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The Relationship Between Property Rights and Civil Rights

By Richard R. B. Powell

Law has, as a major function, the lubrication of the mechanisms of society. It is its task to afford people, in the accelerated closeness of modern living, a society in which they are able to live together harmoniously and with mutual advantage. On this approach it is not far-fetched to say that the most important internal problem of the United States in 1963 is the treatment of its minorities. This problem has generated more heat, more human hostility, more evidence of the need for better lubrication than any other single aspect of current society. Can “law” do a better job? If so, how? It is always easier to tell other people, living at a distance, how they can improve their behavior and their law. But, perhaps, it is more profitable to start with the behavior and the law in the community wherein we sleep.

I shall begin by sketching the current context of conflict, paying attention first and foremost to the State of California, but not neglecting the national aspects of these questions which are comparable to our local worries. There are five separate situations which deserve attention.

About a year ago the City Council of Berkeley adopted a so-called Fair Housing Law, to supplement the Hawkins and Unruh Acts of 1959. A petition for a referendum resulted in a vote on this statute in the Spring of 1963. One of the arguments advanced against the ordinance was that in prohibiting persons from refusing to sell or to rent to negroes, the “property rights” of landowners would be unlawfully destroyed. The voters of Berkeley killed the ordinance by a vote of about 23,000 to 21,000. For the city of Berkeley, “property rights” were thus shielded from the threat of “civil rights.”

Secondly, when the Board of Directors of the National Association of Real Estate Boards met in Chicago, early in June, 1963, they promulgated what they called a “Property Owners’ Bill of Rights.” Among the ten “rights” so asserted were these four:

4. The right to occupy and dispose of property, without governmental interference, in accordance with the dictates of his conscience. . .

* Emeritus Dwight Professor of Law, Columbia University; Professor of Law, Hastings College of the Law; Reporter on Property for the American Law Institute.


2 Realtor’s Headlines, June 10, 1963, p. 2.
6. The right to maintain what, in his opinion, are congenial surroundings for tenants...

3. The right to determine the acceptability and desirability of any prospective buyer or tenant of his property...

10. The right to enjoy the freedom to accept, reject, negotiate, or not negotiate with others.

Shortly after the Chicago meeting, Daniel F. Sheehan, Sr., of St. Louis, President of the National Association of Real Estate Boards, speaking in St. Louis, made it clear that these “declared rights” were intended to assert the right of an owner or landlord to determine the acceptability of a vendee or tenant on the basis of such person’s “race, color or creed.”

No more clear-cut assertion of the superiority of “property rights” over civil rights has been found. It acquires extra significance from the fact that the organization headed by Mr. Sheehan includes upwards of 74,000 licensed realtors, organized into 1,455 local boards.

California had discovered that its Hawkins and Unruh legislation of 1959 left much to be desired as a tool to prevent discrimination. Its area of coverage was unclear. The inclusiveness of the phrase “all business establishments of every kind” lent itself to argument and distinctions. Its teeth, consisting only of a civil action and penalty, found few persons willing to pay the costs of an attempted enforcement. Chief Justice Gibson and a unanimous supreme court had tried to find significance in the statute’s language in Burks v. Poppy Constr. Co., decided March 26, 1962. The belief of Governor Brown that further legislation was needed found expression in a 1962 article by Marshall Kaplan, the Report

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4 CAL. CIV. CODE § 51.
5 CAL. 2d 463, 20 Cal. Rptr. 609, 370 P.2d 313 (1962) See, for example, the following passages from the opinion of Chief Justice Gibson:

The Legislature used the words “all” and “of every kind whatsoever” in referring to business establishments covered by the Unruh Act (Civ. Code § 51), and the inclusion of these words, without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term “business establishments” was used in the broadest sense reasonably possible.

Although the Unruh Act makes no express provision for injunctive relief, that remedy as well as damages may be available to an aggrieved person.

For more than 50 years prior to the enactment of the Unruh Act, sections 51 and 52 of the Civil Code contained provisions prohibiting discrimination in places of “public accommodation or amusement.” The constitutionality of this legislation was upheld in Piluso v. Spencer, 36 Cal. App. 416, 419 [172 Pac. 412] and there is no valid reason why the extension of the prohibition against discrimination to “all business establishments,” including those dealing with housing, would be violative of due process. Discrimination in housing leads to lack of adequate housing for minority groups, and inadequate housing conditions contribute to disease, crime and immorality.

6 Kaplan, Discrimination in California Housing: The Need for Additional Legislation, 50 CALIF. L. REV. 635 (1962)
Coordinator of the Governor's Advisory Commission on Housing. Thus the third current context of conflict became the Rumford Act,\textsuperscript{7} which was passed by the legislature late in June, 1963. This legislation declares that "The practice of discrimination because of race, color, religion, national origin or ancestry, in housing accommodations [is] against public policy";\textsuperscript{8} and that this position is taken under the police power of the State, "for the protection of the welfare, health and peace of the people of California."\textsuperscript{9} The statute, in terms, applies to "all publicly assisted housing," and, perhaps, to some sixty or seventy per cent of other housing. Mr. L. H. Wilson, president of the California Real Estate Boards, was quoted in an article written for the \textit{New York Times} by Lawrence E. Davies\textsuperscript{10} as having said in San Mateo: first, that the Rumford Bill "had been fought every step of the way" by the California Real Estate Association; second, that this organization did not intend to take the statute "lying down"; and third, that the association's lawyers were seeking to find ways in which the act could be adjudicated unconstitutional, if the petition to submit it to a referendum vote failed. It is, perhaps, fair to conclude that Mr. Wilson, speaking for the organized realtors of California, had little affection for the Rumford Act. To a significant extent, that act treats civil rights as qualifications on property rights. Newspapers have stressed the activity of realtors, especially in Los Angeles, in procuring signers to compel a referendum. Some 200,000 signatures to this end were collected, largely by realtors of the state, but since the needed number of 292,000 was not procured by the deadline date of September 19, there was no delay in the effective date of the Rumford Act.

The fourth current context of conflict is found in the five sit-in cases which were argued at the beginning of the current term of the United States Supreme Court. In each of these cases one or more negroes was convicted in state courts of "trespass," for being on the premises of a merchant who had invited the public, except for negroes, to come on his premises to make purchases. It will suffice to present briefly the facts in three of these five cases. In \textit{Bell v. Maryland}\textsuperscript{11} twelve negro students, on June 17, 1960, entered Hooper's Restaurant in Baltimore, and sought to purchase food. They refused to leave after being requested to do so and were arrested for "trespass." Their convictions were affirmed by the

\textsuperscript{7} Cal. Stat. 1963, ch. 1853.
\textsuperscript{8} Cal. Health & S. Code § 35700.
\textsuperscript{9} Cal. Health & S. Code § 35700.
\textsuperscript{10} N. Y. Times, July 20, 1963, p. 3, col. 1 (West. ed.)
\textsuperscript{11} 227 Md. 302, 176 Atl. 771 (1962)
Court of Appeals of Maryland on January 9, 1962; and the Supreme Court permitted an appeal by certiorari, granted June 10, 1963. In 
_Barr v. City of Columbia_ and its companion case, _Bouie v. City of Columbia_, negro students sat-in in the Taylor St. Pharmacy and in 
Eckerd's Drug Store. After arrest they were convicted of "entry upon 
the lands of another after notice prohibiting the same." Their convictions 
were affirmed by the Supreme Court of South Carolina on December 14, 
1961, as to Barr, and February 13, 1962, as to Bouie. The Supreme 
Court of the United States permitted an appeal by certiorari, granted 
June 10, 1963. In these cases the existence of the offense charged de- 
pended on whether the owner of the restaurant in Maryland, or the drug 
stores in South Carolina, had a "property right" to select his customers 
on the basis of the color of the customer's skin. No decision by the Su-
preme Court on these cases is likely for several months.

The fifth current context of conflict centers on the late President 
Kennedy's proposed civil rights legislation as to public accommodations. 
It is, of course, to the great credit of California that for half a century 
prior to 1959 this state had in Civil Code §§ 51-54 a quite comprehensive 
statute barring discrimination in public accommodations. No motel 
operator, or movie owner, or store manager or night club proprietor 
in California appears to think that his property rights are being in-
fringed by the necessity of serving negroes. This is an accepted part 
of our mores. People in many parts of the country feel differently, 
and the opposition to the public accommodations part of the presently 
proposed federal civil rights program is extremely keen.

Thus, in five situations of the current year property rights and civil 
rights have met head on. In Berkeley and in the councils of the National 
Association of Real Estate Boards property rights have been regarded 
as superior. In the case of the Rumford Act civil rights have at least a 
toe hold on victory. In the litigations based on trespass from Maryland 
and South Carolina, and in the debates concerning the public accommo-
dation provisions of the proposed federal legislation, the solution of this 
conflict between property rights and civil rights is in the balance.

As we undertake our thinking together on this problem, we must keep 
our perspective clear. The problem of race and property is but one 
aspect of the bigger problem of the minorities, which even in our home 
state reaches out into the economic questions of employment, into the

14 239 S.C. 570, 124 S.E. 2d 332 (1962)
pervasive questions of education, and into the less tangible problems of human dignity. I shall confine my words within my announced topic and within the field of my life-time specialization. Thus, perhaps, I can avoid the ineptitude of Charles Lindbergh, who having proved himself an intrepid aviator by solo flying across the Atlantic sought acceptance as an expert on German politics; or of Admiral Rickover, who having great competence in naval engineering claims credence as an inspired speaker on problems of education. One more preliminary generality. In the Foreword to the posthumously published last book by Eleanor Roosevelt, she says this:

Nothing which happens to anyone has value unless it is a preparation for what lies ahead. We face the future fortified only with the lessons we have learned from the past. It is today that we must create the world of the future... In a very real sense, tomorrow is now.16

With full awareness that the lessons of yesterday are the guideposts for today, and that tomorrow is really now, let us proceed with our considerations.

The content of the term “property right” has greatly changed in the past two centuries.16 If one looks far enough backward it could fairly be said that “he who owns, may do as he pleases with what he owns.” Blackstone, writing at the middle of the eighteenth century described private property as the “sole and despotic dominion... over the external things of the world, in total exclusion of the right of any other individual in the universe.”17 As Walter Lippman soundly wrote in *Newsweek* magazine for September 16, 1963:

No civilized society has long tolerated the despotic theory of private property. This conception of property is alien to the central truths of Christendom, which have always held that property is not absolute but is a system of rights and duties that are determined by society.

Private property is, in fact, the creation of the laws of the land. It is a primitive, naive, and false view of private property to urge that it is not subject to the laws which express the national purpose and the national conscience... 18

Restrictions and freedom are two facets of the same social factor. You must be restricted so that I may have liberty. Similarly, I must be restricted so that you can have freedom. The task of any government worth its salt is to keep the restrictions sufficiently strong to assure to all equal

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16 Compare Ky. CoNsT. art. 13, § 3 (1850) : “The right of property is before and higher than any constitutional sanctions; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever.”

17 2 BLACKSTONE, COMMENTARIES *2.

freedoms. "Property rights," at any moment of time, represent the current wisdom as to how this balance is best served.  

It is, perhaps, worthy of note that we in the United States do not live in a vacuum. We have a cherished system of American democracy, which is under scrutiny by the rest of the world. We cannot, successfully, pull a "Governor Wallace" on the world. Our wisdom in defining "property rights" in 1963 will be examined and, in the parlance of law schools, will be graded by the people of other countries, a vast majority of whom are non-Caucasians.

So much of the American interposition for the modification of absolute property rights is both so well entrenched and so long accepted that we sometimes fail to recognize its full significance. Property consists mainly of two powers: (a) the power to dispose of what is owned; and (b) a power to use the land in question.

The power to dispose of owned assets has been outstandingly cut down by

(a) the Rule Against Perpetuities;
(b) the law on unlawful restraints on alienation;
(c) the general law barring illegal or anti-social dispositions; and
(d) the insistence upon formalities as prerequisites for full efficacy.

Beginning in the late seventeenth century, the Rule Against Perpetuities took final form after a gestation period of a century and a third as a magnificent judicially manufactured ingredient of the law designed to curb "inconvenient" lessenings of the alienability of property and

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29 Bentham, Limits of Jurisprudence Defined 84 (Evret ed. 1945) "The case is that in a society in any degree civilized, all the rights a man can have, all the expectation he can entertain of enjoying anything that is said to be his is derived solely from the law." It has been well said that property rights are not protected by the courts, but what the courts protect, these constitute property rights; see infra note 56.

20 No census of the world population on the basis of race is known to the author. The World Almanac and Book of Facts, 1963, gives the world population as 3,060,800,000. It is the writer's considered estimate from the data there given as to populations of continents and countries that much less than one-third of the world's population could claim to be Caucasians.


22 4 Restatement, Property §§ 370-401 (1944); 5 Powell, Real Property §§ 759-90 (1962).

23 4 Restatement, Property §§ 404-23 (1944); 6 Powell, Real Property §§ 839-48 (1958).


25 6 Powell, Real Property §§ 879-85 (deeds); §§ 939-60 (wills) (1958).
thus to curb the power of the dead hand to rule the future. It placed outer limits of time on the power of the too often assumed all-wisdom of present owners. Dispositions designed to take effect too far into the future became barred because of the recognized undesirable social consequence of permitting them.

Rooted even more anciently in feudal practices, restraints upon the alienation of present interests earned invalidity. At one time a feudal tenant could lose his right hand, which had derogated from his overlord’s rights, by presuming to sign a deed of alienation. Modern thinking has made less drastic the prohibited forms of alienation and has made milder the penalties for overstepping established barriers; but the law as to illegal restraints on the alienation of property bulks large as restrictions upon what the owner of property can do with that which he believes he owns.

“Illegality” is broader than the restriction upon the alienability of property. Whenever a proposed provision in a deed or will is judged significantly to interfere with the long-time welfare of society, it encounters in our courts a stern “This you may not do!” In general such cases involve efforts by the owner of property to use the bait of wealth to control the conduct of his donee. Such attempts have been found illegal where the donor:

(a) has attempted to control or to preclude marriage;
(b) has attempted to shape an exercise of the power of testamentary disposition;
(c) has attempted to interfere with the religious behavior of the recipient;
(d) has attempted to cause departures from normal familial relationship;

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26 Cf. De Peyster v. Michael, 6 N.Y. 467, 498 (1852), where the court said: “This restraint on alienation . . . arose partly from favor to the heir, and partly from favor to the lord, and the genius of the feudal system was originally so strong in favor of restraint upon alienation, that by a general ordinance, mentioned in the book of Fiefs, the hand of him who wrote a deed of alienation was directed to be struck off.”
27 See Schnebly, Restraints upon the Alienation of Legal Interests, 44 Yale L.J. 961, 1186, 1380 (1935).
has sought to meddle with the education, or life work of the recipient.
In all of these fields of found illegality, the criterion is the same. Is the disposition, as attempted, anti-social in its consequences? If it is so found, the disposition is not allowed.

The conveniences of a society depend, in part, upon proper evidences of acts of disposition. In consequence we have developed many prerequisites for effective deeds and for effective wills. These constitute a framework within which owners of property must function if they desire effective dispositions.

Thus the owner’s power to dispose of land which he owns has become regulated by compelling a becoming modesty in his efforts to control the future; by barring the imposition of restraints on the alienability of present interests; by setting limits on his use of his wealth as bait to control the lives of his donees; and by the prescription of formalities to be observed in acts of disposition. All of these qualifications upon the completeness of property rights have come into our law because of an increased recognition of society’s stake in the law of property.

More important than the power to dispose of land is the power to use it. As one looks back over the decades preceding 1963, the ever advancing lava flow of socially originating restrictions on the individual’s exercise of his “privileges of use” becomes truly impressive.

When the owner of land conveys an interior part—that is, a portion not bordering on a highway—it is socially undesirable to permit the land to be unusable. Hence, the conveyor is said by the courts “to have given to his grantee” an easement by necessity for access to, and exit from, the conveyed land. “Social welfare” negatives the otherwise existent power of the conveyor to insist on undisturbed possession of what he has retained.

When two parcels of land—are in the same locality, the owner of Blackacre is not permitted so to use his land as to lessen the reasonable enjoyment of Whiteacre by its owner or occupier. The twelfth century assize of nuisance began the

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See note 25 supra.

More than three centuries ago, Chief Justice Glynn, in deciding Packer v. Welsted, 2 Sid. 39, 82 Eng. Rep. 1244 (1657), and finding an easement by necessity, said that it would be to the “prejudice of the public weal, that land should lie fresh and unoccupied.” See also San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 689 (1899).

cf. 5 Powell, Real Property § 705 (1962). “The law of nuisance has been described as the ‘rule of give and take, live and let live.’ It has to consider both the social value of the defendant’s activity and the conflicting social value of the plaintiff’s use and enjoyment of his land. Hence the utility of the defendant’s conduct must be weighed against the gravity of the plaintiff’s harm.

See McRae, The Development of Nuisance in the Early Common Law, 1 U. Fla. L. Rev. 27 (1948).
body of law which cuts down what the owner of Blackacre can do, in view of his duty of neighborliness. Modern equity since the year 1800 has been making constantly new applications of the basic idea that persons who live in proximity to each other must so use their land as not to injure others. The need for these narrowings of the absolute rights of property has been steadily increased by the factor of close-living in modern communities. Reasonableness of conduct becomes more restrictive as neighbors gain nearness. The otherwise existent power to make uses of land which produce noisome odors,\textsuperscript{38} or sounds of disturbing loudness,\textsuperscript{39} or much dust\textsuperscript{40} or too bright lights\textsuperscript{41} has been kept within limits because of the requirements of social welfare.

Water is one of the great gifts of nature. Sometimes it is in a stream, sometimes it runs on the surface, sometimes it is to be found in underground pockets or sponges, sometimes it is in the form of clouds or enveloping mists.\textsuperscript{42} In any given area the amount and regularity of the rainfall, the rock formations below the surface and the topographic configuration of the surface combine to determine the total moisture available for the nurture of the land and for uses of navigation and business. In the arid and semi-arid states the available amount falls far short of demand.\textsuperscript{43} In other areas the needs for water power are seldom fulfilled. The supervision of the proper division of these scarcities is a task of the law. Rules based on reasonableness\textsuperscript{44} or prior use control those inclined to be pigs for the protection of others. Considerations of social policy fix the scope of reasonable use and also determine the rules of prior appropriation.\textsuperscript{45} Land ownership does not include the power to take or to use water to an extent or in a manner inconsistent with public welfare.

\textsuperscript{38} See, \textit{e.g.}, Ludlow \textit{v. Colorado Animal By-Prod. Co.}, 104 Utah 221, 137 P.2d 347 (1943)
\textsuperscript{40} See, \textit{e.g.}, McCarty \textit{v. Natural Carbonic Gas Co.}, 189 N.Y. 40, 81 N.E. 549 (1907) (soot and soft coal dust)
\textsuperscript{41} See, \textit{e.g.}, Hanson \textit{v. Independent School Dist. No. 1}, 61 Idaho 109, 98 P.2d 959 (1940) (stadium lights which hindered sleep)
\textsuperscript{43} In the semi-arid area which covers approximately 400,000 square miles, there is an annual rainfall varying from twelve to twenty-five inches. The truly arid areas of Arizona, southeastern California, Nevada, New Mexico, southwestern Texas and Utah have an average rainfall of less than ten inches and a high rate of evaporation, because of high temperatures.
\textsuperscript{44} See 5 \textit{POWELL, REAL PROPERTY} ¶ 713-18 (1962)
\textsuperscript{45} See 5 \textit{POWELL, REAL PROPERTY} ¶ 734 (1962).
A government finds its reasons for existence in the services which it renders to the group governed. Hence it is not surprising to find our courts repeatedly asserting that "property rights" are, and always have been, held subject to the "police power," that is, the power of the government to do that for which it exists, namely, to impose restrictions (without compensation to the owner) upon property owners, whenever such restrictions serve the health, the safety, the morals, the conservation of natural resources, or the general welfare of the governed group. See, for example, the language of Chief Justice Gibson in Wilkins v. San Bernardino, or of Justice Shenck in the cases of Ayres v. City Council of Los Angeles, and Beverly Oil Co. v. City of Los Angeles. In the latest of these three cases the opinion, concurred in by six justices, said, "... The very essence of the police power, as differentiated from the power of eminent domain, is that the deprivation of individual rights and property cannot prevent its operation, ..." The court then quoted from the Supreme Court of the United States, in affirming a prior California opinion:

It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. There must be progress, and if in its march private interests are in the way they must yield to the good of the community.

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46 Cf. Shepard, History and Theory of Government, 7 Encyc. Soc. Sci. 8-9 (1957) : "Whenever a group of human beings actuated by common interests and desires creates an organized institutional mechanism for the furtherance of these ends and for the adjustment and control of their relationships, there is government. The functions of government are social control and public service."

47 See, e.g., Dube v. City of Chicago, 7 Ill. 2d 313, 131 N.E.2d 9 (1956), where the court sustained an ordinance restricting noise in a manufacturing district, saying: "The constitutional declarations that private property shall not be taken for public use without 'just compensation, or without due process of law are always subordinate to the interest of the public welfare as expressed through the exercise of the police power of the State.'"

48 29 Cal. 2d 332, 175 P.2d 542 (1946) In sustaining a zoning ordinance which confined complainant's property to single family dwellings, the court, in a four to three decision, said: "Every exercise of the police power is apt to affect adversely the property interest of somebody." It then proceeded to hold that four multiple dwellings erected by complainant in violation of the ordinance could not be used as such although the trial court had found that his use for multiple dwellings was a "substantial property right of the plaintiff."

49 34 Cal. 2d 31, 207 P.2d 1 (1949) The court, in a five to two decision, upheld conditions annexed by the planning authorities to the approval of a submitted subdivision plan, over the objection of the land owner that these conditions took from him some land for which he was entitled to compensation.

50 40 Cal. 2d 552, 254 P.2d 865 (1953)

51 Id. at 557, 254 P.2d at 867-68.
Some aspects of the redefinition of property rights in the light of public welfare reach back nearly six centuries. Sanitary legislation began in 1389. Commissioners of sewers were established in 1430. Building regulations received a large impetus from the Great Fire of London in 1666. The safeguarding of “health” and “safety” were the aspects of the police power heavily stressed in the nineteenth century. Building codes are now a commonplace in almost every community. By 1951 some 2,233 municipalities were listed as having such codes. They establish specifications which must be complied with by property owners both as to the construction and use of buildings. A landowner, wishing to have on his land a multiple dwelling or a tenement house, must conform to the requirements dictated by the safeguarding of health, safety and public welfare with respect to plumbing, toilet facilities, air space per occupant, fire hazards and ventilation. No property owner is permitted to indulge his fancy for yard or porch water closets. Factories, in proportion to the number of workers employed, have more rigorous prerequisites, plus, in some instances, special requirements dictated by the kind of work to be conducted therein. Mercantile structures are similarly regulated.

Where, alas, has gone the liberty of property owners to do as they choose with what they own? Why, if Mr. X owns Blackacre, may he not devote Blackacre to whatever uses would be personally most profitable to him; why may he not erect such structures as he chooses at the least possible cost? Are not such rights part of his “property rights”? Indeed they are not, and I believe I am safe in assuming that no one today would argue that they are. Why have his property rights become cut-down? Because the governmental police power requires that the liberty of a landowner be curtailed so as to assure the larger liberties of other

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12 Rich. II, c. 13 (1389)
8 Hen. VI, c. 3 (1429).
1The ordinance for the reconstruction of London, 18 and 19 Car. II, c. 8 (1667), which was not replaced until 1848, embodied and embellished the pre-existing rules on party walls.
2Most cities have a building code ordinance. A survey, published in 1951 by the Housing and Finance Agency of the Division of Housing Research, reported that 2233 municipalities had such codes. A high percentage of these codes have been modelled on some one of four basic codes, namely (a) the Code of the National Board of Fire Underwriters (1949), effective in approximately 500 communities; (b) the Southern Standard Building Code (1953), effective in over 500 communities; (c) the Code of the Pacific Coast Building Officials Conference (1949), effective in over 600 communities; and (d) the Code of the Building Officials Conference of America, Inc. (1950), which was adopted in over 150 communities in the four years after its publication. See also Note, 6 STAN. L. REV. 104 (1953)

3See Hamilton and Till, Property, 12 ENCYC. SOC. SCI. 536 (1957) “It is incorrect to say that the judiciary protected property; rather they called that property to which they accorded protection.”
human beings. Compulsions which are the purveyors of a greater liberty
are abridgments of the completeness of property rights made for the
promotion of social welfare.

In the field of morals there has been a similar evolution. There was
a time when profitable houses of prostitution were thought to lie within
the property rights of generally respected members of the community.
This is no longer true. Obscene exhibitions now incur remedial social
action. Open gambling — except in Nevada — is generously frowned
upon. The desirable outer limits on police power regulation with respect
to public morals are not yet clearly defined. The exact content of "morality,"
especially in the fields of gambling and sexual behavior, is subject
to dispute. The fact remains that property owners can be effectively de-
barred from any use of their property found to offend public morals and
such debarring calls for no reimbursement of the owner so debarred.57

In the wide open spaces between Chicago and Texas there have been
comparable developments. Soil conservation districts have adopted
sometimes quite costly land use regulations which must be observed even
by unwilling owners in the district.58 Such regulations sometimes find
supplementing sanctions in the conditioning of local land loans on pre-
scribed social behavior.59 In areas devoted to cattle raising, property
owners are debarred from such over-grazing as will be productive of
short-term gain, but also of long-term lessening of general welfare.
Under the Federal Taylor Grazing Act60 and the Montana Grazing Act61
a private owner cannot procure his much needed permits to use public
lands without establishing use of his privately owned lands in a manner
preserving its long-time value. Thus "property rights" acquire redefini-
tions to assure continuing supplies of forage, called for by considera-
tions of public welfare. Rural zoning to preserve timber and to assure refor-
estation of denuded areas serves not only the desirable ends of conserva-
tion, but also preserves local tax revenues by returning land to the
growing of timber and by delaying the need for as yet insupportable
expenditures for new roads and new schools.62

67 See 6 Powell, Real Property § 864 (1958). Cf. People v. Martín, 45 Cal. 2d 755,
(1952) (bookmaking by telephone); People v. Renek, 105 Cal. App. 2d 277, 233 P.2d 43
(1951) (occupying store with horse race betting paraphernalia)
68 See Parks, Soil Conservation Districts in Action 13, 147 (1952)
69 1950 Wis. L. Rev. 716.
During the past half-century the evolution of the law of zoning has exemplified the potential scope of the police power in promoting the welfare of the community. Largely since the Supreme Court decided Village of Euclid v. Ambler Realty Co. in 1926, it has become accepted that the "property rights" of any land owner:

(a) are subordinate to the establishment of residential areas in which relaxation and relative tranquility can be enjoyed, and in which there will be absent the vibration, noise, smoke, odors, fumes and bustle of industry and commerce;  
(b) are subordinate to the establishment of areas devoted to the provision of goods and services without an intermixture of more offensive uses; and  
(c) are subordinate to the social need for controlling densities of population so that the public services of transportation, policing, fire protection, water and power supply and waste removal can be effectively rendered.

In consequence most urban land owners find themselves restricted to stipulated uses, regulated as to the fraction of the lot on which structures can be erected, and kept within fairly strict rules as to the heights to which buildings can be constructed. Statutes, administrative provisions and court decisions embody a pragmatic reconciliation of the conflicting pulls of the constitutional guarantee that private property shall not be taken without compensation and the underlying police power of our government to serve the public welfare. In this area alone property rights have received more narrowing redefinitions in a relatively few years than any prophet of fifty years ago could have believed possible.

Still more recent has been the effectuation of public welfare objectives in the fields of planning, blight prevention and housing adequacy. The momentous decision of Berman v. Parker, stemming from the District of Columbia, is still less than a decade old. Only one year earlier,
the district court in deciding the same case had regarded "property rights" as an insuperable obstacle to the recognition of the demands of public welfare.

Felix Cohen, in his essay, The Legal Conscience, published in 1960, refers to "property" as a "function of inequality." There is a germ of truth in this which has present relevance. It is a part of the function of government to mitigate the hardship of the less powerful members of the community by throwing a bit of weight into the scales on the side of those who are at a disadvantage in the balanced processes of bargaining. Courts and legislatures have resorted to the "police power"—the general welfare of society—in problems involving renters and borrowers. The otherwise existent power of landlords to exact high rents and spend as little as possible on upkeep has been diminished by considerations based on social policy. The otherwise existent power of moneylenders to exact the last pound of flesh has been trimmed by considerations of public welfare. Deficiency judgments have been kept within rather tight limits.

I have reviewed in the past few pages some twenty aspects of the law in which the absoluteness of property rights has been rejected because of the basic proposition that one cannot use what he owns in a fashion harmful to the community of which he is a part. The rule against perpetuities, unpermitted restraints on alienation, illegal uses of the

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\[\text{Schneider v. District of Columbia, 117 F. Supp 705 (1953)}\]
\[\text{Cohen, THE LEGAL CONSCIENCE 41 (1960)}\]
\[\text{In 2 Powell, REAL PROPERTY §§ 250-52 (1950), after tracing the legislation, state and national, for the relief of lessees, the author says at the end of § 252:}\]

The future of legislation in aid of the lessee population is not certain. Swings in social philosophy may end all such legislation for a time and bring it back again at a later date. The experience thus far accumulated should be studied as a guide for future decisions. The age-old controversy on the relative merits of nation-wide regulation versus local control is likely to continue in this and other fields. One lesson from the past should be observed. It is very difficult fairly to regulate the rent receipts of lessors without simultaneously regulating the prices they must pay for maintenance materials and maintenance labor. It is also difficult fairly to regulate rentals without governmental participation in the financing of real estate and in supervision of the prices at which land can be sold. These difficulties merely illustrate the Scylla and Charybdis of society in general. License must be curbed for the protection of liberty. Curbs gain effectiveness as they become comprehensive. There comes a time when their effectiveness eliminates liberty. Our struggle must be to preserve that degree of liberty which gives the best equilibrium with curbed license.

\[\text{See 3 Powell, REAL PROPERTY §§ 472-73 (1952) \text{In sustaining the constitutionality of a Minnesota mortgage moratorium statute, the Supreme Court in Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), said that "the economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." See CAL. CODE CIV. PROC. §§ 580a, b, d.}\]
bait of wealth to dominate the lives of other people, formalities pre-
requisite to an effective deed or will—all these define property rights
with subtractions as to the power to dispose, stemming from the preser-
vation of public welfare. When one turns to the area of permissible uses
of property, easements by necessity, the law of nuisance, the division of
the benefits of water, regulations as to sanitation and sewerage, building
codes, the maintenance of at least a minimum of morality, soil conserva-

over-grazing, timber control, zoning, planning, blight prevention,
housing adequacy, and the protection of those short in bargaining power,
such as renters and borrowers, are aspects of our legal background in
which progressively property rights have been trimmed for the protec-
tion of society. In each of these twenty areas the criterion has been
basically the same. Is the claimed exercise of property rights one which
is consistent with the public welfare? If so the claim is given effect. If not
the claim is found not to be a right at all.

As early as 1945, Mr. Justice Jackson of the Supreme Court, in
stressing the subordination of private so-called rights to matters of social
cconcern put it thus:

Only those economic advantages are “rights” which have the law back
of them . . . whether it is a property right is really the question to be
answered. . . .

Rights, property or otherwise, which are absolute against all the
world are certainly rare, and water rights are not among them. Whatever
rights may be as between equals such as riparian owners, they are
not the measure of riparian rights on a navigable stream relative to the
function of the Government in improving navigation. Where these inter-
ests conflict they are not to be reconciled as between equals, but the
private interest must give way to a superior right, or perhaps it would
be more accurate to say that as against the Government, such private
interest is not a right at all.7

Thus the history of the law of private ownership has witnessed
simultaneously a playing-down of absolute rights and a playing-up of
social concern as to the use of property. Writing a few years back, Prof.
Harry Cross of the University of Washington at Seattle wrote of the
“diminishing fee.” 8 His title was descriptive of what has been narrated
thus far, and prophetic of what is still ahead. Property rights have been
redefined in response to a swelling demand that ownership be responsi-
ble and responsive to the needs of the social whole. Property rights
cannot be used as a shibboleth to cloak conduct which adversely affects

the health, the safety, the morals, or the welfare of others.

Let us turn the light of this history upon the soundness of the Property Owners’ Bill of Rights promulgated by the National Association of Real Estate Boards to strengthen the backbones of owners, renters and realtors in discrimination; upon the legality of the provisions in the Rumford Act; upon the propriety of convicting of trespass negroes who sat-in at a public restaurant in Baltimore, Md., or sought to be served food at public drug stores in Columbia, S. C.; upon the lawfulness of the proposed public accommodation provisions in the civil rights legislation now under consideration by Congress. The criterion is a simple one. Is it contrary to public welfare to permit an owner of property to reject a vendee or lessee solely because of the color of his skin? Is it contrary to public welfare to permit the operator of a store, to which the public is invited, to qualify his invitation by the addition “except negroes”? To the extent that such conduct is contrary to the public welfare, then the history reviewed here shows us that there is no property right to be asserted for the defeat of these civil rights.

So we are remitted to a basic question of fact. To what extent, if at all, is it contrary to “public welfare” to sanction discrimination based on (in the words of the Rumford Act): “race, color, religion, national origin or ancestry.” If it is contrary to public welfare, the National Association of Real Estate Boards is living amidst the trappings of a past era. If it is contrary to public welfare, the Rumford Act, so far as it goes, is a move in the right direction. If it is contrary to public welfare, the Supreme Court should reverse the trespass convictions of Bell, Barr and Bouie. If it is contrary to public welfare, the public accommodations provisions of the proposed federal act embodies that which is already law.

It is difficult for a white person fully to realize the hurt to human dignity, the deep feeling of injustice, the souring of the milk of human kindness, the establishment of the foundations of bitter hatred caused to a negro when he find that his money is not acceptable in the purchase of a home or in the rental of housing, or when he finds himself excluded from a restaurant, or a motel, or a hotel, or a drug store open to serve other human beings. It is true that only about ten per cent of our national population are negroes. Is the white majority in this country

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56 In an address to the State Bar of California, during the Fall of 1963, Justice Tobriner of the Supreme Court of California suggested that our courts already have power to enforce rules which our legislators are hesitating to put into statutory form.
57 The novels of James Baldwin make clear this inner hurt to a negro.
willing to blink at the racial hostilities generated by continued adherence to its inherited prejudices? Deep seated resentments in a substantial fraction of our populace are too likely to prove costly both as to the safety and the welfare of the rest of the country. If one were told by his doctor that 10% — maybe 17 pounds — of his body was infected with cancer, would he retain his poise and feel assured that there was no danger to the health or welfare of the balance of his body?

This question rises above partisan lines. It is true that President Kennedy in his message to Congress said “No property owner who holds his property for the purpose of serving at a profit the American public at large, can claim any inherent right to exclude a part of that public on grounds of race or color.” It is also true that the Republican platform of 1960 in dealing with “equality under law” said: “It becomes a reality only when all persons have equal opportunity, without distinction of race, religion, color or national origin, to acquire the essentials of life — housing, education and employment.” As long ago as 1910, a not wholly forgotten Republican, Theodore Roosevelt, expressed the idea basic to this article when he said, “Every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it.”

Even if one could develop sufficient calluses so as to feel not at all the upset of his 15,000,000 brothers, the problem would not be solved. In an age of jet planes and nuclear fission these United States do not live apart. The world is smaller than it was fifty, or forty, or thirty or twenty or even ten years ago. The validity of American democracy, the truth or hypocrisy of its protestations of belief in justice and in the fatherhood of God and the brotherhood of all humans is up for judgment at the bar of world opinion. That tribunal is no longer stacked in favor of the white man. The Caucasians of the world are vastly outnumbered both by members of the yellow race and by members of the black race. Is it not contrary to both the “safety” and “general welfare” of white Americans to continue practices of discrimination within our borders which hurt the self-respect of untold millions around the world, and which furnish to our ideological enemies the strongest arguments as to our sincerity?

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8 It might be argued that there is, perhaps, another ten per cent of our national population who will become more hostile than they are now to negroes, if segregation ceases. If we are forced to choose between incurring further hostility of prejudiced whites, or incurring the further hostility of demanding blacks by denying them equal rights in our supposed democracy, can anyone doubt which choice is inevitable under the elemental principles of justice or in accordance with the teachings of any of the religions professed by our citizens?

Unless someone is able to show that continued discrimination based on color does not threaten the safety and public welfare of this fair land, the so called Property Owners’ Bill of Rights promulgated by the National Association of Real Estate Boards in so far as it has relevance on this topic should be rejected; the Rumford Act should be accepted, conformed to and applied with remedial liberality; the trespass cases should be reversed by the Supreme Court on the basic proposition that property rights provide no cloak for the denial of civil rights, and the public accommodation clauses of the federal civil rights legislation should be speedily enacted and rigorously enforced.

Property rights cease when civil rights involving the public welfare are at stake.