you. I will let you decide if the direction our society is taking is that which you feel it should be taking. What I would like to point out is where and why this conflict has arisen in the past, and will likely show itself in the future, and most importantly what this conflict has done to create both our present law and order problem and a general anti-government feeling which pervades so much of the country today.

### Civil Rights and Property Rights Defined

Before starting this discussion let me first set up a definition of civil rights and property rights as I will use them tonight. We could disagree semantically on these definitions, but I would hope not too drastically. Stated simply a civil right springs from one's being a human being while property rights are somehow acquired or earned. Civil rights, therefore, as I shall be using the term, would encompass inherent personal or individual liberty not tied in any way either to the ownership of tangible property, real or personal, or to the possession of intangible property rights. The term would include all the traditional concepts of freedom of speech, freedom of press, freedom of assembly, etc., plus such concepts as freedom of personal action and freedom from unwarranted and unreasonable government control or domination. Property rights, on the other hand, would encompass not only the traditional rights attendant to the ownership of real and personal property, but also to any rights which, though not associated directly with tangible property, are acquired by dint of service, etc. such as job security or seniority. It is interesting to note that under this definition if we establish a guaranteed annual wage in this country the right thereto would be denominated a civil right rather than a property right.

Accepting these definitions it is obvious that everyone possesses civil rights and theoretically at least to the same extent; while with property rights everyone does not necessarily possess them and clearly there is an unbelievably wide variance with respect to total amount of such rights individual members of society possess. Some have millions, others unfortunately live in abject poverty but, of course, most of us fall in between even if perhaps, toward the lower end of the scale.

### Our Attitude Toward Civil Rights and Property Rights

Perhaps because civil rights are common to all of us, we take them for granted until they are put in jeopardy and we fear their possible loss. If attacked we defend them with all our might, but they do not pervade our daily thoughts. Examine your memory as to the last time you thought about your civil rights and unless you have recently been to a lecture or discussion on the subject or read something in the press which concerned the area, it will probably turn out that the last such occasion was when you felt your rights were somehow being infringed.

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\* A talk given to the Watkins Glen-Montour Falls Rotary Club on November 20, 1968

Property rights, however, are a daily concern. Not only do we concern ourselves with those we already have, but our active hours are generally spent in attempting to secure more of them.

Moreover, while our society honors those who have achieved athletic, artistic, and scholastic excellence we also venerate those whose sole distinction is the possession or acquisition of a considerable amount of property. The "American Dream" is the attainment of a considerable number of property rights. A man devotes all his energy to provide a home and necessities for his family, security for the future and hopefully also with as many as possible of the luxuries which are available in our society; a color TV, a second car, a winter vacation. His goals in life are based on achieving a certain level of property ownership and his success in major part by the level attained.

If I have sounded in these last sentences as though I am criticizing this property oriented nature of our society, I assure you I am not. While hopefully property acquisition would not be the sole motivating force in our society, it must be recognized as one of the driving forces that has made us the great industrial country we are today. The profit motive on the part of the manufacturers, the wage motive for the employees, and the desire for different, better and more modern forms of property on the part of consumers are the basis for industrial expansion.

#### The Law and Property Rights

Throughout much of our history the law has dutifully protected the interests of the property owner against those who would injure or destroy those interests. Under the code of Hamurabi, the thief's hand was removed, in Elizabethan England he was hung or beheaded or even drawn and quartered and in the old west the cattle or horse thief was with undue ceremony summarily lynched on the nearest tree with few qualms of conscience, unless it was later discovered he was innocent. Generally speaking during much of our history, crimes against property received as equally hard if not harder punishment as crimes against the person. A man's home was his castle which he could do with as he wished and from which he could exclude all others with whatever force that proved necessary. Not only could he use his property as he wished while he was the owner, but also he could freely dispose of it as he wished and to whomever he wished. The law developed to protect the property owners. For example, the law of trespass and the duties of an insurer imposed on an innkeeper, as to the baggage and horse of his guests.

Moreover, even in later periods government control over private property was considered extremely limited, and one need only look at the Supreme Court decisions in the late 1930's striking down the N.R.A. and similar legislation as relatively recent examples of this. And yet even the most casual look at today's restrictions on property rights will convince one that we have moved far away from the almost absolute, unfettered position with respect to property rights which existed just a few short years ago.

## The Emergence of Civil Rights and Government Control

It takes little observation to realize that the recognition of civil rights has reached its zenith during our lifetime. We live in an era where the rights of the individual to express himself and conduct himself as he chooses are considered paramount. The concept of freedom of speech and freedom of action and conduct have been made broader and broader, and there are those who are constantly trying to push new limits. Statements and conduct which a few short years ago would not have been tolerated and 100 years ago ruthlessly suppressed are today sanctioned by our highest courts as constitutionally protected. The right to criticize, to protest to assemble peacefully is protected and even fostered so long as the form of its exercise does not include an activity which creates a clear and present danger of injury to others or violates reasonable restrictions designed to protect others in the pursuit of their everyday affairs. Who can tell what is "obscene" under the laws of the land today? The press is responsible for defamatory publications only if actual malice can be shown. Children in school cannot pray or be compelled to salute the American flag. These are merely representative and many more examples are obviously available.

Moreover, the government, both Federal and in some states, is even becoming more of a participant in our daily lives. Governmental agencies protect us from each other and even ourselves. They promote and advance the cause of civil rights and yet in many cases infringe upon them also. They promote private enterprise on the one hand through the enforcement of the anti-trust laws and limit it on the other through the morass of restrictions, requirements, forms, taxes, etc. which drive the small businessman virtually to the wall. Everywhere we look government is meddling in both our business and private affairs. That we have, in effect, asked for this development, have brought it on ourselves might well be a topic for another discussion but there is not time to develop it here.

One illustration is, perhaps, sufficient to demonstrate the trend I am alluding to. Recently I heard that a farmer near Albany, who for years had raised pigs on his property in the same manner, was having difficulty with state Public Health Officials because of the odors emanating from his operation. These odors were allegedly no worse than in the past but he now has a recently established suburban residential neighborhood nearby and its inhabitants raised objections to the pungent aromas particularly when the wind conditions were just so. On the merits of each side of the argument I have no comment. The law for years, under its doctrine of nuisance has settled problems of conflicting property uses such as this situation presents. What I would point out is first, that the residential property owners did not, to my knowledge, even attempt to seek legal redress in the courts to protect their private interests, but instead turned directly to a government agency to solve their plight and secondly that the government agency not only proceeded to intervene in essentially a private dispute between adjacent landowners, but issued directives to the farmer as to the operation of his farm which, and even assuming they were justified, it assertedly had no basis in the law to issue.

### The Trend

It is almost inevitable that as civil rights expand property rights must suffer, that as the rights of the individual are increased property rights must be adversely affected. Moreover, as government grows and becomes involved with or takes over more facets of our society, property rights of individuals are necessarily diminished.

There are myriad examples of both of these positions. The most obvious example is what actions are tolerated in the name of social protest. There are those who adamantly take the position that legitimate protest of the social ills they see in our society excuse any disregard of the property rights of others; that looting, arson, destruction of property are merely forms of constitutionally protected expression. Such concepts pervade all areas of our society. Certain dissidents of the ghetto and of the campuses in both this country and abroad and certain of the war protesters feel little restraint in engaging in or approving of the destruction of property belonging to innocent third parties to advance their positions.

While some community leaders have refused to deal forcefully with such flagrant conduct, and others, have perhaps, overreacted, the courts have not only not as yet sanctioned such extreme forms of conduct in name of free speech, but several members of the Supreme Court have clearly indicated their opposition to such a position (see, Justice Abe Fortas' excellent and concise pamphlet "Concerning Dissent and Civil Disobedience").

With non-violent forms of protest the courts have, however, been willing to uphold infringements on traditional property rights. As Justice Fortas said in "Concerning Dissent and Civil Disobedience": "Our Constitution ... generously protects the right to organize people for protest and dissent. It broadly protects the right to assemble, to picket, to stage 'freedom walks' or mass demonstrations, if these activities are peaceable, and if the protesters comply with reasonable regulations designed to protect the general public without substantially interfering with effective protest." And this so not only for protests on public property but also apparently on privately owned, but semi-public property. Just last week the United States Supreme Court refused to grant certiorari to review a second circuit court decision granting the right of anti-war protesters to bring their cause peaceably and subject to reasonable restrictions to the New York Port Authority Bus Terminal over the objections of the Authority operator (Port of New York Authority v. Wolin, 392 F. 2d 83, Cert, den. \_\_\_\_\_ U.S. \_\_\_\_\_ [Nov. 12, 1968]). And previously the court also refused to review a California decision which upheld the right of employees of an employer whose business was located in a shopping center to picket the employer or the shopping center property against the objection of the shopping center owner (Schwartz-Torrance Investment Corp. v. Bakery and Confectionary Workers' Union, etc. 394 P. 2d 921, cert. den. 380 U. S. 906). The rationale in both cases is that in opening the property to the general public the owner has diluted his property right and the property loses its identity as private property. Whatever the merits of such decisions they clearly constitute a diminution of the traditional property rights of the owner. Similarly open housing legislation and school desegregation programs affect what have been considered traditional property rights. In addition, government action in the area of zoning, building codes, urban renewal, eminent domain for highway and other programs, water and air pollution control legislation just to name a few have clearly limited the rights of the property owner. Zoning, since it eliminates property rights without even compensation is a particularly forceful example.

Another even more graphic illustration is the limitations placed by the Penal Code, effective September 1, 1967, on the property owner in New York as to the defense of his property. While he was still permitted to use reasonable force to defend his property, he could no longer use deadly force except to prevent arson. He could not shoot the trespasser, no matter how serious his transgression, or the car thief or the looter. Deadly force was available only in defense of his person, and not his property. Property values were clearly subordinated to human life.

Immediately following the promulgation of the new Penal Law there was an immediate public demand for a re-examination of this position, particularly since it left the property owner who had a burglar coming through his bedroom window in the middle of the night with a decision before he shot as to whether the intruder was just after his property or might also injure his person. After public hearings and exhaustive consultations, including representatives of police groups, a revision of § 35.20 of the Penal Law was enacted by the New York State Legislature at its 1968 session which retracted to a degree the severe limitation it had imposed on the use of deadly force in the defense of property.

The new section treats the use of physical force in the defense of premises in three categories: the right to use physical force for the purpose of (1) preventing or terminating crimes involving damage to real property, (2) preventing or terminating criminal trespass, and (3) preventing or terminating burglary.

As to the first category subdivision 1 of § 35.20 provides:

Any person may use physical force upon another person when he reasonably believes such to be necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission by such other person of a crime involving damage to premises. He may use any degree of physical force, other than deadly physical force, which he reasonably believes to be necessary for such purpose, and he may use deadly physical force if he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of arson.

With respect to the second category subdivision 2 of § 35.20 provides:

A person in possession or control of any premises, or a person licensed or privileged to be thereon or therein, may use physical force upon another person when he reasonably believes such to be necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission by such other person of a criminal trespass upon such premises. He may use any degree of physical force, other than deadly physical force, which he reasonably believes to be necessary for such purpose, and he may use deadly physical force in order to prevent or terminate the commission or attempted commission of arson, as prescribed in subdivision one, or in the course of a burglary or attempted burglary, as prescribed in subdivision three.

As to the third category subdivision 3 of § 35.20 provides:

A person in possession or control of, or licensed or privileged to be in, a dwelling or an occupied building, who reasonably believes that another person is committing or attempting to commit a burglary of such dwelling or building, may use deadly physical force upon such other person when he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of such burglary.

For the purposes of the three sections the term premises "includes the term building, and any real property"; the term building "in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein. Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and a part of the main building." The term dwelling "means a building which is usually occupied by a person lodging therein at night".

This new legislation effects two significant changes in the former statute. First, whereas the former provision, as did the former Penal Law, limits the justification for using deadly force against burglars to a householder or person rightfully in a dwelling, the amendment extends such authorization to any person rightfully in any occupied building, thus placing a man in his store or office upon the same footing as one in his home. Second, the scope of the authorization to use deadly force is expanded by according such right to the burglary victim when he reasonably believes such to be necessary in order to prevent or terminate the burglary or attempted burglary. This meets the fear espoused by persons across the State that they had been placed in the dangerous posture of responding to force during home burglaries.

In addition the new legislation contains the important modification that any person, not merely one in possession or in control of premises as under the present law, could now use deadly physical force to prevent arson. The provision now encompasses situations where arson is committed by the use of "Molotov cocktails" and the like as the need for the wrongdoer to be a trespasser is now eliminated.

§ 35.25 of the Penal Law also was slightly changed in wording to comport with the new posture of § 35.20 but still prohibits the use of deadly physical force to prevent larceny or criminal mischief "with respect to property other than premises".

In effect the property owner may now use deadly physical force not only to thwart the arsonist but also the burglar who seeks to enter his home or occupied store or office building, but with these exceptions still cannot use deadly force in defense of his property.

Nor have intangible property rights, such as job security and seniority escaped unscathed. The New York City teachers' dispute was in part at least an attempt to defend the job security of the teachers against the curtailment thereof by the local board, which in turn advances educational and other reasons for its actions. In the same light is union resistance, particularly among the trade unions, to forced programs to provide more employment opportunities for Negroes. The attraction of George Wallace among blue collar workers is clearly attributable to a fear of job security as well as housing considerations.

Finally the property owner, even if he has none of the above complaints or fears, sees a steady increase in his real estate taxes as a threat to his continued ownership, particularly if he is retired and living on a fixed income. One need only look at the number of school budgets that were defeated last year throughout the state and county to note this reaction. One could only guess if city, county, state and federal budgets were put up for voter approval what the result might be.



Nor, unless there is a drastic change in present trends, is there likely to be any halt in the erosive process of traditional property rights. I believe there will be still more restrictions and more eliminations of traditional rights in the name of social advancement. Businessmen, farmers, and property owners in general will find that they have less and less to say with respect to the use of their property. I do not mean to imply that we will have a completely controlled society, but we are clearly moving further and further away from a society where the property owner has an unrestricted right to do with his property as he wishes.

### The Conflict

It seems evident that as this trend proceeds we are in for a period of serious domestic discord. If I am correct that the attainment of property rights is a major motivating factor in our society, those who have acquired property rights will naturally resent any diminution of those rights. The cry for law and order is not simply a cry for protection of the person from the mugger, murderer and rapist on the city streets, but also from those who would destroy, damage, or purloin property, and it matters not to the property owner what the motive of the offender.

Also much opposition to progressive social legislation is not steeped in opposition to the principle involved, but to the adverse effect its implementation will have on existing property rights. Many property owners who are not inherently prejudiced oppose open housing because they believe, in most cases unjustifiedly so, that a Negro family in the neighborhood will affect their property values.

A second source of discord we should recognize is that those who have achieved a certain level of property rights only after a considerable effort on their part resent a similar level of property rights being conferred on others who have not expended that same effort. The workman who has achieved a level of seniority after years of labor resents benefits which he has earned being conferred on others without a similar effort. This is also the reason there is so much resentment to social programs such as welfare and medicaid. An individual who preserves those property rights he has earned and as a result finds himself unable to get medicaid is naturally resentful of the system when he discovers that his wastrel co-employee who has squandered all his assets is eligible for benefits.

Similar examples can be given for practically any social program. For example, the businessman whose prime location is taken as part of an urban renewal project and turned over to another, perhaps even a competitor, who in the judgment of city planners will use it for more progressive purposes deemed to be more in accord with the development goals of the municipality obviously must look askance at such a happening.

Finally, even if economic fear or resentment are not involved, any drastic dilution of property rights in the name of social betterment is opposed by many on the basis of fundamental principle. Some individuals, of course, oppose any change from the status quo for any reason, but it is also arguable that a wholesale disregard of traditional property rights will eventually result in a loss of or diminution in the very civil rights in whose name property rights are being circumscribed. All rights, both civil and property, exist only because society recognizes them and cherishes them. When any traditional right is questioned all traditional rights also become subject to question. Not that tradition alone is a justification for the perpetuation of an outmoded principle, but it

should make us change that principle only after the closest examination as to both the necessity for the change and results thereof. There is a real question as Judge Cardozo wrote many years ago that we may reach a point where "the state under the guise of paternal supervision may attempt covertly and gradually to mould its members to its will." (Cardozo: *The Paradoxes of Legal Science*, p. 111). Perhaps, it would be a more orderly society where government officials determine what and how property owners, particularly real property owners, use their property. I personally, hope we do not ever take this road. The rights of property owners must at least be respected, even if their use of their property does not coincide with the ideas, however enlightened, of the avant garde. We cannot, of course, return to *laissez faire*, but we can and must find some sort of economic or social middle way. Any change which affects traditional property rights should be made only after clear consideration not only of the benefit from the change, but the cost to the property owner. Whatever decision is then reached will hopefully balance the interests of all involved.

#### Conclusion

In closing, I am reminded\* of the fundamental principle of government which the mentor of the young Cyrus of ancient Persia tried to implant in him. When asked whether a ruler should compel a subject whose coat was too large for him to trade it with another whose coat was too small, if one of them objected to the exchange, the young future ruler replied in the affirmative, for the reason that each would then have a coat that fit him. The mentor told him that he was wrong, since he had confused expediency with justice.

\* See Judge Van Voorhis dissent in Cannata v. City of New York, 11 N.Y. 2d 210 at 218-219 for the source of this anecdote.