LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW

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—VS.—

STATE OF MARYLAND, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Petitioners,

—v.—

STATE OF MARYLAND.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above-entitled case on January 9, 1962.

Citations to Opinions Below

The opinion of the Court of Appeals of Maryland is unreported as of yet and is set forth in the appendix hereto, *infra*, pp. 6a-8a. The opinion of the Criminal Court of the City of Baltimore is unreported as of yet and is set forth in the appendix hereto, *infra*, pp. 1a-5a.

Jurisdiction

The judgment of the Court of Appeals of Maryland was entered January 9, 1962, *infra*, pp. 6a-8a. On April 5, 1962, Mr. Justice Black signed an order extending petitioners' time for filing petition for writ of certiorari to and including June 8, 1962.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, §1257(3), petitioners having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

Whether Negro petitioners were denied due process of law and equal protection of the laws as secured by the Fourteenth Amendment:

1. When arrested and convicted of trespass for failing to leave a public restaurant which in accordance with community custom adhered to a policy of excluding Negroes.

2. When petitioners were denied freedom of expression secured by the Fourteenth Amendment when convicted of trespass upon refusal to leave a public restaurant while engaging in a sit-in protest demonstration.

3. When said convictions were obtained under a statute so vague as to give no fair warning that their conduct was prohibited.

Constitutional and Statutory Provisions Involved

1. This case involves §1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Article 27, §577 of the Code of Maryland (1957), which states:

> Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor, and on conviction thereof before some justice of the peace in the county or city where such trespass may have been committed be fined by said justice of the peace not less than one, nor more than one hundred dollars, and shall stand committed to the jail of county or city until such fine and costs are paid; provided, however, that the person or persons so convicted shall have the right to appeal from the judgment of said justice of the peace to the circuit court for the county or Criminal Court of Baltimore where such trespass was committed, at any time within ten days after such judgment was rendered; and, provided, further, that nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others.

Statement

Petitioners, twelve Negro students, were arrested for engaging in a sit-in protest in a Baltimore, Maryland restaurant (Tr. 3-5), and were convicted of trespass in violation of Article 27, Section 577 of the Maryland Code, 1957 ed.

A group of fifteen to twenty Negro students (Tr. 7) including petitioners, entered Hooper's Restaurant, Baltimore about 4:15 p.m., June 17, 1960 (Tr. 7). In the lobby of the restaurant, the hostess, acting on the orders of Mr. Hooper, the owner, told them: "I'm sorry, but we haven't integrated as yet" (Tr. 7, 8). She later testified that the group was properly dressed, and that, had they been white people, they would have been seated (Tr. 14).

> Q. . . . "Now, you refused them admission to this restaurant solely on the basis of their color, is that correct? A. Yes, sir" (Tr. 13-14).

Similar admissions were made by the manager (Tr. 20). The petitioners took seats at tables both in the main dining room and in a lower-level cafeteria (Tr. 16). At the time, the restaurant manager was explaining to a leader of the group that the restaurant policy prohibits service to Negroes (Tr. 16, 43-44). While many of the group sat one to a table, this action did not nor was it intended to interfere with the service of other customers (Tr. 51-52).

At the owners' request, police were called and the State trespass statute was read to the group (Tr. 17), some of whom left the premises (Tr. 18). Warrants were obtained against the others who failed to leave after an additional warning (Tr. 18-19).

Petitioners waived preliminary hearings in the Magistrates' Court, and were indicted by the Grand Jury of

Baltimore City and found guilty of trespass after trial without jury in the Criminal Court of Baltimore. Each petitioner was fined $10.00, which fine was suspended because as the Trial Court found, " . . . these people are not law-breaking people; that their action was one of principle rather than any intentional attempt to violate the law." Petitioners appealed to the Maryland Court of Appeals which affirmed.

Mr. Hooper, the restaurant owner, testified, "I wanted to prove to them it wasn't my policy, my personal prejudice, but that I'm at the mercy of my customers" (Tr. 25). "I go on record as I favor what you people are trying to do . . . but I do not approve of your method in trying to reach it" (Tr. 32-33).

A leader of the group testified that they had gone to the restaurant hoping to be served (Tr. 45); that while they knew Hooper's policy was to serve only whites, eating places sometimes changed their policies on the spot when the group presented itself and requested service (Tr. 57-58). Having been refused service, petitioners proceeded to inform the public of the discriminatory nature of Hooper's policy (Tr. 46). Some began picketing outside of the restaurant (Tr. 46) while others sought a similar goal by sitting quietly at the tables waiting to be served.

How the Federal Questions Were Raised and Decided Below

At the close of the State's case in the trial court and again at the conclusion of petitioners' case, petitioners moved for a directed verdict in their favor (R. 41, 76). While the grounds upon which these motions were based do not appear in the record, it is clear from the opinion of the Criminal Court of the City of Baltimore, *infra*, pp. 1a-5a, and the

opinion of the Court of Appeals of Maryland, pp. 6a-8a, that federal constitutional questions were properly raised in the Courts below and decided adversely to petitioners' contentions.

The Court of Appeals of Maryland summarized petitioners' contentions as follows:

> "The appellants contend that the State may not use its judicial process to enforce the racially discriminatory practices of a private owner, once that owner has opened his property to the general public, and that the Maryland Criminal Trespass Statute, although constitutional on its face, has been unconstitutionally applied" (*infra*, p. 7a).
>
> "The appellants further contend, however, that the Maryland Statute, as applied, denies to them the freedom of speech guaranteed under the First and Fourteenth Amendments to the United States Constitution" (*infra*, pp. 7a-8a).

The Court of Appeals of Maryland explicitly rejected petitioners' constitutional objections, *infra*, pp. 7a-8a, holding:

> "We find it unnecessary to dwell on these contentions at length because the same arguments were fully considered and rejected by this Court in two recent cases, *Drews* v. *State*, 224 Md. 186, and *Griffin & Greene* v. *State*, 225 Md. 422. . . . and that the statutory references to entry upon or crossing over, cover the case of remaining upon land after notice to leave."[1]

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[1] Both *Drews* v. *State* (No. 840, 1960 Term; renumbered No. 71, 1961 Term) and *Griffin* v. *State* (No. 287, 1961 Term) are sit-in cases pending before this Court.

The Court further held, *infra*, p. 8a, that:

> "On principle, we think the right to speak freely and to make public protest does not import a right to invade or remain upon the property of private citizens, so long as private citizens retain the right to choose their guests or customers. We construe the *Marsh* case, supra, as going no further than to say that the public has the same right of discussion on the sidewalks of company towns as it has on the sidewalks of municipalities. That is a far cry from the alleged right to engage in a 'sit-in' demonstration."

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With Decisions of This Court Which Condemn the Use of State Power to Enforce a State Custom of Racial Segregation.

The record in this case clearly shows that the petitioners were refused service, ordered to leave the Hooper Restaurant, and arrested and convicted of a crime because they were Negroes. Without dispute, the practice of the Hooper Restaurant was to open its doors to the public and stand ready to serve food to white persons and to refuse such service to Negroes. It is also apparent that the arrests were made in support of this discrimination, and that the trial court convicted petitioners on evidence plainly indicating that race, and race alone, was the basis for the order to leave and the consequent arrest for failing to leave. This is thus a case where the difference in treatment to which petitioner has been subjected is clearly a racial discrimination.

There are several dominant and relevant components of action by state officials in the chain of events leading to appellant's conviction and punishment for violating the racially discriminatory customs. Here, as in all criminal prosecutions, there is action by state officers in the persons of the police, prosecutors and judges; the official actions of such officers are "state action" within the meaning of the Fourteenth Amendment. The subject of judicial action as "state action" was treated exhaustively in part II of Chief Justice Vinson's opinion in *Shelley* v. *Kraemer,* 334 U. S. 1, 14-18; cf. *Boynton* v. *Virginia,* 364 U. S. 454; policemen (*Screws* v. *United States,* 325 U. S. 91; *Monroe* v. *Pape,* 365 U. S. 167) and prosecutors (*Napue* v. *Illinois,* 360 U. S. 264) are equally subject to the restraints of the Fourteenth Amendment.

Ever since the *Civil Rights Cases,* 109 U. S. 3, 17, it has been conventional doctrine that racial discrimination when supported by state authority, violates the Fourteenth Amendment's equal protection clause; and since *Brown* v. *Board of Education,* 347 U. S. 483, it has been settled that racial segregation constitutes a forbidden discrimination.

However, in this case the involvement of the public law enforcement and judicial officers in the racial discrimination practiced against petitioner, through their use of the state's criminal law machinery to support and enforce it, is now sought to be excused because, it is said, there is also "private action" involved, and the state is said to be merely enforcing "private property" rights through its criminal trespass laws.

It is said that only "trespassers" and not Negroes are punished by the state, and thus it is private property rights and not racial discrimination that is being preserved by the state's officers and laws. But we must ask, what is the nature of the property right here recognized and enforced

by the state? Moreover, does this property right have any proper relation to the state's legitimate interest in the protection of the right to privacy or state customs and laws?

As a starting point it is fit to observe, as this Court did in *Shelley* v. *Kraemer, supra,* that the mere fact that property rights are involved does not settle the matter. The Court said at 334 U. S. 1, 22:

> "Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. Marsh v. Alabama, 326 U. S. 501, 90 L. ed. 265, 66 S. Ct. 276 (1946)."

This Court has said on several occasions, "that dominion over property springing from ownership is not absolute and unqualified." *Buchanan* v. *Warley,* 245 U. S. 60, 74; *United States* v. *Willow River Power Co.,* 324 U. S. 499, 510; *Marsh* v. *Alabama,* 326 U. S. 501, 506; cf. *Munn* v. *Illinois,* 94 U. S. 113. As the Court said in *Marsh, supra,* "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793, 796, 802."

Obviously then further inquiry must be made as to the specific nature of the property right of the Hooper Restaurant which is being enforced by the State in this criminal trespass prosecution. At the outset, it is clear that the case does not involve state enforcement of a property owner's desire to exclude a person or persons for reasons of whim or caprice. The owner testified that he refused to serve the petitioners and ordered them from his restaurant in order to conform with the community custom and a racially segregated "way of life" which has been fostered and buttressed by law (Tr. 25).

Petitioners submit that it is readily apparent that the property interest being enforced against them on behalf of the Hooper Restaurant, bears no substantial relation to any constitutionally protected interest of the property owner in privacy in the use of his premises. The State is not in this prosecution engaged in protecting the right to privacy. It has long been agreed by the courts that a state can "take away" this property right to racially segregate in public accommodation facilities without depriving an owner of Fourteenth Amendment rights. *Western Turf Asso.* v. *Greenberg,* 204 U. S. 359; *Railway Mail Ass'n* v. *Corsi,* 326 U. S. 88; *Pickett* v. *Kuchan,* 323 Ill. 138, 153 N. E. 667, 49 A. L. R. 499 (1926); *People* v. *King,* 110 N. Y. 418, 18 N. E. 245 (1888); Annotation 49 A. L. R. 505; cf. *District of Columbia* v. *John R. Thompson Co.,* 346 U. S. 100.

And indeed a great number of states in our nation have enacted laws making it criminal to engage in just the type of racially discriminatory use of private property which the Restaurant seeks state assistance in preserving here.[2]

From the fact that the States can make the attempted exercise of such a "right" a crime, it does not follow neces-

[2] See collections of such laws in Konvitz, A Century of Civil Rights, *passim* (1961).

sarily and automatically that they must do so, and must refuse (as petitioners here urge) to recognize such a claimed property right to discriminate racially in places of public accommodation. But the fact that the States can constitutionally prohibit such a use of property and that when they do so they are actually conforming to the egalitarian principles of the Fourteenth Amendment (*Railway Mail Ass'n* v. *Corsi, supra,* at 93-94) makes it evident that the property interest asserted by the Hooper Restaurant is very far from an inalienable or absolute property right. Indeed the property owner here is attempting to do something that the state itself could not permit him to do on state property leased to him for his business use (*Burton* v. *Wilmington Parking Authority,* 365 U. S. 715), or require or authorize him to do by positive legislation (*cf.* Mr. Justice Stewart's concurring opinion in *Burton, supra*).

A basic consideration in this case is that the restaurant involved is a public establishment in the sense that it is open to serve the public and is part of the public life of the community (Mr. Justice Douglas, concurring in *Garner* v. *Louisiana,* 368 U. S. 157, 176). As a consequence of the public use to which the property has been devoted by the owner, this case involves no real claim that the right to privacy is being protected by this use of the State's trespass laws. And, of course, it does not follow from the conclusion that the State cannot enforce the racial bias of the operator of a restaurant open to the public, that it could not enforce a similar bias by the use of trespass laws against an intruder into a private dwelling or any other property in circumstances where the state was exercising its powers to protect an owner's privacy. This Court has recently reiterated the principle that there is a constitutional "right to privacy" protected by the Due Process

clause of the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643, 6 L. ed. 2d 1081, 1090, 1103, 1104; see also *Poe* v. *Ullman*, 367 U. S. 497 (dissenting opinions).

It is submitted that due consideration of the right to privacy affords a sound and rational basis for determining whether cases which might arise in the future involving varying situations should be decided in the same manner urged by petitioner here—that is, against the claimed property interest. Only a very absolutist view of the property "right" to determine those who may come or stay on one's property on racial grounds—an absolutist rule yielding to no competing considerations—would require that the same principles apply through the whole range of property uses, public connections, dedications, and privacy interests at stake. The Court has recognized the relation between the right of privacy and property interests in the past. See e.g. *Thornhill* v. *Alabama*, 310 U. S. 88, 105-106; *Breard* v. *Alexandria*, 341 U. S. 622, 626, 638, 644.

Petitioners submit that a property right to determine on a racial basis who can stay on one's property cannot be absolute at all, for this claimed right collides at some points with the Fourteenth Amendment right of persons not to be subjected to racial discrimination at the hand of the government. *Burton* v. *Wilmington Parking Authority, supra; Shelley* v. *Kraemer, supra.* Mr. Justice Holmes said in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Petitioners certainly do not contend that the principles urged to prevent the use of trespass laws to enforce racial discrimination in a lunch counter operated as a public business would prevent the state from enforcing a similar bias in a private home where the right of privacy has its greatest meaning and strength. A man ought to have the right to order from his home anybody he prefers not to have in it, and ought to have the help of the government in making his order effective. Indeed, the State cannot constitutionally authorize an intrusion into a private home except in the most limited circumstances with appropriate safeguards against abuses. *Mapp* v. *Ohio, supra;* cf. *Frank* v. *Maryland,* 359 U. S. 360. Racial discrimination in a private home, or office, or other property where the right of privacy is paramount is one thing. Racial discrimination at a public restaurant is quite another thing indeed.

Finally the property involved in this case is "affected with a public interest," *Munn* v. *Illinois,* 94 U. S. 113. By its use it has become "clothed with a public interest [is] of public consequence, and affect[s] the community at large" (*id.* at 126).

It is submitted that the totality of circumstances in this case, including the actions of the State's officers in arresting, prosecuting and convicting petitioners, the public character of the business property involved, the plain and invidious racial discrimination involved in the asserted property rights being protected by the state, the absence of any relevant component of privacy to be protected by the state's action in light of the nature of the owner's use of his property, and the state custom of segregation which has created or at least substantially buttressed the type of discriminatory practices involved, are sufficient to require a determination that the petitioners' trespass convictions have abridged their rights under the Fourteenth Amendment.

II.

The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment.

Petitioners were engaged in the exercise of free expression, by verbal and nonverbal requests to the management for service, and nonverbal requests for nondiscriminatory restaurant service, implicit in their continued remaining in the dining area when refused service. As Mr. Justice Harlan wrote in *Garner* v. *Louisiana*: "We would surely have to be blind not to recognize that petitioners were sitting at these counters, when they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." 7 L. ed. 2d at 235-36. Petitioners' expression (asking for service) was entirely appropriate to the time and place at which it occurred. They did not shout or obstruct the conduct of business. There were no speeches, picket signs, handbills or other forms of expression in the store possibly inappropriate to the time and place. Rather they offered to purchase food in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas" (*Abrams* v. *United States*, 250 U. S. 616, 630, Holmes, *J.*, dissenting), within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U. S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U. S. 88 (picketing); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 633-634 (flag salute); *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449 (freedom of association).

Questions concerning freedom of expression are not resolved merely by reference to the fact that private property is involved. The Fourteenth Amendment right to free ex-

pression on private property takes contour from the circumstances, in part determined by the owner's right of privacy, and his use and arrangement of his property. In *Breard* v. *Alexandria*, 341 U. S. 622, the Court balanced the "householder's desire for privacy and the publisher's right to distribute publications" in the particular manner involved, upholding a law limiting the publisher's right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers*, 319 U. S. 141 where different kinds of interests led to a corresponding difference in result. Moreover, the manner of assertion and the action of the State, through its officers, its customs and its creation of the property interest are to be taken into account.

Thus, petitioners submit that a determination of their right to free expression requires consideration of the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action is supporting. *Marsh* v. *Alabama*, 326 U. S. 501.

In *Marsh*, *supra*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize for their faith, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama*, *supra*, involving picketing on company-owned property; see also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); *United Steelworkers* v. *N.L.R.B.*, 243 F. 2d 593, 598 (D. C. Cir. 1956), reversed on other grounds, 357 U. S. 357, and compare the cases mentioned above with *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U. S. 240, 252, condemning an employee seizure of a plant. In *People* v. *Barisi*, 193 Misc.

934, 86 N. Y. S. 2d 277, 279 (1948) the Court held that picketing within Pennsylvania Railroad Station was not a trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it." See also *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959), which on Fourteenth Amendment and Labor Management Relations Act grounds decided that pickets may patrol private property within a privately owned shopping center.

As Mr. Justice Douglas said while concurring in *Garner* v. *Louisiana*, 368 U. S. 157:

> "Restaurants, whether in a drug store, department store, or bus terminal, are a part of the public life of most of our communities. Though they are private enterprises, they are public facilities in which the states may not enforce a policy of racial discrimination."

The court below denied that the trespass convictions of the petitioners denied any First or Fourteenth Amendment rights stating:

> "On principle, we think the right to speak freely and to make public protest does not impart a right to invade or remain upon the property of private citizens, so long as private citizens retain the right to choose their guests or customers" (App. 8a).

But in this case, the property had been opened to the public, for profit, and race alone was the basis for refusal to serve petitioners. Significantly, the refusal of service was not because of the owner's caprice, but because he felt constrained to conform to the racial prejudice of the community. Thus, under the circumstances of this case, it is

not a general property right which the state enforced by the arrest of petitioners, but a community pattern of racial discrimination which the state clearly may not sanction, *Civil Rights Cases,* 109 U. S. 3, and should not be permitted to encourage or support. See Henkin, *Shelley* v. *Kraemer: Notes for a Revised Opinion,* 110 U. of Pa. L. Rev. 473, 499 (1962).

Where free expression rights are involved, the question for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the state has the right to prevent. *Schenck* v. *United States,* 249 U. S. 47, 52. The only "substantive evil" sought to be prevented by this trespass prosecution is the elimination of racial discrimination and the stifling of protest against it; but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination.

III.

The Decision Below Conflicts With the Decisions of This Court Barring Convictions Under Criminal Statutes and Warrants Which Give No Fair and Effective Warning That Petitioners' Actions, Which Violate No Standard Required by the Plain Language of the Law, Are Prohibited.

The fact that the arrest and conviction were designed to short circuit a bona fide protest is strengthened by the necessity of the state court to make a strained interpretation of the statute in order to bring petitioners' conduct within its ambit. Petitioners' conviction for trespass rests on an interpretation which flies in the face of the plain words of the statute, which reads:

"*Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so* shall be deemed guilty of a misdemeanor, and on conviction thereof before some justice of the peace in the county or city where such trespass may have been committed be fined by said justice of the peace not less than one, nor more than one hundred dollars, and shall stand committed to the jail of county or city until such fine and costs are paid; provided, however, that the person or persons so convicted shall have the right to appeal from the judgment of said justice of the peace to the circuit court for the county or Criminal Court of Baltimore where such trespass was committed, at any time within ten days after such judgment was rendered; and provided, further, that nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others." (Emphasis added.)

In this case, however, petitioners had entered the restaurant and asked to be assigned seats at a table before they were advised by the hostess, "We have not integrated as yet" (Tr. 8). They had taken seats and had discussion about the restaurant's policy with both the manager and the owner before the trespass statute was read to them and they were formally asked to leave. Clearly petitioners' failure to obey this request does not bring their action within the purview of this statute. Under the Court of Appeals of Maryland's construction of the law conduct is reached which the words of the statute do not fairly and

effectively proscribe, thus depriving petitioners of any notice that their acts would subject them to criminal liability. There is no assertion that petitioners "enter[ed] . . . after having been notified . . . not to do so" only that they remained after being told to leave. In terms of the clear command of the statute as to entry after notice, this case would fall within the principle of *Thompson* v. *Louisville*, 362 U. S. 199 as a conviction resting on no evidence of guilt.

The vice of vagueness is particularly odious where the right of free speech is put in jeopardy. Conduct involving free speech can only be prohibited by a statute "narrowly drawn to define and punish specific conduct as constitute a clear and present danger to substantial interest of the state." *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, 308; *Garner* v. *Louisiana*, 368 U. S. 157, 185 (Mr. Justice Harlan concurring). If the Court of Appeals of Maryland can affirm the convictions of these petitioners by such a construction they have exacted obedience to a rule or standard that is so ambiguous and fluid as to be no rule or standard at all. *Champlin Ref. Co.* v. *Corporation Com. of Oklahoma*, 286 U. S. 210. Such a result cannot but have a "potentially inhibiting effect on speech." *Smith* v. *California*, 361 U. S. 147, 151. But when free expression is involved, the standard of precision is greater; the scope of construction must, therefore, be less. If this is the case when a State Court limits a statute it must *a fortiori* be the case when a State Court expands the meaning of the plain language of a statute. *Winters* v. *New York*, 333 U. S. 507, 512.

CONCLUSION

WHEREFORE, for the foregoing reasons petitioners pray that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 167

ROBERT MACK BELL, et al.,
Petitioners,

—vs.—

STATE OF MARYLAND,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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OCTOBER TERM, 1962

No. 167

ROBERT MACK BELL, ET AL.,
Petitioners,

v.

STATE OF MARYLAND,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of Maryland in this case, reported as *Bell v. State*, 227 Md. 302, 176 A. 2d 771, and the Memorandum Opinion of Judge Byrnes, Criminal Court of Baltimore City, are fully set forth in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Petitioners allege that the Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. 1257(3). The Respondent denies that the Supreme Court has jurisdiction over this case.

QUESTIONS PRESENTED

1. Do the Petitioners present a case of sufficient importance to warrant further review?

2. Does the arrest and conviction, pursuant to a general State trespass statute, of Negro students protesting racial segregation who, over the objection of the owner, seated themselves in the dining area of a privately-owned restaurant in a privately-owned building, and who refused to leave the premises when so ordered by the owner, under the facts of this case, constitute prohibited State action within the meaning of the Fourteenth Amendment of the United States Constitution?

3. Did the arrest and conviction of Petitioners under the Criminal Trespass Statute in this case deny the Petitioners, who were engaged in a "sit-in demonstration" in a private restaurant, the freedom of speech and assembly guaranteed by the First and Fourteenth Amendments to the Constitution of the United States?

4. Was the conviction of Petitioners obtained under a statute so vague as to give no fair warning that their conduct was prohibited and so as to constitute a violation of due process of law secured by the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Section 1, Fourteenth Amendment to the Constitution of the United States.
2. First Amendment to the Constitution of the United States.
3. Section 577, Article 27, Annotated Code of Maryland (1957 Edition); Chapter 66, Laws of Maryland, 1900. (See Petition at page 3.)

STATEMENT OF FACTS

The State adopts the Petitioners' Statement of Facts.

ARGUMENT

I. PETITIONERS HAVE NOT PRESENTED A CASE OF SUFFICIENT IMPORTANCE TO WARRANT FURTHER REVIEW.

The Petitioners in this case have not presented to the Supreme Court a case of sufficient magnitude to warrant further review. The issue in this case as it applies to Hooper's Restaurant is no longer significant. Since the conviction of the Petitioners, the City Council of Baltimore City has passed an ordinance (Baltimore City Ordinance No. 1249, June 8, 1962; see Appendix, *infra*, p. 11) barring refusal of service in Baltimore restaurants solely on racial grounds.

Circumstances leading to the conviction of the Petitioners could not again arise by reason of the above cited ordinance. The Supreme Court should not grant certiorari in this case, the issues of which have become purely academic, inasmuch as the Petitioners have achieved by political means in this community the result sought in the courts. See *United States v. Abrams*, 344 U.S. 855; *Community Services, Inc. v. United States*, 342 U.S. 932; *Sokol Brothers v. Commissioner*, 340 U.S. 952; *Beal v. United States*, 340 U.S. 852; Stern, *Denial of Certiorari Despite a Conflict*, 66 Harvard Law Review 465 (1953). Furthermore, the Supreme Court has had before it on previous occasions cases involving the constitutional questions presented in this Petition and the Court in those instances refused to consider the constitutional issues presented here. *Boynton v. Virginia*, 364 U.S. 454; *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Garner v. Louisiana*, 368 U.S. 157.

II. THE ARREST AND CONVICTION, PURSUANT TO A GENERAL STATE TRESPASS STATUTE, OF NEGRO STUDENTS PROTESTING RACIAL SEGREGATION, WHO OVER THE OBJECTION OF THE OWNER SEATED THEMSELVES IN THE DINING AREA OF A PRIVATELY-OWNED RESTAURANT IN A PRIVATELY OWNED BUILDING, AND WHO REFUSED TO LEAVE THE PREMISES WHEN SO ORDERED BY THE OWNER, UNDER THE FACTS OF THIS CASE, DOES NOT CONSTITUTE PROHIBITED STATE ACTION WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Petitioners argue that the decision below conflicts with decisions of the Supreme Court which condemn the use of state power to enforce a "state custom" of racial segregation. There is nothing in the record to support the bald assertion that there is in the State of Maryland a custom of racial segregation. There was no such finding of fact by the trial court. Almost three years ago, a considerable period considering the rapid evolution of race relations, Chief Judge Thomsen of the United States District Court of Maryland found, as a matter of fact, that in February of 1960 there was no "custom, practice, and usage of segregating the races in restaurants in Maryland." *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, 126, 127, aff'd Fourth Cir., 284 F. 2d 746. In that decision, after reviewing facts presented by both sides on the question of custom and usage, Chief Judge Thomsen stated: "Such segregation of the races as persists in restaurants in Baltimore is not required by any statute or decisional law of Maryland, nor by any general custom or practice of segregation in Baltimore City, but is the result of the business choice of the individual proprietors, catering to the desires or prejudices of their customers". *Ibid*, page 127, 128. Furthermore, in view of the fact that the elected representatives of the people of Baltimore have passed an ordinance condemning racial segregation in restaurants

in the city, it can hardly be said that the action of the court in finding the Petitioners guilty of trespass in fact was pursuant to and in support of an entrenched public policy of racial segregation.

The State action under the facts of this case was not prejudicial to Petitioners' constitutional rights. State action in *Garner v. Louisiana*, 368 U.S. 157, was initiated by the police. Petitioners were denied no rights of property. *Shelley v. Kraemer*, 334 U.S. 1. In remaining on the premises of the restaurant, they had none. A considerable time elapsed between the hostess's refusal to seat the Petitioners and their arrest. The record shows that they pushed past the hostess to obtain seats in the dining area (T. 13). There was then a long conversation between the leader of the group and the manager and owner of the restaurant (T. 33). The Petitioners were requested to leave but refused to do so (T. 26). The Police were summoned. When they arrived the members of the Negro group were the only persons remaining in the restaurant (T. 37). The Trespass Statute was read to the group in the presence of the police (T. 37). Some of the group left, but the remainder refused (T. 38). Employees of the restaurant took down names and addresses of those remaining (T. 37). Since the Police refused to arrest the Petitioners without a warrant, Mr. Hooper went to the Central Police Station to obtain warrants (T. 38). The Magistrate called the leader of the group on the telephone, discussed the situation and arrangements were made for a trial on the following Monday (T. 38). Warrants were neither served nor were Petitioners taken into custody (T. 38, 39). It can hardly be said that Petitioners were victimized by oppressive State action under these circumstances.

The State Trespass Statute under which Petitioners were convicted is declaratory of the undoubted common law

right of an owner of property to eject any person who shall enter his private property or remain thereon without his permission and provides for criminal enforcement thereof. *Bell v. State*, 227 Md. 302, 176 A. 2d 771; *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845. The right of a person to protect his property, including business property, necessarily includes the right to eject persons trespassing thereon. At common law the occupant of any house, store, or other building has the legal right to control and permit whom he pleases to enter and remain there and he also has the right to expel from the room or building anyone who abuses the privilege which has been given him. Therefore, while the entry by a person on the premises of another may be lawful by reason of an implied invitation, his failure to depart at the request of the owner will make him a trespasser and will justify the owner in using reasonable force to eject him. 4 Am. Jur., *Assault and Battery*, Section 76, page 167; American Law Institute, *Restatement, Torts*, Section 77; cases collected in 9 A.L.R. 379, "Right to Eject Customers from Store;" *Martin v. Struthers*, 319 U.S. 141.

To prohibit the State through its inherent police power and its law enforcement officials to assist the owner of private property to forcibly eject trespassers (i.e, persons unlawfully remaining on the private premises) would subject the owner to the onus of employing his own means to achieve this purpose should he wish to do so. The violence which could result in some parts of the country is hardly a desirable social solution in these racial rights controversies. The conduct of the parties in this Maryland case was unusual and, we submit, exemplary.

The Petitioners contend that a restaurant, such as Hooper's, is so "affected with the public interest" that its right to choose its clientele, however discriminatory, can-

not be enforced when such discrimination is based upon race alone (Petition, page 13). In support of this proposition Petitioners have cited no cases involving restaurants. *Garner v. Louisiana*, 368 U.S. 157, involving a department store lunch counter, was decided on other grounds. *Munn v. Illinois*, 94 U.S. 113, involves rate regulation of a public utility and is not germane to restaurants. In fact, the Supreme Court has refused to hold that where a privately-owned restaurant is involved, in the absence of the general taxpaying public's ownership of the facilities, or interstate commerce, that the Supreme Court will extend Federal protection against racial discrimination on the basis of the Fourteenth Amendment. *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Boynton v. Virginia*, 364 U.S. 454.

Petitioners have cited the case of *Shelley v. Kraemer, supra*, in support of the Petition. That case, however, involved unwarranted restraint upon the alienation and use of real property solely on the basis of race. The facts in the instant case do not involve the denial to the Petitioners of any rights of property and, therefore, these cases are not in conflict.

III.

THERE IS NO CONFLICT BETWEEN THIS CASE AND DECISIONS OF THE SUPREME COURT SECURING THE RIGHT OF FREEDOM OF SPEECH AND ASSEMBLY UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

Petitioners have cited no case that extends Federal protection of freedom of speech and assembly to an unprivileged demonstration in the interior of a privately-owned restaurant on privately-owned property. The Supreme Court has not gone that far. The picketing cases cited by Petitioners involve the special field of labor relations, which

is necessarily concerned with the rights of individual employees who have, depending on the circumstances, an implied license to demonstrate as a part of bargaining activities on the private premises of the employer by reason of their contract of employment. There is no such relationship between the Petitioners and the owners of this restaurant. *Marsh v. Alabama*, 326 U.S. 501, involves religious solicitation on the *streets* of a company town, which can hardly be considered analogous; nor should the court be impressed with the analogy of picketing in the Pennsylvania Railroad Station in New York City, hardly a quiet dining room. *People v. Barisi*, 86 N.Y.S. 2d 277.

In *Martin v. Struthers, supra*, at page 147, Mr. Justice Black stated as follows:

> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. *The dangers of distribution can so easily be controlled by traditional legal methods*, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.
>
> "*Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off.* General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away." (Emphasis supplied.)

Applying this dicta to the facts of this case, the record indicates that the restaurant owner was not only fully apprised of Petitioners message as evidenced by their actions as well as words, but that he indicated that he wished them to leave. Furthermore, by the time the police had arrived, there were no more customers present in the dining room and pickets were parading outside of the restaurant. Under these circumstances it can hardly be said that Petitioners' rights of expression were violated by their trespass conviction. In addition, according to the testimony of their leader, Petitioners expected to be arrested, and the trial court could well have found under these circumstances that their arrest was a part of their expression of their cause and enhanced the publicity given thereto (T. 46, 48, 55, 56).

> "Q. Now, Mr. Quarles, you remained even though you knew you were going to be arrested? A. Yes, sir.
>
> "Q. Is that part of your technique in these demonstrations? A. Yes, sir" (T. 55, 56).

For the foregoing reasons, it is submitted that neither does the Maryland Court of Appeals' decision conflict with decisions of the Supreme Court securing the right of freedom of expression, nor was the Maryland Court in error in affirming Petitioners' conviction on this ground.

IV.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT BARRING CONVICTIONS UNDER CRIMINAL STATUTES WHICH GIVE NO FAIR WARNING THAT PETITIONERS' CONDUCT WAS PROHIBITED.

The point is raised for the first time in the petitions and was neither raised in the trial court nor in the Maryland Court of Appeals. According to the transcript, *inter alia*, the leader of the Petitioners, Quarles, fully understood the

meaning of the trespass statute and recognized that Petitioners were to be arrested if they remained in the restaurant after being told to leave and having the Trespass Statute read to them (T. 53, 54, 55, 56, 58).

The statute under which Petitioners were convicted is a general trespass statute, of the type referred to in *Martin v. Struthers, supra,* as being on the books of at least twenty states, while similar statutes of narrower scope are on the books of at least twelve more. See n. 10, at page 147, *Martin v. Struthers,* 319 U.S. 141. The statute was enacted in 1900, and has never been found to be so vague and indefinite as to fail to apprise a violator of prohibited acts thereunder.

CONCLUSION

WHEREFORE, for the foregoing reasons, the State of Maryland respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

Nos. 9, 10, and 12

CHARLES F. BARR, et al., *Petitioners,*

—vs.—

CITY OF COLUMBIA, *Respondent.*

SIMON BOUIE and TALMADGE J. NEAL, *Petitioners,*

—vs.—

CITY OF COLUMBIA, *Respondent.*

ROBERT MACK BELL, et al., *Petitioners,*

—vs.—

MARYLAND, *Respondent.*

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA AND THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR PETITIONERS

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CHARLES F. BARR, *et al.*,

Petitioners,

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CITY OF COLUMBIA.

No. 10

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—v.—

CITY OF COLUMBIA.

No. 12

ROBERT MACK BELL, *et al.*,

Petitioners,

—v.—

MARYLAND.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA AND THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR PETITIONERS

Opinions Below

1. *Barr* v. *Columbia*. The opinion of the Supreme Court of South Carolina (R. Barr 53) is reported at 239 S. C.

395, 123 S. E. 2d 521 (Dec. 14, 1961). The opinion of the Richland County Court, April 28, 1961, is unreported (R. Barr 46). The oral opinion of the Columbia Recorder's Court, March 30, 1960, is unreported (R. Barr 41).

2. *Bouie* v. *Columbia.* The opinion of the Supreme Court of South Carolina (R. Bouie 64) is reported at 239 S. C. 570, 124 S. E. 2d 332 (Feb. 13, 1962). The opinion of the Richland County Court, April 28, 1961, is unreported (R. Bouie 57). The oral opinion of the Columbia Recorder's Court, March 25, 1960, is unreported (R. Bouie 50).

3. *Bell* v. *Maryland.* The opinion of the Court of Appeals of Maryland (R. Bell 10) is reported at 227 Md. 302, 176 A. 2d 771 (Jan. 9, 1962). The Memorandum Opinion of the Criminal Court of Baltimore, March 24, 1961, is unreported (R. Bell 6).

Jurisdiction

1. *Barr* v. *Columbia.* The final judgment of the Supreme Court of South Carolina, which is the order denying rehearing, was entered January 8, 1962 (R. Barr 59). The petition for certiorari was filed April 7, 1962, and granted June 10, 1963 (R. Barr 63).

2. *Bouie* v. *Columbia.* The final judgment of the Supreme Court of South Carolina, which is the order denying rehearing, was entered March 7, 1962 (R. Bouie 69). The petition for certiorari was filed June 5, 1962, and granted June 10, 1963 (R. Bouie 73).

3. *Bell* v. *Maryland.* The judgment of the Supreme Court of Maryland was entered January 9, 1962 (R. Bell 12). On April 6, 1962, Mr. Justice Black extended the time for filing a petition for writ of certiorari to and including June 8, 1962 (R. Bell 62). The petition was filed on that date and was granted June 10, 1963 (R. Bell 62).

The jurisdiction of this Court in each of these cases is invoked pursuant to 28 U. S. Code §1257(3), petitioners having asserted below and here the denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Statutory and Constitutional Provisions Involved

I. Each of these cases involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

II. Statutes:

A. *Barr* v. *Columbia*—petitioners were convicted under the following statutes:

1. Code of Laws of South Carolina, 1952, Section 16-386, as amended:

> §16-386. *Entry on lands of another after notice—prohibiting same.*—Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid, for the purpose of trespassing.

2. Code of Laws of South Carolina, 1952, Section 15-909:

> §15-909. *Disorderly conduct, etc.*—The mayor or intendant and any alderman, councilman or warden of any city or town in this State may, in person, arrest, or may authorize and require any marshal or

> constable especially appointed for that purpose to arrest, any person who, within the corporate limits of such city or town, may be engaged in a breach of the peace, any riotous or disorderly conduct, open obscenity, public drunkenness or any other conduct grossly indecent or dangerous to the citizens of such city or town or any of them. Upon conviction before the mayor or intendant or city or town council, such person may be committed to the guardhouse which the mayor or intendant or city or town council is authorized to establish or to the county jail or to the county chain gang for a term not exceeding thirty days and if such conviction be for disorderly conduct such person may also be fined not exceeding one hundred dollars, *provided,* that this section shall not be construed to prevent trial by jury.

B. *Bouie* v. *Columbia*—petitioners were convicted under Code of Laws of South Carolina, 1952, Section 16-386, as amended, quoted *supra*.

C. *Bell* v. *Maryland*—petitioners were convicted under Annotated Code of the Public General Laws of Maryland, 1957, Article 27, §577, appearing at Volume 3, p. 234:

> Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor, and on conviction thereof before some justice of the peace in the county or city where such trespass may have been committed be fined by said justice of the peace not less than one, nor more than one hundred dollars, and shall stand committed to the jail of the county or city until such fine and costs are paid; provided, however, that the person or persons so convicted shall have the

right to appeal from the judgment of said justice of the peace to the circuit court for the county or city or Criminal Court of Baltimore where such trespass was committed, at any time within ten days after such judgment was rendered; and, provided, further, that nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim or right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others.

Questions Presented

I.

Were petitioners' rights under the Fourteenth Amendment violated by conviction of crimes for having remained in luncheonette or restaurant seats in disregard of the proprietors' racially discriminatory orders that they leave, where the states have used their judicial machinery to enforce racial discrimination, where the discrimination was caused at least in part by a segregation custom substantially supported by state laws, and where the states' regimes of laws have failed to protect petitioners' claim to equality by subordinating it to a narrow and technical claim of property right to racially discriminate in places of public accommodation?

II.

Were petitioners denied due process under the Fourteenth Amendment in that their convictions under S. C. Code §16-386 and Md. Code Art. 27, §577 were either based upon no evidence or the laws as applied failed to furnish any fair warning as to the conduct prohibited?

III.

A. Were petitioners in *Barr* v. *Columbia* deprived of rights under the Fourteenth Amendment where, in addition to the other measures of state involvement mentioned above, the racial discrimination against them was the product of police collaboration in "requesting" that the proprietor ask them to leave the lunch counter?

B. Were petitioners in *Barr* v. *Columbia* denied due process by their convictions for breach of the peace where either the convictions were based upon no evidence or the law as applied failed to furnish any fair warning as to the conduct prohibited?

Statement

1. *Barr* v. *Columbia*

Petitioners, five Negro college students, were convicted of the crimes of entry on lands of another after notice prohibiting such entry (S. C. Code §16-386) and breach of the peace (S. C. Code §15-909) in the Recorder's Court of Columbia, South Carolina, at a non-jury trial held March 30, 1960 (R. Barr 53).

Four witnesses testified at the trial. The City's witnesses were Carl Stokes, a State Law Enforcement Division (SLED) officer, and John Terry, co-owner and manager of the Taylor Street Pharmacy in Columbia where petitioners were arrested. The City's witnesses gave the following version of what happened on March 15, 1960, leading to the arrests.

Mr. Stokes, and two local officers were ordered to go to the Taylor Street Pharmacy, and they arrived there at about 10:30 A.M. (R. Barr 2-3); the police had information that a "sit-down demonstration" was to occur there (*id.*, 3, 6). The manager Terry had been alerted by the police on the previous day that a demonstration was planned for

12:35 A.M. (*id.*, 20-21). At about that hour the petitioners entered the store (*id.*, 3). When they entered a couple of them stopped at the card counter (*id.*, 3, 7), then all proceeded to the lunch counter in the rear and took seats—four at one counter and one at another (*id.*, 3). Stokes and the co-owner Terry followed them to the rear, and when they sat down Terry stated to the group that "he wasn't going to serve them, that they would have to leave" (*id.*, 4, 17); petitioners did not respond to this (*id.*, 17). (It is clear that Mr. Terry said nothing to them before they sat down (*id.*, 12)). Several white customers seated at the counter continued to sit; it was said that one white lady "jumped up, or stood up" (*id.*, 12). After Terry's statement, SLED agent Stokes said he "requested that Mr. Terry go to each individual and ask him to leave, in my presence, and he went to each one and asked him to leave, that he wasn't going to serve them," and he added that "each one turned and looked at him but they never said anything" (*id.*, 4). At this point agent Stokes said that petitioner Carter got up and "asked Mr. Terry if he could ask him a question"; Mr. Terry said that he had no comment to make, that they would have to leave" (*id.*, 4). Stokes said that when Carter stood up the other petitioners did, but then Carter "motioned for them to sit back down and they sat back down and sat there" (*id.*, 4). After "several minutes," Stokes said he told them that he was a State officer and "they had been asked to leave and they didn't so they were under arrest" (*id.*, 4-5). Petitioners then followed the officers out of the store and were taken to police headquarters.

Mr. Terry's version was substantially the same as Agent Stokes' (*id.*, 17). He testified that the store's policy was not to serve Negroes at the lunch department (*id.*, 17); but that he catered to the public generally irrespective of race in the front of the store, i.e., all areas except the lunch counter; and that he had "quite large numbers" of Negroes trading in the store (*id.*, 18-19). He said Negroes can come

into the luncheonette to receive "food service to go" (*id.*, 19). Terry said that he had a sign in the luncheonette saying that he "can refuse service to anyone" (*id.*, 20); there was no mention of any sign explicitly barring Negroes. Terry acknowledged that the store was advertised as a complete department store, and volunteered that "we have two City licenses . . . the luncheonette is one and the front area is another" (*id.*, 18).

When asked if he asked the police to arrest petitioners when they ignored his direction to leave, Terry said, "We [the police and himself] had a previous agreement to that effect, that if they did not leave, they would be placed under arrest for trespassing" (*id.*, 23), and later:

> Q. Was it your idea to have these defendants arrested, or was it the idea of the police department?
>
> A. I'll put it that it was the both of us' idea, that if they were requested to leave and failed to leave, and given time to leave, that they would be arrested (*id.*, 24).

Stokes testified that before petitioners arrived Terry had told him "that if they came, he wasn't going to serve them" (*id.*, 9). Terry acknowledged that petitioners did not interfere with anyone in the store, were generally orderly, were neatly dressed, and that their appearance was generally that of any other customer except for their color (*id.*, 22). He agreed that his only reason for not serving them was the fact that they sat down and the fact that they were Negroes (*id.*, 23); and expressed the view that their sitting down "created a disturbance" and that "everyone was on pins and needles, more or less, for fear it could possibly lead to violence" (*id.*, 24). Mr. Stokes said that his purpose in being there was to prevent violence; that none occurred; and that "the only incident that I figured violence might come from was when they sat down and the customers stood up, and I didn't know what was going

to come off. I couldn't read their minds or anyone else's in fact" (*id.*, 13).

The account of the events given by petitioners David Carter (*id.*, 27-30) and Richard M. Counts (*id.*, 31-37) radically contradicted the City's witnesses on numerous points; some are indicated below.[1] Messrs. Carter and Counts both stated that they thought they had a right to be there, and that they wanted to be served (*id.*, 25, 28, 31, 37). On cross-examination Mr. Carter said: "I did not go with the idea of being arrested, but I had been promised that I would have equal protection in that store or any other store" (*id.*, 28). Carter's explanation of this was cut off by the Court sustaining the prosecutor's objection of "hearsay"; on cross (R. Barr 28):

> Q. Who promised you that?
>
> A. The City Manager. There were five of us went down to City Hall.
>
> Q. He promised you?
>
> A. Listen to me now. Five of us went to the City Hall one day to see the Mayor. The Mayor was not in. We then talked with the City Manager, who was very polite to us. He said to us: *"Gentlemen, further demonstrations will not be tolerated."* We said: "Mr. McNayr, what would you do to stop such demonstrations?" He said to us: "If you are going to go down, I don't object to nobody—." (Emphasis supplied.)

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[1] For example, both Messrs. Carter and Counts denied that Terry asked them to leave (R. Barr 29, 35); both said that another store employee—possibly the luncheonette manager—spoke to them and said as Carter recalled it, "You might as well leave because I ain't going to serve you" (R. Barr 26, 34). Carter said that he stood up, tried to ask the luncheonette manager a question, but Terry said, "No, don't answer him"; that Counts also stood up; that he motioned to the other three petitioners and told them to sit until someone asked them to leave; and that he had turned to walk away when he was stopped by a deputy (R. Barr 26). Counts also said he stood up and walked to the exit, and then the deputy sheriff told him that he was under arrest (R. Barr 33).

Mr. Sholenberger: This is all hearsay, your Honor.

The Court: I'm going to strike that out. You see, you have to answer counsel's questions.

A. I'm answering his questions—

The Court: We don't want any speech here. We're not going to tolerate any great big speech.

Mr. Jenkins: Your Honor, I want the record to show that counsel opened the door for this type of testimony.

The Court: He didn't open the door for any hearsay testimony. I'm going to rule hearsay testimony out, definitely. I rule it out right now. Ask him the questions.

At the conclusion of the trial the Court found petitioners guilty as charged, and sentenced them to pay $100 on each charge, or serve 30 days in jail on each charge, provided that $24.50 was suspended on each charge (*id.*, 1). Before and after the verdict petitioners made motions objecting that the convictions would, and did, violate their rights under the due process and equal protection clauses of the Fourteenth Amendment (*id.*, 38-40; 42-45). The convictions were affirmed by the Richland County Court and the Supreme Court of South Carolina (*id.*, 46, 53).

2. *Bouie* v. *Columbia*

Petitioners Bouie and Neal, Negro college students, were convicted of the crime of entry on the lands of another after notice prohibiting the same (S. C. Code §16-386; R. Bouie 65). (They were charged, but not convicted of breach of the peace. Bouie's conviction for resisting arrest was reversed on appeal.) The trials were held March 25, 1960, in the Recorder's Court of the City of Columbia, South Carolina, without a jury. The State called two witnesses, Shep A. Griffith, Assistant Chief of Police in Columbia,

who made the arrests, and an officer who examined petitioners' possessions at the police station. Petitioners called Dr. Guy Malone, manager of Eckerd's Drug Store in Columbia, where they were arrested. Both also testified in their own defense.

Eckerd's Drug Store in Columbia is a rather large store, with numerous departments including a luncheonette area; it is a part of a chain of similar establishments located in different southern states (R. Bouie 24). The manager Malone testified that the general public, including Negroes, is invited to do business at Eckerd's, except that Negroes are not served at the lunch counter department which is for whites only (*id.*).[2]

Petitioners entered Eckerd's around 11:05 A.M. on March 14, 1960, went to the rear lunch area and sat in the first booth (R. Bouie 25, 28, 29). They had books, and sat reading them for about fifteen minutes, during which no store employee approached them to take their order, because as Dr. Malone put it, "we didn't want to serve them." While acknowledging Eckerd's policy of not serving Negroes at the lunch area, Dr. Malone denied that he *refused* to serve them because they were Negroes; this is perhaps explainable by Malone's subsequent statement that he "didn't do anything" (*id.*, 25-26),[3] and thus never

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[2] There was no evidence of a sign announcing this policy in the store. The City's witnesses did not mention it, but Neal testified that after he and Bouie took seats a salesman came up with a "No Trespassing" sign on a chain in his hands and put it up (R. Bouie 29).

[3] The testimony (R. Bouie 25-26) was:

"Q. Did anyone seek to take the orders of these young men?
A. No, they did not.
Q. Why did they not do so?
A. Because we didn't want to serve them.
Q. Why did you not want to serve them?
A. I don't think I have to answer that.
Q. Did you refuse to serve them because they were Negroes?
A. No.

affirmatively told them he wouldn't serve them. Dr. Malone did call the City police and ask that these young men be removed (*id.*, 26).

Assistant Chief of Police Griffith and a police detective responded to a call that there was "some disturbance" at Eckerd's (*id.*, 3). In Griffith's words (*id.*, 3-4):

> A. Well, Detective Slatterer and I went there as a call to Headquarters that there was some disturbance in Eckerd's Drug Store. When we arrived, Mr. Malone, who is the Manager, went back to the booth. He met us about halfway up the store and he went back to a booth with the two defendants Neal and the other boy, Bouie, and he said: "Now, you have served your purpose and I want you out, because we aren't going to serve you" and they sat there just ignoring him, so to speak, kept reading or looking down at something, whether they were reading or not, and he said: "I'm asking you the second time to get on out." That was in my presence, so then I told them both that the Manager wanted them out and they should go on out, and this boy on the other side there, Bouie, said: "For what?" I said: "Because it's a breach of the peace and I'm telling you the second time to go on out." He said: "Well, I asked you for what?" So at that time I reached and got him by the

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Q. You did say, however, that Eckerd's has the policy of not serving Negroes in the lunch counter section?
A. I would say that all stores do the same thing.
Q. We're speaking specifically of Eckerd's?
A. Yes.
Q. Did you or any of your employees, Mr. Malone, approach these defendants and take their order for food?
A. No.

The Court: He testified to that awhile ago.

Q. What, if anything, did you do?
A. I didn't do anything.
Q. Did any of your employees do anything?
A. No."

> arm. Neal here had started to make an effort to get up but the other boy had not, and I had to pull him up out of the seat, so I stood them up and made a preliminary frisk, which we usually do to see if they had any weapons on them and I found none. Then I caught him in the belt, his belt and his breeches.

Chief Griffith said that when he arrived the only reason Malone gave for calling him was: "He said there were two colored boys back there in the seat and refused to move, yes sir" (*id.*, 5); he made clear that when he arrived the petitioners were just sitting in the booth reading (*id.*, 8). The Chief said that there were no other persons seated in the food area when he arrived (*id.*, 11); but there was a group of people "standing there completely idle, watching" (*id.*, 10). Chief Griffith declined to say how much time elapsed after his second request to Bouie to leave before he lifted him out of the seat except that it was "enough time for him to get up" (*id.*, 13).

The Chief described Eckerd's as "a public place," generally patronized by the public (*id.*, 16-17), and expressed no doubt as to why he was called to arrest petitioners. On cross he was asked if this was "because they were Negroes who were asking for food service in the food department in Eckerd's Drug Store, and the manager was directing them out because they were Negroes?" and he responded: "Why, certainly, I would think that would be the case" (*id.*, 17).

Petitioners were sentenced to pay fines of $100 or serve thirty days in jail, $24.50 being suspended (*id.*, 1).

Petitioners made motions raising Fourteenth Amendment due process and equal protection objections at the end of the State's case, at the close of the trial, and after the trial (*id.*, 20, 49-50, 51-57). On appeal the convictions under S. C. Code §16-386 were affirmed by the Richland County Court and the State Supreme Court (*id.*, 57, 64).

3. *Bell* v. *Maryland*

Petitioners, twelve Negro students, were charged and convicted of violating Article 27, §577 of the Maryland Code, as a result of their participation in a "sit-in" demonstration in a Baltimore, Maryland restaurant on June 17, 1960. Petitioners were indicted by the Baltimore City grand jury, in a two-count indictment dated July 12, 1960 (R. Bell 14-15). They were found not guilty on count two, and guilty on count one (*id.*, 9), which charged that the twelve petitioners:

> . . . on the seventeenth day of June, in the year of our Lord nineteen hundred and sixty, at the City aforesaid, unlawfully did enter upon and cross over the land, premises and private property of a certain corporation in this State, to wit, Hooper Food Co., Inc., a corporation, after having been duly notified by Albert Warfel, who was then and there the servant and agent for Hooper Food Co., Inc., a corporation, not to do so; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State (*id.*, 14).

At the trial, held in the Criminal Court of Baltimore without a jury on November 10, 1960, the following evidence was presented. On Friday, June 17, 1960, at about 4:15 or 4:20 P.M., a group of 15 or 18 Negro students, including petitioners, entered the lobby of Hooper's Restaurant (*id.*, 23). They were met at the topmost of four stairs leading from the lobby to the dining room by Miss Dunlap, the hostess (*ibid.*). When one asked to be seated, Miss Dunlap said, "I'm sorry, but we haven't integrated as yet" (*ibid.*). The restaurant manager, Albert Warfel, came to where Miss Dunlap was standing and began to talk to one of the petitioners, John Quarles (*id.*, 24, 27). Warfel said:

> . . . It has been stated, it had been stated to me company policy, we're not, we have not integrated the restaurant. I so notified— First I asked the leader of the group, which I wanted to get it centralized. I spoke to him [Quarles]. I told him the company policy (*id.*, 27).

Warfel continued:

> "Well, while in the process of translating the company policy, the group broke. They brushed by us and sat at various tables in the restaurant. After they were seated they proceeded to hedgehop" [spread out to various tables] (*id.*, 27-28).

Mr. Hooper, owner of the corporation operating the establishment, arrived at this point and instructed Warfel to summon the police (*id.*, 28). Police Sgt. Sauer and Lt. Redding were in the area and were called over by Warfel; when they went inside they found the group of colored people, including petitioners sitting around at different tables (*id.*, 38-39). Warfel read Article 27, §577 of the Maryland Code to the petitioners, and then requested that they leave (*id.*, 39). Some of the group had apparently not entered the upstairs dining room, but had gone into the downstairs grill area (*id.*, 43, 52). Sgt. Sauer said that "After reading the ordinance upstairs we went down to the basement restaurant which is more or less of a cafeteria arrangement and the same thing followed down there (*id.*, 39). At this point some of the Negroes left and the others' names were taken down (*id.*, 39, 29); Hooper went to a magistrate's office and secured warrants for those who remained. Petitioners were not placed in custody—it was arranged by phone that they would appear in court on the following Monday (*id.*, 39-40). When Sgt. Sauer returned they had left the restaurant (*id.*, 40).

Mr. Warfel made it clear that the petitioners were refused service solely on the basis of their color (*id.*, 30).

Mr. Hooper said he was aware of the aim of the demonstration as other such demonstrations had occurred in his restaurant (*id.*, 32); that he was "in sympathy" with the demonstrators' "objectives" but disapproved their methods (*id.*, 32-33); and that he told Mr. Quarles that he "felt personally that it was an insult to human dignity" and he sympathized but that "customers govern my policy" (*id.*, 37).

Mr. Quarles also testified as to this conversation, including Hooper's statement that his policy was as it was because his "customers don't want to eat with Negroes," and his explanation to Hooper that "we were there to be served and also to let his customers become aware of the problem of segregation in Baltimore City," and that "we were not there to interrupt his business and we were not there to distort or destroy his business. We were simply there seeking service as humans and also as citizens of the United States of America" (*id.*, 43-44).

Defendants filed a motion raising Fourteenth Amendment due process and equal protection objections including free speech and association, and racial discrimination claims, during and after the trial (*id.*, 4-5, 41, 60). Their constitutional defenses were rejected by the trial court and on appeal. The trial court's opinion was rendered on March 24, 1961 (*id.*, 6), and petitioners were sentenced on that day to fines of ten dollars, which were suspended, because of the Court's views that "these people are not law-breaking people; . . . their action was one of principle rather than any intentional attempt to violate the law," and "they did not intend to deliberately violate the law but were seeking to establish a principle" (*id.*, 9-10). The Maryland Court of Appeals affirmed, rejecting petitioners' constitutional arguments by citing its decisions in *Drews* v. *State*, 224 Md. 186, 167 A. 2d 341 (1961), and *Griffin & Green* v. *State*, 225 Md. 422, 171 A. 2d 717 (1961) (*id.*, 10-12).

Summary of Argument

I.

Petitioners' convictions enforce racial discrimination in violation of the Fourteenth Amendment. The records clearly show racial discrimination. The states are constitutionally responsible for the discriminations under three related theories urged by petitioners. First, the use of state judicial machinery to convict petitioners of a crime is a use of state power in the Fourteenth Amendment sense. *Shelley* v. *Kraemer*, 334 U. S. 1, is applicable, and cannot properly be distinguished. Second, state action is involved because the acts of discrimination were causally related, at least in part, to a segregation custom which law has substantially supported. State action is causally traceable into the discrimination; all the evidence tends to show this. The States have not shown the contrary, and the burden of proving otherwise should rest on them in the circumstances of the cases. Finally, state power is involved to a significant degree in that the states' regimes of laws fail to furnish protection to petitioners by subordinating their claimed right to equality to a narrow and technical property claim. The states' role is not neutral; they have preferred the discriminator's insubstantial property claim to the petitioners' claim of equality. The Fourteenth Amendment overrides this state choice, for equal protection of the laws requires the states to protect the claim of equality in such circumstances. A part of the holding in the *Civil Rights Cases*, 109 U. S. 3, should be discarded; the holding that the Fourteenth Amendment applies only where government is involved is not challenged.

The theories of "state action" urged above may rationally be limited in their incidence by an interpretation of the substantive meaning of the equal protection clause, which recognizes other constitutional demands. Thus, the personal

and private life of individuals need not be subjected to Fourteenth Amendment norms. Petitioners do not urge that no state action is needed under the Fourteenth Amendment, but rather, that because it is usually present a substantive rule applying the equal protection clause to the "public life" of the community is needed to do some of the work that the state action concept is wanted for but cannot do.

II.

The convictions under S. C. Code §16-386 and Md. Code Art. 27, §577, deny due process because there was no evidence of the conduct proscribed, or else the laws as applied fail to furnish fair warning. Both statutes provide against entry after notice not to do so; these records clearly show petitioners were arrested for failures to leave premises they were already on following demands to leave. Only a fiat of construction could apply these laws to petitioners' acts.

III.

Additional grounds require reversal in *Barr* v. *Columbia*. First, the records show police involvement in "working with" the proprietor to effect the discrimination against petitioners; the policeman even *"requested"* the store manager to ask petitioners to leave. This is an active use of state machinery, power, and influence in support of and initiation of discrimination. Cf. *Lombard* v. *Louisiana*, 373 U. S. 267, and *Peterson* v. *Greenville*, 373 U. S. 244.

In addition to the grounds stated above, the breach of the peace convictions may be reversed on the ground that there was either no evidence of guilt or South Carolina's crime breach of the peace is so indefinite as to violate the rule of *Edwards* v. *South Carolina*, 372 U. S. 229, and other similar cases.

ARGUMENT

I.

Petitioners' Convictions Enforce Racial Discrimination in Violation of the Fourteenth Amendment to the Constitution of the United States.

A. *The convictions enforced racial discrimination against petitioners.*

Indisputably, petitioners' convictions in each of these cases (including the breach of the peace convictions in *Barr*) rest upon and constitute racial discriminations against them. In each case petitioners are Negro students who sat at food service counters and tables insisting upon service which was refused pursuant to the establishments' racially exclusionary policies.

In the *Bell* case petitioners took seats at tables in Hooper's Restaurant on June 17, 1960. Hooper's maintained a policy of excluding Negroes (R. Bell 29). The restaurant manager, Albert Warfel, whose direction petitioners were charged with disobeying (R. Bell 3), directly acknowledged that they "were refused service solely on the basis of their color" (R. Bell 30), and "for no other reason" (*id.*). Indeed, it was stipulated that petitioners "refused to leave at that time after being refused service because of their race . . ." (R. Bell 40).

In the *Barr* case petitioners took seats at a lunch counter in the Taylor Street Pharmacy on March 16, 1960, and were refused service and ordered to leave because they were Negroes (R. Barr 23). It was the policy of the Taylor Street Pharmacy not to serve Negroes in the lunch department (R. Barr 17).

In the *Bouie* case petitioners sat in a luncheonette booth at Eckerd's Drug Store on March 14, 1960. Eckerd's welcomed Negroes as customers in all its departments except the lunch counter which, by the management's policy, was "closed to members of the Negro public" (R. Bouie 24). The manager, Mr. Malone, acknowledged this policy of not serving Negroes and said that no employee took petitioners' food orders "because we didn't want to serve them" (R. Bouie 26). Strangely, at one point Malone refused to answer "why" he did not want to serve them and denied that he *"refused"* them service because they were Negroes (R. Bouie 26). This is on its face interpretable as an assertion that he did not expressly "refuse" service; he immediately afterwards said "I didn't do anything" (*id.*). Other things in the record amply confirm that the exclusion was purely racial. The policy of not serving Negroes was expressly admitted (R. Bouie 24); nothing in the record about petitioners' conduct, dress, demeanor, or anything else even suggests any nonracial basis for the exclusion; the arresting officer readily acknowledged that race was the reason the manager called him and ordered petitioners from the store:

> Q. Chief, isn't it a fact that the only reason you were called in from the Police Department to arrest these two persons, was because they were Negroes who were asking for service in the food department in Eckerd's drug store, and the manager was directing them out because they were Negroes? Isn't that correct?
>
> A. Why certainly, I would think that would be the case (R. Bouie 17).

The arresting officer said that the only reason Malone gave for calling him was that "there were two colored boys back there in the seat and refused to move . . ." (R. Bouie 5).

The several South Carolina courts proceeded to decide the case on express or implied assumptions that race was the basis for the exclusion,[4] and, indeed, the arguments made in the State's Brief In Opposition to Certiorari *In Bouie* seem to rest on the same premise.[5]

Clearly, then, all three of these cases involve discrimination based on color, "simply that and nothing more" (*Buchanan* v. *Warley*, 245 U. S. 60, 73), and it is no longer arguable that such discriminations by government are valid. Racial discriminations have been held repeatedly to violate the due process and equal protection clauses of the Fourteenth Amendment and the due process clause of the Fifth Amendment. *Brown* v. *Board of Education*, 347 U. S. 483; *Bolling* v. *Sharpe*, 347 U. S. 497; *Cooper* v. *Aaron*, 358 U. S. 1; *Goss* v. *Board of Education*, 373 U. S. 683; *Peterson* v. *Greenville*, 373 U. S. 244; cf. *Colorado Com.* v. *Continental Airlines*, 372 U. S. 714.

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[4] The trial court's oral ruling cited *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959), a racial discrimination case, to support its view that "any business has a right to serve anybody and to refuse to serve anybody, be they white or colored" (R. Bouie 21-22; cf. R. Bouie 51). The intermediate tribunal, the Richland County Court, held that petitioners in this and a companion case were "trespassers *ab initio*" because they "had notice that neither store would serve Negroes at their lunch counters" (R. Bouie 62), having previously said that ". . . the proprietor can choose his customers on the basis of color without violating constitutional provisions" (R. Bouie 59). The Supreme Court of South Carolina rejected petitioners' Fourteenth Amendment defenses merely by citing its prior decisions which held that the operators of privately owned lunch counters could racially discriminate and that the Fourteenth Amendment was no bar to trespass prosecutions in such cases (R. Bouie 66).

[5] The brief argues: "Such proprietor violates no constitutional provision if he makes a choice on the basis of color." (Brief in Opposition to Certiorari, p. 3.)

B. ***The employment of the state judicial machinery (in association with police and prosecutors) to sanction and enforce the racial discrimination here shown, constituted a use of state power within the sense of the Fourteenth Amendment.***

There are a number of elements of state involvement in these cases. These elements are complexly interrelated. The "state action" issue need not turn on any one of them in isolation, but may be resolved by consideration of their interrelation; this is not a matter of softening the focus but of widening the angle of vision. Nevertheless, analytic clarity requires separate consideration of the several modes of "state action" here found.

Petitioners first invoke, as clearly applicable, the doctrine of *Shelley* v. *Kraemer*, 334 U. S. 1. Unless that case is to be overruled (or, what is the same thing, irrationally "confined to its own facts"), it is settled law that there are some cases in which the "state action" requisite for invocation of the Fourteenth Amendment is to be found in the use of the judicial power to enforce a privately-originated scheme of racial discrimination.

It is unthinkable that *Shelley* is to be overruled. It has been followed[6] and approvingly cited in this Court.[7] It is unlikely that there is now much disagreement with its broader principle; who, for example, would now think it right to uphold the action of a state court in ordering specific performance, by one restaurateur who wanted to desegregate, of an agreement among all the restaurateurs in a town to retain segregation? Yet such an injunction,

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[6] *Trustees of the Monroe Avenue Church of Christ* v. *Perkins*, 334 U. S. 813 (1948).
Barrows v. *Jackson*, 346 U. S. 249 (1953).

[7] *Hurd* v. *Hodge*, 334 U. S. 24, 33 (1948).
Cooper v. *Aaron*, 358 U. S. 1, 17 (1958).

absent the Fourteenth Amendment, would be well within the equity categories governing the administration of the private-law remedy of specific performance, as a state might choose to develop them.

As Professor Henkin, one of the most thoughtful analysts of *Shelley* has said: "*Shelley* v. *Kraemer* was not wrongly decided. It is not a special case. It need not be rejected; it need not be narrowly limited." Henkin, "*Shelley* v. *Kraemer*: Notes For A Revised Opinion," 110 U. Pa. L. Rev. 473, 491 (1962).

But if the *Shelley* principle has living force, it is hard to see why it should not apply here. These cases are stronger than *Shelley*. In *Shelley*, the state action immediately involved consisted (aside from the furnishing of recordation machinery) in keeping the courts open for the filing of complaints that asked injunctive relief, in granting such relief when asked by a private party, and in standing by with the contempt machinery for use in the event the private party might invoke that machinery. In these cases, the police were either present in advance to assist the proprietor in maintaining racial discrimination or acted as formal witnesses to the warning, or both. (In the *Barr* case, the collaboration of police went much further, and furnishes an independent ground for reversal there; see Part III-A, *infra*.) The public prosecutor, supported by the public fisc, carried the cases to court. Most crucially, the cases were criminal prosecutions, in which the state appears as a party, *in its own interest*, in knowing support of the discriminatory scheme, which it thereby sanctions within the public order of its criminal law, and not merely within the framework of its dealing with private rights. The States of Maryland and South Carolina have taken on these cases as their own from the first policeman's warning to the last argument in this Court; it must be a

paradoxical distinction indeed which could find "state action" in the private-law umpiring performed by the state in *Shelley* v. *Kraemer*, and not find it here.

Suggested distinctions, isolating these cases from *Shelley*, make no sense. The South Carolina court, in its opinion in *Barr* (R. 49) stressed that *Shelley* involved a willing purchaser and a willing buyer; but that distinction ignores the complaining party in *Shelley*, the covenantee who was most unwilling to lose the benefit of his covenant, and who nevertheless was told that the Fourteenth Amendment forbade its judicial enforcement. The suit in *Shelley* was brought by a man asserting his own contractual and property right to discriminate with respect to the race of his neighbors. The principal relief asked of and granted by the state courts was the exclusion of a Negro from a house on the application of the very person who claimed a contractual and property right to exclude him from that house. *Shelley* did not primarily, if at all, involve a state court attempt to force a seller to discriminate, but was an attempt at implementing a right to discriminate claimed by the plaintiff.[8]

It has been urged that *Shelley* involved contract rights, while these cases involve property rights; but this distinction, aside from its obvious unviability in the robust air of a constitutional context, is not even descriptively accurate, for the covenant that runs with the land creates a kind of property interest, described in the state court's opinion in a companion case to *Shelley*, as "reciprocal negative easements."[9] Substantially, the right asserted in *Shelley* was more weighty than that asserted here; if one

[8] While the straw grantor was a nominal defendant in *Shelley*, in *McGhee* v. *Sipes*, the companion case, the Negro owners were the only defendants.

[9] See record in U. S. Supreme Court in *McGhee* v. *Sipes*, 334 U. S. 1, No. 87, Oct. Term, 1947, p. 51.

really dislikes Negroes, having a Negro as a next-door neighbor is more disagreeable than selling a Negro a sandwich—or, more accurately, having to endure his sitting and ordering a sandwich.

It is asserted that the state is not enforcing racial discrimination, but implementing a property right. The distinction is a false one; the state is enforcing racial discrimination *by* implementing a property right, just as in *Shelley* the state was enforcing racial discrimination by implementing a contract right which was also a property right.

The suggested distinctions totally fail, and "state action" is to be found here squarely on the authority of *Shelley* v. *Kraemer*, as well as by application of the sound principle it illustrates. It is recognized that the thoroughgoing acceptance of the *Shelley* principle might, unless means of rational limitations are available, threaten the invasion of those purely private objects of human life. Petitioners intend, in Part I-E, *infra*, to suggest to the Court readily available means for preventing this result, by interpretation of the substantive guarantees of the Fourteenth Amendment.

C. ***The state is involved in the acts of racial discrimination sanctioned in these cases, since they were performed in obedience to a widespread custom, which in turn has been confirmed and maintained by state law.***

The petitioners' substantive contention here rests on nothing more farfetched than the proposition that the formal acts of the state are to be traced to their natural and probable consequences. The submission is that, where the individual act of segregation is performed substantially under the influence of a widespread public custom of segregation, and where this widespread public custom has in

turn been substantially supported by formal state law, then the act of segregation is infected with state power. This proposition seems little more than a corollary of the obvious truth that the state acts when its formal exertion of power is causally traceable into the act complained of.

The unfolding of this proposition requires a few words.

First, its submission is that where the causal connection of the segregation with custom is *substantial*, and not only where that connection amounts to practical coercion, the required nexus is present; similarly, where state law has *substantially* supported the custom of segregation, and not only where it is the sole force behind that custom, state action is traceable in the custom. These propositions are conformed to the *Civil Rights Cases* statement that "some" state action is enough (109 U. S. 3, 13) as well as with the "significant extent" criterion in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722, and will not seem *sui generis* to anyone familiar with the ordinary rule as to the liability of joint tort-feasors, or with other similar rules in the common law.

Secondly, there is no principled reason for finding state action only in those cases where state law presently in force supports the segregation custom; states, like men, are to be charged with the consequences of what they do, even when those consequences follow after the act that produced them is finished, or even repented. The maintenance for generations of a *de jure* segregated regime has its consequences after the laws are changed, and the rules of "state action" ought to give effect to this obvious social truth. The purpose of tracing out this chain of causation is not the penalization of the present state officials, but the resolution of the issue whether in fact state power is a substantial factor in the discrimination complained of.

Thirdly, it is not dispositive of the question of the causal nexus between state law and state custom to show that the segregation code of the state did not contain a provision specifically commanding the very sort of segregation involved in the case. A reasonably comprehensive segregation code surely contributes to some extent to the likelihood that segregation will be observed as a general custom even where that code does not specifically command it.

It remains to deal with questions of burden of proof. Two issues are important: (1) If it appears that a custom of segregation exists, and that a proprietor segregates in factual conformity to that custom, on whom should the burden rest with respect to the issue of his being to some extent influenced by the custom? (2) If it appears that a custom of segregation exists, and it further appears that the state in question has in force or until recent times has had in force a system of legal dispensations sanctioning segregation, on whom should the burden rest with respect to the issue of substantial causal connection between the custom and that legal regime?

9 Wigmore, *Evidence* (3d ed., 1940) §2486, states the general rule on the allocation of the burden of proof: "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." And, again, ". . . [T]his apportionment depends ultimately on broad considerations of policy . . ." *id.*, §2488.

It is not doubtful where these considerations lead, with respect to the two numbered questions just put.

As to the first: It can surely be recognized by this Court, as a broad fact of human nature, that men are rarely wholly isolated from the settled customs of their communities, and that the notion of a man's acting in exact conformity to

custom, but without being influenced in any substantial way by the existence of the custom, is virtually a paradox. If this be doubted in the general case, surely it cannot be doubted in the case of the proprietor catering to the public; his business success (as one of the proprietors here testified, R. Bell 32) may depend on his conformity to community custom. And of course the business motive of pleasing his customers by conformity is not a *different* motive from conformity to custom, but that very motive itself, in one of its varieties of incidence. Given these facts, which it is hard to think anyone will care seriously to dispute, it is plain that the burden of proof, and a very heavy one, ought to be placed on the asserter of the proposition that some individual is that *rara avis*, a man who is in business catering to the public, and who factually conforms to public custom, but who does so *solely* from self-generated causes, and without any reference to the custom's existence.

As the second numbered question, the case seems equally plain, particularly in the light of the broad history of segregation. There is good historic ground for the belief that the segregation system was brought into being, or at least licked into shape, by state law. See Woodward, *The Strange Career of Jim Crow* (1957), 16-22, 81-85, 91-93, *et passim*.[10] Against that historic background, the issue is

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[10] Professor Woodward emphasizes the relative recency of extensive segregation in America. Woodward, *The Strange Career of Jim Crow*, vii-viii (1957). Even after the end of Reconstruction the rigid system characteristic of later years had not become the rule. During the early years after Reconstruction Negroes were unsegregated in many public eating establishments in the South (id. at 18-24). This was true of Columbia, S. C.; T. McCants Stewart, a Negro, traveled throughout the South in April 1885 prior to the enactment of state laws requiring segregation of races and wrote the following remarks about Columbia:

> I feel about as safe here as in Providence, R. I. I can ride in first class cars on the railroads and in the streets. I can go into saloons and get refreshments even as in New York

whether one should have to prove that custom was to some extent the function of law aimed at structuring the custom, or whether the opponent should have to prove that it was not. It is clear that the *total* lack of such a causal relation is the thing for which proof should be required. And it should be especially noted that, in cases such as the present, the asserter of the proposition that no causal relation exists between law and custom, that they have moved in a Cartesian parallelism, is the very state that maintained the legal provisions, now perceived to be unconstitutional, that were aimed at shoring up the custom; surely something not far from estoppel should at the least prevent the state's benefiting from the assumption that its own efforts were vain, without even adducing proof. Cf. *Peterson* v. *Greenville*, 373 U. S. 244, 248: "The State *will not be heard* to make this contention in support of the convictions." (Em-

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I can stop in and drink a glass of soda and be more politely waited upon than in some parts of New England (id. at 21).

Cf. also comments of Colonel Thomas Wentworth Higginson (id. at 16-17).

The Jim Crow or segregation system became all-pervasive some years later as a part of the aggressive racism of the 1890's and early 1900's, including Jim Crow laws passed at that time, which continued until an all-embracing segregation system had become the rule (id. at Ch. II). Professor Woodward writes:

> At any rate, the findings of the present investigation tend to bear out the testimony of Negroes from various parts of the South, as reported by the Swedish writer Gunnar Myrdal, to the effect that 'the Jim Crow statutes were effective means of tightening and freezing—in many cases instigating—segregation and discrimination.' The evidence has indicated that under conditions prevailing in the earlier part of the period reviewed the Negro could and did do many things in the South that in the latter part of the period, under different conditions, he was prevented from doing (id. at 90-91).

As late as 1895 and 1898 opposition to state attempts to introduce racial legislation in South Carolina prevailed. See the comments of the editor of the Charleston News and Courier (id. at 49-50), as well as those of Tom Watson (id. at 73).

phasis supplied.) Cf. Mr. Justice Harlan's concurrence in the same case, 373 U. S. at 252.

If these substantive and evidentiary principles are right, their application to the instant cases is plain. This Court will hardly require citation to the propositions that South Carolina has a public custom of segregation of the races, and has fostered and maintained that custom by law.[11] For South Carolina now to deny that segregation is at least in substantial part her doing is to assert that the deepest policies and most comprehensive laws of the state have been mere works of supererogation. The state ought at least be required to prove such a strange assertion, and the record is barren of such proof. What proof there is tends in the other direction; asked about his store's segregated policy, the manager in *Bouie* at one point did not immediately answer directly, but instead gave a reply which he obviously believed responsive because explanatory, "I would say that all stores do the same thing" (R. 26). In *Barr*, the co-owner and actual manager (R. 16)

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[11] State law requires segregation at circuses and traveling shows (Code of Laws of South Carolina Ann. §5-19 (1962)); in prisons and chain gangs (S. C. Code §55-1 (1962)); on steam ferries (S. C. Code §§58-714, 58-715, 58-718-720 (1962)); in carrier station restaurants or eating places (S. C. Code §58-551 (1962)); on streetcars, where Negroes are to be seated in the rear (S. C. Code §58-1331 (1962) and, when standing are to be kept as far from whites as practicable (S. C. Code §58-1332 (1962)); on buses (S. C. Code §58-1491 (1962)—held unconstitutional in *Flemming v. South Carolina Electric and Gas Co., 224 F.2d 752 (4th Cir.* 1955) appeal dismissed 351 U. S. 901); in State parks (S. C. Code §51-2.1 to 2.4 (1962)—held invalid in *Brown* v. *South Carolina Forestry Commission,* (E. D. S. C., C. A. July 10, 1963). South Carolina announced that it would close its parks rather than desegregate, N. Y. Times, August 21, 1963, p. 24, col. 2.); in textile factories (S. C. Code §40-452 (1962)); and in schools (S. C. Code §21-751 (1962); Constitution of South Carolina, Article 11 §7—both held invalid in *Briggs* v. *Elliott, (Brown* v. *Board of Education),* 347 U. S. 483).

testified that his "personal reasons" were not involved in the case (R. 20), leaving nothing but custom as a determinant of his actions. On the whole, there is nothing whatever in the South Carolina cases to rebut the natural inference, from the roughest knowledge of the recent and remote history of that state, that segregation in public places, such as those involved in the petitioners' convictions, takes place in South Carolina substantially because a state-wide public custom, massively supported by state laws abandoned only under pressure,[12] commands that it shall take place.

The Maryland case is concededly less crushingly obvious, but petitioners submit that it too falls within the principles contended for. The record in that case is absolutely clear in establishing that the segregation in question took place solely in obedience to custom, and much against the personal wishes of the proprietor (R. 32). The 1957 Annual Report of the Commission on Inter-racial Problems and Relations to the Governor and General Assembly states that 91% of all public facilities in Baltimore exclude or segregate Negroes (p. 13). In 1962, the same Commission's Report was to the effect that change had been "slow and inconsistent." In 1937, the Court of Appeals of Maryland held that "separation of the races is normal treatment in this state", *Williams* v. *Zimmerman*, 172 Md. 563, 192 Atl. 353 (1937). Maryland, a slave-holding state, had until fairly recent times many Jim Crow provisions comparable to those of other southern states.[13]

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[12] The required pressure is sometimes of nearly geologic duration and intensity; on April 5, 1962, the City of Greenville arrested and charged a Negro with the crime of living in a "white block". (*City of Greenville* v. *Robinson*, Arrest and Trial Warrant No. 179); Cf. *Buchanan* v. *Warley*, 245 U. S. 60 (1917).

[13] Maryland statutes concerning segregation in the state school system have not yet been repealed. There must be separate state

It should be made clear that no one is charging the present regime in Maryland with wrongdoing, with respect to segregation by statute or ordinance. The submission is altogether different; it is simply that where a state has, until times so recent as to fall within the formative years of people now in their prime, maintained a Jim Crow regime by law, and where the Jim Crow custom has hung on for the historically brief period since the legal regime began to wither, the probability of there being some causal nexus between the laws and the custom is so overwhelming that it is utterly unreasonable to allow the state, without proof, to enjoy, in a criminal case, the benefit of the implausible assumption that no such causal nexus exists.

Finally, it should be said that even if (as petitioners contend is not the case) either the state-created custom or the use of state police, prosecutor, attorney-general and courts (Point I-B, *supra*) be in itself an insufficient element of state action, nevertheless, in co-action, they are indisputably sufficient. These records, in a social context that is a matter of common knowledge, present the picture

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colleges (Ann. Code of Maryland, Article 65A, §1 (1957)); industrial schools (Md. Code, Article 77, §226 (1957)); normal schools (Md. Code, Article 77, §279 (1957)); juvenile reform schools (Md. Code, Article 27, §655, Article 78A, §14 (1957))—held unconstitutional in *Myers* v. *State Board of Public Welfare*, 224 Md. 246, 167 A. 2d 765 (1961); and separate scholarship grants (Md. Code, Article 49B, §5 (1957)). Miscegenation is still a criminal offense (Md. Code, Article 27, §398 (1957)). As late as 1951, a Maryland statute required segregation on railroads and steamboats (Md. Code, 1939, Article 27, §510-526, repealed by Laws of Maryland, 1951, C. 22). Maryland was a party to the Southern Regional Education Compact, a measure designed to foster segregated education within the "separate but equal" framework. See Md. Code, Art. 41, §§185-188; see *McCready* v. *Byrd*, 195 Md. 131, 73 A. 2d 8 (1950). Hospital segregation was sanctioned by a 1939 provision, Md. Code, 1939, Art. 59, §§61-63.

of a segregation performed in obedience to a custom which is at least in substantial part a creature of state law; the action so motivated is then supported and enforced by prosecutions conducted by state officials, and by convictions in state courts. If "state action" is not to be found in such cases, then the "state action" concept has suffered some weird transformation from the coordinates of reality, and can be of no use in the process of adjusting constitutional interests. One need not doubt what the judgment of history will be on the proposition that the political power of the former segregating states is to no significant degree engaged in the present struggle.

In Part I.—E., *infra*, petitioners will suggest to the Court that sound principles in the interpretation of the substantive guarantees of the Fourteenth Amendment, and not untenable refinements in the concept of "state action", are the apt means to keeping inviolate the genuinely private life of man.

D. ***The state has here denied equal protection of the laws, by maintaining a regime of laws which fails to furnish such protection to petitioners, and which instead subordinates their claim of equality in public life to a narrow and technical property claim.***

It is true that the Fourteenth Amendment applies only to those actions in which state power is to some significant degree engaged. But one of the things the state may not do is "deny . . . equal protection of the laws." An obligation not to "deny" protection is an obligation to furnish protection, to maintain a regime of law under which equal protection is enjoyed.

It is petitioners' submission that this obligation is breached by the state, when, far from maintaining such a regime, the state instead maintains a regime of law which gives paramount place to a narrow property claim here as-

serted with respect to premises in all senses but one open to the general public, and visits with criminal penalties the petitioners' attempts to protest and peacefully to resist the inconvenience and humiliation they suffer from their exclusion from the normal incidents of membership in the community.

With full knowledge (see Part I.—A., *supra*) that a racial discrimination was being sanctioned, the highest courts of Maryland and South Carolina, construing and applying statutes passed by their respective legislatures, have made an affirmative election between the values asserted in these cases, and have determined that, as a matter of state law, the value represented by the claim to exclude Negroes is to be preferred to that underlying the Negroes' claim to equal treatment in public facilities.

It is argued for the states that this is a neutral decision, that the courts have merely declared the common law, and neutrally furnished a legal framework to enforce the property rights to discriminate racially. It is argued that "at common law" restaurateurs could racially discriminate, and that, since no statute has changed this, they still can —the courts merely announcing these principles of law as they find them.

But modern American jurisprudence teaches that the states are as much the authority for, and as much responsible for, their common law rules as they are for their legislation; there is no "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Erie R. Co.* v. *Tompkins*, 304 U. S. 69, 79, settled all that, and finally vindicated Mr. Justice Holmes' earlier dissents, where he had said:

> "The common law so far as it is enforced in a state, whether called common law or not, is not the common

law generally but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else." *Black & White T. & T. Co.* v. *Brown & Yellow T. & T. Co.*, 276 U. S. 518, 533-34 (Holmes, *J.*, dissenting).

"The law of a state does not become something outside of the state court, and independent of it, by being called the common law. Whatever it is called, it is the law as declared by the state judges, and nothing else." *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 372 (Holmes, *J.*, dissenting).

And, of course, a state's formal adoption of the common law of England, as with Maryland's Constitution (Declaration of Rights, Article 5), confirms the formal equivalence of common law with statutory or state constitutional rules.

When a state acts by its legislature or its courts to promulgate rules of law affecting the competing claim of its citizens it must work its will within the limitations of state power imposed by the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1, 22, and *Marsh* v. *Alabama*, 326 U. S. 501, 505-56, both rest on this premise. It is conventional doctrine that rules of law declared by a state's judiciary to be the common law are just as much subject to the restraints of the Fourteenth Amendment as are legal rules embodied in legislation. This Court has frequently found denial of Fourteenth Amendment rights in judicially erected substantive rules. See *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Bridges* v. *California*, 314 U. S. 252; *Edwards* v. *South Carolina*, 372 U. S. 229.

It is clear that the states have acted in resolving the conflicting claims being asserted here; it was inevitable that

they prefer one claim or the other or else leave the parties in conflict. If the state law, common or statutory, declared and effected a preference subordinating petitioners' rights to, say, the general associational preferences of the white community, and made it unlawful for a Negro to enter a "white" restaurant at all events without regard to the proprietor's wishes, such a choice (which is the very one embodied in some state statutes and city ordinances) would be obnoxious to the Fourteenth Amendment. See *Peterson* v. *Greenville,* 373 U. S. 244. But the state's interest in the psychological comfort of some of its citizens, and the state's interest in the enforcement of the property rights of some of its citizens are not of different *genera.* At the very least in the case of a criminal prosecution (though the limitation is unnecessary), the state chooses to infringe the one interest in furtherance of the other. The indictment in *Bell,* in its preservation of the old "peace and dignity" form, bears on its face the acknowledgment of state choice and state interest which alone justifies the imposition of any public sanction (R. 3). But no archaic form is needed to warrant the conclusion that where a state acts to protect one claimant as against another, it has itself determined the values of their respective claims, in the framework of its own public order.

The determination of the ranking to be given the interests asserted by the members of society, and hence of the legal sanctions to be applied in adjusting these interests, is in the general case the business of the states. But the Fourteenth Amendment overrides such of the state's choices as violate its terms. Where the choice ranks some asserted public interest above the interest in public racial equality, "equal protection of the laws", in the sense settled once for all in *The Slaughterhouse Cases,* 83 U. S. (16 Wall.) 36, 70-73, and in *Strauder* v. *West Virginia,* 100 U. S. 303, 306, is not afforded, which is to say it is "denied".

All the purely public considerations which states could bring forward to justify their sanctioning of a racist regime have now been seen to be insufficient to support such state action, as against the Fourteenth Amendment. *Buchanan* v. *Warley*, 245 U. S. 60; *Brown* v. *Board of Education*, 347 U. S. 483. It would be strange indeed if the state's interest in maintaining a narrow "property" right, which consists in nothing but the exclusion of Negroes, were to be found sufficient to justify a state in the knowing support of public racial discrimination. "Property" is in the regime of law, and is for all practical purposes the creature of law. As petitioners will copiously illustrate in Appendix A, the subjection of property to regulation, in the name of competing claims, is a massive part of our legal system. The state acts in one of its most characteristic ways, stretching from the law of nuisance to the law of fire-exits, when it determines where the limits on "property" rights shall be set, or, conversely, what sanction shall be put behind asserted "property" rights, and on what showing.

The regulation of the access of citizens to places of public accommodation is also a regular and normal part of the business of civilized regimes of law. Thirty states forbid racial discrimination in places of public accommodation and this type of regulation invades no constitutionally protected property rights.[14] *Railway Mail Ass'n*

[14] Cal. Civil Code, §§51-52 (Supp. 1961); Colo. Rev. Stat. Ann. 25-1-1 et seq. (1953); Conn. Gen. Stat. Rev. §53-35 (Supp. 1961); D. C. Code §47-2901 et seq. (Supp. 1960); Idaho Acts 1961, c. 309; Illinois, Smith-Hurd Ann. Stat., Criminal Code of 1961, Article 13; Indiana Stat. Ann. §§10-901, 10-902 (Supp. 1962); Iowa Code Ann. §735.1 (1950); Kansas Gen. Stat. Ann. §21-2424 (1949); Maine Rev. Stat., c. 137, §50 (Supp. 1959); Maryland Ann. Code, Art. 49B, §§11-15 (Acts 1963, c. 227, c. 228) (applicable only to certain counties); Mass. Gen. L., c. 272, §§92A, 98 (1956); Mich. Stat. Ann. §28.343 (Supp. 1959); Minn. Stat. Ann. §327.09 (1947); Mont. Rev. Codes §64-211 (Supp. 1961); Neb. Rev. Stat. §§20-101,

v. *Corsi*, 326 U. S. 88; *Western Turf Asso.* v. *Greenberg*, 204 U. S. 359.

Moreover, virtually nowhere in the British Commonwealth or in the Western European democracies would the State find petitioners guilty of a crime if they committed within those jurisdictions the acts for which they have been brought to bar in Maryland and South Carolina.[18] (Notably, however, South Africa has the same rule as

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102 (1943); N. H. Rev. Stat. Ann. §354.1 (Supp. 1961); N. J. Stat. Ann. §§10:1-2 to 10:1-7 (1960); N. M. Stat. Ann. §§49-8-1 to 49-8-6 (Supp. 1961); N. Y. Civil Rights Law §40 (1948), Executive Law, §§292(9), 296(2) (Supp. 1962); N. D. Cent. Code, §12-22-30 (Supp. 1961); Ohio Rev. Code §4112.02 (G) (Supp. 1961); Ore. Rev. Stat. §§30.670-.680, as amended by L. 1961 c. 247; Pa. Stat. Ann. Tit. 18, §4654, as amended by Act No. 19 (1961); R. I. Gen. Laws §§11-24-1 to 11-24-6 (1956); S. D. Acts 1963, Senate Bill No. 1, Jan. 30, 1963; Vt. Stat. Ann., Tit. 13, §§1451, 1452 (1958); Wash. Rev. Code, §§49.60.040, 49.60.215 (1962); Wis. Stat. Ann. §924.04 (1958), as amended (Supp. 1962); Wyo. Stat. §§6-83.2 (Supp. 1961).

[18] Insofar as can be ascertained, in the leading countries of the European continent, sit-ins of the type involved in the case at bar would not constitute criminal offenses. Since careful search of the jurisprudence has failed to disclose a single decided case or other authoritative source dealing with discrimination against Negroes or other racial groups in circumstances similar to those presented here, no authority squarely in point can be cited. However, principles of law well-established in those countries warrant the conclusion that a peaceable sit-in by a Negro would not constitute a crime. On the contrary, rather than punish the peaceable Negro sit-in, most, if not all, of these nations, including such prominent countries as France and Italy, grant him a right, protected by either civil or criminal sanctions or both, to be served and otherwise to make use of the facilities of the public accommodations to which he has gained entry.

In the Commonwealth nations there are also no reported cases of what here are called "sit-ins" in public restaurants. In these nations there are criminal trespass and related statutes which, for various reasons, as will appear, would be inapplicable to a "sit-in" situation. Moreover, in four Commonwealth nations and parts of another, discrimination is forbidden by law.

For a country-by-country analysis, see Appendix B.

respondents.) This near universal experience in nations that share our values is particularly pertinent in application of the Fourteenth Amendment which deals with those "personal immunities 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' . . . or are 'implicit in the concept of ordered liberty.'" *Rochin* v. *California*, 342 U. S. 165, 169. This subject is, unlike the identity of one's dinner guests, a subject with which law may be expected to deal, a ubiquitous component of the modern legal regime. And the direction in which the laws of the great majority of other states and countries have dealt with the subject shows conclusively that, in claiming immunity from being penalized for entering public places, petitioners are not claiming icing on the cake, but the common daily bread of law's protection, as enjoyed virtually everywhere but in the American South and in the Union of South Africa.[16]

[16] The integration of the subject of treatment in public accommodations into the whole regime of law, as well as the ineluctability of the state's making policy choices in this area, is well illustrated by the recent history, in Maryland, both of this subject and of the very statute under which the petitioners in *Bell* were convicted. One June 8, 1962, the Mayor and City Council of Baltimore passed an ordinance providing for equal treatment in places of public accommodation, with some exceptions. Proprietors of certain affected establishments filed suit to invalidate this ordinance on the ground, amongst others, that it infringed the very Article 27, §577 (the "trespass" law) under which petitioners were convicted. A lower state court upheld this contention (*Karson's Inn, Inc.* v. *Mayor and City Council of Baltimore* (Baltimore Superior Court Case No. 1962/990/74578)); the City's appeal is still pending (Md. Ct. of Appeals, 1963 Docket, No. 29). Meanwhile, the Maryland legislature has amended Section 577 so as to prevent its application in this manner, but only as to the City of Baltimore, the following proviso having been added at the end of §577:

> Provided, however, that nothing contained herein shall preclude the Mayor and City Council of Baltimore from enacting legislation making it unlawful or prohibitory to refuse, withhold from or deny to any person because of his race, creed,

When one looks at the matter from the side of petitioners, it is evident that the state's duty of minimal protection has been grossly breached. The refusal of service in places of public accommodation is physically a nagging inconvenience and morally a humiliation; no *de minimis* considerations shield the state from the imputation here of failure to maintain a regime of law that does not flagrantly "deny . . . equal protection" to petitioners.

The force of this argument is greatly augmented by recurrence to the basic symmetries of social obligation. The states of South Carolina and Maryland are not proposing that the petitioners be exempted from taxation, or from the duty to obey the general criminal law. Some of the petitioners are liable to military service, and may even have to risk their lives to keep safe the cities of Columbia and Baltimore. Emotion-fraught though they be, these facts are a part of the framework within which one must construe the Fourteenth Amendment obligation of South Carolina and Maryland to maintain legal regimes which do not "deny" to petitioners the equal "protection" of the laws. The scope of affirmative "protection" required ought not, as a matter of sound interpretation, be less than what is decent in face of the fact that the heaviest

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color or national origin any accommodations, advantages, facilities or privileges of any place or places whose facilities, accommodations, services, commodities or use are offered to or enjoyed by the general public, either with or without charge. (House Bill No. 391, Chap. 453, Acts of 1963.)

(Cf. Maryland's New Public Accommodations Law, Md. Acts 1963, c. 227, c. 228.)

A seemingly "neutral" trespass statute which cuts deep enough to impede the solution by a city of its own public accommodations problem can hardly be characterized as genuinely neutral. But the deeper lesson is that in the struggle between those who would extend to all citizens equal rights in public places and those who would deny them the state cannot be neutral, but does inevitably make an election of the values which it is to support.

duties of citizenship, as well as the privileges of that status, were placed upon petitioners by the Fourteenth Amendment. Far from decent, it is scandalous that states imposing the burdens of state citizenship on Negroes, and benefiting from the imposition on them of the duties of federal citizenship, not only should fail to protect them in their right to be treated equally in fully public places, but should instead place the weight of law behind their humiliation.

It is useful to recall that this Court has long recognized that certain crucial abdications of governmental power—sometimes explained as affirmative decisions by government not to act—can make government responsible in the Fourteenth Amendment sense. The several opinions in *Terry* v. *Adams*, 345 U. S. 461, interpreting the "state action" requirement of the Fifteenth Amendment reflect this.[17] So

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[17] Justice Black (with Justices Douglas and Burton), 345 U. S. at 469:

> "For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. . . . It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election."

Justice Frankfurter, 345 U. S. at 473:

> "The application of the prohibition of the Fifteenth Amendment to 'any State' is translated by legal jargon to read 'State action.' This phrase gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored."

At 345 U. S. 475:

> "The State of Texas has entered into a comprehensive scheme of regulation of political primaries, ... If the Jaybird Association, although not a political party, is a device to defeat the law of Texas regulating primaries, and if the electoral officials, clothed with State power in the county, share in that

does the majority's opinion in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725.[18] In the *Burton* case Justice Stewart's concurring opinion and the two dissents also embrace something of this notion when they state that a state law which sanctioned racial discrimination by restaurateurs in plain words would violate the Amendment.[19] This view underlies *McCabe* v. *Atchison, Topeka & S. F. Ry. Co.*, 235 U. S. 151, where the Court invalidated a state law which merely sanctioned but did not require a carrier's discriminatory policy. See also, *Public Utilities Commission* v. *Pollak*, 343 U. S. 451.

The affirmative thrust of the Amendment and the notion that failures to protect are embraced by the Amendment is clearly seen in opinions which found violations of the Civil

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subversion, they cannot divest themselves of the State authority and help as participants in the scheme."

And at 345 U. S. 477:

"The evil here is that the State, through the action and abdication of those whom it has clothed with authority, has permitted white voters to go through a procedure which predetermines the legally devised primary."

Mr. Justice Clark (with Chief Justice Vinson and Justices Reed and Jackson), 345 U. S. at 484:

"Consonant with the broad and lofty aims of its Framers, the Fifteenth Amendment, as the Fourteenth, 'refers to exertions of state power in all forms.' Accordingly, when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play."

[18] "But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." (365 U. S. at 725.)

[19] 365 U. S. at 726-727, 729.

Rights laws when policemen stood aside while mobs attacked their prisoners (*Lynch* v. *United States,* 189 F. 2d 476 (5th Cir. 1951), cert. den. 342 U. S. 831), or unpopular religious workers (*Catlette* v. *United States,* 132 F. 2d 902 (4th Cir. 1943)).

In *Mapp* v. *Ohio,* 367 U. S. 643, it was maintained by the State that its courts had not affirmatively sanctioned police incursion into constitutional guarantees of privacy and that, therefore, its courts were not to be held accountable for the violation of those guarantees. But this Court held the state court proceedings to be violative of the due process clause because the state court had ruled admissible evidence seized as the fruit of an unconstitutional search; the state court had failed adequately to protect the individual's privacy. In overruling *Wolf* v. *Colorado,* 338 U. S. 25, and thereby making the federal exclusionary rule applicable to the states, Mr. Justice Clark said:

> [W]e note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the states was that "other means of protection" have been afforded the right of privacy. The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other states. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this court since *Wolf.* 367 U. S. at 651-652.

It is submitted that this reasoning is applicable to the instant cases. That is, when a state court, as here, fails to adequately protect the right to be free from racial discrimination, it is responsible for that discrimination, just as the state court which failed to adequately protect the right to privacy was responsible for its violation.

Nor is this all. In *Mapp*, it was pointed out by Justice Clark that the state court, in admitting such tainted evidence, was subverting judicial integrity. A court must not remain aloof to the methods which bring evidence to its doors. Neither, it is submitted, may it blind itself to the *consequences of its decisions. There is a right to equality*: "we can no longer permit that right to remain an empty promise." [20]

In *Griffin* v. *Illinois*, 351 U. S. 12, it was contended by the state that because an indigent criminal defendant could not afford a costly transcript necessary for appellate review was no reason to charge the state with discrimination against the poor. But this Court disagreed and held that the rule, although nondiscriminatory on its face, was grossly discriminatory against the poor in its operation. This reasoning is applicable; it is no answer to say that the trespass law applies equally to whites and blacks, just as it was no answer in *Griffin* to say that the rule there applied equally to rich and poor. Classically, it is no answer to say that "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread" (351 U. S. at 23). Cf. *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

The operation of this trespass law is to enforce and effectuate racial discrimination, and the fact that the law on its face does not command racial discrimination must not mislead.

The opinion in the *Civil Rights Cases*, 109 U. S. 3, lends support to the notion that states are responsible for some failures to provide a legal system which protects against discrimination. How else can the importance the court attached to the assumption that the state laws would furnish

[20] 367 U. S. at 660.

redress against denial of equal access to inns and common carriers be explained?"[21] Similar overtones appear in *United States* v. *Cruikshank*, 92 U. S. 542, 554-555.[22] The legislative debates at and around the time of adoption of the Fourteenth Amendment assure us that these notions

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[21] "We have discussed the question presented by the law, on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right or not, is a different question, which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine. (109 U. S. at 19.)

Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears. (109 U. S. at 24.)

Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy, under that amendment and in accordance with it. (109 U. S. at 25.)"

[22] "The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. *The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power.* That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right." (Emphasis supplied.)

And cf. *United States* v. *Hall*, 26 Fed. Cas. 79, 81 (No. 15,282; 1871).

of the affirmative thrust of the Amendment were not judicial inventions.[23]

Petitioners have here contended that the Fourteenth Amendment imposes an affirmative obligation on the State to ensure "equal protection of the laws". It is obvious that federal judicial enforcement of that affirmative obligation would raise difficult questions which need not be broached

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[23] For example, Rep. Wilson of Indiana in debates on the Enforcement Act of April 20, 1871, 17 Stat. 13, argued that the states were under an obligation to assure equality and that failure to do so was a denial of equal protection:

"1. The provisions 'no State shall deny' and 'Congress shall have power to enforce' mean that equal protection shall be provided for all persons.

2. That a failure to enact the proper laws for that purpose, or a failure to enforce them, is a denial of equal protection.

3. That when there is such a denial Congress may enact laws to secure equal protection."

Cong. Globe, 42nd Cong., 1st Sess. 483 (1871).

Representative Lawrence in debates on the Civil Rights Act of 1875 stated: "What the State permits by its sanction, having the power to prohibit, it does in effect itself." Cong. Rec., 43d Cong., 1st Sess. 412 (1874).

Senator Pool in debates on the Enforcement Act of May 31, 1870, 16 Stat. 140, argued that:

> . . . but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights. Cong. Globe, 41st Cong., 2d Sess. 3611 (1870).

Other contemporary Congressmen also suggested that state inaction may be as culpable as action. In a speech delivered by Representative Bingham of Ohio, the framer of the key phrases in Section One, it was repeatedly stated that the Fourteenth Amendment granted Congress the power to act on individuals and could provide relief against the denial of rights by the states whether by "acts of omission or commission." Appendix to the Cong. Globe, 42d Congress, 1st Sess. 85. Representative Coburn of Indiana said that a state could deny equal protection by failing to punish individuals violating the rights of others. Cong. Globe, 42d Congress, 1st Sess. 459.

here. The Court may be obliged to leave the states "a wide area of . . . constitutional discretion" in fashioning means to fulfill the duty of equal protection. *Griffin* v. *Illinois*, 351 U. S. 12, 20, 24. The definition of the measure of a state's affirmative obligation might even be outside judicial competence, and the obligation might have to be left, at least in some circumstances, inchoate and moral only. (Cf. *Kentucky* v. *Dennison*, 65 U. S. (24 How.) 66, where an affirmative federal constitutional duty was found clearly to exist, but federal judicial enforcement was found unpractical.) It might be that the measure of state affirmative obligation would have to be made specific, and hence judicially manageable, by Congress, acting under §5 of the Fourteenth Amendment. Under that section, doubtless, Congress might either require the states to afford appropriate judicial remedies (see *Testa* v. *Katt*, 330 U. S. 386), or, under a broad reading of its power to "enforce", provide federal remedies to fill the gaps of state inaction.

None of these questions need give trouble here. If the state has an obligation, however shadowy of contour with respect to affirmative remedies, to maintain a legal regime in which Negroes are not "denied protection" in their claim to be treated as equal members of the community, then the state is *a fortiori* under an obligation not to put its criminal law machinery in motion in the opposite direction, and the reversal of the judgments here is clearly called for.

Petitioners recognize that in order to find state action on the basis urged in this portion of the brief it is necessary to discard a part of the holding in the *Civil Rights Cases*, 109 U. S. 3. The argument does not challenge the basic pronouncement of the *Civil Rights Cases* that the Fourteenth Amendment is addressed to state governments and not to individuals and that some state involvement is necessary. But it does challenge the holding that states are not con-

stitutionally responsible for—and that the Fourteenth Amendment does not reach or allow Congress to reach—racial discrimination in privately owned business premises.

It is recognized that the principal difficulty about the present argument is the problem of its limitation within manageable bounds. It is in the tradition of our legal system that the process of such limitation must proceed case by case. Nevertheless, petitioners submit that the very phrase, "equal protection of the laws", suggests a limitation to matters commonly dealt with by law, as, for example, the choice of guests in the home is not. Further, the whole thrust of the Fourteenth Amendment is toward the public life. The general problem of the placing of principled limitation on the impact of the Amendment, even under the theories of "state action" so far argued, will be taken up in the section immediately following.

E. ***The theories of "state action" urged by petitioners in the foregoing arguments need not result in the subjection of the private life of individuals to the norms of the Fourteenth Amendment.***

Petitioners have urged, in application to the facts of these cases, that "state action" is to be discerned in the following circumstances:

1. Where the formal organs of state power (as courts or the executive) are employed to enforce a scheme of racial discrimination originating in a nominally "private" choice (I-B).

2. Where a nominally "private" act or scheme of racial discrimination is performed, in significant part, because of the influence of custom, and where such custom has been, in turn, in significant part, created or maintained by formal state law (I-C).

3. Where the state maintains a regime of law which, in its net operation, places a higher value on some asserted contractual or property claim than it places on the claim to move about free from the inconvenience and humiliation of racial discrimination (I-D).

None of these theories is strained or paradoxical. The first, is the seasoned law of *Shelley* v. *Kraemer*, 334 U. S. 1, but if it were a new proposition it would amount to no more than the assertion that the state "acts" when its formal organs act, and that it then "acts" to that end which is the intended and natural result of their action—a proposition near to truism. The second applies to "state action" ordinary theories of causation, and merely attributes to the state the effects in society of its formal acts—an attribution again more susceptible to the imputation of truism than to that of paradox. The third, interpreting literally the state's obligation not to "deny . . . equal protection of the laws," simply finds such protection "denied" when the regime constituted by those laws grossly fails to protect equality.

It is submitted that the uneasiness which the first consideration of these theories may produce stems not from any difficulty about their intrinsic correctness, but rather, from a difficulty in discerning how their application can rationally be limited so as to prevent the absurd application of constitutional requirements to the genuinely private and personal choices of man.

It would violate the soundest methodologic canons of our case-law system for this Court now to face and answer every question that might someday arise as to the application of the theories urged to these private and personal choices.[24] Petitioners now submit, however, that

[24] Cf. Frankfurter, *J.*, concurring in *Smith* v. *California*, 361 U. S. 147, 161-162.

several lines of evidently sensible distinction can be foreshadowed, for development and application as cases may arise, and that the application of one or more of the above theories to the present cases need not, therefore, be arrested by apprehension lest the Court might thereby irreversibly have started down a road leading to violation of the sacred areas of human privacy.

It will be submitted that these distinctions go not so much to the question of the presence or absence of "state action" as to the question whether the *substantive guarantees* of the Fourteenth Amendment are violated. See Henkin, *"Shelley* v. *Kraemer*: Notes for a Revised Opinion," 110 U. Pa. L. Rev. 473 (1962). That Amendment does not forbid all "state action," but only such state action as violates those substantive guarantees. The latter, in turn, are (like all constitutional provisions) susceptible of reasonable interpretation, in the light of their purpose of ensuing a practical and thoroughgoing equality for the Negro, in the communal life of the states. The *Slaughterhouse Cases*, 83 U. S. (16 Wall.) 36. The following distinctions (not supposed to be exhaustive) furnish copious means for the legitimate performance of that task of interpretation in such a manner as to prevent an interference with the genuinely private life.

First and most crucially, the records in these cases affirmatively establish that no private or personal associational interest is at stake. This is obvious on the face of it; the relation involved is that of a restaurant-keeper to a casual customer. Eckerd's Drug Store, in *Bouie*, is one of a large chain, and the manager who ordered petitioners out was acting in compliance with company policy; obviously, no personal relational interest can exist in such a case. Mr. Terry, the co-owner of the store in *Barr*, testified, "I don't think my personal reasons are involved

in this case, are they?" (R. 20). In *Bell*, the restaurant owner testified that he personally was in sympathy with petitioners' objectives, but had to keep them out to please his customers (R. 32). The only genuinely personal choice involved in such restaurant cases, so far as association is concerned, is the choice that parties of customers might make to eat together, a choice limited along racial lines, where segregation prevails.

Secondly, and closely connected, the events and the issues in these cases are in the fully public rather than in the private life. A restaurant is a public place, contrasting totally with the home and other traditional citadels of privacy. Segregation in restaurants is a sectional and national public problem; no informed person (and certainly not the members of this Court, given the content of its docket) can fail to be aware of this fact. The practice of restaurant and other public segregation defines the public character of whole communities and states, and significantly affects the status of millions of American citizens. The Fourteenth Amendment guarantees, it may be thought, are ancillary to the "citizenship" it confers (see *Slaughterhouse Cases, supra*) and "citizenship" is a public term, having to do with the public life.[25]

[25] It may be that the citizenship clause of the Fourteenth Amendment is to be read as an affirmative grant of membership in our society, carrying with it not merely the right to be referred to as a "citizen," but also the right to be treated as an equal member of the community. See Mr. Justice Harlan's dissent in *The Civil Rights Cases*, 109 U. S. 3, 46-47 (1883). As Justice Harlan there points out, this inclusion immediately resulted in the application to the new citizens of the "privileges and immunities" clause in Article IV, §2. Cf. *Scott* v. *Sanford*, 60 U. S. 19 (19 How.) 393, 404, 407 where "citizenship" is treated as being defined by one's being "a part of the people," fit to "associate with the white race." It is to be observed that there is no textual basis for a "state action" requirement with respect either to the citizenship clause of the Fourteenth Amendment or to the privileges and immunities clause

Thirdly, no competing federal constitutional claims must be weighed here against the petitioners' claim to be extended protection against racial discrimination or at the least not to have the state use its power *de facto* to further and support such discrimination. If the privacy of the home, as recognized in the Third Amendment were at stake,[26] or if the aim were to enforce association forbidden by religious tenets, or if what were proposed were an invasion of privacy as deep as that effected by unauthorized search, or if any other constitutional norm of independent value (as freedoms of speech, assembly, petition, etc.) were brought into confrontation with the one petitioners assert, accommodation would evidently have to be made, for the Constitution is to be construed as a whole.[27] Here the only colorable competing claim would arise from the Fifth and Fourteenth Amendment guarantees against the deprivation of property without due process of law,

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of Article IV, §2. This absence of textual basis is highly material, for the doctrine of the *Civil Rights Cases*, the fountainhead of the "state action" concept, was based on the phrase "No State shall . . ." Cf. Mr. Justice Harlan's characterization of *The Civil Rights Cases* opinion as resting on "subtle and ingenious verbal criticism" (109 U. S. at 26).

[26] Douglas, *J.*, concurring in *Lombard* v. *Louisiana*, 373 U. S. 267, 274:

> "If this were an intrusion of a man's home or yard or farm or garden, the property owner could seek and obtain the aid of the state against the intruder. For the Bill of Rights, as applied to the States through the Due Process Clause of the Fourteenth Amendment, casts its weight on the side of the privacy of homes. The Third Amendment with its ban on the quartering of soldiers in private homes radiates that philosophy."

[27] "The Constitution is an organic scheme of government to be dealt with as an entirety. A particular provision cannot be severed from the rest of the Constitution." Frankfurter, *J.*, concurring in *Reid* v. *Covert*, 354 U. S. 1, 44. Cf. Henkin, *op. cit. supra*, 110 U. Pa. L. Rev. at 487.

but those guarantees protect only against arbitrary regulation unrelated to legitimate public ends (*Nebbia* v. *New York*, 291 U. S. 502), and such a claim could not be weighed in the same scale as the petitioners' claim to be free of public racial discrimination, a thing categorically and at all events forbidden.

Fourthly, the businesses and places concerned in the cases at bar are already abundantly regulated; their licensing and their subjection to minute codes is a common-place of modern life.[28] They are not only *de facto* public, but are built into the regulatory regime of our law. Most strikingly, the very relationship here concerned—that of restaurant-keeper and customer—has traditionally been regulated *in both directions* by the law's command that dis-

[28] Maryland chain stores (Ann. Code of Maryland, Article 56, §§2, 57 (1957)), restaurants (Md. Code, Article 56, §178 (1957)) and soda fountains (Md. Code, Article 56, §174 (1957)) are licensed by the state. A person doing business is subjected to fine or imprisonment (Md. Code, Article 56, §9 (1957)). Maryland law prescribes comprehensive sanitary rules and regulations for places where food is to be served. (Md. Code, Article 43, §200 (1957)). The State Board of Health is given *a right of entry* for purposes of inspection. (Md. Code, Article 43, §203 (1957)). The Board is also empowered to make further rules and regulations necessary to effectuate the statute (Md. Code, Article 43, §209 (1957)). Violations of these provisions are punishable by fine or imprisonment or both. (Md. Code, Article 43, §202 (1957)).

South Carolina restaurants, cafes and lunch counters are governed by rules and regulations formulated by towns and cities. Code of Laws of South Carolina Ann. §§35-51, 35-52 (1962). Failure to comply with municipal regulations may result in denial or revocation of a license (S. C. Code, §35-53 (1962)) or punishment by fine or imprisonment (S. C. Code, §35-54 (1962)). State law exists concerning refrigerators in restaurants (S. C. Code, §35-130 (1962)), dishes and utensils (S. C. Code, §35-131 (1962)), food (S. C. Code, §35-132 (1962)), garbage disposal (S. C. Code, §35-133 (1962)), physical examination of employees (S. C. Code, §35-135 (1962)), inspection by the State Board of Health (S. C. Code, §35-136 (1962)). Violation of state laws is subject to fine or imprisonment (S. C. Code, §35-142 (1962)). Licenses are required in order to operate luncheonettes. The proprietor in *Barr* mentioned his city licenses (R. Barr 18).

crimination be practiced[29] (a command now perceived to violate the Fourteenth Amendment),[30] and by the command that it not be practiced.[31] The application of the Fourteenth Amendment to the formation of this relationship is not a radically new entrance of government into a matter hitherto assumed to be free, as would be the case if the Fourteenth Amendment were applied to the living-room, to the really private club, or to the car-pool.

Fifthly, *de facto* segregation, by nominally private choice, is the functional equivalent, or a close approximation thereto, of something forbidden by the Fourteenth Amendment, for it makes no practical difference to a Negro whether he is barred from public places by city ordinance, or barred from the same places by a nominally "private" segregation resting on tacit understanding and custom—just as it made no difference to him in *Shelley* v. *Kraemer*, 334 U. S. 1, whether ordinance or covenant kept him out of a neighborhood, and made no difference to him in *Terry* v. *Adams*, 345 U. S. 461, whether his right to vote effectively was taken away by statute or by the Jaybirds, and made no difference, in *Marsh* v. *Alabama*, 326 U. S. 501, whether speech was effectively denied by enforcement of trespass statutes on company-owned streets, or by more candid means.[32]

Sixthly, the "property" interest asserted here is minimal and technical. It amounts to no more than the right to exclude Negroes from a place where everybody else is

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[29] South Carolina law requires segregation in carrier station restaurants or eating places. S. C. Code, §58-551 (1962).

[30] *Peterson* v. *Greenville*, 373 U. S. 244 (1963).

[31] See footnote 14, *supra*.

[32] And compare, *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir. 1947), cert. denied, 333 U. S. 875, with *Brown* v. *Baskin*, 80 F. Supp. 1017 (E. D. S. C. 1948), aff'd 174 F.2d 391 (4th Cir. 1949).

welcome. Its assertion is, correspondingly, not so much a reason as a restatement of the claim. Sanctity or "sacredness," [11] has been predicated of this claim, but not many angels can dance on the point of this needle. If "sacredness" is a relevant concept here, its emotional overtones may more readily be enlisted on the side of the petitioners, who, as Americans, subject to the most exacting duties of citizenship, assert their right to move about in public as equal members of the citizenry.

Seventhly, though, not by literally verbal means, the petitioners here were expressing themselves on topics of high public concern, as Ghandi was doing when he marched to the sea. *Thornhill* v. *Alabama*, 310 U. S. 88; *Stromberg* v. *California*, 283 U. S. 359. This fact gives emphasis to the location of these events in the fully public life (cf. *Marsh* v. *Alabama*, 326 U. S. 501), and suggests a special concern to make sure that the power of the State is not engaged in the suppression.

It is necessary to be precise as to the bearing of these numbered points on the present question. Petitioners are not asserting that "state action" is itself to be found in any of these considerations. "State action," they rather assert, is to be found in these cases through one or more of the theories developed in parts I-B to I-D, *supra*, and summarily listed at the beginning of the present section. Petitioners recognize, however that "state action," under any of these three theories rationally developed, might be found in cases where the result of the application of the Fourteenth Amendment would be an absurd incursion into areas of genuine human privacy. For the clearest example, "state action" might be found, under the *Shelley* theory of Point I-B, where legal process is used to keep an unwanted in-

[11] *North Carolina* v. *Avent*, 253 N. C. 580, 588, 118 S. E. 2d 47, 53 (1961).

truder out of the home. The numbered points briefly sketched just above are designed to suggest to the Court that, whether or not, as an abstract question, "state action" is present in such a case, there are many lines along which, by following an interpretation of the substantive guarantees of the Fourteenth Amendment consonant with the social context in which it exists, the Court might, if the necessity should ever arise, keep the Fourteenth Amendment out of the living-room, where it does not belong, without keeping it out of the public life of the community. The full development and application of any one of these distinctions is obviously not called for in this case; the fact that they are evidently sensible is relevant to these cases only as a means of demonstrating that, by recognizing the existence of "state action" in these cases, the Court is not committing itself to the application of constitutional imperatives to the authentic privacies of the people.

The extension of constitutional guarantees to the authentically private choices of man is wholly unacceptable, and any constitutional theory leading to that result would have reduced itself to absurdity. But the problem created by this unacceptability cannot be solved in a principled manner by pretending not to see "state action" where it is present. This pretense carries a double danger. To protect the privacy of the living-room by blinding oneself to the very palpable "state action" that actively or potentially maintains that privacy is to endanger the privacy itself, for the gross fiction stands permanently vulnerable. On the other hand, the felt necessity of ignoring the "state action" that protects the living-room must result in sporadic and irrational failure to recognize 'state action' where it exists and where no genuine interest in privacy is present, for the concepts elaborated to shore up the illusion that "state action" does not support and enforce the choices of men in their purely private life are bound to radiate, with

arbitrary effect, into fields where no such choices are really concerned. (The present cases, in fact, present the latter danger.)

It is earnestly urged that the way out of this impasse does not lie along the road of the elaboration of qualitative distinctions among different "forms" of state action. These distinctions have no warrant in the language of the Fourteenth Amendment. They have no relation to the purposes of that Amendment. They cannot be made to correspond to any wise views of the relations between the private man and his society, and the endless series of fine lines which they proliferate must ceaselessly be drawn and redrawn, as time produces endlessly new patterns of state intervention and involvement. The way out does not lie in a distinction between "more" or "less" state action, for there is not the roughest scale of quantitation, objective or intuitive, along which the incommensurables of the multiform presented facts can be measured.

The "state action" concept, burdened as it is and must be with an unshakeable train of teasing questions in the metaphysics of law, is not an apt instrument for drawing practical lines. In the ultimate jurisprudential sense, "state action" supports every private action; to "draw the line" between "private" and "state" action is like trying to determine which jaw of the vise is gripping the piece of wood. In a more pragmatic and experiential sense, "state action" is always seen, in at least one and usually in many gross forms, in every case of racial discrimination reaching this Court or likely to reach it.

The way out lies in a frank acceptance of at least this pragmatic omnipresence of "state action," and in the equally frank use of an available alternative technical resource for doing the work which the "state action" concept cannot rationally do. That work is the protection of the really

private life of man—in its arbitrary choices, in its caprice, even in its injustice—from subjection to the standards of the Constitution. The available technical device, as suggested above, is the exploration of a rule of interpretation of the substantive guarantees of the Fourteenth Amendment, which would limit them to incidence upon public life. The Fourteenth Amendment lives in a social context—and in a constitutional context—wherein privacy and individuality are of high assumed value, and there is nothing unwonted to law in the application of that context to its interpretation.

It is not supposed that the distinction between the public and the private life is one of hair-line clarity. If, as Mr. Justice Holmes said, all law, as it becomes more civilized becomes a matter of degree,[34] then all law, in the process of its civilization, moves from the fictitious and facile clarity of categorical concept into the less impressive but at least workable phase of assessment and weighing. The distinction between the public and the private life of man, as a criterion for the application of the Fourteenth Amendment, has at least the merit, so hard to attain, that it tries to draw the line in the place where the line is wanted, along the cleavage of felt need and apprehension. And its substitution as a conceptual means for doing some of the work now assigned to the "state action" concept is not the substituting of the vague for the clear, but rather the substitution of a vagueness progressively clarifiable for an apparatus of nebulous confusion and multiple ambiguity.

To summarize and perhaps clarify this point, it is not here contended that "state action" is not a requisite for the application of the Fourteenth Amendment. If that case ever comes to the bar of this Court of which it can truly be

[34] Holmes, *J.*, partially concurring in *LeRoy Fibre Co.* v. *Chicago, M. and St. P. Ry.*, 232 U. S. 340, 354.

said that "no state action" in any form supports the discriminatory pattern, then "state action" rule surely ought to be applied. It is rather contended that the "state action" concept, admitting its validity, must either be artificially and arbitrarily burdened with distinctions corresponding to no reality, or else can do no work. It is urged that the work for which this concept is wanted can be done by wholly different concepts, legitimately to be applied to the interpretation of the Fourteenth Amendment. Without deciding hypothetical cases not now before the Court, it is easy to perceive that these considerations make it possible to give effect to the presence of "state action" in these cases, without any unwanted commitment to the application of Fourteenth Amendment guarantees to the genuinely private concerns of man.

II.

The Convictions of Petitioners in the *Barr* and *Bouie* Cases, Pursuant to S. C. Code, §16-386, and in the *Bell* Case Under Md. Code Ann., Art. 27, §577 Deny Due Process of Law Because There Was No Evidence in the Records of the Conduct Prohibited by Those Laws, or Else, the Laws as Construed to Include Petitioners' Conduct Do Not Convey a Fair Warning That It Was Prohibited.

The records in *Bouie* and *Barr*, the cases from South Carolina, show (if the testimony be taken most favorably to the State) an invited entry into a drug store open to the public, an entry into the lunch counter section not forbidden by any notice, and a short delay in getting up and leaving when requested to do so. Of course, arrest and jail sentence on such a factual showing, would be quite incredible if one did not happen to know that Negroes were involved. But it is not too much to speak of sheer fantasy

when one reads the text (understandably not quoted in the South Carolina court's opinion) of the statute (S. C. Code §16-386) into which these facts are supposed to fit:

> Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid, for the purpose of trespassing.

Quite aside from the very evident fact that the statute is aimed at trespass on open lands, the decisive objection to its application to petitioners is that it prohibits "*entry . . . after notice,*" and that is not what was proved here. Much expansion cannot add to this simple truth.

In these and a contemporaneous sit-in case, *Charleston* v. *Mitchell*, 239 S. C. 376, 123 S. E. 2d 572 (1961), the South Carolina court, evidently confusing the law of civil trespass with the problem of this statute's meaning, has introduced an entirely novel construction of this statute, holding, in effect, that "entry" means "remaining a short while," or, in the alternative, that "after" means "before."

These convictions either offend the due process clause under the doctrine of *Thompson* v. *Louisville*, 362 U. S. 199, and *Garner* v. *Louisiana*, 368 U. S. 157, or else the law has been so unfairly expanded by construction that it fails to warn, violating the principles of *Lanzetta* v. *New Jersey*,

306 U. S. 451; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Edwards* v. *South Carolina*, 372 U. S. 229; and other similar cases.

South Carolina, subsequent to petitioners' arrest, passed a law specifically relating to failure or refusal to leave business or other premises "immediately upon being ordered or requested to do so." [35] The South Carolina courts have long recognized a difference between entry after notice and "trespass", saying that "trespass" is not identical but is "more comprehensive." [36]

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[35] S. C. Code, (1962) §16-388, (S. C. Acts 1960, p. 1729, Act No. 743, May 16, 1960) provides:

> *"Entering premises after warning or refusing to leave on request; jurisdiction and enforcement.*—Any person who, without legal cause or good excuse, enters into the dwelling house, place of business or on the premises of another person after having been warned within six months preceding not to do so or any person who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than one hundred dollars or be imprisoned for not more than thirty days.
>
> "All municipal courts of this State as well as those of magistrates may try and determine criminal cases involving violations of this section occurring within the respective limits of such municipalities and magisterial districts. All peace officers of the State and its subdivisions shall enforce the provisions hereof within their respective jurisdictions.
>
> "The provisions of this section shall be construed as being in addition to, and not as superseding, any other statutes of the State relating to trespass or entry on lands of another."

This was the provision involved in *Peterson* v. *Greenville*, 373 U. S. 244.

[36] See *State* v. *Hallback*, 40 S. C. 298, 18 S. E. 919, 922:

> ". . . but it is clear that 'trespass' is a more comprehensive term than 'entry,' and indeed includes it, especially when we consider the words that follow—'after notice'—which does not

A conviction without evidence to support it may also be perceived as one based on a law which fails to give fair warning. Indeed, *Thompson* v. *Louisville*, 362 U. S. 199, 206, rested in part upon *Lanzetta* v. *New Jersey*, 306 U. S. 451. Surely the South Carolina entry after notice law (§16-386) utterly fails to convey to potential offenders or to the tribunals any standards by which the proposed or past act could be charged. Could this statute furnish any warning to petitioners that what they were doing violated it, and could it be thought to command their conviction, on the factual showing in these records, with anything like the clarity needed in a court of law? The obvious negative answers make it clear that due process was violated.

The Maryland statute involved in *Bell* read, in part, as follows:

> "Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor, and on conviction thereof before some justice of the peace in the county or city where such trespass may have been committed be fined . . . . " (Md. Code, 1957, Art. 27, §577).

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occur at all in section 2501 [now §16-382], which creates the offense of 'trespass.'"

In *State* v. *Mays*, 24 S. C. 190 (1886), the distinction was made between entry after notice and trespass, the court holding that an affidavit charging "trespass after notice" failed to inform the defendant that he was charged under G. S. 2507 (now §16-386) rather than under G. S. 2501 (now §16-382). Giving notice was referred to as "essential" (24 S. C. at 195).

None of the civil trespass discussion in cases relied on by the State such as *Shramek* v. *Walker*, 152 S. C. 88, 149 S. E. 331, and *State* v. *Lazarus*, 1 Mill., Const. (8 S. C. Law) 31 (1817), has any bearing on the meaning of entries after notice in §16-386.

The application of this statute to the peaceable refusal to leave a restaurant table does not excite the risibilities, as does the analogous application in the South Carolina cases. But the radical vice is the same. What is prohibited is entering or crossing of land, premises, or private property, after due notification, and that is not what petitioners did. The indictment, drawn after the statute, charged them with entering and crossing the premises "*after* having been duly notified by Albert Warfel . . . not to do so. . . ." (R. 3; emphasis supplied), but the record conclusively shows that this notification (by Warfel) was given when the petitioners were seated at tables in the restaurant (R. Bell 28-29, 39).[37]

Again, the Maryland court has, by a novel construction of this old law in a recent sit-in case decided after petitioners' acts (*Griffin* v. *State*, 225 Md. 422, 171 A. 2d 717 (1961), cert. granted, 370 U. S. 935), interpreted this statute to apply to the act of remaining after warning. No prior Maryland law was invoked to support this novelty;[38] the court in *Griffin*, *supra*, looked to *State* v. *Avent*, 253 N. C. 580, 118 S. E. 2d 47 (1961), vacated 373 U. S. 375, North Carolina's response to the sit-ins. But to that construction the same remarks apply as were made above with respect to the South Carolina statute. If, as a matter of state law, a statute saying "enter" means "remain," then, as a

[37] The single possible exception to this is that Mr. Warfel informed petitioner Quarles of "company policy" at the front of the dining room (R. Bell 27-28); there was no other description of Warfel's statement to Quarles, and no statement that he was forbidden to enter in explicit terms. Quarles said he became engaged in a conversation with Mr. Hooper, the owner, at this point (R. Bell 43).

The indictment (R. Bell 3, 14) was based upon Albert Warfel's order to leave and did not refer to Miss Dunlap, the hostess. In any event, her statement—"We haven't integrated as yet"—did not unequivocally forbid entry (R. Bell 24).

[38] In 1958 the Maryland court had emphasized the importance of notice forbidding entry, *Krauss* v. *State*, 216 Md. 369, 140 A. 2d 653 (1958).

matter of federal law, that statute fails, as so applied, in the basic due process requirement of reasonable clarity in its command to the citizen and to the tribunal that must decide whether it has been broken.

Although it is submitted that due process would, for the reasons given in this part, be wanting in these convictions if petitioners had been ordered to leave because they were not wearing ties, or for any other reason exciting no special federal constitutional sensitivity (Cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451), that question need not be decided in these cases. It is settled that the requirements of clarity are especially high in cases involving, as these certainly do, the attempted penalization of expression.[**] *Smith* v. *California*, 361 U. S. 147, 151; *NAACP* v. *Button*, 371 U. S. 415, 432, and cases cited; cf. *United States* v. *National Dairy Prod. Corp.*, 372 U. S. 29, 36. The reason for this is that freedom of expression, a specific federal right of great importance in our polity, would be crippled if those exercising it had to guess whether a vague statute might be held to apply to them, or had to guess, as here, whether a statute which seemed obviously inapplicable would be stretched to apply. In short, a buffer zone must be provided, "because First Amendment freedoms need breathing space to survive." *NAACP* v. *Button*, 371 U. S. 415, 433. Then, too, free expression would be endangered if courts, expressing local interests, could freely avail themselves, for the purpose of suppression, of the device of strained construction of seemingly inapplicable statutes, or if police and prosecutors could engage in "selective enforcement against unpopular causes." *Button*, *supra* (371 U. S. at 435); *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98; *Smith* v. *California*, 361 U. S. 147, 151.

[**] It is settled that non-verbal expression such as petitioners' conduct is included within "First Amendment" concepts. *Stromberg* v. *California*, 283 U. S. 359.

For the same reasons a high standard of clarity is imposed on statutes employed to diminish racial equality, for that equality is a federal constitutional interest of very high rank. *Wright* v. *Georgia*, 373 U. S. 284. Even if, contrary to petitioners' view, a state may sometimes employ its judicial power and criminal laws to further and support private racist patterns, it is submitted that this ought to be allowed only where the state law speaks with clarity. The measure of that required clarity need not be taken here, for these statutes, insofar as they are clear, clearly do not apply to the actions of petitioners, and they can be made to apply only by a fiat of construction.

III.

The Convictions in *Barr* v. *Columbia* Should Be Reversed on Several Grounds Specially Applicable to That Case.

A. *In the case of Barr v. Columbia there were special circumstances of police involvement in the racially discriminatory scheme which would supply the element of state action and furnish grounds for reversal if no other existed.*

The following facts are taken from the uncontradicted testimony of the State's own witnesses, the arresting policeman and the manager of the drug store. The manager testified that the police first became involved in the matter of sit-ins in his store when " . . . they came and informed me of the demonstration and *we were working as a group* . . . . I didn't call them to come around and inform me. They informed me in advance" (R. Barr 21) (emphasis supplied). This "group" work with the police resulted in a " . . . previous agreement to that affect, that if they did not leave, they would be placed under arrest for trespassing" (R. Barr 23). In answer to the question, "So

in fact you had instructed the Police Department to arrest them if they refused to leave at your request?" the manager testified, "Not necessarily, I had instructed them, but that was an agreement pertaining to the law enforcement division" (R. Barr, 23). The arresting officer in turn, testified that he was at the drug store not on special call but by prearrangement (R. Barr 5-6). This testimony conclusively establishes that the actions of the police were taken by general and concerted prearrangement, and not by mere arrest on complaint or on the basis of casual observation.[40] Whether or not conclusive in itself on the "state action" question, this fact wholly determines the crucial significance of what follows.

Mr. Stokes, *the arresting officer, was waiting in the store* for the arrival of the expected sit-in demonstrators (R. Barr 6). After they came in, he testified, Mr. Terry, the manager, "made the statement to the five, that he wasn't going to serve them, that they would have to leave" (R. Barr 4). Then, in an action which establishes beyond doubt the close affirmative involvement of the police in the discriminatory scheme, the officer, in his own words, " . . . *requested* that Mr. Terry go to each individual and ask him to leave in my presence . . . . " (R. Barr 4) (emphasis supplied). The store manager's testimony exactly corroborates this point (R. Barr 17).

There is no ambiguity in this action. The officer was not merely keeping order, or arresting for a crime which he passively observed. He *was engaged in counseling the store owner on the means of producing clearcut evidence of*

[40] The closeness of the City's supervision of and interest in this matter, and the nature of its policy commitment, is indicated by the statement attributed to Columbia's City Manager by petitioner Carter: "Gentlemen, further demonstrations will not be tolerated" (R. Barr 28).

"crime," and even "requesting" that he take this racially discriminatory action. The crucial importance of this participation may be shown, if further showing is needed, by this officer's positive testimony that the store manager, though at an earlier time he had said he wanted these Negroes out of his store, did not, at the actual time of the alleged offense, request their arrest or eviction (R. 16).

Beyond a doubt, what is shown here is a general scheme for dealing with sit-ins, in which the police played the role of initiators. Where the officer stands by and "requests" a private person so to frame his words as to make sure a "crime" has been or will be committed, it is absurd to talk of the mere neutral use of state machinery to enforce private discriminatory choice. Cf. *Lombard* v. *Louisiana*, 373 U. S. 267; *Peterson* v. *Greenville*, 373 U. S. 244.

B. *The disorderly conduct convictions in the Barr case either rest on no evidence of guilt and deny due process under the doctrine of Thompson v. Louisville and Garner v. Louisiana, or violate the rule requiring fair warning as exemplified by Edwards v. South Carolina.*

The five petitioners in the *Barr* case were charged and found guilty of "breach of the peace" (S. C. Code §15-909) as well and separate fines were imposed for this offense. Nothing in the trial judge's oral ruling (R. Barr 41) indicates the facts thought to support the breach of the peace convictions. The Richland County Court said that this conviction was proper under S. C. Code §15-909 relating to "Disorderly Conduct, Etc.", and authorizing arrest and specified punishment for:

> Any person who . . . may be engaged in a breach of the peace, any riotous or disorderly conduct, open obscenity, public drunkenness, or any other conduct grossly indecent or dangerous to the citizens of such city or town or any of them. . . .

The Richland County Court held that the convictions could be based on the evidence that "the defendants refused to leave" after the management ordered them to leave—the same evidence which it held supported the trespass convictions (R. Barr 49). The South Carolina Supreme Court noted that the convictions were had under this statute, and that the exceptions on appeal charged a failure to prove a *prima facie* case and the *corpus delicti*, but refused to decide whether the offense was established, saying that these exceptions were "too general to be considered", failing to comply with the court's Rule 4, Section 6 (R. Barr 56).[41]

First, the thought that there might be an independent state ground precluding this Court's review of this particular objection to the breach of the peace convictions should be put out of mind. This is so because the South Carolina court clearly had the power to decide the issue presented by petitioners' exceptions, and simply exercised its discretion in refusing to do so, which does not preclude this Court's review. *Williams* v. *Georgia*, 349 U. S. 375. The South Carolina court's power is conclusively demonstrated by a series of decisions rendered before and after *Barr*. Indeed, shortly after the South Carolina court decided *Barr*,

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[41] Rule 4, Section 6 (Vol. 15, S. C. Code, 1962, p. 146) does more to discourage detailed and elaborate exceptions than to encourage them, providing:

> "*Section 6.* Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review, and the same assignment of error should not be repeated. Each exception must contain within itself a complete assignment of error, and a mere reference therein to any other exception then or previously taken, or request to charge will not be considered. The exceptions should *not* be long or argumentative in form." (Emphasis in original.)

Petitioners' brief in the court below did argue the facts and that the evidence showed merely that petitioners ignored the racially discriminatory command to leave without any evidence of violent, threatening, or otherwise disorderly conduct. And, of course, petitioners argued, in the brief as they had at the trial

it decided the *Bouie* case in which identical exceptions were made (R. Barr 51; R. Bouie 63), and not only considered the merits of the exceptions, but actually reversed Simon Bouie's conviction for resisting arrest on the ground that the elements of the offense were not proved. The court did the very same thing in an opinion filed the day before the *Barr* case as well; in *Charleston* v. *Mitchell,* 239 S. C. 376, 123 S. E. 2d 512 (Dec. 13, 1961), petition for certiorari pending as No. 8, October Term, 1963, the court considered the merits of exceptions identical to those in *Barr* and *Bouie* (see record in *Mitchell,* on file in this Court p. 78) and reversed convictions for interfering with an officer in the discharge of his duties on the ground that the evidence failed to support the convictions (239 S. C. at 393-395, 123 S. E. 2d at 520-521). In the *Mitchell* case, *supra,* the court reviewed the evidence in detail and concluded that it was insufficient to prove the offense; then the court made the following statement which faintly, but confusingly, foreshadowed the next day's pronouncement in *Barr*:

> What we have said disposes of the question of whether the evidence establishes the *corpus delicti* or proves a *prima facie* case against the appellants. We do not pass upon the question of whether this issue was properly before us for consideration. (Mitchell at 239 S. C. 395, 123 S. E. 2d at 521.)

To this abundant showing that the court has power to rule and actually exercises this power, it seems almost superfluous to add two more cases where the court ruled on exceptions identical to those here. This did occur nine

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(R. Barr 39-40), the claim that they were not guilty of any crime as a Fourteenth Amendment due process and equal protection claim. *Thompson* v. *Louisville,* 362 U. S. 199, was cited in the petition for hearing (R. Barr 58)

days before the *Barr* opinion in *State* v. *Edwards*, 239 S. C. 339, 123 S. E. 2d 247 (Dec. 5, 1961), rev'd *sub nom. Edwards* v. *South Carolina*, 372 U. S. 229, and a month before *Barr* in *Greenville* v. *Peterson*, 239 S. C. 298, 122 S. E. 2d 826 (Nov. 10, 1961), rev. *sub nom. Peterson* v. *Greenville*, 373 U. S. 244. So, at least four opinions roughly contemporaneous with that in *Barr* demonstrate that the South Carolina court has the power and authority to, and under its rules actually does, pass on exceptions worded identically to those which it refused to pass on in this case.

Williams v. *Georgia*, 349 U. S. 375, 389, which held that a state court's discretionary decision not to rule on a federal claim "does not deprive this Court of jurisdiction to find that the substantive issue is properly before [it]," is obviously controlling.

Turning to the *Barr* record, it is manifest that either no breach of the peace was proved, or that South Carolina's vaguely defined breach of the peace concept fails to give fair warning. One way or the other the convictions offend the due process clause.

Insofar as petitioners have ascertained, §15-909 has not been definitively construed in any reported decision and has never before been applied to conduct like that in this case. However, since the charge seems to rest on a portion of that statute relating to "breach of the peace" (and not upon any of its other provisions such as those relating to riotous or disorderly conduct, open obscenity, public drunkenness, or any other grossly indecent or dangerous conduct) the obvious place to turn for a meaning of "breach of the peace" under South Carolina law is to decisions on the common law crime of breach of the peace. This was recently defined in *State* v. *Edwards*, 239 S. C. 339, 123 S. E. 2d 247, rev'd *sub nom. Edwards* v. *South Carolina*, 372 U. S. 229.

In *Edwards,* the South Carolina court said that breach of the peace was an offense "which is not susceptible to exact definition" and that it included "a great variety of conduct destroying or menacing public order and tranquility" (239 S. C. at 343, 123 S. E. 2d at 249). The court then stated its approval of the definition of breach of the peace it quoted from 8 Am. Jur., Breach of the Peace, p. 834, §3:

> In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence . . ., it includes any violation of any law enacted to preserve peace and good order. It may consist of an act of violence or an act likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential element in the offense. . . .
>
> By "peace," as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society. (239 S. C. at 343-344, 123 S.E. 2d at 249.)

Petitioners' conduct here did not come within the framework of this definition. There was no showing of any act of violence and there was no showing of any act "likely to produce violence" if we exclude the possibility that the mere presence of Negroes in a place customarily frequented only by white persons is punishable as such a threat to the peace. That cannot be so because of the equal

protection clause. *Garner* v. *Louisiana,* 368 U. S. 157; *Taylor* v. *Louisiana,* 370 U. S. 154; and *Wright* v. *Georgia,* 373 U. S. 284, make clear that the possibility of disorder by others cannot justify conviction of petitioners in such circumstances.

The South Carolina court's definition of breach of the peace contains nothing which suggests that a mere failure to obey a racially discriminatory command of the proprietor of a public accommodation to leave his premises is included within the definition, or that the crime is designed as a protection for this type of "property" claim. The only witness at the trial who asserted that petitioners "created a disturbance" was the store manager, Terry, and he regarded their conduct as entirely orderly (R. Barr 22) until the moment they sat down at the lunch counter (R. Barr 23-24). He did not claim that petitioners' response to his command to leave in any way "created any disturbance"; it was the mere act of sitting at the lunch counter, in violation of the segregation custom, which was thought to do this. The arresting officer, Mr. Stokes, gave no testimony that petitioners created a disturbance or that they did anything which created violence or disorder.

Thus, this case falls clearly within the rule of the *Thompson* and *Garner* decisions, *supra,* and the breach of the peace convictions should be reversed.

If it be considered that Section 15-909, by some loose and expansive construction, embraces petitioners' conduct, then the statute surely denies due process because of its vagueness. Petitioners' conduct was well within the *area* of constitutionally protected free expression, and whether or not it was expression fundamentally exempt from state prohibition, it certainly cannot be prohibited under a vague catch-all law. The First Amendment freedoms in-

clude non-verbal expressions as well as ordinary speech. Cf. *Stromberg* v. *California*, 283 U. S. 359. As Mr. Justice Harlan said, concurring in *Garner* v. *Louisiana*, 368 U. S. 157, 207:

> The fact that . . . the management did not consent to the petitioners' remaining at the "white" lunch counter does not serve to permit the application of this general breach of the peace statute to the conduct shown . . . . For the statute by its terms appears to be as applicable to "incidents fairly within the protection of the guaranty of free speech," *Winters* v. *New York*, *supra* (333 U. S. at 509), as to that which is not within the range of such protection. Hence such a law gives no warning as to what may fairly be deemed to be within its compass.

The threat which vague laws pose to the fragile right of free expression, and the settled principles holding such laws invalid are discussed more fully in Part II above. *Cantwell* v. *Connecticut*, 310 U. S. 296 and *Edwards* v. *South Carolina*, 372 U. S. 229, are controlling. Nothing need be added to what was said so recently in *Edwards*, *supra*, with respect to the obvious, and, indeed, self-confessed indefiniteness of South Carolina's crime of breach of the peace.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

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APPENDIX A

A Discussion of Property Rights

The content of the term "property right" has greatly changed in the past two centuries. (See Powell on Real Property, Par. 746). If one looks far enough backward it could fairly be said that "he who owns may do as he pleases with what he owns." This is not the present law. The present law of land has hesitatingly embodied an ingredient of stewardship, which has grudgingly, but steadily, broadened the recognized and protected scope of social interest in the utilization of things. A property right no longer includes a privilege in the individual owner to act substantially to the detriment of his fellow citizens.

Felix Cohen, in one of his essays published in 1960 (The Legal Conscience at 41), refers to "property" as a "function of inequality." The germ of truth in this has present relevance for as demonstrated throughout this Appendix our law of property has been characterized by governmental redress of that inequality in so many instances that for the state to permit continuation of an inequality is tantamount to endorsing it as an expression of public policy.

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 in (a) a power to dispose; and (b) a power to use. See Blackstone, Comm. I:138.

Both of these powers have been significantly curtailed in the centuries which are back of us. Both of these powers are likely to be further curtailed in the years just ahead.

The power to dispose of owned assets has been outstandingly cut down by (a) the rule against perpetuities; (b) the

law on illegal dispositions; and (c) the insistence upon formalities as prerequisites for full efficacy. Powell on Real Property ¶¶839-858.

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 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. Powell on Real Property ¶762.

Rooted even more anciently in feudal practices, restraints upon the alienation of present interests earned invalidity. At one time, a feudal tenant could lose the hand, which derogated from the overlord's rights, by presuming to pen 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. Restatement of Property §§404-423. "Illegality" is broader than the restriction upon the alienability of property. Whenever a proposed provision is judged significantly to interfere with the long-time welfare of society, it encounters a stern prohibition. In general, these situations involve efforts by the owner of property to use the bait of wealth to control the conduct of his donees. Such attempts have been found illegal where the donor

a. has attempted to control or to preclude marriage; Restatement of Property §§424-427.

b. has attempted to shape an exercise of the power of testamentary disposition; Restatement of Property §§428-432.

c. has attempted to interfere with the religious behavior of the recipient; Restatement of Property §434.

d. has attempted to cause departures from normal familial relationships; Restatement of Property §433.

e. has sought to meddle with the education or life work of the recipients; Restatement of Property §436.

Such uses of wealth are potentially anti-social and hence have been found deserving of substantial curtailment.

More important than the power to dispose is the power to use. As one looks back over the centuries and decades preceding 1963, the ever advancing flow of social restrictions on the individual's exercise of his "privileges of use" becomes most impressive.

When the owner of a large parcel of land conveys an interior part, it is socially undesirable to have land which cannot be worked, and hence the conveyor is presumed to have granted an easement by necessity for access to and exit from the conveyed land. *Finn* v. *Williams*, 376 Ill. 95, 33 N. E. 2d 226 (1941). The otherwise existent power to enforce undisturbed possession is negatived, in part, by an implied easement grounded in social policy.

When Blackacre and Whiteacre are in the same locality, the owner of Blackacre may not so use his land as to lessen the reasonable enjoyment of Whiteacre by its owner or occupier. The twelfth century assize of nuisance, (McRae, "The Development of Nuisance in the Early Common Law," 1 U. Fla. L. Rev. 27 (1948)), began the curtailment of the privileges of use which was essential to the maintenance of a fair standard of neighborliness as between nearby land occupiers. Modern equity since the year 1800, has been making constantly new applications of the basic idea that one must so use his own as not to injure others. W. W. Cook, Equity in 5 Enc. of the Social Sciences, 582-586 (1931).

The law of waters, whether in streams, or on the surface, in underground springs, or lowering clouds, has as a backdrop the facts of nature. The amount and regularity of the rainfall, the geologic factors below the surface and the topographic configuration of the surface combine to determine the total moisture available to the several owners of affected land. Powell on Real Property ¶708. Considerations of social policy fix the scope of "reasonable use."

Courts repeatedly assert 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 are found to serve the health, the safety, the morals, the conservation of resources, or, the general welfare of the governed group.* On this basis, the "residential" character of neighborhoods has been protected from "mobile kitchens" (*Eleopoulos* v. *City of Chicago*, 3 Ill. 2d 247 (1954)); manufacturing areas have been protected from excessive noises (*Dube* v. *City of Chicago*, 7 Ill. 2d 313 (1956)), a statute of Virginia, compelling the connection of a private home with the city water works system, has been upheld (*Weber City Sanit. Comm.* v. *Craft*, 196 Va. 1140 (1955)). Sanitary legislation began as early as 1389 (Stat. 12 Rich. II, c. 13). Commissioners of sewers were established in 1430 (Stat. 8 Henry VI, c. 3). Building regulations received a large impetus from the Great Fire of 1666 in London. The importance of safeguarding "health" and "safety" gained new recognitions in the nineteenth century.

Building Codes are now a commonplace in almost every community. By 1951, some 2233 municipalities were listed as having such codes. Building Regulation Systems in the United States, 1951, published by the Housing and Home Finance Agency of the Division of Housing Research. See also Note, 6 Stanford L. Rev. 104, at 113 (1953). They estab-

lish specifications both as to the construction and use of buildings. Multiple dwellings and tenements have requirements as to plumbing, toilet facilities, air space per occupant and ventilation. No property owner is allowed to indulge his fancy for yard or piazza water closets (*City of Newark* v. *Chas. R. Co.*, 17 N. J. Super. 351 (1952)). Factories, in proportion to the number of workers employed, have requirements as to plumbing, ventilation and the minimizing of fire hazards, plus additional requirements dictated by the kind of work engaged in. Powell on Real Property ¶862. Similarly circumscribed as to permissible utilizations of their land are mercantile establishments. Special requirements exist as to steam boilers, elevators, fire escapes, fire proofing and modes of egress. Powell on Real Property ¶863.

In the field of morals, there has been a similar evolution. Profitable houses of prostitution are no longer the privilege of respectable property owners. Note, 24 Wash. L. Rev. 67 (1949). Obscene exhibitions incur remedial social action. *State ex rel. Church* v. *Brown*, 165 Oh. St. 31, 133 N. E. 2d 333 (1956). Gambling is generously frowned upon. See, for example, Iowa Code (1955) §99.1, injunction against gambling; §726.1, penalty for keeping a place for gambling; Mass. Ann. Laws (1955) c. 271, §§5A, 7, 8, 18 and 23. The desirable outer limits on police power regulation with respect to the public morals becomes less clear as doubts grow concerning the exact content of morality and the efficiency of courts or legislatures in compelling general morality. Powell on Real Property ¶864. See also Symposium on Obscenity and the Arts, 20 Law and Contemporary Problems, 531-688 (1955). The areas in which active debate is now observable concern chiefly gambling and sexual conduct. The fact remains that property owners have been, and can be, effectively debarred from any use of their

property found to offend public morals and such curtailment of "property rights" calls for no reimbursement of the owner so debarred.

In the wide open spaces of the West, there have been comparable developments. Soil conservation districts have adopted sometimes quite costly land use regulations which must be observed by all owners in the district. Parks, Soil Conservation Districts in Action 13, 147 (1952). Conformity has been assisted by the conditioning of land loans on prescribed social behavior (Note, 1950 Wis. L. Rev. 716). In areas devoted to cattle raising, individual owners are prevented from making short-term gains by overgrazing. Penny and Clawson, "Admin. of Grazing Distr.," 29 Land Econ. 23 (1953). This has been accomplished in some areas by conditioning permits to use public lands needed for grazing on the applicant having used his privately owned land in a manner preserving its long-term value. (See Federal Taylor Grazing Act, 43 M. S. C. A. §315 and the Montana Grazing Act, Mont. Rev. Code 1947, §§46-2332). Thus private ownerships are curtailed in their uses of their "owned land" so as to assure adequate continuing supplies of forage. Rural zoning to preserve timber and to accomplish reforestation of cutover areas not only serve the desirable ends of conservation, but also serve the collateral purpose of restoring local tax revenues by returning land to the growing of timber and delaying the need for as yet unbearable expenses for local roads and school maintenance (See Washington's Forestry Practices Act, discussed in *State of Washington* v. *Dexter*, 32 Wash. 2d 551 (1949); Solberg, "Rural Zoning in the United States," Agric. Inform. Bull. No. 59 (1952)).

Courts and legislatures have resorted to the "police power"—the general welfare of the group—in problems involving renters (41 Stat. 298 (1919), constitutionality sustained in *Hirsh* v. *Block*, 256 U. S. 135; N. Y. Laws 1920 cc.

131-139, constitutionality sustained in *New York ex rel. Brixton Operating Corp.* v. *La Fetra*, 230 N. Y. 429, 130 N. E. 601, affd. 257 U. S. 665; see also Powell on Real Property ¶252) and borrowers (Powell on Real Property ¶¶471-474).

The objectives of zoning center on the promotion of the welfare of the community. It has become established since 1925 that the "property rights" of any land owner are subordinate:

a. 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; *Village of Euclid* v. *Ambler R. Co.*, 272 U. S. 365; McQuillan, Mun. Corp. (3d Ed.) 1950, §§25.07, 25.96-25.109; Toll Zoning for Amenities, 2 Law and Contemp. Prob. 266 (1955).

b. to the establishment of areas devoted to the provision of goods and services without an intermixture of more offensive uses; *Bartram* v. *Zon. Com. of Bridgeport*, 136 Conn. 89, 68 A. 2d 308 (1949); *Town of Marblehead* v. *Rosenthal*, 316 Mass. 124, 55 N. E. 2d 13 (1944),

c. 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 efficiently rendered. Symposium, 20 Law and Contemp. Problems 197, 238, 481 (1955).

These 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 any government to serve the social welfare. The transitional judicial thinking on this

subject is well illustrated by contrasting the District Court in *Schneider* v. *District of Columbia,* 117 F. Supp. 705 (1953), with the ultimate decision of the same case, *Berman* v. *Parker,* 348 U. S. 26.

As early as 1945, Mr. Justice Jackson in stressing the control of private rights by consideration of social concern (*U. S.* v. *Willow River Power Co.,* 324 U. S. 499) had said:

> "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 interests 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."

And see Cross, "The Diminishing Fee," 20 Law and Contemp. Prob. 517 (1955).

Thus, the subjection of property rights to competing claims is irrevocably embedded in our law. The nature of the claim to be free from racial segregation is so compelling, and, today, so clear, that no property owner can be heard to say that his "inalienable," "sacred," right to discriminate is somehow immune from this normal process and must be sanctioned and enforced by law. If anything, an owner should expect that the element of stewardship with which all property is impressed, carries with it an obligation, which the law will recognize, not to employ one's public facilities in a way which injures and humiliates a large portion of the public.

Where, alas, has gone the "liberty" of property owners to maintain and to operate structures which smell to high heaven, which are destructive of the lives, or health, or safety, or welfare of customers and workers? Just where it was bound to go! Into the limbo. By the curtailment of these "liberties" there has been assured the larger liberty of society as a whole.

APPENDIX B

Survey of the Law in European and Commonwealth Countries

1. *France*

Article 184, paragraph 2, of the French Penal Code, the only provision that relates to occurrences showing some resemblance to sit-ins, declares punishable the entry, with the aid of threats or violence, of the domicile of a co-citizen. It would be inapplicable to conduct involved in the case at bar for two reasons: First, an essential element of the crime is the use of threats or violence; second, a place of public accommodation does not qualify as "*domicile*" as that term is used in article 184(2).

In France, a peaceful sit-in, rather than commit a crime, has a statutorily protected right to be served. According to Decree No. 58-545 of June 24, 1958 (*Journal Officiel* of June 25, 1958), every person engaged in commercial activities (*commerçant*) is prohibited, on penalty of imprisonment and/or fine, from refusing service to a person who in good faith requests that it be rendered, if the *commerçant* is able to render the service in accordance with normal commercial customs and no law forbids him from rendering it. Although, in the absence of practices of racial discrimination, this provision has never been applied to situations similar to those presented in the present case, its broad language would appear to make escape from its prohibitions impossible.

2. *Italy*

In Italy, as in France, the penal provision protecting the home against unlawful entry does not cover peaceful sit-ins in places of public accommodation. Article 614 of

the Italian Penal Code makes criminal only entry of a home (*abitazione*) or other private residence (*luogo di privata dimora*) against the will of the person who has the right of exclusion, and does not apply to places of public accommodation.

Furthermore, in Italy, the peaceable sit-in would have a right to be served. Article 1336 of the Italian Civil Code, entitled "offer to the public at large" (*"offerta al pubblico"*), provides that unless circumstances or usage indicate otherwise, an offer to the public at large may be accepted by any member of the public. A term in the offer or contract excluding Negroes would be disregarded as violative of Italian public policy. Italy's policy against racial discrimination is firmly embedded in Article 3 of its Constitution, providing that all citizens are equal regardless of sex, race, language, religion, political conviction, or personal or social standing.

3. *Belgium*

Article 439 of the Belgian Penal Code declares punishable the entry of a home, apartment, room or lodging inhabited by someone else against the latter's will, if the entry is made with the aid of threats or violence against persons, or by breaking, climbing in, or with false keys. Article 442 of the same code similarly declares punishable whoever has entered any of the places specified in article 439 without the consent of the owner or the tenant and is found there during the night. Neither of these articles apply to peaceful sit-ins, since (1) they are designed to protect only a person's home or residence and not places of public accommodation and (2) peaceful sit-ins do not involve nocturnal visits and are, by definition, neither accompanied by threats or violence nor effectuated by breaking or climbing in or by using false keys.

It is unclear whether in Belgium a peaceful sit-in would have the right to be served. The answer would seem to depend in part on whether Article 6 of the Belgian Constitution, which provides that all Belgians are equal before the law, also applies to individual, as distinguished from governmental, action. If it does, the answer would be in the affirmative.

4. *The Netherlands*

Article 138, paragraph 1, of the Dutch Penal Code declares punishable whoever unlawfully enters the home or the premises or homestead of someone else or whoever unlawfully staying there refuses to leave. Prominent Dutch authority supports the view that this provision affords protection not only against unlawful invasion of the home, but also against unlawful entry of other premises, including places of public accommodation. See, *e.g.*, 2 *Van Bemmelen & Van Hattum, Hand-en Leerboek van het Nederlandse Strafrecht* 164-65 (The Hague-Arnhem 1954). Nevertheless, this article would not outlaw peaceful sit-ins, since the entry and refusal to leave of sit-ins cannot be characterized as "unlawful." Every owner of a place of public accommodation extends an offer of service to members of the public. A term in his offer limiting it to members of a particular racial group would not be given effect as being against public policy. As a result, a Negro accepting the offer would obtain a right to be served. Since that right would render his entry and refusal to leave lawful, he would not come within the ambit of article 138. The operative Dutch public policy is embodied in Article 14 of the European Convention on Human Rights to which The Netherlands is a party and which prohibits discrimination on the ground of race.

Since a Negro, by accepting the offer of the owner of the place of public accommodation, in effect concludes a contract, he would, in Holland, have a civilly protected right to be served.

5. *Norway*

Article 355 of the Norwegian Penal Code is similar to the corresponding Dutch provision in that it outlaws unlawful entry not only of the home but also of a "vessel, railroad car, motor vehicle or aircraft, or a room in any of these or in any other enclosed place." As a consequence, it would seem to protect against "unlawful" entry of places of public accommodation. Nevertheless, for the same reasons as those elaborated in the discussion of Dutch law, the entry and refusal to leave of a Negro sit-in would not be "unlawful" and therefore not come within the ambit of article 355.

Furthermore, in Norway, a peaceful sit-in would have a right to be served. The existence of this right follows from general principles of contract law, under which the person who exploits a place of public accommodation extends an offer of service to the public at large which may be accepted by a Negro, who may disregard as violative of public policy an exclusion based on race embodied in the offer. Indeed, a person who refuses service solely on the ground of race of the person who requests it may well come within the compass of Article 246 of the Norwegian Penal Code which declares punishable anyone who unlawfully, in word or deed, offends another person's feeling of personal honor.

6. *Germany*

Article 123 of the German Penal Code declares punishable unlawful entry not only of the home, but also of commercial premises (*Geschäftsräume*). It similarly makes it a crime for someone who has no right to be there to refuse to leave these places upon demand by the person entitled to their use and possession. There is no doubt that the broad language of this provision also covers places of public accommodation. Nevertheless, a peaceful sit-in would not come within the compass of its prohibitions.

It is an essential element of the crime of article 123 that the person who has entered the premises has done so unlawfully or stays on the premises without having a right to be there. In the case of a peaceful sit-in, that essential element would be lacking. Two grounds support this conclusion.

Article 3, paragraph 3, of the German Constitution provides that nobody may be granted a disadvantage or advantage because of his sex, birth, race, language, nationality and origin, belief, or religious or political opinions. Although there is a division of opinion among Germany's legal scholars and the problem has not yet been resolved explicitly by the German constitutional court, German scholars of great prominence as well as the first Senate of the Federal Labor Court hold this constitutional mandate to be directed not only to public officials, but also to private individuals. See, *e.g., Leisner, Grundrechte und Privatrecht* 332-53 (Munich 1960); Nipperdey and Boehmer in 2 *Neumann, Nipperdey & Scheuner, Die Grundrechte. Handbuch der Theorie und Praxis der Grundrechte* 20, 422 (Berlin 1954); *S. H.* v. *M. L. F.*, December 3, 1954, 1 *Entscheidungen des Bundesarbeitsgerichts* 185 (1954); *Landkreis U.* v. *Schwester K.*, March 23, 1957, 4 *Entscheidungen des Bundesarbeitsgerichts* 240 (1957). If it does circumscribe the permissible conduct of individuals, there is no doubt that a

refusal of service and a demand to leave the premises based merely on race is in violation of the German Constitution and cannot be given the effect of making unlawful the sit-in's entry of, and presence on, the premises.

However, even if the constitutional provision would not address itself directly to individuals, the sit-in's entry and presence would not be unlawful. Although older authority seems to support the view that places of public accommodation cannot be regarded as extending an offer to the public at large and do no more than invite the public to make an offer, consisting of a request for service, the modern opinion, supported by prominent and most authoritative German scholars, is that the question of whether a place of public accommodation extends an offer to the public must be answered in accordance with the circumstances of the individual case. For the modern view, see 1 *Erman, Handkommentar zum Bürgerlichen Gesetzbuch* 217-218 (3d ed. Westfalen 1962); *Palandt, Bürgerliches Gesetzbuch* 116 (21st ed., Munich and Berlin 1962); 1 *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* 878 (11th ed. by Brändl & Coing, Berlin 1957). This opinion, which favors the finding of an offer, would clearly give the peaceful sit-in, who accepted the offer by entering and ordering, a contractual right to remain on the premises and to be served. Furthermore, even if the sit-in's right to enter, to remain on the premises, and to be served could not be based on a contract, it could be grounded on general principles of tort law. According to Article 826 of the German Civil Code, every act that is *contra bonos mores* (*gegen die guten Sitten*) constitutes a tort that creates a claim for compensation of the damages it causes. There is no doubt that a refusal to give service based on discrimination against the customer's race alone would violate standards of proper conduct generally accepted in Germany and therefore constitute a tortious act. Even those

who oppose the direct applicability of Article 3, paragraph 3, of the German Constitution to private individuals agree that its provisions make clear to what norms an individual's conduct in society must conform. Since article 826 imposes on the place of public accommodation the obligation not to refuse service merely on the basis of the customer's race, the customer would have the corresponding right to enter and remain on the premises. Clearly, the customer's entry and remaining on the premises would be measures designed to protect himself against the unlawful discrimination practiced by the place of public accommodation. Since Article 227 of the German Civil Code provides that a measure that is necessary to defend oneself against an unlawful act is lawful, the customer would undoubtedly be acting lawfully by entering and remaining on the premises.

7. *England and the Commonwealth Countries*

In England, a "sit-in" would seem to be non-criminal, because the criminal trespass laws there require force.[1]

In four provinces of Canada, Fair Accommodation Practices Acts prohibit racial discrimination in public accommodations.[2] In the remaining provinces, it is doubtful whether the criminal law would reach this activity.[3]

In India, racial discrimination in public accommodations is prohibited by the Constitution.[4]

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[1] 10 Halsbury, Laws of England, Criminal Law §1100 (3d. ed. 1955); *Rex* v. *Bake*, 3 Burr. 1731, 97 Eng. Rep. 1070 (K. B., 1765); *Rex* v. *Wilson*, 8 Term Rep. 357, 101 Eng. Rep. 1432 (K. B., 1799): *Rex* v. *Smyth*, 5 C & P 201 (1832).

[2] Saskatchewan Statutes 1956, c. 68; Ontario Statutes 1954, c. 28, as amended by Statutes 1960-61, c. 28; New Brunswick Acts 1959, c. 6; Manitoba Acts 1960, c. 14.

[3] The closest law would seem to be the Malicious Damage Statute, Martin's Criminal Code (1961), Section 372 (1). But the requisite elements of damage would seem to be lacking here.

[4] Constitution of India, Article 15(2).

In Pakistan, the abrogation of the Constitution of 1956 by presidential proclamation in October, 1958 apparently struck out a constitutional right[6] to nondiscriminatory treatment. When the Constitution is fully restored this Right will be effective. However, a "sit-in" would appear not to come within the scope of existing criminal statutes.[6]

In Australia, there are either no state criminal trespass statutes[7] or state statutes which would not reach "sit-ins".[8]

In New Zealand, a "sit-in" might be criminal,[9] but there have been no reported cases of a factually similar nature.

In Ghana[10] and Nigeria,[11] freedom from racial discrimination is a constitutional right.

Only in the Union of South Africa would it be clear that a "sit-in" was criminal[12]—and here, significantly, the racial element is a factor in constituting the crime.

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[6] Article 14, Constitution of 1956.

[6] The requisite intent would appear to be lacking for a violation of the criminal trespass statute, Pakistan Criminal Code, s. 441. *Rahmatullah* v. *State*, 1958 P. L. D. Dacca 350.

[7] Western Australia and Queensland.

[8] The statutes in New South Wales (Inclosed Lands Protection Act, 1901-1939, s. 4) and Southern Australia (Trespassing on Lands Act 1928) apply only to "inclosed lands"—a very restrictive category. See 23 Australian Law Journal 357 (1949). Victoria's statute—Police Offenses Act 1958, s. 20(3)(d)—provides the defense of "supposition of right". See *Martin* v. *Hook*, 5 A. L. R. 6 (1899). Tasmania's statute—Trespass to Lands Act 1862—provides the defense of "reasonable excuse"; additionally, it may not be applicable to an urban setting.

[9] Police Offenses Act 1927, s. 6A; inserted by Police Offenses Amendment Act (No. 2) 1952, s. 3.

[10] Constitution of Ghana, Article 13, Declaration of Fundamental Principles.

[11] Constitution of Nigeria, Chap. III, Fundamental Rights, s. 27.

[12] Reservation of Separate Amenities Act, Act No. 49 of 1953, 3, Section 2(2), making it an offense for a person of one race wilfully to enter public premises or a public vehicle set aside for members of another race.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 12

ROBERT MACK BELL, et al.,
Petitioners,

—vs.—

STATE OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals of Maryland (R. 10) is reported in 227 Md. 302, 176 A. 2d 771 (January 9, 1962). The Memorandum Opinion of the Criminal Court of Baltimore, Byrnes, J., March 23, 1961 is unreported (R. 6).

JURISDICTION

The Petitioners allege that the Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Does a state criminal trespass conviction of Negroes protesting a racial segregation policy in a private restaurant constitute state action proscribed by the Fourteenth Amendment in a municipality where neither law nor local custom require segregation?

2. Were Petitioners denied due process of law because their convictions under the Maryland Criminal Trespass Statute were based upon no evidence of the proscribed conduct, or because the statute gave no fair warning of the prohibited conduct?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Section 1, Fourteenth Amendment to the Constitution of the United States.

2. Section 577, Article 27, Annotated Code of Maryland (1957 Edition); Chapter 66, Laws of Maryland, 1900 (see Amended Brief for Petitioners, Pages 4 and 5).

STATEMENT OF FACTS

The facts in *Bell v. Maryland* differ considerably from the facts in the sit-in cases previously before this Court. Here, the demonstrators entered a private restaurant in a privately-owned building in Baltimore City (R. 30). Neither the municipality in which the restaurant was located nor the State had a restaurant segregation law. Nor was there any evidence of a local custom of segregation in the community (R. 50). The demonstrators, who passed through the street-level lobby of the restaurant, were met at the entrance to the private dining area of the restaurant by the hostess, who normally seats customers

(R. 23). She was standing at the top of four steps (R. 23). Petitioners were barred from further entry into the dining room by the hostess and the Assistant Manager on the sole ground that the owner of the restaurant feared a loss of clientele if Negroes were permitted to eat in the private dining areas of the restaurant (R. 24, 32, 43). In spite of this notice not to enter, the demonstrators nevertheless pushed by the hostess and took seats at tables throughout the dining room, one or two at a table, and in the grille in the basement (R. 25, 47). Meanwhile a long conversation took place between the leader of the group and the manager and owner of the restaurant (R. 32). The Petitioners were requested to leave but refused to do so (R. 28). The police were summoned. When they arrived the members of the Negro group were the only persons remaining in the restaurant (R. 39). The Trespass Statute, Section 577, Article 27, Annotated Code of Maryland (1957 Edition) was read to the group in the presence of the police (R. 28, 39). Some of the group left, but the remainder refused (R. 39). Employees of the restaurant took down the names and addresses of those remaining (R. 39). Since the police refused to arrest the Petitioners without a warrant, Mr. Hooper, the owner, went to the Central Police Station to obtain warrants (R. 39). The magistrate spoke with the leader of the group on the telephone; and the Petitioners agreed to come down to the police court on Monday morning and submit to trial (R. 40). One and one-half hours after their initial entry, Petitioners left the restaurant (R. 41). The leader of the demonstrators later testified that the group remained on the premises even though they knew they were going to be arrested; and that being arrested was a part of their technique in demonstrating against segregated facilities (R. 49).

ARGUMENT

I.

A STATE CRIMINAL TRESPASS CONVICTION OF NEGROES PROTESTING A RACIAL SEGREGATION POLICY IN A PRIVATE RESTAURANT DOES NOT CONSTITUTE STATE ACTION PROSCRIBED BY THE FOURTEENTH AMENDMENT IN A MUNICIPALITY WHERE NEITHER LAW NOR LOCAL CUSTOM REQUIRE SEGREGATION.

Conspicuously absent from the facts in this case is State action. In order to be constitutionally prohibitive, State action must "coerce," "command", and "mandate" the racial discriminatory practice leading to conviction of the petitioners. *Lombard v. Louisiana*, 373 U.S. 267. There is neither such command, coercion, nor mandate here. The State's involvement is not to a degree that it may be held *responsible* for the discrimination.

Maryland at the time of the arrest of the Petitioners did not have a statute requiring segregation of restaurants and other places of public accommodation. Cf. *Peterson v. Greenville*, 373 U.S. 244. Nor did the City of Baltimore, the situs of the subject restaurant, have an ordinance prohibiting equal access to restaurants. *Ibid.* The evidence adduced at the trial did not reveal that the proprietor refused service on the basis of any express official State or municipal policy. Cf. *Lombard v. Louisiana*, *supra*. It was not unlawful for the restaurant owner to serve the demonstrators; nor was it unlawful for them to eat in the restaurant if the owner had served them. Cf. *Peterson v. Greenville*, *supra*; *Gober v. Birmingham*, 373 U.S. 374.

The neutrality of the State here is implicit in the acts of its officers. The police, when summoned by the proprietor refused to arrest the Petitioners (R. 40). The police insisted that the owner swear out warrants before a Police Magistrate. The arrests were never made by

the police even though one and one half hours after their initial entry, the Petitioners were still in the restaurant refusing to leave. The proprietor, nevertheless, had advised the Petitioners that they would be arrested if they failed to leave and he read the trespass statute to them (R. 29, 48). The Petitioners were not placed in custody. In fact, they made arrangements with the Magistrate by telephone to come to the court the following Monday, voluntarily, to submit to trial (R. 40, 50).

Community custom did not dictate the result in the *Bell* case. No evidence was produced before the trial court to show the existence of an overriding custom or "climate" of segregation in the community causing unequal enforcement of otherwise innocuous State laws solely to exclude Negroes on the basis of their race. In fact the evidence reveals exactly the opposite conclusion. Quarles, leader of the demonstrators, testified that in a number of other restaurants where the demonstrators had sought service, they sat, were served and ate (R. 50). In such a fluid situation in the immediate community, it could hardly be concluded now by the mere recitation of empty statutes not even before the trial court (Bell brief, p. 31, n. 13), that Jim Crow ruled the roost. Furthermore, over three years ago, a considerable period considering the rapid evolution of race relations, Chief Judge Thomsen of the United States District Court of Maryland found, as a matter of fact, that in February of 1960 there was no "custom, practice, and usage of segregating the races in restaurants in Maryland." *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, 126, 127, aff'd Fourth Cir., 284 F. 2d 746. In that decision, after reviewing facts presented by both sides on the question of custom and usage, Chief Judge Thomsen stated:

> "Such segregation of the races as persists in restaurants in Baltimore is not required by any statute or

decisional law of Maryland, nor by any general custom or practice of segregation in Baltimore City, but is the result of the business choice of the individual proprietors, catering to the desires or prejudices of their customers." *Ibid,* pages 127, 128.

The reason given by the owner of the restaurant for refusing service to Petitioners was that in his opinion his particular clientele did not wish to eat with Negroes.*

> "I tried to reason with these leaders, told them that as long as my customers were deciding who they want to eat with, I'm at the mercy of my customers. I'm trying to do what they want. If they fail to come in, these people are not paying my expenses. and my bills. They didn't want to go back and talk to my colored employees because every one of them are in sympathy with me and that is we're in sympathy with what their objectives are, with what they are trying to abolish, but we disapprove of their methods of force and pushed their way in" (R. 32, 33).

This statement was corroborated by Petitioner Quarles' own statement:

> "I was asking him, well, why wasn't it these Negroes he thought so much of weren't capable of sitting at his tables to eat? He said, well, it's because my customers don't want to eat with Negroes" (R. 43).

Petitioners' argument that the State of Maryland has denied to Petitioners equal protection of its laws is based upon the erroneous theory that the State of Maryland has caused the Petitioners' convictions of a crime from which persons other than Negroes would be immune. In the absence of legislation to the contrary, the State is not

* Although the nominal owner of the restaurant is a corporation, of which Mr. Hooper is President, he is referred to herein as the owner of the restaurant in the same manner as he is referred to as the owner in the testimony (R. 30, 31).

charged with the positive duty of prohibiting unreasonable discrimination in the use and enjoyment of facilities licensed for public accommodation. *Williams v. Howard Johnson's Restaurant,* (4th Cir.) 268 F. 2d 845; *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, aff'd, (4th Cir.) 284 F. 2d 746. The owner of a restaurant, having the legal right to select the clientele he will serve, may, to enforce this right, use reasonable force to repel or eject from his place of business any person whom he does not wish to serve for whatever reason. See cases collected in 9 A.L.R. 379 and 33 A.L.R. 421; also 4 Am. Jur., *Assault and Battery*, Section 76, page 167; *Restatement of the Law of Torts*, Section 77; *Martin v. Struthers*, 319 U.S. 141.

So long as such right of the proprietor exists, to leave, as his sole remedy, the application by him of force would surely offend the principles of an ordered society. Cf. *Griffin v. Collins*, 187 F. Supp. 152. However, in calling upon a peace officer of the State to eject any person, the owner may employ only such means involving the State as do not single out and enforce sanctions against a particular racial class of persons. This is the gist of the State action argument.

Petitioners' theory is incorrect because where the application of the criminal trespass statute operates equally against all persons whom the proprietor wishes to exclude or eject, and the State is not significantly involved in the owner's selection, then the neutral use of the State law enforcement process to enforce the proprietor's selection of clientele is not prohibited by the Fourteenth Amendment. Cf. *Shelley v. Kraemer*, 334 U.S. 1; *Barrows v. Jackson*, 346 U.S. 249.

Petitioners further contend that licensing of restaurants by the State is a significant factor. However, State action with respect to licensed facilities depends upon whether

interdependence between State and its licensees is to an extent that the State participates in and can regulate decisions of its licensees relating to private discrimination on the basis of race or color. *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *McKibbin v. Michigan Corporation & Securities Commission*, 369 Mich. 69, 119 N.W. 2d 557 (1963). Where the statutory fee, imposed by the State upon a business enterprise operated for a profit, is a mere tax on the business and not a regulatory license, there can be no State involvement in the decisions of the internal management of the business. *Spencer v. Maryland Jockey Club*, 176 Md. 82, 4 A. 2d 124, app. dismissed, 307 U.S. 612. Where the licensing is regulatory in the exercise of the police power, however, the Legislature may prescribe reasonable rules within the scope of the regulation. Any restaurant operated for profit in Maryland must obtain a license whether it operates as an exclusive club or is open to the public generally. Maryland Code (1957 Edition), Article 56, Section 178. This license is a statutory fee or tax. The distinction between those food service facilities that must pay the statutory fee and those that are exempt therefrom, is whether or not the business operates for profit. Ibid, Sec. 8. There is no statutory exemption for facilities that operate as exclusive clubs or place restrictions upon clientele. The police and health statutes apply to all establishments regardless of profit or selection of clientele. Maryland Code, Article 43, Secs. 200-203.

It is settled law in Maryland and in other jurisdictions that the licensing of a place of public amusement does not constitute a franchise requiring the owner to furnish entertainment to the public or admit everyone who applies. *Greenfield v. Maryland Jockey Club*, 190 Md. 96, 57 A. 2d 335; *Marrone v. Washington Jockey Club*, 227 U.S. 633; *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E. 2d 697; 1 A.L.R. 2d 1160, cert. den. 332 U.S. 761; cases

collected in 1 A.L.R. 2d 1165, 60 A.L.R. 1089, 30 A.L.R. 651. Nor does the refusal to contract, based solely upon the race of the party seeking the bargain, offend the guarantees of the Fourteenth Amendment. *Reed v. Hollywood Professional School*, 169 Cal. App. 2d 887, 338 P. 2d 633; *Gardner v. Vic Tanny Compton*, 182 Cal. App. 2d 506, 87 A.L.R. 2d 113.

Shelley v. Kraemer, supra, has no application here. In that case the constitutional right violated by the State's enforcement of restrictive covenants was a property right—the right to the use and enjoyment of property already purchased. In the case before this Court, Petitioners were denied no rights or property. Under the present status of the law they had none. *Civil Rights Cases*, 109 U.S. 3. This Court's holding that each person in the community has a right to remain on private premises of another operated as a business, licensed or otherwise, without the permission of the owner, would be tantamount to conferring upon ever person an inchoate property right in the business premises, becoming vested at the moment of entry. In the absence of legislation creating or taking away property rights involved here, such a holding would not be proper exercise of the judicial function.

In conclusion, in order to make *Shelley v. Kraemer* logically consistent with the result in the case at bar urged by these Petitioners, this Court must hold that these Negroes had an inalienable right to enter and receive food service in Hooper's Restaurant, which right could not be denied them by Mr. Hooper on the basis of their race alone. Anything short of such a holding would be begging the question; for if this Court holds that Petitioners' rights were merely dependent on the existence of notices posted upon the door, the basic civil rights issue will merely be shifted to the street.

II.

PETITIONERS WERE NOT DENIED DUE PROCESS OF LAW SINCE THEIR CONVICTIONS UNDER THE MARYLAND CRIMINAL TRESPASS STATUTE WERE BASED UPON EVIDENCE OF THE PROSCRIBED CONDUCT, OR, IN THE ALTERNATIVE, BECAUSE THE STATUTE GAVE FAIR WARNING OF THE PROHIBITED CONDUCT.

There are ample facts in the record showing violation of the Maryland trespass statute. Petitioners entered the lobby of Hooper's Restaurant through a revolving door. Petitioners were notified by the hostess (R. 24, 42) and Assistant Manager (R. 43, 47) of the restaurant that they would not be permitted to enter and be seated in the private dining areas of the restaurant. Nevertheless, part of the group of demonstrators ascended the four steps separating the lobby from the dining room and pushed by the hostess to gain entry to the dining room. Part of the group, also ignoring the management's warning, descended the steps from the lobby to the grille on the lower floor (R. 43, 47).

Clearly, under the facts of this case, Petitioners, after notification by the owner's agent not to do so, entered and crossed over the premises and private property of another in violation of the Maryland Criminal Trespass Statute. That Petitioners were so notified was admitted by Quarles, leader of the group, in his testimony (R. 42, 43). As to the demonstrators who went to the grille downstairs, Quarles stated:

> "Q. Why did some of the students go downstairs? Didn't you say they went downstairs because they couldn't be seated upstairs? A. After they were blocked forcibly by the manager and hostess, they proceeded downstairs to seek service" (R. 46, 47).

Judge Byrnes, who presided at the trial, in his Memorandum Opinion (R. 6, 7) found as a matter of fact that

the testimony disclosed that the defendants entered the restaurant and requested the hostess to assign them seats; but she refused, informing Petitioners that it was not the policy of the restaurant to serve Negroes. She said she was following the instructions of the owner of the restaurant. Commenting on the evidence, Judge Byrnes stated:

> "Despite this refusal, defendants persisted in their demands and, brushing by the hostess, took seats at various tables on the main floor and at the counter in the basement" (R. 7).

It is submitted that the evidence before the trial judge in this case goes far beyond the mere refusal to leave after lawful entry, the basis of the attack on the application of the Maryland statute. On the basis of the foregoing references to the testimony, and Judge Byrnes' comments thereon, it is clear that there was evidence of notice to the Petitioners by the owner; and that such evidence was considered by the trial judge. Cf. *Krauss v. State*, 216 Md. 369, 140 A. 2d 653 (1958).

It should be noted that the Maryland statute refers both to "entry upon" and "crossing over" such premises. The Petitioners in this instance were notified by the owner's agent not to enter the dining areas of the premises. If the Court should construe the statute to require notification of entry, as to those portions of the premises, such notification was given. But here, under the Maryland statute, it is unnecessary to go that far. The Maryland statute merely requires that the owner notify the potential trespasser not to "cross over" his property. Implicit in such a warning is the command to halt and advance no further on the owner's premises, when so notified.

The construction of the statute advanced here is consistent with the fact that Maryland has two criminal trespass statutes. The second count of the indictment was drawn pursuant to Section 576 of Article 27 of the Mary-

land Code (1957 Ed.). This Section of the criminal trespass act prohibits the entry of "posted" premises. Clearly, such statute pertains to notification by means of posting signs at the boundary of such property. However, by the addition of the words "crossing over", Section 577 surely refers to the failure of the trespasser to continue beyond the point where, upon discovery, the owner had notified him to halt. The words of the statute are clear and a reasonable construction is called for. It should be noted that the statute proscribes *either* entry upon *or* crossing over.

However, even if the Supreme Court, in reviewing the record before it, finds *no* evidence that the Petitioners were duly notified not to enter or cross over the dining areas of the restaurant, it has before it ample evidence that Petitioners refused to leave the premises when so requested. The Maryland Court of Appeals, in construing the Maryland Trespass Statute, has stated that statutory references to "entry upon or crossing over", cover the case of remaining upon land after notice to leave. *Bell v. State*, 227 Md. 302, 176 A. 2d 771 (R. 11); *Griffin v. State*, 225 Md. 422, 171 A. 2d 717 (1961). See also, *State v. Avent*, 253 N.C. 580, 118 S.E. 2d 47, vacated and remanded on other grounds, *Avent v. North Carolina*, 373 U.S. 375.

The Maryland Trespass Statute is neither void for vagueness nor unconstitutionally applied because the terms used are clear and have well-settled meanings. In *Alford v. United States*, 274 U.S. 264, this Court upheld the conviction of a person under a statute penalizing the building of a fire "near" any forest in the public domain. The Court said that the word "near" taken in connection with the danger to be prevented, laid down a plain enough rule of conduct for anyone who seeks to obey the law. Similarly in *Omaechevarria v. Idaho*, 246 U.S. 343, this Court held that men familiar with range conditions and desirous of

observing the law would have little difficulty in knowing what was prohibited by a statute forbidding the herding of sheep on any cattle "range," "usually" occupied by any cattle grower. It has been held further that a criminal statute penalizing a bank employee for receiving money, checks, or other property as a deposit in the bank when he has knowledge that it is insolvent, is not unconstitutionally vague although "insolvent," which has several meanings, was not defined in the statute. *Eastman v. State,* 131 Ohio State 1, 1 N.E. 2d 140, appeal dismissed 299 U.S. 505.

This Court has said in effect that persons of ordinary intelligence engaged in an activity coming within the purview of a criminal statute are in a position to know what that statute proscribes. *McGowan v. Maryland,* 366 U.S. 420, 428; *United States v. Harriss,* 347 U.S. 612, 617. The Petitioners here fall within this rule. Petitioners were engaged in an activity — namely, demonstrating against segregation in private establishments — which was, to say the least, risky. One of the risks of which they were aware was arrest (R. 49). It was testified that one or two of the group had been arrested previously for demonstrating in Hooper's Restaurant (R. 35, 56, 57); and the Trespass Statute was read to them at that time (R. 58). On that occasion the owner had to use physical force to keep demonstrators from entering the outside door (R. 59). Additionally in the present case the Petitioners arrived at the restaurant carrying picket signs which some of the group proceeded to display outside the door after Petitioners were refused service (R. 44). Under these circumstances, it could hardly be said Petitioners were mislead by the application of the Maryland Trespass Statute here. In fact, it is quite apparent that they knew, prior to entering, that they were not welcome in Hooper's Res-

taurant; and their arrest, trial, and attendant publicity thereof, were an intrinsic part of their method of expressing protest (R. 49). Furthermore, if Petitioners had really been ingenuously ignorant of the proscriptions of the Maryland statute, they would certainly have raised the issue at their trial in their defense. The record does not show that Petitioners did not know they would subject themselves to criminal penalties for remaining on the private premises of another after having been warned to leave.

In conclusion, Petitioners were not denied due process of law because their convictions under the Maryland Criminal Trespass Statute were based upon some evidence that (1) they entered the dining areas of the restaurant after warning not to do so; (2) they crossed over a portion of the premises after warning not to do so; or (3) they had actual notice prior to entry that they would be in violation of the Maryland Criminal Trespass Statute if they sought food service in Hooper's Restaurant. Further, the Maryland Criminal Trespass Statute gave fair warning, and they had actual knowledge, that to remain on the private premises of another after warning was proscribed by the statute.

CONCLUSION

It is respectfully submitted, for the reasons set forth herein, that the judgments below should be affirmed.

Respectfully submitted,

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For Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

Nos. 6, 9, 10, 12, and 60

WILLIAM L. GRIFFIN, et al., *Petitioners,*

—vs.—

STATE OF MARYLAND, *Respondent.*

CHARLES F. BARR, et al., *Petitioners,*

—vs.—

CITY OF COLUMBIA, *Respondent.*

SIMON BOUIE, et al., *Petitioners,*

—vs.—

CITY OF COLUMBIA, *Respondent.*

ROBERT MACK BELL, et al., *Petitioners,*

—vs.—

STATE OF MARYLAND, *Respondent.*

JAMES RUSSELL ROBINSON, et al., *Appellants,*

—vs.—

STATE OF FLORIDA, *Appellee.*

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA AND THE COURT OF APPEALS OF MARYLAND AND ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 6

WILLIAM L. GRIFFIN, ET AL., PETITIONERS

v.

STATE OF MARYLAND

No. 9

CHARLES F. BARR, ET AL., PETITIONERS

v.

CITY OF COLUMBIA

No. 10

SIMON BOUIE, ET AL., PETITIONERS

v.

CITY OF COLUMBIA

No. 12

ROBERT MACK BELL, ET AL., PETITIONERS

v.

STATE OF MARYLAND

No. 60

JAMES RUSSELL ROBINSON, ET AL., APPELLANTS

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ON WRITS OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA AND THE COURT OF APPEALS OF MARYLAND AND ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland

in *Griffin* (G. 76–83) [1] is reported at 225 Md. 422, 171 A. 2d 717. The opinion of the Circuit Court for Montgomery County (G. 72–75) is not reported.

The opinion of the Supreme Court of South Carolina in *Barr* (BA. 53–56) is reported at 239 S.C. 395, 123 S.E. 2d. 521. The opinions of the Richland County Court (BA. 46–51) and the Recorder's Court of the City of Columbia (BA. 41) are not reported.

The opinion of the Supreme Court of South Carolina in *Bouie* (BO. 64–67) is reported at 239 S.C. 570, 124 S.E. 2d. 332. The opinions of the Richland County Court (BO. 57–62) and the Recorder's Court of the City of Columbia (BO. 50–51) are not reported.

The opinion of the Court of Appeals of Maryland in *Bell* (BE. 10–12) is reported at 227 Md. 302, 176 A. 2d 771. The opinion of the Criminal Court of the City of Baltimore (BE. 6–9) is not reported.

The opinions of the Supreme Court of Florida in *Robinson* (R. 40–44; 46–48) are reported at 132 So. 2d 3 and 144 So. 2d 811. The opinion of the District Court of Appeals of Florida (R. 44–45) is reported at 132 So. 2d 771. The judgment of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (R. 38) and the statement of the Criminal Court of Record of Dade County (R. 36–37) are not reported.

JURISDICTION

The judgment of the Court of Appeals of Maryland in *Griffin* was entered on June 8, 1961 (G. 76).

[1] The records in *Griffin* v. *Maryland*, No. 6; *Barr* v. *Columbia*, No. 9; *Bouie* v. *Columbia*, No. 10; *Bell* v. *Maryland*, No. 12; and *Robinson* v. *Florida*, No. 60, are referred to as "G.," "BA.," "BO.," "BE.," and "R.," respectively.

The judgment of the Supreme Court of South Carolina in *Barr* (BA. 53) was entered on December 14, 1961, and a petition for rehearing was denied on January 8, 1962 (BA. 59).

The judgment of the Supreme Court of South Carolina in *Bouie* (BO. 64) was entered on February 13, 1962, and a petition for rehearing was denied on March 7, 1962 (BO. 69).

The judgment of the Court of Appeals of Maryland in *Bell* (BE. 10–12) was entered on January 9, 1962.

The judgment of the Supreme Court of Florida in *Robinson* (R. 46) was entered on September 19, 1962.

The petition for a writ of certiorari in *Griffin* was granted on June 25, 1962 (370 U.S. 935; G. 84). The case was argued on November 5 and 7, 1962, and on May 20, 1963 the case was restored to the calendar for reargument (373 U.S. 920).

On June 10, 1963, the petitions for writs of certiorari in *Barr, Bouie* and *Bell* were granted (373 U.S. 804–805; BA. 63; BO. 73; BE. 62) and probable jurisdiction was noted in *Robinson* (374 U.S. 803; R. 57).

The jurisdiction of the Court rests on 28 U.S.C. 1257 (2) and (3).

QUESTIONS PRESENTED

In *Griffin, Barr, Bouie,* and *Bell,* the question is whether a criminal trespass statute which, on its face, proscribes only entry onto private property after warning not to enter may constitutionally be applied

to Negroes who entered upon business premises open to the general public without having been forbidden but refused to leave when requested to do so.

In *Robinson,* the question is whether a criminal statute which proscribes remaining on private property after a request to leave, but only when the management deems the presence of the guest detrimental to business (or the guest is guilty of obnoxious conduct), may constitutionally be applied to a mixed group of whites and Negroes who refused to leave a restaurant after being requested to do so but without being told, despite inquiry, why they were being evicted.[2]

INTEREST OF THE UNITED STATES

These cases are the third group of "sit-in" cases to reach this Court. They involve American citizens peacefully protesting the racially discriminatory practice of certain places of public accommodation. As in the previous cases, the petitioners claim that the State involvement in their arrests and convictions violates the equal protection clause of the Fourteenth Amendment. The respondents, on the other hand, invoke the State's power to preserve law and order and its duty to protect the rights of owners of private property. Since the ultimate resolution of these competing claims involves the interests of millions of citizens and the consideration of vital constitutional is-

[2] Our statement of the questions is confined to those to which this brief is addressed.

sues, these cases are of obvious importance to the country as a whole.

In presenting the government's views, we are mindful, at the same time, of the precept that this Court will not ordinarily reach broad constitutional issues if the cases admit of disposition on narrower grounds. In our opinion, these cases may properly be decided (as we argue *infra*) on the basis of relatively narrow and well settled principles of constitutional adjudication. Accordingly, it seems unnecessary and undesirable at this time to express an opinion upon the unsettled and far-reaching questions to which much of the parties' argument has been addressed. Should the Court disagree and desire an expression of the views of the United States upon reargument, we would be prepared to make a full statement.

STATEMENT

1. GRIFFIN *v.* STATE OF MARYLAND, No. 6

a. *Statute Involved.*—Petitioners were convicted of violating Article 27, Section 577, of the Maryland Code (1957) which provides:

> Any person * * * who shall enter upon or cross over the land, premises or private property of any person * * * after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor * * * provided [however] that nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only

to prohibit any wanton trespass upon the private land of others.

b. *The Facts.*—This case involves a "sit-in" demonstration at Glen Echo Amusement Park in Montgomery County, Maryland. The Park advertised extensively. Its advertisements were directed to the general public and did not indicate that admission was in any way limited (G. 44–46).

On June 30, 1960, petitioners, young Negro students, entered the Park through the main gates (G. 6–7; 59). No tickets of admission were required for entry; tickets are purchased at individual concessions within the Park (G. 17). Petitioners, with valid tickets that had been purchased for them by white supporters, took seats on the carousel (G. 7–8; 17; 59–60). The carousel was not put in operation and petitioners were approached by one Francis J. Collins (G. 8–9; 61). Collins performed services for Glen Echo as a "special policeman" under arrangements with the National Detective Agency (G. 5; 14). At the request of the Park management, Collins had been deputized as a Special Deputy Sheriff of Montgomery County (G. 14–15; Montgomery County Code (1955) sec. 2–91). He was dressed in the uniform of the National Detective Agency and was wearing his Montgomery County Special Deputy Sheriff's badge (G. 14). Collins directed petitioners to leave the Park within five minutes, explaining that it was "the policy of the park not to have colored people on the rides, or in the park" (G. 7–8). Collins had not spoken with any of the petitioners prior to encountering them on the carousel (G. 28). Petition-

ers declined to obey Collins' direction and remained on the carousel for which they tendered tickets of admission (G. 8, 17). Collins then arrested petitioners for trespass, under Article 27, Section 577, of the Maryland Code (G. 12).

Collins took this action under the instructions of his employer. He had been told by one of the co-owners that the Park "didn't allow negroes" (G. 39). On the occasion in suit, Collins acted after consulting the Park Manager who "instructed [him] to notify [the students] that they were not welcome in the park, and we didn't want them there, and to ask them to leave, and if they refused to leave, within a reasonable length of time, then they were to be arrested for trespass" (G. 54. See also, G. 7).

At the Montgomery County Police precinct house, where petitioners were taken after their arrest, Collins preferred sworn charges for trespass against petitioners by executing an "Application for Warrant by Police Officer" (G. A, 12). Upon Collins' charge, a "State Warrant" was issued by the Justice of the Peace.[4] Petitioners were tried in the Circuit Court of Montgomery County on September 12, 1960.

[4] The original State Warrant, filed on August 4, 1960 (G.B.) alleged that each of the petitioners "[d]id enter upon and pass over the land and premises of Glen Echo Park (KEBAR) after having been told *by the Deputy Sheriff for Glen Echo Park, to leave* the Property, and after giving him a reasonable time to comply, he *did not leave* * * *." (Emphasis added). This was replaced by an amended State Warrant of September 12, 1960 (G.C.) which alleged that petitioners "did unlawfully and wantonly enter upon and cross over the land * * * after having been duly notified by an Agent of Kebar, Inc., not to do so * * *."

They were convicted of wanton trespass and ordered to pay a fine (G. F, 72–75). The convictions were affirmed by the Maryland Court of Appeals, which rejected petitioners' argument that, because of the absence of adequate warning, the Maryland statute was inapplicable (G. 79–80). It held that:

> Having been duly notified to leave, these appellants had no right to remain on the premises and their refusal to withdraw was a clear violation of the statute under the circumstances even though the original entry and crossing over the premises had not been unlawful. * * *

2. BARR *v.* CITY OF COLUMBIA, No. 9

a. *Statute Involved.*—The petitioners were convicted of violating Section 16–386, as amended, and Section 15–909 of the Code of Laws of South Carolina, which provide:

> 16–386. *Entry on lands of another after notice prohibiting same.*
>
> Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against

the person making entry as aforesaid for the purpose of trespassing.

15–909. *Disorderly Conduct, etc.*

The mayor or intendant and any alderman, councilman or warden of any city or town in this State may in person arrest or may authorize and require any marshall or constable especially appointed for that purpose to arrest any person who, within the corporate limits of such city or town, may be engaged in a breach of the peace, any riotous or disorderly conduct, open obscenity, public drunkenness, or any other conduct grossly indecent or dangerous to the citizens of such city or town or any of them. Upon conviction before the mayor or intendant or city or town council such person may be committed to the guardhouse which, the mayor or intendant or city or town council is authorized to establish or to the county jail or to the county chain gang for a term not exceeding thirty days and if such conviction be for disorderly conduct such person may also be fined not exceeding one hundred dollars; *provided,* that this section shall not be construed to prevent trial by jury.

D. *The Facts.*—This case involves a sit-in demonstration at the Taylor Street Pharmacy in Columbia, South Carolina (BA. 3; 25). The pharmacy served Negroes on the same basis as whites at all places in the store except the lunch counter (BA. 17–19). At the lunch counter, Negroes could buy food to remove from the store but could not consume it on the premises (BA. 19).

Petitioners, five Negro students at Benedict College, entered the Taylor Street Pharmacy on March 15, 1960

(BA. 25; 30–31). After some of them had made purchases in the front portion of the store, they seated themselves at the lunch counter in the rear (BA. 3; 7; 31).[4] There was a sign indicating that the manager reserved the right to refuse service, but no sign specifically barring use of the counter by Negroes (BA. 20; 37). As petitioners sat down, some of the white patrons at the counter stood up (BA. 4; 11–12). Mr. Terry, the store manager, came to the counter and informed petitioners that they should leave because they would not be served (BA. 3–4; 17).[5] Petitioners did not leave at this request (BA. 4). Police Officer Stokes then directed the manager to request again that petitioners leave, which he did (BA. 4; 14–15; 17).[6] The manager left the luncheon area after his announcement to the petitioners, and the police officer arrested petitioners without a direct request from the manager (BA. 5; 16–17).

[4] Petitioner Carter gave his reason for seeking service (BA. 25): "Being a part of the general public we felt we had a right there, and we still feel we have a right there."

[5] Petitioner Carter testified that he was approached only by the luncheonette manager—not Mr. Terry, the store manager—and told: "You might as well leave because I ain't going to serve you" (BA. 26). Petitioner Counts testified similarly (BA. 32–34).

[6] Petitioners Carter and Counts denied that the store manager or Officer Stokes ever asked them to leave (BA. 26; 29; 35). Carter also claimed that one of the white customers at the counter stood up at the time petitioners sat down because the customer was asked to do so by the store manager or cashier (BA. 25–26). Until this request, Carter testified (BA. 26): "She sat there and began eating just as if I was a human being sitting beside her, which I was."

The petitioners were well dressed and orderly, and they caused no interference with other customers (BA. 7; 21–22). The co-owner of the restaurant indicated that there was no difference between the dress and demeanor of the petitioners and other customers "other than the color of their skin" (BA. 22). There was no violence during the sit-in, nor any open threat of violence. The only untoward occurrence was the departure of some white patrons from the counter as petitioners sat down (BA. 13–14).[1]

The police had advance knowledge that the sit-in was going to occur (BA. 3). They so advised the store manager and three policemen were present at the store when the petitioners arrived (BA. 5; 9, 21). The collaboration between the store and the local police is made clear by the manager in his answer to a question whose "idea" it was to arrest petitioners (BA. 24):

> A. I'll put it that it was the both of us' idea, that if they were requested to leave and failed to leave, and given time to leave, that they would be arrested.

Petitioners were sentenced by the Recorder's Court of the City of Columbia to pay a fine of $100.00 on

[1] Mr. Terry, the store manager, however, referred to the sit-in as a "disturbance" (R. 22). When asked: "Other than the fact that they came in and sat at the lunch counter, they created no disturbance did they?" he replied: "When they sat down they created a disturbance, yes. You could have heard a pin drop in there, especially two weeks before that or whatever time before that, a large number came in, it just completely stopped everything" (BA. 23–24).

each charge or to serve thirty days on each charge, $24.50 of the fines being suspended (BA. 42; 53). The convictions were upheld by the Richland County Court (BA. 46–51). That court ruled that a restaurant proprietor can choose his customers on the basis of color without violating the Constitution, that petitioners had no right to remain in the store after the manager asked them to leave, and that the manager could call upon the police to eject petitioners. The court said (BA. 51):

> Since Defendants had notice that neither store would serve Negroes at their lunch counters, they were trespassers *ab initio.* Aside from this however, the law is that even though a person enters property of another by invitation, he becomes a trespasser after he has been asked to leave. *Shramek* v. *Walker, supra* [152 S.C. 88, 149 S.E. 331].

The Supreme Court of South Carolina affirmed (BA. 53–56), relying principally on its decision in *City of Greenville* v. *Peterson,* 239 S.C. 298, 122 S.E. 2d 826, *reversed,* 373 U.S. 244.

3. Bouie v. City of Columbia, No. 10

a. *Statute Involved.*—The petitioners were convicted of violating Section 16–386, Code of Laws of South Carolina, which is set forth, *supra*, p. 8, in connection with the *Barr* case.*

* Both petitioners were also charged with breach of the peace in violation of Section 15–909, but they were not convicted of this offense. (BO. 1). In addition, petitioner Bouie was charged with and convicted of resisting arrest but his conviction on this charge was reversed by the South Carolina Supreme Court (BO. 1; 66–67).

b. *The Facts.*—This case involves a sit-in demonstration at the Eckerd's Drug Store in Columbia, South Carolina (BO. 3). Eckerd's, one of Columbia's larger variety stores, is part of a regional chain with numerous stores located throughout the South (BO. 24). In addition to the lunch counter, Eckerd's maintains several other departments, including one for retail drugs, another for cosmetics and one for prescriptions (BO. 24). Negroes and whites are invited to purchase and are served alike in all departments of the store with the single exception of the food department which is reserved for whites (BO. 24). The store manager explained that Negroes are not served in the food department because "* * * all the stores do the same thing" (BO. 26). There was no evidence that any signs or notices were posted indicating that Negroes would not be served at the lunch counter.

On March 14, 1960, the petitioners, two Negro college students, seated themselves at a booth in the lunch room at Eckerd's and sought service (BO. 3; 27; 40).* No one spoke to petitioners or approached them to take their orders for food (BO. 26; 32). Shortly after they were seated, an employee of the

*Petitioner Neal explained why he went to Eckerd's (BO. 27): "Well, I entered Eckerd's under the impression to be served, and I felt that I was within my rights to be served food there, inasmuch as it was open to the public, I consider myself as a part of the public and I felt it was my right to be served." Petitioner Bouie stated (BO. 45): "I was served previously in all of the other departments of Eckerd's and I felt that I had a legitimate right to be served in the lunch room."

store put up a chain with a "no tresspassing" sign attached to it (BO. 29). Petitioners remained seated for about fifteen or twenty minutes; each sat with an open book before him and one worked on a puzzle (BO. 6; 31; 40). During this time, white persons were seated in the lunch room and were being served (BO. 30).

The Columbia police, called by Eckerd's manager, approached petitioners and, in the presence of the police, the store manager told petitioners to leave "* * * because we aren't going to serve you" (BO. 3; 9; 26). Petitioners remained seated and the Chief of Police then asked them to leave (BO. 3–4). Bouie asked the Chief of Police "For what," and he replied (BO. 4): "Because it's a breach of the peace * * *." Bouie again asked the Chief of Police "for what" (BO. 4). The Chief then "reached and got him by the arm * * * and * * * had to pull him out of the seat" (BO. 4). He then seized him by the belt, gave him a "preliminary frisk", and marched him out of the store (BO. 4). Bouie testified that he offered no resistance and told the Chief, "That's all right, Sheriff, I'll come on" (BO. 42).

The arresting officer described the conditions surrounding the arrest of petitioners as follows (BO. 8; 11):

> Q. When you observed these two defendants, was either of them engaged in any riotous or disorderly conduct?
>
> A. Well certainly there was no riotous. If it was disorderly conduct, it was because of the fact that the Manager had asked them to

move, in my presence, and they refused to move.

Q. Other than that there was nothing which you would say was any disorderly conduct.

A. No.

Petitioners were tried in the Recorder's Court of the City of Columbia without a jury and were convicted of trespass and sentenced to pay fines of $100.00 or serve thirty days in jail, $24.50 of the fines being suspended (BO. 51). Petitioner Bouie was convicted of resisting arrest and fined $100.00 or thirty days, $24.50 of the fine being suspended (BO. 51). Bouie's sentences were to run consecutively (BO. 51).

Petitioners appealed to the Richland County Court which sustained the judgments and sentences of the Recorder's Court in the same opinion upholding the judgments in the *Barr* case (BO. 57–62).

On February 13, 1962, the Supreme Court of South Carolina affirmed the convictions for trespass, but reversed the conviction of petitioner Bouie for resisting arrest (BO. 64–67). The Court relied principally on its decisions in the *Peterson* and *Barr* cases (BO. 66).

4. BELL *v.* STATE OF MARYLAND, No. 12

a. *Statute Involved.*—The petitioners were convicted of violating Article 27, Section 577, of the Maryland Code (1957) which has already been set forth in connection with the *Griffin* case (*supra,* p. 5).

b. *The Facts.*—This case involves a sit-in demonstration in Hooper's Restaurant in Baltimore, Mary-

land (BE. 3). The restaurant is owned by the Hooper Food Company, Inc., which has several other restaurants in the city (BE. 30).

Petitioners, twelve Negro students, were part of a group of fifteen to twenty Negro students who entered Hooper's Restaurant on June 17, 1960 (BE. 3). In the lobby of the restaurant, the hostess, acting on orders of Mr. Hooper, the owner, told them: "I'm sorry, but we haven't integrated as yet" (BE. 23–24). She testified that the group was properly dressed, and that, had they been white persons, they would have been seated (BE. 26).

Some of the students succeeded in by-passing the hostess and manager and took seats in the main dining room and in a lower level grill (BE. 24–25; 43). At the time the students entered the service area of the restaurant, the manager was explaining to the leader of the group that the restaurant's policy prohibited service to Negroes (BE. 27–28). While many of the group sat one at a table, this action did not, nor was it intended to, interfere with the service of other customers (BE. 44; 46). [10]

The manager, at Mr. Hooper's request, called the police (BE. 28; 33). The State trespass statute was read to the group by the manager and some of them left the premises (BE. 28–29; 33).[11] The remaining

[10] Petitioner Quarles testified that he told Mr. Hooper that (BE. 44): * * * we were not there to interrupt his business and we were not there to distort or destroy his business. We were simply there seeking service as humans and also as citizens of the United States of America."

[11] Petitioner Quarles explained that he remained, knowing that he would be arrested "[b]ecause I think arrest is a small price to pay for your freedom as a human being" (BE. 49).

students were then asked to identify themselves and Mr. Hooper went to a police station to obtain warrants for their arrest (BE. 29; 39).[12] The petitioners were served with the warrants and their trials followed.

Petitioners waived preliminary hearings in the Magistrates' court and were indicted by the Grand Jury of Baltimore City (BE. 6–7). The indictment was in two counts and charged (BE. 14–15) that petitioners—

> [1] * * * unlawfully did enter upon and cross over the land, premises and private property of a certain corporation in this State, to wit, Hooper Food Co., Inc., a corporation, after having been duly notified by Albert Warfel, who was then and there the servant and agent for Hooper Food Co., Inc., a corporation, not to do so; * * *
>
> [2] * * * unlawfully did enter and trespass on certain property of Hooper Food Co., Inc., a corporation, which said property was then and there posted against trespassers in a conspicuous manner; * * *

Each petitioner, after trial without jury in the Criminal Court of Baltimore, was found guilty on the first count and not guilty on the second count (BE. 6–9). Fines of $10.00 were imposed but the fines were suspended on the finding of the trial court that "* * * these people are not law-breaking people; that their

[12] During the sit-in, other students picketed outside of the restaurant (BE. 44). None in this group were arrested.

action was one of principle rather than any intentional attempt to violate the law" (BE. 9).

On January 9, 1962, the Maryland Court of Appeals affirmed petitioners' convictions (BE. 10–12). The court relied principally on its decision in the *Griffin* case (BE. 11).

5. ROBINSON *v.* STATE OF FLORIDA, No. 60

a. *Statute Involved.*—Appellants were found guilty of violating Section 509.141 of the Florida Statutes which provides:

> (1) The manager, assistant manager, desk clerk or other person in charge or in authority in any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall have the right to remove, cause to be removed, or eject from such hotel or apartment house, tourist camp, motor court, restaurant, rooming house or trailer court in the manner hereinafter provided, any guest of said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, who, while in said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises is intoxicated, immoral, profane, lewd, brawling, or who shall indulge in any language or conduct either such as to disturb the peace and comfort of other guests of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court or such as to injure the reputation or dignity or standing of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, or who, in the opinion of the

management, is a person whom it would be detrimental to such hotel, apartment house, tourist camp, motor court, restaurant, rooming house, or trailer court for it any longer to entertain.

(2) The manager, assistant manager, desk clerk or other person in charge or in authority in such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall first orally notify such guest that the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court no longer desires to entertain him or her and request that such guest immediately depart from the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court. If such guest has paid in advance the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall, at the time oral or written request to depart is made, tender to said guest the unused or unconsumed portion of any such advance payment. Said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court may, if its management so desires, deliver to such guest written notice in form as follows:

"You are hereby notified that this establishment no longer desires to entertain you as its guest and you are requested to leave at once and to remain after receipt of this notice is a misdemeanor under the laws of this state."

(3) Any guest who shall remain or attempt to remain in such hotel, apartment house, tourist camp, motor court, restaurant, rooming house

> or trailer court after being requested, as aforesaid, to depart therefrom, shall be guilty of a misdemeanor, and shall be deemed to be illegally upon such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises.[13]

b. *The Facts.*—This case involves a demonstration at the Shell City Restaurant in Miami, Florida. The restaurant is a part of a large store in which Negroes are served on the same basis as whites (R. 24; 29). The restaurant is separated from the rest of the store by a glass enclosure (R. 15).

Appellants, a mixed group of eighteen Negroes and whites, entered the restaurant on August 17, 1960, and seated themselves at five tables (R. 15–16).

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[13] The statute further provides:

"(4) In case any such guest, or former guest, of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, or any other person, shall be illegally upon any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises, the management, or any employee of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, may call to its assistance any policeman, constable, deputy sheriff, sheriff or other law enforcement officer of this state, and it shall be the duty of each member of the aforesaid classes of officers, upon request of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court management, or hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court employee, forthwith and forcebly, if necessary, to immediately eject from such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, any such guest, or former guest, of other person, illegally upon such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises, as aforesaid."

The manager of the store—Mr. McKelvey—saw appellants enter (R. 16). However, he did not approach them. Rather, he and three other store employees seated themselves at another table and ordered coffee (R. 16). The manager observed the group for one half hour (R. 17). Shortly thereafter, appellant Perkins approached the manager. He complained that he had not been served and asked when he could expect service (R. 17). He was told by the manager that he and the others in his group would not be served (R. 17; 25). Perkins asked to speak further with McKelvey, but McKelvey told him he had nothing further to discuss with him (R. 17). Mr. McKelvey then spoke with another store executive, after which he called the police (R. 17).[14]

The police arrived ten to twelve minutes after Mr. McKelvey's call (R. 17). At this time, Mr. McKelvey, accompanied by a police officer and another store employee, approached each table and told the persons sitting there that they would not be served and asked them to leave (R. 18; 28; 33). One of the appellants asked McKelvey why he was being asked to leave and McKelvey told him that he "had nothing further to state" (R. 19). Appellants were then asked to leave by the police officers but they persisted in their refusal to leave and they were arrested (R. 33).

[14] There was testimony that a group of about one hundred persons had gathered outside of and within the restaurant (R. 23; 25). However, the arresting officer testified that there was only a small group of persons present when he arrived and that restaurant tables were occupied by persons other than appellants (R. 34–35).

At appellants' trial, Mr. McKelvey explained that he refused service to Negroes "Because I feel, definitely, it is very detrimental to our business to do so" (R. 19). When asked: "Is it not a fact that Shell's City does not have the official opinion that it is detrimental to their business for Negroes to purchase products in other parts of their store?", he replied: "That is correct" (R. 24). Mr. Williams, a Vice President and Auditor of Shell, also testified that he believed service of Negroes in the resturant would be detrimental to his business (R. 29).

The appellants were tried in the Criminal Court of Record of Dade County, Florida, on August 26, 1960 (R. 3). The information filed against them charged that on August 17, 1960, they did, in Miami, Florida (R. 1–2):

> * * * unlawfully remain or attempt to remain in a restaurant after being requested to depart therefrom in violation of Section 509.141(3), * * * the manager, assistant manger, or other person in charge or in authority of the aforesaid restaurant, * * * being then and there of the opinion that if the above-named defendants were entertained or served it would be detrimental to the said restaurant, * * *.

Appellants were found guilty, but the imposition of sentence was stayed and they were placed on probation (R. 4–7; 36–37). After a "circuitious and devious route" through Florida appellate courts, the judgment of the trial court was affirmed by the Supreme Court of Florida on September 19, 1962 (R. 46–48). The latter court said (R. 48):

> We find it unnecessary to engage in any prolonged discussion of the merits of the case. The sole point presented is the matter of the validity vel non of Section 509.141, Florida Statutes. We have concluded, as did the trial judge, that the statute is nondiscriminatory and that it reflects a valid exercise of the legislative power of the State of Florida. * * *

ARGUMENT

INTRODUCTION AND SUMMARY

In each of these cases, a group of Negroes, sometimes accompanied by white sympathizers, unsuccessfully sought service at a privately owned business establishment generally open to the public. Three of the cases (*Barr,* No. 9, *Bouie,* No. 10, and *Robinson,* No. 60) involve lunch counters or restaurants operated in connection with retail stores which welcomed the Negro trade in all other portions of the establishment. The two Maryland cases involved facilities—an amusement park (*Griffin,* No. 26) and a restaurant (*Bell,* No. 12)—which, at the time, refused Negro customers. In each case, petitioners were denied the service, directed to leave the premises, and, upon refusing, were arrested by State officers. In no instance, however, were they warned, by sign or word, *before entering,* that their presence was forbidden. Yet, in four of the cases (Nos. 6, 9, 10 and 12) the petitioners were convicted of trespass under statutes (Md. Code, Art. 27, Sec. 577, *supra,* p. 5; S.C. Code, Sec. 16–386, *supra,* p. 8) which, on their face, condemn only *entry* after notice not to enter. While the statute in the re-

maining case (No. 60) proscribes remaining after notice to leave, it does so only when the entrant is personally obnoxious, either because of specified conduct or because his continued presence is deemed detrimental to business. See Fla. Stat., Sec. 509.141, *supra,* p. 18. Yet, the appellants there were never told that their exclusion was required on one of the statutory grounds. Indeed, their express inquiry why they were requested to leave was left unanswered.

On these facts, we think it plain that petitioners were denied due process. They were not adequately warned that their conduct was unlawful. In four cases, nothing in the statute notified them that remaining after being requested to leave would subject them to criminal penalties. Though we must, of course, accept the State court's ruling that the local enactment in fact condemned such conduct, the failure of the law itself to say so makes it unconstitutionally vague as applied to these petitioners. Likewise, in the fifth case, the petitioners, on the face of the statute, were entitled to fair notice that their exclusion was justified on one or more of the specified grounds. If, as we are now told, the law requires no such explanation, then it is void for failure to give adequate warning that this is so.

It will be said that our argument depends upon a narrow reading of the local statutes involved and a strict application of the rule of vagueness. This is accurate. But there are compelling reasons for such a course in these cases. At the outset, we detail those considerations, applicable to all of the cases. As we show, the laws at the base of these prosecutions must

be tested according to strict standards, not only because they impose criminal sanctions, but because they are here applied against peaceful conduct which is, if illegal, plainly not immoral. They proscribe acts which the State has a doubtful interest in condemning. Moreover, the statutes affect the exercise of First Amendment rights and must be judged for their inhibiting effect on the free expression of ideas.

Having defined and justified the general approach, we examine each particular statute and its application in each case. Noting the novel and unexpected construction necessary to fit the facts, we conclude in each instance that the statute is unconstitutionally vague as applied.

THE TRESPASS STATUTES UNDERLYING THE CONVICTIONS ARE UNCONSTITUTIONALLY VAGUE AS APPLIED TO THE CONDUCT REFLECTED BY THE RECORDS

A. THE GENERAL APPROACH

We have already said that we deem it proper to test the trespass statutes in suit, as applied in these cases, by somewhat stricter standards than would be appropriate in a different context. Since the reasons govern all the cases, it is convenient to discuss them first.

1. At the outset, it must be remembered that we deal here with *criminal* laws. Much has been said in these cases about the property interest of the storeowner and his right freely to choose his customers. But the rights of the proprietor are not necessarily co-extensive with the scope of the criminal statutes which protect private property. There may be a right in the

owner to evict an unwelcome guest although the latter has committed no crime, and commits none in refusing to leave. One may be, or become, a trespasser in the sense of the civil law and yet not be guilty of *criminal* trespass. These statutes are not rules of property, but criminal laws which presumably condemn only the more serious acts against property. Accordingly, the usual requirement of specificity common to all criminal enactments applies fully here.[15]

The general rule is plain: "Before a man can be punished, his case must be plainly and unmistakably within the statute." *United States* v. *Brewer*, 139 U.S. 278, 288. A vague criminal statute "violates the first essential of due process." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391. It is, like "the ancient laws of Caligula," "a trap for the innocent." *United States* v. *Cardiff*, 344 U.S. 174, 176. The duty of warning before punishing applies equally to the States. The Fourteenth Amendment "imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required." *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 458. See, also, *Wright* v. *Georgia*, 373 U.S. 284; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278; *Winters* v. *New*

[15] The exception in favor of common-law crimes with a "well-settled common law meaning" is inapplicable to these statutory offenses. See *Connally* v. *General Construction Co.*, 269 U.S. 385, 391. On the contrary, these enactments, in derogation of the common law (3 Burdick, *The Law of Crime*, Sec. 720) must be strictly construed. See *Brown* v. *Barry*, 3 Dall. 365; 3 Sutherland, *Statutes and Statutory Construction* (3d ed.), chap. 62.

York, 333 U.S. 507, 519; *Musser* v. *Utah,* 333 U.S. 95, 97; *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453.[16]

2. Another relevant consideration is the character of the conduct condemned in these cases. It cannot be said here that, regardless of the law, petitioners must have known what they were doing was wrong. Compare *Screws* v. *United States,* 325 U.S. 91, 101–102; *Williams* v. *United States,* 341 U.S. 97, 101–102. They were not acting with evil motive, nor were their acts so plainly injurious that notice was superfluous. At worst, their behavior was on the borderline of legality, and the morality of their purpose is hardly

[16] The Maryland Court of Appeals has repeatedly recognized that fair notice is an element of due process. See, *e.g.*, *State* v. *Cherry*, 224 Md. 144, 167 A. 2d 328 (1960); *Police Commissioner of Baltimore* v. *Siegel Enterprises, Inc.*, 223 Md. 110, 162 A. 2d 727 (1959); *Craig* v. *State*, 220 Md. 590, 155 A. 2d 684 (1959); *McGowan* v. *State*, 220 Md. 117, 151 A. 2d 156 (1958); *State* v. *Magaha*, 182 Md. 122, 32 A. 2d 477 (1943). In *State* v. *Magaha*, *supra*, the court explained the requirement of certainty (182 Md. at 125): "* * * It is an established doctrine of constitutional law that a penal statute creating a new offense must set forth a reasonably ascertainable standard of guilt and must be sufficiently explicit to enable a person of ordinary intelligence to ascertain with a fair degree of precision what acts it intends to prohibit, and therefore what conduct on his part will render him liable to its penalties. A statute which either commands or forbids the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess at its meaning and differ as to its application violates the constitutional guarantee of due process of law."

The South Carolina courts also have recognized the fair notice requirement. See, *e.g.*, *Gaud* v. *Walker*, 214 S.C. 451, 53 S.E. 2d 316 (1949); *Byrd* v. *Lawrimore, County Treasurer*, 212 S.C. 281, 47 S.E. 2d. 728 (1948).

debatable."[17] Whether or not petitioners' conduct was a civil trespass or a tort is irrelevant to the question of adequate notice for the purposes of criminal liability. Cf. *Pierce* v. *United States,* 314 U.S. 306. The statutes themselves, as interpreted and applied here, required no finding of bad faith or intent to injure and the adjudication of guilt implies no such finding. Compare *Gorin* v. *United States,* 312 U.S. 19, 27–28; *United States* v. *Ragen,* 314 U.S. 513, 524; *Communications Assn.* v. *Douds,* 339 U.S. 382, 412–413; *Dennis* v. *United States,* 341 U.S. 494, 515–516; *United States* v. *National Dairy Corp.,* 372 U.S. 29, 35. There is accordingly every reason to demand clear forewarning here before the sanctions of the criminal law are brought to bear.

Nor is this all. Not only was the conduct held criminal here not *malum in se,* but petitioners may well have conceived that their actions were protected against State interference by the Federal Constitution. Indeed, in the absence of violence, disorder or other disturbance of the peace, it is, at the least, debatable whether the State had any legitimate public objective to serve in lending its policeman, its prosecutor and its magistrate to support the storeowner's "private" policy of racial discrimination, cf. *Shelley* v. *Kraemer,* 334 U.S. 1; *Barrows* v. *Jackson,* 346 U.S.

[17] Professor Freund has noted, "[i]n applying the rule against vagueness or overbroadness something, however, should depend on the moral quality of the conduct." See Freund, *The Supreme Court and Civil Liberties,* 4 Vand. L. Rev. 533. 540 (1951). See also Note, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. of Pa. L. Rev. 67, 87, n. 98 (1960).

249, or his decision to ban from his "private" premises the exercise of First Amendment rights. See *Thornhill* v. *Alabama,* 310 U.S. 88; *Marsh* v. *Alabama,* 326 U.S. 501. Treading so close to the constitutional line, it was incumbent on the State to give most specific warning of the conduct sought to be prohibited and to define the offense with particularity.

3. Constitutional doubts about the validity of the statutes aside, the First Amendment context of these cases is of independent significance. What Mr. Justice Harlan wrote in *Garner* v. *Louisiana,* 368 U.S. 157, 201, is applicable here:

> There was more to the conduct of those petitioners than a bare desire to remain at the "white" lunch counter and their refusal of a police request to move from the counter. We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served in order to demonstrate that their race was being segregated in dining facilities in this part of the country.
>
> Such a demonstration, in the circumstances of these two cases, is as much a part of the "free trade in ideas," *Abrams* v. *United States,* 250 U.S. 616, 630 (Holmes, J., dissenting), as is verbal expression, more commonly thought of as "speech." It, like speech, appeals to good sense and to "the power of reason as applied through public discussion," *Whitney* v. *California,* 274 U.S. 357, 375 (Brandeis, J., concurring), just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This Court has never limited the right to speak,

> a protected "liberty" under the Fourteenth Amendment, *Gitlow* v. *New York,* 268 U.S. 652, 666, to mere verbal expression. *Stromberg* v. *California,* 283 U.S. 359; *Thornhill* v. *Alabama,* 310 U.S. 88; *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 633–634. * * *

Here, also, petitioners were plainly protesting against unjust discrimination. Their evident purpose was to demonstrate the existence of the condition, protest against it, and solicit public sympathy for their cause or indignation at the treatment they were made to endure. In short, their object was to prick the conscience of the community and of the Nation. They chose a peaceful course. No violence resulted, no disturbance of the peace ensued. In the circumstances, "stricter standards of permissible statutory vagueness may be applied." *Smith* v. *California,* 361 U.S. 147, 151. See, also, *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432; *Winters* v. *New York,* 333 U.S. 507, 509–510; 517–518; *Herndon* v. *Lowry,* 301 U.S. 242; *Stromberg* v. *California,* 283 U.S. 359.

The reasons are plain. Pervasive or loosely drawn statutes affecting the exercise of First Amendment rights tend to encroach on the area of constitutionally protected conduct. "[A] man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California, supra.* There are two dangers. The first results from the *inhibiting* effect of permitting vague enactments to be enforced or specific words to be given an unlikely interpretation. If he cannot be sure what is included within the ban of the statute, the citizen may timidly forfeit his right to express

himself in a manner which the law does not, or cannot, forbid. Equally dangerous is the absence of a clear guide for the policeman who must initially administer the law. However clearly the indictment may later describe the charge, or the judge ultimately define the scope of the offense for the jury's benefit, the vice of the vague statute is that it leaves the peace officer at sea. With the best intentions, he may encroach on conduct which, it turns out, the law does not condemn as criminal (whether or not it might provide basis for a civil suit). For the less scrupulous policeman, the statute is a license for abuse of power or for discriminatory enforcement, especially in an area, as here, where the pressures of local prejudice invite misuse of authority. "[A] vague and broad statute lends itself to selective enforcement against unpopular causes." *N.A.A.C.P.* v. *Button, supra,* at 435. In either event, the arrest, or the order to disperse under threat of arrest, effectively denies the exercise of First Amendment rights, whatever the ultimate disposition of the matter.

These reasons, we submit, justify a close examination of the statutes in suit. Barring other constitutional objections—which we think it unnecessary to discuss [18]—they can be sustained in this special con-

[18] So saying, we do not abandon the argument advanced last Term in *Griffin* v. *Maryland*—that, having clothed the employee of Glen Echo with its police powers, the State became so inextricably involved in the discrimination practiced by the park that it could not, consistently with the Fourteenth Amendment, arrest, prosecute and convict the victims of that discrimination. Indeed, the decisions in *Peterson* v. *Greenville*, 373 U.S. 244, and *Lombard* v. *Louisiana*, 373 U.S. 267, seem to lend support to that contention. Rather than repeat the argu-

text only if they gave clear forewarning that the conduct charged was prohibited.

B. THE MARYLAND AND SOUTH CAROLINA CASES

The petitioners in *Barr* and *Bouie* entered retail stores in Columbia, South Carolina, which cater to Negroes and whites on the same basis except where food is served. There were no signs barring Negroes from the food departments. Indeed, in *Barr,* Negroes could buy food at the lunch counter to "take out," but could not consume it on the premises. In *Griffin,* the petitioners entered the Glen Echo Amusement Park through its main gates. No one directed them not to enter,[19] and tickets of admission were not required. Petitioners took seats on a carousel. They were approached by Officer Collins and asked to leave the Park within five minutes. They were arrested when they declined to obey Collins' direction and remained on the carousel. In *Bell,* petitioners entered Hooper's Restaurant in Baltimore, Maryland. There was no sign posted outside of the building barring admission to Negroes. In the restaurant lobby, petitioners were confronted by a hostess who told them: "I'm sorry, but we haven't integrated as yet." Nevertheless, petitioners took seats and were eventually arrested.

Thus, in each case, it is clear that petitioners entered

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ment here, however, we respectfully refer the Court to the brief for the United States as *amicus curiae* in No. 26, October Term, 1962.

[19] Glen Echo co-owner Abram Baker testified that Officer Collins had been instructed to stop Negroes at the main gate and tell them that they could not enter (G. 36), but that procedure was not followed in this case.

without notice that entry was forbidden. Nor is it charged that their initial entry violated the law. The trespass alleged is the refusal to leave after request. Yet, at the time, there was no indication in the local law that such a refusal was subject to criminal sanctions. The South Carolina and Maryland statutes did not say so. And, so far as we are able to determine, no court in either State had so held.

1. The South Carolina statute (p. 8) punishes, in terms, only "Every entry * * * after notice from the owner or tenant prohibiting such entry." There is nothing in the statute to suggest that it also applies to a person who is on the land without having received any notice.[20] Nor have we found any South Carolina case decided prior to the events in *Barr* and

[20] When the South Carolina courts have been called upon to interpret Section 16–386, they have applied strict standards and have proceeded on the theory that where a person wishes to assert his right to exclude individuals from his property and have the backing of the criminal law, it is not too much to ask him to give clear notice. Thus, the cases decided under Section 16–386 place special emphasis on the requirement that clear notice be given before the person charged with trespass enters upon the property. For example, in *State* v. *Mays*, 24 S.C. 190, 195 (1886), the court referred to "giving notice to the defendant not to trespass upon the land" as "so essential a matter." And, in *State* v. *Green*, 35 S.C. 266, 14 S.E. 619 (1892), the court said:

"* * * under the view we take of this provision of our laws [G.S. 2507, a predecessor to 16–386], when the owner or tenant in possession of land forbids entry thereon, *any person with notice who afterwards* enters such premises is liable to punishment." (Emphasis added).

See also, *State* v. *Cockfield*, 15 Rich. 53 (1867); *State* v. *Tenny*, 58 S.C. 215, 36 S.E. 555 (1900); *State* v. *Olasov*, 133 S.C. 139, 130 S.E. 514 (1925).

Bouie that interprets Section 16-386 as covering persons who enter upon property without being forbidden to do so but subsequently are asked to leave. The only decision relied upon by the South Carolina courts in these cases—*Shramek* v. *Walker,* 152 S.C. 88, 149 S.E. 331 (1929)—is plainly inapplicable. That case involved civil trespass, and it is elementary that the test of civil and criminal liability is not always the same.[21]

To be sure, the South Carolina Supreme Court decided in the instant cases that the statute applies to petitioners' conduct. But it is well settled that the requirement of adequate forewarning is not satisfied by judicial construction of the statute in the very case in which it is challenged as too broad and indefinite.[22] Such a retrospective interpretation "is at war with a fundamental concept of the common law." *Pierce* v. *United States,* 314 U.S. 306.[23] In *Lanzetta* v. *New*

[21] See Bishop, *Criminal Law* (9th Ed., 1923), Vol. 1, Sec. 208:

"In civil jurisprudence, when a man does a thing by permission and not by license, and, after proceeding lawfully part way, abuses the liberty the law has given him, he shall be deemed a trespasser from the beginning by reason of his subsequent abuse. But this doctrine does not prevail in our criminal jurisprudence; for no man is punishable criminally for what was not criminal when done, even though he afterwards adds either the act or the intent, yet not the two together."

[22] For that reason, too, *Charleston* v. *Mitchell,* 239 S.C. 376, 123 S.E. 2d 512 (1961)—now pending before this Court on certiorari; No. 8, this term—fails to cure the defect here, for it was decided subsequent to the events which led to petitioners' arrests and convictions.

[23] *Pierce* involved a statute making it criminal to pretend to be an "officer * * * acting under the authority of the United States, or any Department, or any officer of the Government thereof." It was held material error to refuse to instruct that pretending to be an officer of the TVA, a government corpora-

Jersey, 306 U.S. 451, 456, the Court said:

> It would be hard to hold that, in advance of judicial utterance upon the subject, [defendants] * * * were bound to understand the challenged provision according to the language later used by the court.

See also, *Smith* v. *Cahoon*, 283 U.S. 553, 563–565.

As Professor Freund summarized:[24]

> The objection to vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss.

To be sure, as it is written, the statute at issue does not seem "vague," at least in the layman's sense. Yet, as construed in these cases, the language is unconstitutionally vague because the words do not convey the full import of what the statute is now said to prohibit. At best, the text left it uncertain whether petitioners' conduct was made criminal. Nor is this a case where the problem of interpretation, with its attendant possibility of different constructions, was apparent from the statute itself. The statute wholly

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tion, would not be within the statutory prohibition. This Court declared (314 U.S. at 311): "* * * [J]udicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

[24] See Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 541 (1951). See also, Note, *Due Process Requirement of Definiteness in Statutes*, 62 Harv. L. Rev., 77, 82 (1948).

failed to warn those to whom it was addressed that it might be interpreted as here. The constitutional principle applies equally whether lack of adequate notice results from a loose text or a loose reading of a text that is apparently limited.

It is noteworthy that even the South Carolina legislature seems to have entertained doubts about the application of Section 16–386 in these cases.[25] Shortly after the events in *Barr* and *Bouie*—on May 16, 1960—Section 16–388 was added to the South Carolina Code. See Acts and Joint Resolutions of South Carolina, 1960, pp. 1729–1730. This new provision expressly applicable to those who have permissibly entered a privately owned "place of business," in terms condemns failing and refusing "to leave immediately upon being ordered or requested to do so."[26] The in-

[25] Another difficulty with Section 16–386 is its apparently exclusive concern with trespass on *open land*. As amended in 1952, it proscribes "Every entry upon the lands of another *where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another* * * *." It is certainly questionable whether this language provided adequate forewarning that trespass on business premises was punishable. Applying the rule of *ejusdem generis*—recognized in South Carolina, *Vassey* v. *Spake*, 83 S.C. 566, 65 S.E. 825 (1909)—a reasonable construction of Section 16–386 is that it applies only to farm or pasture lands.

[26] Section 16–388 was involved in *Peterson* v. *City of Greenville*, 373 U.S. 244. It provides:

"*Entering premises after warning not to do so or failing to leave after requested.*

"Any person:

"(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of an-

ference is plain that the legislature realized that the earlier statute might not reach this conduct.[17] Cf. *Garner* v. *Louisiana*, 368 U.S. 157, 168.

2. The absence of forewarning in the statute underlying the convictions in *Griffin* and *Bell* is equally apparent. On its face, Article 27, Sec. 577, of the Maryland Code punishes only those who "enter" on private property "after having been duly notified * * *." Petitioners in *Griffin* were not notified "by the owner or his agent" of the Glen Echo Amusement Park that they could not enter. They did in fact

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other person, after having been warned, within six months preceding, not to do so or

"(2) Who, having entered into the dwelling, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,

"Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days."

[17] The petitioners in *Barr* were also convicted of breaching the peace. But there was no evidence that petitioners' demeanor in any way differed from that of other customers. There was no violence during the sit-in and the only possible indication that a disturbance might occur was when *white patrons* left the counter as petitioners sat down. While the store manager did consider petitioners' mere presence at the counter a "disturbance," he testified only that when they sat down "you could have heard a pin drop * * *." Clearly, on the basis of this record, there is no evidence to support a conviction for breach of the peace. See *Wright* v. *Georgia*, 373 U.S. 284, 293; *Taylor* v. *Louisiana*, 370 U.S. 154; *Garner* v. *Louisiana*, 368 U.S. 157; *Thompson* v. *Louisville*, 362 U.S. 199. Nor can the possibility of disorder by others justify an arrest for breach of the peace. *Wright* v. *Georgia*, *supra*; *Edwards* v. *South Carolina*, 372 U.S. 229.

enter free from any interference.[25] Nor were petitioners in *Bell* afforded proper notification before they entered Hooper's Restaurant. In both cases petitioners had no way of knowing that their refusal to leave could subject them to criminal prosecution.

Here, also, the statutory language stood alone. There was then no "judicial gloss" which suggested the applicability of the statute to the conduct now held within its reach. The conclusion of the Maryland Court of Appeals in *Griffin* that "[h]aving been duly notified to leave, these appellants had no right to remain on the premises and their refusal to withdraw was a clear violation of the statute under the circumstances even though the original entry and crossing over the premises had not been unlawful" (G. 80), is unsupported by any citation of Maryland authority. Even the foreign decisions relied upon are of doubtful relevance.

Thus, the Maryland court cited *State* v. *Fox,* 254 N.C. 97, 118 S.E. 2d 58, a case (now pending before this Court, No. 5, this Term), in which the North Carolina Supreme Court affirmed convictions for trespass by relying on its decision in *Avent* v. *North Carolina,* 253 N.C. 580, 118 S.E. 2d 47, judgment vacated and remanded, 373 U.S. 375, which in turn, invoked an earlier decision apparently supporting application of the North Carolina statute to the type of conduct in

[25] It is noteworthy that the original State Warrants alleged that petitioners "[d]id enter upon and pass over the land * * * after having been told * * * to leave * * * and after giving * * * a reasonable time to comply * * * did not leave." The amended warrant corrected this patently absurd charge. See note 3, *supra.*

suit.[29] But, assuming the North Carolina Supreme Court had sufficiently clarified its own trespass statute to give fair warning of a broad reading, it does not follow that the petitioners here were sufficiently forewarned by the statute of Maryland. Reliance on *Commonwealth* v. *Richardson,* 313 Mass. 632, 48 N.E. 2d 678, is obviously misplaced since the statute there involved proscribed *both* entering and remaining after having been forbidden to do so. Moreover, as we show later (*infra,* p. 46) the court vacated the convictions in that case on the ground that the defendants were improperly charged with entry after warning, while they had, in fact, been requested to leave only after penetrating the building. Finally, the Maryland court's assertion that such words as "enter upon" or "cross over" are synonymous with "trespass" is, at best, debatable; there is contrary authority. See, *e.g., State* v. *Hallback,* 40 S.C. 298, 305, 18 S.E. 919: "* * * it is clear that *trespass* is a more comprehensive term than 'entry,' and, indeed, includes it * * *."

In *Bell*—which involved events occurring prior to the *Griffin* decision on appeal—the court concluded that the petitioners' conduct was covered by Article 27, Sec. 577, merely by relying on its decision in *Griffin.* None of the Maryland cases arising prior to *Griffin* and *Bell* and interpreting Article 27, Sec.

[29] The decision relied on in *Avent, State* v. *Clyburn,* 247 N.C. 455, 101 S.E. 2d 295, involved a "sit-in" at an ice cream parlor where signs announced the discriminatory practice of the establishment. That decision, in turn, rests on earlier cases construing a wholly separate statute which, on its face, prohibits remaining on private property after committing acts which will likely result in a breach of the peace.

577, involves a comparable situation.[30] The Maryland court, like the South Carolina court, broadly construed its statute for the first time in the cases involving these petitioners.

3. The conclusion that the South Carolina and Maryland courts have, in these cases, given a novel and forced construction to their respective statutes which petitioners could not fairly be expected to anticipate is confirmed by the teaching of other jurisdictions.

At the outset, we note that other States intending to prohibit both entry after warning and remaining after a request to leave have experienced no difficulty in drafting appropriate statutes which clearly distinguish between the two situations. Indeed, South Carolina herself recently enacted Section 16–388 (*supra*, p. 36) which covers both a person who "enters into the dwelling house [etc.] * * * after having been warned * * * not to do so * * *" and one who "without having been warned * * * fails and refuses * * * to leave immediately upon being ordered or requested to do so. * * *" Fourteen States and the District of Columbia have substantially similar statutes,[31] and in four other States the statute penalizes both entering

[30] *Bishop* v. *Frantz*, 125 Md. 183, 93 A. 412 (1915) involved a malicious prosecution charge arising out of an arrest for trespass. It is clear from this case, however, that the alleged trespasser had been given clear notice not to enter on the property. *Krauss* v. *State*, 216 Md. 369, 140 A. 2d 653 (1958) reversed a conviction under Article 27, Sec. 577, on the grounds that the notice not to enter was inadequate. *Cf. Griffin* v. *Collins*, 187 F. Supp. 149, 153 (D. Md.).

[31] Ala. Code, Tit. 14, sec. 426; 28 Conn. Gen. Stat. Ann. 53–103; D.C. Code, Tit. 22–3102; Florida Stat. Ann. sec. 821.01;

after notice and remaining, but only in restricted circumstances.[32] Seven States have statutes which deal only with entering and use substantially the same language as the South Carolina and Maryland statutes involved in these cases,[33] while the statutes of six States, also restricted to entries, are more narrowly drawn.[34] Seven States have statutes that proscribe only the refusal to leave after being requested to do so,[35] and trespass statutes not distinguishing between entering

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Rev. Laws of Hawaii, sec. 312–1; Ill. Crim. Code of 1961, C. 38, sec. 21–3; Ind. Stat. Ann. sec. 10–4506; Mass Laws Ann. C. 266, sec. 120; Mich. Stat. Ann. sec. 28.820(1); L.S.A.—R.S. 14:63.3; Miss. Code Ann. C. 1, Tit. 11, sec. 2411; Nev. Rev. Stat. sec. 207.200; Ohio Rev. Code Ann. sec. 2909.21; 4 Code of Vir. 18.1–173; Rev. Code of Wash. Ann. sec. 9.83.060.

[32] Cal. Penal Code, sec. 602.5 (applies to noncommercial premises); N. H. Rev. Stat. Ann. sec. 572.11 (applies to livestock); Wisc. Stat. Ann. sec. 943.13(1)(b) (applies where there is intent to remove product from land); Wyo. Stat. C. 10, Tit. 6, 6–226 (applies to enclosed lands).

[33] Ga. Code Ann. 26–3002; Me. Rev. Stat. C. 131, secs. 39–40; N.J. Anno. Stat. 4:17–2; N.C. Gen. Stat. sec. 14–134; Okla. Stat. Ann., Tit. 21, sec. 1835 (restricted to entries into gardens, yards, enclosed fields and pecan groves); South Dakota Code, sec. 25.0427 (restricted to entries for purpose of hunting); West Virginia Code Ann. sec. 5974 (confined to enclosed lands).

[34] Colo. Rev. Stat. 40–18–13 (limited to entries to gardens, orchards and other improved lands); Ky. Rev. Stat. sec. 433.720 (land must be prominently posted); Mo. Stat. Ann. sec. 560.445 (limited to posted enclosed premises); Rev. Code of Mont. sec. 94–3309 (limited to hunting on enclosed lands); Penn Stat. Ann. sec. 4954 (lands must be prominently posted); General Laws of R.I., sec. 11–44–4 (restricted to entering posted land to hunt or fish).

[35] Ark. Stat. Ann. sec. 71–1803 (limited to public places of business); Compiled Laws of Alaska, sec. 65–5–112; Minn. Stat. Ann. sec. 621.57; Neb. Rev. Stat. 28–589 (limited to enclosed and cultivated lands). Oreg. Rev. Stat. 164.460; 1 Texas Penal Code, Art. 479 (restricted to peddlers); Vermont Stat. Ann., Tit. 13, Sec. 3726 (restricted to fairgrounds).

and remaining or confined to limited situations exist in ten other States.[36] As one would expect, where State legislatures have desired to prohibit specified types of conduct, they have been able to find the necessary language.

Except for the South Carolina and Maryland decisions in these cases, and a few other cases involving sit-in demonstrations,[37] our research discloses no reported instance of a statute apparently confined to trespass after warning being held to include remaining after a request to leave. In fact, the only cases we have uncovered treat entering after warning and remaining after a request to leave as separate and distinct offenses that must be specifically proscribed.

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[36] Ariz. Rev. Stat. 13–711; Delaware Code, sec. 871–877; Idaho Code, sec. 18–7011; Iowa Code Ann. sec. 714.6, 714.25; Gen. Stat. of Kansas Ann. 32–139; N. Mex. Code, 40–47–2; N.Y. Penal Code, sec. 2036; N. Dak. Century Code, sec. 12–41–07; Tenn. Code Ann., 39–4510; Utah Code Ann., sec. 76–60–2.

[37] Besides South Carolina and Maryland, North Carolina has interpreted its trespass after warning statute to cover remaining after being told to leave. See, *e.g.*, *State* v. *Clyburn*, 247 N.C. 455, 101 S.E. 2d 295 (1958); *Avent* v. *North Carolina*, 253 N.C. 580, 118 S.E. 2d 47 (1961), remanded for reconsideration, 373 U.S. 375. Prior to the *Clyburn* case, the *North Carolina* law appears to have been otherwise. Thus, in *State* v. *Baker*, 231 N.C. 136, 140, 56 S.E. 2d 424 (1949), Judge (now Senator) Ervin enumerated the elements required for a conviction under G.S. 14–134 as follows: "To constitute trespass on the land of another after notice or warning under this statute, three essential ingredients must coexist: (1) The land must be the land of the prosecutor in the sense that it is in either his actual or constructive possession; (2) the accused must enter upon the land intentionally; and (3) *the accused must do this after being forbidden to do so by the prosecutor.*" (Emphasis added). *Cf. State* v. *Stinnett*, 203 N.C. 829, 167 S.E. 63 (1933); *State* v. *Tyndall*, 192 N.C. 559, 135 S.E. 451 (1926).

For example, Section 3874 of the Alabama Code of 1886 provided that:

> Any person who, without legal cause or good excuse, enters into the dwelling house, or on the premises of another, after having been warned within six months preceding not to do so, is guilty of a misdemeanor.

In *Goldsmith* v. *State,* 86 Ala. 55, 5 So. 480 (1888) the court held that this statute did not apply to a person who was asked to leave after he had entered the premises in question. The Alabama Supreme Court said (86 Ala. at 56–57):

> The defendant was on the premises, the land, when he received the warning; and after he left the premises, there is no proof that he ever returned. * * *
>
> We think, the testimony, under any interpretation, failed to make a case within the statute. There must be a warning first, and an entry afterwards. One already in possession, even though a trespasser, or there by that implied permission which obtains in society, can not, by a warning then given, be converted into a violator of the statute we are construing, although he may violate some other law, civil or criminal.—*Watson* v. *State, supra* [63 Ala. 19].

Subsequently, the Alabama statute was changed to its present form. See *Randle* v. *State,* 155 Ala. 121, 124, 46 So. 759 (1908). But the amended statute was held to encompass two separate offenses. In *Brunson* v. *State,* 140 Ala. 201, 203, 37 So. 197 (1903), the indictment charged that the defendant "without legal cause or good excuse entered on the premises of An-

drew Zimlich after having been warned, within six months preceding not to do so, against the peace. * * *" The defendant claimed that he was already on the property when told to leave and, therefore, could not be convicted on this indictment. The Alabama Supreme Court agreed and said (140 Ala. 202–204; 205):

> This statute [section 5606 of the Criminal Code of 1896] embraces two separate and distinct offenses under the common designation of trespass after warning; or, in other words, the offense of trespass after warning may be committed in two different and distinct ways. First, where the defendant "without legal cause or good excuse, enters into the dwelling house, or on the premises of another, after having been warned, within six months preceding, not to do so;" second, where the defendant, "having entered into the dwelling house or on the premises of another without having been warned within six months not to do so, and fails or refuses, without legal cause or good excuse, to immediately leave on being ordered or requested to do so by the person in possession, his agent or representative." This latter provision, contained above under the second head, was not embraced in section 3784 of the Code of 1886—that statute denouncing only the entering on the premises after warning given not to do so. This section was amended by an act approved December 3d, 1896 (Session Acts, 1896–97, p. 34), by incorporating in the statute the said second provision set out, and as thus amended was brought forward and adopted into the present Code as section 5606. Prior to this

> amendment, and under the statute as it stood in the Code of 1886, it was decided by this court that a prosecution could not be sustained for trespass after warning where the defendant had already entered upon the premises and was in possession before any warning given him not to do so. * * *
>
> * * * Evidence of the refusal of the defendant after having entered on the premises and before notice or warning not to do so, to leave said premises, is insufficient under the above authorities to sustain the indictment. * * * If the indictment had been found under the second clause of the statute, a conviction might have been well supported on the undisputed evidence in the case. The amendment, which was introduced into the statute by the act of December 3, 1896, was doubtless intended to meet such conditions as are presented in the present case.

The New Jersey Supreme Court has also held that a statute which, on its face, prohibits only entry after warning cannot be used to punish one who remains on property after being told to leave. In *Pennsylvania Railroad Co.* v. *Fucello,* 91 N.J.L. 476, 477, 103 A. 988 (1918), taxicab drivers in the City of Trenton had been warned by the railroad not to park their automobiles on railroad property any longer than was required to discharge their passengers. Certain taxicab drivers were charged with having failed to obey this warning and the following statute was invoked against them:

> That if any person or persons shall unlawfully enter upon any lands not his own, after having

> been forbidden so to do by the owner or legal possessor of such lands, he shall forfeit and pay for each offence to the owner of said lands or his or her tenant in possession, the sum of three dollars, * * *

The New Jersey Supreme Court ruled the statute inapplicable (91 N.J.L. at 477–478):

> This act, it will be observed, deals with an actual trespass *ab initio,* and not with a constructive trespass created by an act of entry originally lawful, but made unlawful by a tortious act committed after entry. *Garcin* v. *Roberts,* 69 N.J.L. 572.
>
> * * * * *
>
> The statute clearly applies to an original entry, which can be denominated in the first instance a trespass. *Garcin* v. *Roberts, supra.* The statute being penal in its nature and consequences must, under the familiar rule applicable to such legislation, be strictly construed, and will not be held to include any other offence by intendment.
>
> The act constituting the alleged offence must be within both the letter and the spirit of the statute. *Lair* v. *Kilmer,* 25 N.J.L. 522.
>
> The result is that the entry of the various defendants having been within the privilege accorded them, their subsequent dereliction in failing to obey the command of the railroad company, cannot be construed into an original trespass, and will not operate to charge them as trespassers, within the meaning of the statute.

And the Supreme Judicial Court of Massachusetts, in *Commonwealth* v. *Richardson,* 313 Mass. 632, 48 N.E. 2d 678 (1943), like the Alabama Court, has con-

cluded that, under a statute that proscribes both entering and remaining, an indictment charging only that the defendant entered after warning cannot sustain a conviction on evidence that the defendant entered before warning but remained when told to leave. In *Richardson,* the defendants were confronted by the landlord and told to leave after they had entered the vestibule of an apartment house, but before they passed the inside door leading into the corridors where the various apartments were located. The court said (313 Mass. at 637–638):

> We have already observed that the defendants were charged in the complaints not with remaining in or upon the premises in question after having been forbidden so to do, but only with having "knowingly, without right * * * [entered] upon the dwelling house of John Assies [the landlord], after having been directly forbidden so to do by John Assies, he having the legal control of the premises." The two acts thus forbidden by the statute are expressed in the disjunctive, and violation of either is a crime. One may be guilty of one, or the other, or of both, but one may not be found guilty of one that is not the subject of the complaint against him. * * *
>
> We are of the opinion that the evidence would not warrant a finding that the defendants entered the vestibule of the building after having been forbidden by Aysies "so to do." They were already in the vestibule when confronted by Aysies. They had entered by the open outer door of the vestibule. * * * *[a]

[a] See also *Steele* v. *State*, 191 Ind. 350, 132 N.E. 739 (1921). *Cf. People* v. *Lawson*, 238 N.Y.S. 2d 839 (Crim. Ct. 1963).

These decisions of the highest courts of Alabama, New Jersey and Massachusetts demonstrate how strained was the construction given the local statutes in the cases at bar.

Summing up all the elements of the South Carolina and Maryland cases it becomes plain that the criminal trespass laws under which petitioners were convicted are unconstitutionally vague as applied to petitioners' conduct. At best, it was uncertain whether the statutes were applicable. The statutes spoke of entry after being notified not to enter. There was nothing to warn of a more expansive interpretation. Petitioners are not charged with unlawful entry but only with refusal to leave. The most that can be said about a warning is that they might have known that their refusal was a civil trespass. Until the demonstrations against public segregation in restaurants and lunch counters, the statutes had never been authoritatively applied to refusals to leave. The only judical interpretation of parallel laws in other States refused to extend the prohibition. Under these circumstances there is the greatest danger that the decisions to arrest and to prosecute were influenced by public prejudice or emotion, or by opposition to the demonstrations, rather than even-handed application of a standard of conduct the legislature had plainly declared. To permit such statutes thus to be applied to citizens engaged in peaceful public demonstrations against a grievous affront would be a deterrent to other exercises of freedom of expression. Petitioners' exercise of that freedom may have conflicted with the property rights of those who engaged in the affront,

but petitioners' knowledge of that conflict and the possible right of the property owner to recover in trespass is not the equivalent of notice that the conduct constituted a criminal offense. Every consideration of policy that condemns unconstitutionally vague criminal law applies with full force to petitioners' conviction here for conduct not clearly defined as criminal.

C. THE FLORIDA CASE

Section 509.141 of the Florida Statutes (*supra,* pp. 18–20) establishes a procedure for ejecting certain classes of patrons from hotels, restaurants, rooming houses and like establishments. Subparagraph (3) of the Section provides that "any guest who shall remain * * * after being requested, as aforesaid, to depart therefrom, shall be guilty of a misdemeanor * * *" Subparagraph (2) deals with the form of request to leave and requires the agent of the establishment to "first orally notify such guest that the hotel, [etc.] * * * no longer desires to entertain him or her and request that such guest immediately depart from the hotel * * *" or to deliver a written notice in the form prescribed.[39] Subparagraphs (2) and (3) relate back to subparagraph (1) [40], which describes with particu-

[39] "Said hotel, [etc.] * * * may, if the management so desires, deliver to such guest written notice in form as follows: 'You are hereby notified that this establishment no longer desires to entertain you as its guest and you are requested to leave at once and to remain after receipt of this notice is a misdemeanor under the laws of this state.'"

[40] Subparagraph (2) refers to "such guest", *i.e.*, a guest engaged in the type of conduct described in subparagraph (1). Similarly, subparagraph (3) speaks of guests who have been requested to leave "as aforesaid."

larity the circumstances in which the statute is operative. Four classes of persons (and presumably no others) may be ejected under the statute. They are described as follows:

> * * * any guest * * * who * * * [1] is intoxicated, immoral, profane, lewd, brawling or [2] who shall indulge in any language or conduct either such as to disturb the peace and comfort of other guests * * * [3] or such as to injure the reputation or dignity or standing of such * * * restaurant * * * [4] or who, in the opinion of the management, is a person whom it would be detrimental to such * * * restaurant * * * for it any longer to entertain.

Appellants were charged with committing an offense which came within the fourth category.[41] That provision is significantly different from the others. The first three categories deal with specific overt conduct which is objectively discernible and which the offender himself can appreciate and presumably control. Of course, a guest might disagree that his con-

[41] The information filed against appellants alleged (R. 2): "* * * * that the above-named defendants did then and there seat themselves as guests at tables in the aforesaid restaurant; and that said above-named defendants did then and there unlawfully remain or attempt to remain in the aforesaid restaurant after said above-named defendants had been requested to depart therefrom by the manager, assistant manager, or other person in charge or in authority of the aforesaid restaurant, said manager, assistant manager, or other person in charge or in authority of the aforesaid restaurant being then and there of the opinion that if the above-named defendants were entertained or served it would be detrimental to the said restaurant, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida."

duct, for example, was lewd, but, normally, he will know what conduct the management thinks objectionable. At least, he is not at the mercy of the subjective, uncommunicated thoughts of management, which no self-examination can reveal. When these objective circumstances are present, it might be unnecessary to advise the guest specifically why he is being asked to leave. The statute itself warns him that certain acts will subject him to ejection. The offense is complete without further action on the part of the management. A person arrested under these circumstances can avoid conviction if he can demonstrate at his trial that he, in fact, had not engaged in the proscribed conduct. It is presumably with reference to such outwardly offensive conduct that the statute prescribes a form of written notice which does not offer explanations (*supra*, p. 49). The reason, plainly, is that none are necessary when the guest's behavior is susceptible of objective proof by the testimony of witnesses.

The charge here, however, does not relate to any *acts* committed by the unwelcome guest. The only standard set out is the subjective opinion of management. Thus, an essential element of appellants' offense is the opinion of others. In our view, it is a violation of due process to convict persons under this statute unless, prior to their arrest, they are advised of that opinion. Cf. *Lambert* v. *California*, 335 U.S. 225, 228.

It is important to emphasize that these appellants were not prosecuted—if indeed they could have

been—[42] merely for refusing to leave after being told to do so. They were prosecuted for refusing to leave when "in the opinion of management" it would have been detrimental to further entertain them. Otherwise wholly passive and innocent conduct became criminal under the statute only because the restaurant management subjectively determined that appellants' continued presence would be detrimental to business. Moreover, they expressly inquired why they were refused service. In this context, appellants being guilty of no conduct which could possibly "disturb the peace and comfort of other guests" or "injure the reputa-

[42] Section 821.01 of the Florida Statutes provides:

"*Trespass after warning*

"Whoever willfully enters into the enclosed land and premises of another, or into any private residence, house, building or labor camp of another, which is occupied by the owner or his employees, being forbidden so to enter, or not being previously forbidden, is warned to depart therefrom and refuses to do so, or having departed re-enters without the previous consent of the owner, or having departed remains about in the vicinity, using profane or indecent language, shall be punished by imprisonment not exceeding six months, or by a fine not exceeding one hundred dollars."

It is doubtful whether this provision would have been applicable in the present context. On its face, the statute does not expressly cover the "public" portion of a restaurant, during hours when the establishment is generally open for business. Moreover, the more recent enactment, Section 509.141, explicitly dealing with places of public accommodation, seems to supersede the general trespass statute with respect to this subject matter. In any event, of course, appellants were not charged under the quoted provision, and, as this Court said in *Cole* v. *Arkansas*, 333 U.S. 196, 201—and reiterated in *Garner* v. *Louisiana*, 368 U.S. 157, 164: "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

tion or dignity or standing" of the establishment, their question amounted to asking: "Is our mere presence detrimental to business?" Since criminal liability depended wholly on an affirmative answer, it seems plain appellants were entitled to a response. Met with the manager's stubborn refusal to answer, they were justified in concluding that a statutory basis for exclusion was lacking. At least, they could not be required to interpret the silence which greeted their inquiry as a statement that the color of their skins (or, in the case of the white students, their association with Negroes) alone inflicted economic injury on the establishment.

Fundamental fairness, we submit, required communication of management's private opinion, on which criminality depended, before criminal liability could attach. But, at the very least, the principle of fair notice demanded that persons in appellants' position be unequivocally warned that the statute would condone their ejection as "detrimental" merely because they were Negroes (or associated with Negroes), and that they must expect no disclosure of the subjective reason for their exclusion.[4] It is going too far to require a class of citizens (who have been served elsewhere in the establishment) to presume that their

[4] *Cf. Garner* v. *Louisiana*, 368 U.S. 157, 170, 172, where the Court noted that "[i]n none of the cases was there any testimony that the petitioners were told that their mere presence was causing, or was likely to cause, a disturbance of the peace" and "there is no evidence that this alleged fear [that a disturbance would occur] was ever communicated to the arresting officers, either at the time the manager made the initial call to police headquarters or when the police arrived at the store."

mere presence will, because of their color, be deemed harmful to the store. On the contrary, an American of any race or creed should be entitled to presume that he will not be treated discriminatorily in an establishment open to the public. Moreover, experience teaches, as Mr. Justice Frankfurter noted in *Garner* v. *Louisiana*, 368 U.S. 157, 176, that "[i]t is not fanciful speculation * * * that a proprietor who invites trade in most parts of his establishment and restricts in another may change his policy when non-violently challenged."

Assuming that appellants were fully aware of the provisions of Section 509.141, they could have believed, with complete good faith, that none of the events which transpired at Shell City Restaurant was sufficient to make out a violation of the statute under which they were ultimately convicted. They knew that they were not intoxicated, immoral, profane, lewd or brawling. They knew that by peacefully sitting at restaurant tables they were not indulging in language or conduct which would disturb the peace and comfort of guests or which would injure the reputation or dignity of the restaurant.[*] They had no reason to assume

[*] Appellants sat at tables for one half hour without being approached by any store official. All during this time, the manager and three other store employees were seated in the restaurant having coffee. In this respect, this case resembles *Garner* v. *Louisiana*, 368 U.S. 157, where, although the store manager testified that he "feared that some disturbance might occur" because of petitioners' mere presence at a white lunch counter, he "continued eating his lunch in an apparently leisurely manner at the same counter at which the petitioners were sitting before calling the police" (368 U.S. at 171).

that their mere presence was detrimental to Shell City's business. Shell City solicits Negro patronage in all of its departments but one. Appellants well could have believed that if the store secured their arrests, this action would be more detrimental to the company's business than merely permitting them to sit in the restaurant. The request to appellants that they leave put them on notice that Shell City's management did not wish to serve them. But it did not forewarn them that their ejectment was justified on any basis recognized by the statute. Until properly advised, appellants might reasonably have thought themselves entitled to ignore the request to leave, for, so far as they knew, the request was premised on a reason which the statute does not recognize, such as racial prejudice on the part of the proprietor.

Since the statute did not give warning that an explanation would be unnecessary (indeed, it implies the contrary) and since none was given (though demand was made), the State of Florida is in the position of arguing that appellants were required to assume that they were committing a crime even though they had no way of ascertaining whether the management purported to be relying upon a reason for exclusion recognized by Florida law. This cannot be squared with the constitutional requirement of fair notice.

CONCLUSION

Discrimination is alien to our law and its practice forbidden to both State and Nation. An affront to the dignity of the victim, it is, by the same token,

demeaning to him who engages in the practice and destructive of the fiber of a democratic society. If it be true that this Court cannot right every moral failing, it is also true, we believe, that it must hold every exercise of governmental power to the strictest standards of legal accountability when the failure to do so may encourage or abet a fundamental human wrong. So viewed, we submit, these convictions should not stand.

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SEPTEMBER 1963.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

Nos. 6, 9, 10, 12, and 60

WILLIAM L. GRIFFIN, et al., *Petitioners,*

—vs.—

STATE OF MARYLAND, *Respondents.*

CHARLES F. BARR, et al., *Petitioners,*

—vs.—

CITY OF COLUMBIA, *Respondent.*

SIMON BOUIE, et al., *Petitioners,*

—vs.—

CITY OF COLUMBIA, *Respondent.*

ROBERT MACK BELL, et al., *Petitioners,*

—vs.—

STATE OF MARYLAND, *Respondent.*

JAMES RUSSELL ROBINSON, et al., *Appellants,*

—vs.—

STATE OF FLORIDA, *Appellee.*

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA AND THE COURT OF APPEALS OF MARYLAND AND ON APPEAL FROM THE SUPREME COURT OF FLORIDA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 6

WILLIAM L. GRIFFIN, ET AL., PETITIONERS

v.

STATE OF MARYLAND

No. 9

CHARLES F. BARR, ET AL., PETITIONERS

v.

CITY OF COLUMBIA

No. 10

SIMON BOUIE, ET AL., PETITIONERS

v.

CITY OF COLUMBIA

No. 12

ROBERT MACK BELL, ET AL., PETITIONERS

v.

STATE OF MARYLAND

No. 60

JAMES RUSSELL ROBINSON, ET AL., APPELLANTS

v.

STATE OF FLORIDA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA AND THE COURT OF APPEALS OF MARYLAND AND ON APPEAL FROM THE SUPREME COURT OF FLORIDA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed pursuant to the Court's order of November 18, 1963, inviting the Solicitor General, pursuant to his suggestion, to file a brief expressing

the views of the United States upon "the broader constitutional issues which have been mooted" in these cases.

We confine the brief to those issues, but believe it appropriate to note two somewhat narrower grounds specially applicable to *Robinson* v. *Florida,* No. 60, which came to our attention in preparing to argue the broader issues.

1. At the time petitioners Robinson *et al.* were arrested, there was in effect a regulation of the Florida Board of Health applicable to restaurants (Florida State Sanitary Code, Chapter VII, Section 6), which provided: [1]

> Toilet and lavatory rooms must be provided for each sex and in case of public toilets or where colored persons are employed or accommodated separate rooms must be provided for their use. Each toilet room shall be plainly marked, viz: "White Women," "Colored Men," "White Men," "Colored Women."

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[1] *A Manual of Practice for Florida's Food and Drink Services based on the Rules and Regulations of the Florida State Board of Health and State Hotel and Restaurant Commission*, published in July 1960 (one month before petitioners were arrested), prescribed (pp. 140–141):

"4.6.7—Toilet and hand washing facilities

"(a) Basic requirement—In every food and drink service establishment adequate toilet and hand washing facilities shall be available for employees and guests. Separate facilities shall be provided for each sex and for each race whether employed or served in the establishment. Toilet rooms shall not open directly into a room in which food or drink is prepared, stored or served."

The substance of the regulation quoted in the text was reissued on June 26, 1962, and is now part of Florida Administrative Code, Chapter 170C, Section 8.06. See pp. 99–100, *infra.*

While the regulation does not require segregation in the parts of the restaurant where customers are eating, the regulation not only gives official support to the principle of racial segregation but puts the proprietor who desires to serve both races indiscriminately to the financial burden of providing duplicate toilets and lavatories.[2] Thus, the regulation would seem to impose sufficient State pressure to bring the case within *Peterson* v. *Greenville,* 373 U.S. 244, and *Lombard* v. *Louisiana,* 373 U.S. 267.

2. The views expressed by Mr. Justice Stewart in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 726, would also seem to require reversal in the *Robinson* case.

Chapter 509 of Florida Statutes Annotated sets forth a comprehensive code of regulation for public lodging and public food service establishments. Section 509.092, however, provides—

> Public lodging and public food service establishments are declared to be private enterprises and the owner or manager of public lodging and public food service establishments shall have the right to refuse accommodations or service to any person who is objectionable or undesirable to said owner or manager.

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[2] A restaurant serving fewer than 100 people at one time would be required to have one toilet and one lavatory for women, one toilet, one urinal and one lavatory for men, provided that no Negroes were accommodated. If Negroes were accommodated, the facilities would have to be duplicated. See *A Manual of Practice for Florida's Food and Drink Services, supra,* p. 141.

It is undisputed that petitioners were refused service only because they were either Negroes or in the company of Negroes (R. 19–20, 29).

Section 509.141, the statute under which petitioners were convicted, authorizes the manager to eject any person who, in his opinion, is a—

> person whom it would be detrimental to such * * * restaurant * * * for it any longer to entertain.

The managers invoked this section because they believed that enforcing segregation accorded with the wishes of a majority of the people of the county and any contrary course would be detrimental to the business.

The statute in *Burton* v. *Wilmington Parking Authority* allowed a proprietor to refuse to serve—

> persons whose reception or entertainment by him would be offensive to the major part of his customers * * *.

In *Burton,* Mr. Justice Stewart said—

> There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment.

Here, as in *Burton,* there is no suggestion in the record that any appellant *as an individual* was a person deemed detrimental to the business because personally offensive to other customers. Whites were automatically served and Negroes and groups contain-

ing Negroes were automatically excluded. Here, as in *Burton*, therefore, the highest court of the State has construed its legislation as authorizing a discriminatory classification based exclusively upon color.[3] Such a law is invalid equally with the Delaware legislation, and the convictions thereunder should be reversed.[4]

We turn now to the broader issue.

QUESTION PRESENTED

In four of these five cases petitioners peacefully entered premises thrown open by the proprietor to the general public for the service of food and refreshments; in the fifth, they entered an amusement park offering entertainment to the public at large. In each

[3] See also the statement of the trial court at R. 36. The instant case would seem even clearer than *Burton*, for the statute was enacted in 1957 in a context of systematic segregation.

[4] It has been suggested that Mr. Justice Stewart's opinion in *Burton* v. *Wilmington Parking Authority* should be read as saying that there was no suggestion in the record that appellant's race made him "offensive to the major part of [the restaurant's] customers." Examination of the record makes it plain that this cannot be the meaning. The case was decided on cross motions for summary judgment. The third affirmative defense asserted the restaurant's right as a private business to refuse refreshment "to persons whose reception or entertainment would be offensive to the major part of its customers and would injure its business," and that the defendant "is therefore not bound to serve the plaintiff in its restaurant." Transcript of Record, p. 8, No. 164, October Term, 1960. On motion for summary judgment, that allegation would be taken as true. The nub of the matter, therefore, was that plaintiff was refused service not as an offensive individual but upon the ground that a majority of the customers desired a racial classification. The situation in the instant case is the same.

case, although otherwise acceptable, petitioners were refused service and asked to leave on the ground that they were Negroes or were in the company of Negroes. This was done pursuant to the proprietor's policy of denying service to Negroes as a class, although he rendered service to all other members of the public, without discrimination, to the extent of his facilities. In three of the cases Negroes were invited into the premises to buy goods, and their patronage was sought for all purposes except the service of food to be eaten there in the presence of white patrons.

In each instance petitioners refused to leave the premises when requested. They were arrested by the local police, prosecuted and subsequently convicted of criminal trespass or an equivalent crime. The relevant State laws afforded Negroes and non-Negroes technical equality in the limited sense that they gave no member of the public an enforcible right to entertainment or service in the establishments involved.[4a]

The question presented is whether the convictions are invalid under the equal protection clause of the Fourteenth Amendment, when it appears (as we shall argue)—

(1) that the convictions gave legal effect to a community-wide practice under which non-Negroes are automatically served in establishments of public accommodation while Negroes are automatically segre-

[4a] The briefs previously filed in these cases present full statements of the facts and proceedings below. We have epitomized the essential elements to the extent necessary to present the broad constitutional issue.

gated or excluded in order to stigmatize them as members of an inferior race, and

(2) that the practice is an integral part of the fabric of a caste system woven of threads of both State and private action.

ARGUMENT

INTRODUCTORY

For nearly a century, a nation dedicated to the faith that all men are created equal nonetheless tolerated Negro slavery and still more widely espoused, in laws and public institutions, as well as private life, the thesis that the Negro is a servile race destined to be set apart as an inferior caste neither sharing nor deserving equal rights and opportunities with other men. A great war resulted. At the end the Thirteenth, Fourteenth and Fifteenth Amendments not only abolished human bondage but purported to eradicate the imposed public disabilities based upon the false thesis that the Negro is an inferior caste. Before their government, the Amendments taught, in the eyes of the law, all men—men of all races—are created equal.

Slavery was in fact abolished. The twin promise of civil equality failed of immediate performance. State laws were enacted, customs were promoted by public and private action, institutions and ways of life were established, all upon the pervasive thesis that, although human bondage was forbidden, Negroes were still an inferior caste to be set apart, neither sharing nor entitled to equality with other men.

One of the pivotal points in the State-promoted system of public segregation and subjection became separation in all places of public transportation, entertainment or accommodation.[4] There the brand of inferiority burns the deepest; there the wrong is the greatest; for there no element of private association, personal choice or business judgment enters the decision—only the willingness to join in the imposition of the public stigma of membership in an inferior caste. There the Negro asks most insistently whether we mean our declarations and constitutional recitals of human equality or are content to live by, although we do not profess, the theories of a master race.

That is the question petitioners raised when they entered and sought service in these places of public accommodation. They raised the question in various forms. They raised a moral, and therefore in a sense

[4] Throughout this brief we frequently use the term "places of public accommodation" as a convenient shorthand description of the soda fountains or lunch counters, restaurants and amusement park involved in these cases. The phrase seems apt to describe all establishments which throw their premises open to the public at large (except for any racial restrictions), which invite the patronage of the general public without selection either in the invitation or rendition of service, and which furnish lodging, food or drink, entertainment, amusement or similar services. The meaning might extend far enough to include gasoline service stations which "feed" the automobiles, just as the adjacent restaurant feeds the traveler. The exact limits are unimportant for it is the characteristics of the soda fountains or lunch counters, restaurants and amusement park described later in this brief that are legally significant and the expression is merely a shorthand way of describing them. If other establishments were shown to have the same characteristics, the same legal consequences would follow.

a personal question, as they presented it to the proprietors of the establishments in which they were arrested. The question became legislative as the demonstrations pressed the Congress and the States to consider whether to require establishments holding themselves out to the public to serve all members of the public without regard to race. It became a question for government, also, when the managers of the establishments called upon State authority to support a right to evict petitioners and thus join in maintaining the system of stigmatizing Negroes an inferior caste. When the State intervened, a constitutional issue was raised—how far and in what circumstances does the Fourteenth Amendment permit a State to support the system of public segregation of Negroes for the purpose of stigmatizing them as an inferior caste.

Only the last question is here. It is manifestly different from both the moral question posed for the individual and the policy questions presented to Congress and State authorities, but it is nonetheless related to the ideal of civil equality. While the Fourteenth Amendment does not lay upon individuals and non-governmental institutions the standards of conduct applicable to the States and does not compel a State to exercise all its regulatory power to abolish all forms of private (*i.e.*, non-governmental) discrimination, the Amendment does reach State-sponsored inequality in every form. In the *Civil Rights Cases*,

109 U.S. 3, 11, the Court drew the fundamental distinction:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. * * *

The distinction is deeply imbedded not only in our fundamental law but in our national life. It is essential to a free, pluralistic society. It is a product of our moral philosophy, which values freedom because it calls upon man to exercise his noblest quality—the power of choice between good and evil. Freedom, in this sense, is freedom to be foolish as well as wise, to be wrong as well as right. While the State may sometimes limit the choice, especially in the regulation of business conduct, there is room for legislative judgment. Nothing in the Constitution prevents a State which has always scrupulously stayed its hand, from continuing to prefer the course of private self-determination, at least for those who have not opened their premises to the public and perhaps even for those whose businesses are affected with a public interest. It would be equally false to ideals secured by the Thirteenth, Fourteenth and Fifteenth Amendments, however, to permit a State to use the cloak of private choice to hide affirmative State support for a caste system heavily infused with governmental action.

We unqualifiedly accept the fundamental distinction laid down in the *Civil Rights Cases*. Moreover, in applying it, we take for granted the proposition that the mere fact of State intervention through the courts

or other public authority in order to provide sanctions for a private decision is not enough to implicate the State for the purposes of the Fourteenth Amendment. In a civilized community, where legal remedies and sovereign authority have been substituted for private force, private choice in the use of property or business or social relations often depends upon the support of sovereign sanctions. Where the only State involvement is color-blind support for every property-owner's exercise of the normal right to choose his business visitors or social guests, proof that the particular property-owner was motivated by racial or religious prejudice is not enough to convict the State of denying equal protection of the laws.

But that is not this case. We deal here not with individual action but with a community-wide, public custom of denying Negroes the opportunity of breaking bread with their fellow men in public places in order to subject them to a stigma of inferiority as an integral part of the fabric of a caste system woven of threads of both State and private action. The refusal to allow an individual to eat at a lunch counter generally open to all orderly members of the public, when viewed in isolation, can be fairly described in legal terms as a businessman's exercise of the right to select his customers, or as the property owner's exercise of the right to choose whom he will permit upon his premises. Depending upon his motive, the manager's act may be petty, vindictive, immoral, a harsh business judgment, or even justifiable; but in the absence of statute his right is absolute. But history and an appreciation of current institutions

(whose meaning is partly a product of history) show that racial segregation in places of public accommodation cannot be viewed as merely a series of isolated private decisions concerning the use of property or choice of customers, or even as a widespread private custom unrelated to governmental action. The incidents are not separable. The custom is infused with official action both in its origins and implementation. The legal concepts applicable to isolated incidents are not more adequate to capture the truth of racial segregation in places of public accommodation than chemical formulas for body content are sufficient to describe mankind. By way of illustration, Hitler's pogroms were not mere instances of assault, battery and malicious destruction of property.

To break the institution into its components even for the purposes of analysis loses some of the reality, but in our argument we emphasize, first, that the essence of the practice of racial segregation in places of public accommodation is not the management of property or the selection of customers but the stigmatization of the Negro as an untouchable member of an inferior caste. Its only function is to preserve, despite the Thirteenth, Fourteenth and Fifteenth Amendments, the essence of the earlier disabilities associated with slavery but extended more widely through the Nation. Segregation in places of public accommodation does not involve the management of property or selection of customers in any true sense. These are public places, made so by the proprietors' voluntarily inviting the public at large to use them. Between proprietor and customer there is only the

most casual and evanescent of all business relationships. Any orderly person is served, always and automatically, except those branded as members of an inferior race. There is none of the continuity or selectivity that enters into employment; and none of the personal contact or need for mutual trust, confidence and compatibility that characterizes the doctor-patient and lawyer-client relationships. The virtual irrelevance of the legal concepts of private property is vividly demonstrated by the practice of many department stores. They solicit the patronage of Negroes, invite them onto the property and into the store, make sales in other departments—some even furnish food to eat away from the counter—but then they deny the Negro the privilege of breaking bread with other men. Manifestly, it is the stigma—the brand of inferiority—that is important, not presence on the premises or the character of customers.

Second, we show that the practice of stigmatizing Negroes as an inferior caste by refusing to serve them in places of public accommodation together with their fellow men is a product of State action in the narrowest sense, although not currently required by law, because it is an important and inseparable part of a system of segregation established by a combination of State and private action. When the Thirteenth, Fourteenth and Fifteenth Amendments outlawed slavery and sought also to eradicate the public disabilities relegating Negroes to the status of an inferior caste, respondents and some sister States were unwilling to eliminate all vestiges of the caste system from their jurisprudence, official policies and public insti-

tutions and leave the development of business, professional and social relations to private choice. State statutes and municipal ordinances, on a wide scale, required segregation in places of public accommodation, upon common carriers, and in places of public entertainment. State laws provided for segregation in related areas such as schools, court houses and public institutions. State policies expressed, in countless other ways, the notion that Negroes should be treated as an inferior caste. The community-wide fabric of segregation thus was filled with the threads of law and government policy woven by government through the warp of custom laid down by private prejudice. The system is all of a piece. Segregation in places of public accommodation cannot be severed and appraised in isolation. One cannot tell what would happen if the threads of State law and State policy were pulled from the cloth, save that manifestly it would be changed.

After developing these two points in the hope of clarifying the true nature of the institution with which the cases are concerned, we return to the legal question—whether a State which has fostered the practice of racial segregation in places of public accommodation in order to preserve the stigma upon the Negro as an inferior caste, contrary to the promise of the Thirteenth, Fourteenth and Fifteenth Amendments, may now, consistently with the requirements of the Fourteenth Amendment, use the sovereign authority of its police and courts to sanction the eviction of Negroes, pursuant to the practice, as an exercise of private choice.

It is a settled principle that a State cannot exculpate itself merely by showing that the racial segregation or some other invasion of fundamental interests was contingent upon the decision of private individuals. *Shelley* v. *Kraemer*, 334 U.S. 1; *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Lombard* v. *Louisiana*, 373 U.S. 267; *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225. This is not to retract our previous acknowledgement that neither recognition of a right of private choice in a business subject to public regulation nor the use of State power to safeguard the choice once made is automatically sufficient to implicate the State for the purposes of the Fourteenth Amendment. It is to assert, in a complex, civilized community where public and private action are interwoven and interdependent, that the determination of a State's responsibility under the Fourteenth Amendment depends upon a judgment upon the size and importance of the elements of State involvement in relation to the elements of private action, both measured from the standpoint of the fundamental aims of the constitutional guarantees.

The framers of the Thirteenth, Fourteenth and Fifteenth Amendments were not content merely to forbid human bondage. They were equally determined to remove the widespread public disabilities, associated with slavery, that branded the Negro an inferior caste excluded from the promise that in America all men are created equal. This is the heart of the guarantees of the privileges and immunities of citizens, of equal voting rights, and of equal protection of the laws.

The Fourteenth Amendment, it must be emphasized required major changes in State laws: the old slave codes were to be repealed; civil disabilities in owning property, in contracting and in the laws of inheritance were to be eradicated; there were to be no State barriers to business opportunities and the professions; nor were the States left free passively to watch Negroes suffer individual wrongs at the hands of private persons in situations in which the State would intervene to protect non-Negroes.

On the other hand, the Amendments left most social and business associations to private choice. Where the law did not compel social intercourse, business associations and other private relationships among whites, the Amendment did not require them between whites and Negroes. Whether a Negro won equality and acceptance in the private world outside the sphere of government once freed from the public stigma of civil disabilities would depend upon his own capacities and efforts, hampered perhaps by personal prejudices but freed from the caste system.

In historical terms it can hardly be denied that any State intervention in support of the preservation of the caste system in an everyday element of public life defeats the promise of the Amendments. In stricter legal terminology, the elements of State "involvement" in these cases are sufficient, we submit, to carry State "responsibility" for the constitutional injustice.

The State is involved because its police intervened, its officials prosecuted the petitioners, and its courts convicted and sentenced them as a result of racial dis-

crimination. The discrimination became operative through the State's action. The State cannot close its eyes to what all other men see.

The State is further involved because the discrimination occurred in public places, voluntarily thrown open by the proprietors to the community at large. It occurred in a segment of public life in which the rights and duties—the relationships between the proprietor and the invited public—have always been a special concern of the legal system. In each of the respondent States, but especially in Florida, the relationship between these places of public accommodation and the general public is so closely supervised as to involve the State in all its aspects.

The States are involved through their support of the system of segregation. For both the Negro and the white supremacists, discrimination in places of public accommodation is a pivotal point in the caste system. The respondents and neighboring States commanded segregation for many years on a broad front. Between State policy and the prejudices and customs of the dominant portions of the community there was a symbiotic relation. The prejudices and customs gave rise to State action. Legislation and executive action confirmed and strengthened the prejudices, and also prevented individual variations from the solid front. State involvement under such conditions is too clear for argument, even though segregation might be the proprietor's choice in the absence of legislation. Cf. *Peterson* v. *Greenville,* 373 U.S. 244.

State responsibility does not end with the bare repeal of laws commanding segregation in places of public accommodation. The very history of the caste system belies the claim of legal innocence when the State, in these and similar cases, intervenes to support its central stigma. The State is responsible for the momentum its action has generated. The law is filled with instances of liability for the consequences of negligent or wrongful acts carried through a chain of cause and effect until the connection between the wrong and the consequences has become too attenuated to be a substantial factor in the harm. Until time and events have attenuated the connection, the respondents continue to bear responsibility for the conditions, which they shared in creating, that result in branding Negroes an inferior caste. They have not wiped the slate clean.

We recognize that treating the discrimination as a consequence of State action for the purposes of imposing a measure of State responsibility will, to a corresponding extent, lessen the opportunities and protection for private choice. Decision here requires striking a balance with liberty and equality in opposing scales. The "liberty" asserted is hardly consequential. These are all business premises thrown open to the public. The proprietors have voluntarily foregone virtually all power of choice concerning the customers they serve. There is no element of personal selection or personal judgment. Non-Negroes are served automatically; Negroes are automatically

segregated or excluded. With rare exceptions there is no other basis of choice.

There may be instances where the racial choice is purely private in the sense that the proprietor would make it even if the States had been truly neutral and no community system of segregation had been preserved. While our reasoning would sweep them under the one conclusion until the caste system is eliminated from public places, there is no unfairness in this conclusion. When the proprietor of a place of public accommodation discriminates against Negroes in a community which practices segregation, he knows that he is joining in the enforcement of a caste system and his acts take on the color of the community practice and suffer the common disability resulting from the community wrong. "[T]hey are bound together as the parts of a single plan. The plan may make the parts unlawful." *Swift & Co.* v. *United States,* 196 U.S. 375, 396; *Terry* v. *Adams,* 345 U.S. 461, 470, 476 (Mr. Justice Frankfurter concurring). The risk that some proprietors may lose State protection for an arbitrary choice not influenced by the State's previous conduct is not great enough to permit the continuance of support for the caste system, which is a product of State involvement. Cf. *Texas & N.O.R. Co.* v. *Brotherhood of Railway & S.S. Clerks,* 281 U.S. 548; *National Labor Relations Board* v. *Southern Bell Co.,* 319 U.S. 50.

These problems, moreover, lie in an area where there is little basis for the plea of private rights. The proprietors of places of public accommodation

open their property and business to public use. While the dedication cannot supply affirmative elements of State involvement, it is relevant in weighing the significance of those elements for the purposes of the Fourteenth Amendment. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama,* 326 U.S. 501, 506.

The choice of affirmative remedies for State involvement in a system of segregation in places of public accommodation rests with Congress under Section 5 of the Fourteenth Amendment. We do not argue that Negroes would have a direct action against such an establishment to secure the services of food or admission to entertainment. Our contention is simply that a State which has contributed to this evil custom may not constitutionally take steps to aid its enforcement in public places. The same reasoning that interdicts State action in the form of arrests and criminal prosecution equally condemns State support for the caste stigma in the recognition of a legal privilege to use private force against the person. Whoever first resorts to violence is guilty of a breach of the peace, be he the Negro seeking to enter and be served or the operator seeking to evict him. The State may punish such disturbances of public order without discrimination. The failure to accord either party that normal protection against an aggressor upon racial grounds would also be a denial of equal protection of law.

Beyond this point, the question is for Congress. Congress alone can meet the present national crisis arising from the system of segregation by removing the fundamental injustice in places of public accommodation. Neither petitioners nor the United States is arguing that the Court should undertake to hold that places of public accommodation must serve all members of the public alike without regard to race or color. The Court, being subject to judicial and constitutional limitations, cannot solve the whole problem. There is judicial power, nevertheless, to scrutinize a State's contribution to the injustice and to invalidate any convictions flowing from affirmative State involvement. After a century of frustration, it is not too much for petitioners to ask that, whatever action the Congress may take, the barriers raised by the Thirteenth, Fourteenth and Fifteenth Amendments to any continued State support for the caste system should be made unmistakably plain.

I

THE REFUSAL TO ALLOW NEGROES TO EAT WITH OTHER MEMBERS OF THE PUBLIC OR TO SHARE AMUSEMENT IN THESE PLACES OF PUBLIC ACCOMMODATION WAS AN INTEGRAL PART OF A WIDER SYSTEM OF SEGREGATION ESTABLISHED BY A COMBINATION OF GOVERNMENTAL AND PRIVATE ACTION TO SUBJECT NEGROES TO CASTE INFERIORITY

At the heart of these cases lies the necessity for understanding the human significance of the institutions with which we deal. The courts below reasoned

that the States had not violated the Fourteenth Amendment because under their law no one has a legal right to be served in a place of public accommodation and anyone, white or Negro, is subject to prosecution and conviction if he refuses to leave the private property at the proprietor's request. The decisions look only to technical legal equality of right and no-right in the immediate context. The courts below dealt in terms of the abstract legal concepts of property rights, trespass, freedom of association, and business choice without going behind the formulas to see what is actually involved.

In our view that approach is fundamentally wrong. We argue below the legal error of confining the focus so narrowly (Point II, pp. 64 ff.), but first we seek to catch the truth of these events. A department store's refusal to serve a Negro at its lunch counter is not, in truth, either for the Negro, the proprietor or the community, an isolated act of personal antipathy. Nor is the exclusion from an amusement park. All are based upon an invidious classification applied by the proprietor automatically and invariably. Each proprietor acts pursuant to a community-wide practice. The practice serves the function of branding Negroes inferior to other men. It is an integral part of a caste system, based upon racial segregation, established by a combination of State and private ac-

tion. No other discrimination based upon race, nationality or religion is the same.*

Because the question for decision turns upon an appreciation of these simple, institutional facts, we develop them in some detail before discussing their legal significance. Full presentation requires a study of the system of segregation as it followed in the wake of Negro slavery, but we concentrate first upon the facts pertaining to discrimination in places of public accommodation: lunch counters, restaurants and an amusement park are here involved.

A. ACTS OF RACIAL DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION ARE PARTS OF A COMMUNITY-WIDE PRACTICE STIGMATIZING NEGROES AN INFERIOR CASTE

When these cases arose, the practice of excluding or segregating Negroes in lunch counters, lunch rooms, restaurants, bars, hotels, and places of public amusement was almost universal in the former slave States. The pervasiveness of the discrimination is

* The reasoning does not apply with the same force, if at all, in jurisdictions where there has been no governmental support for the caste system and where the discrimination is uneven. Racial discrimination, even in these instances, might be regarded as the fringes of a single fabric; or distinctions could be drawn based upon differences in fact. The question seems more academic than practical. No cases have arisen under such conditions, so far as we know, and none seems likely to arise. Thirty States outside the old slave-holding areas have enacted equal public accommodations laws. See p. 31, n. 22, *infra*.

too notorious to require documentation. It is perhaps most dramatically illustrated by consulting the list of the cities where protest demonstrations have occurred in the last four years.[7] Though it obviously

[7] While no complete list is available, protests directed specifically against segregation in privately-owned places of public accommodation have occurred in at least the following communities:

Alabama: Birmingham, Gadsden, Huntsville, Mobile, Montgomery, Selma, Tuskegee.

Arkansas: Helena, Little Rock, Pine Bluff.

Delaware: Dover, Newark, Smyrna, Wilmington.

Florida: Bradenton, Clearwater Beach, Daytona Beach, DeLand, Dunnellon, Gainesville, Jacksonville, Lakeland, Melbourne, Merritt Island, Miami, Ocala, Panama City, Pensacola, St. Augustine, St. Petersburg, Sarasota, Tallahassee, Tampa, Winter Haven.

Georgia: Albany, Americus, Athens, Atlanta, Augusta, Brunswick, Columbus, Savannah, Valdosta, Warner Robins.

Kentucky: Henderson, Lexington, Louisville.

Louisiana: Baton Rouge, Clinton, Hammond, New Orleans, Plaquemine, Shreveport.

Maryland: Annapolis, Baltimore, Cambridge, Catonsville, Crisfield, Cockeysville, Gwynn Oak, Ocean City, Prince Georges County, Silver Spring.

Mississippi: Clarksdale, Greenville, Greenwood, Jackson.

Missouri: Berkeley, Kansas City, St. Louis.

North Carolina: Chapel Hill, Charlotte, Concord, Dunn, Durham, Elizabeth City, Enfield, Fayetteville, Gastonia, Goldsboro, Greensboro, Henderson, High Point, Kinston, Lexington, Monroe, Mount Airy, New Bern, New Salem, Oxford, Raleigh, Rocky Mount, Salisbury, Shelby, Southport, Statesville, Thomasville, Williamston, Wilmington, Wilson, Winston-Salem.

South Carolina: Anderson, Beaufort, Charleston, Columbia, Denmark, Florence, Newberry, Orangeburg, Rock Hill, Southport, Sumter.

Tennessee: Chattanooga, Clarksville, Humboldt, Jackson, Knoxville, Memphis, Moscow, Nashville, Oak Ridge, Somerville.

Texas: Amarillo, Austin, Galveston, Houston, Kerrville, Longview, Marshall, San Antonio.

gives only a partial sampling of the areas involved, the list includes several cities in each of the Southern and border States, and reflects a generalized practice of segregation even in the most public of all places of public accommodation, the dime store, drug store or department store lunch counter.[8] While the demonstrations met with a measure of success, usually in a very narrow area,[9] and other forces have had their influence, the overall picture is not greatly changed. Even a partial record of State prosecutions involving attempts to break down the color barrier in places of public accommodation is eloquent testi-

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Virginia: *Arlington*, *Charlottesville*, *Danville*, *Farmville*, Hampton, Hopewell, Leesburg, Lynchburg, Newport News, Norfolk, Petersburg, Portsmouth, Prince Edward, Richmond, Suffolk.

West Virginia: Bluefield, Charleston, Huntington, Wheeling.

This incomplete list is compiled on the basis of a study of the demonstrations from February 1, 1960, through March of the same year by Professor Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 Duke L.J. 315, a report by the Southern Regional Council for the same two-month period, *The Student Protest Movement: Winter 1960* (April 1, 1960, *rev.*), and a survey of news reports made in the Department of Justice covering only the six-month period from May 20, 1963, to November 21, 1963. During the latter period, our reports show at least 663 demonstrations of this kind in the Southern and Border States.

[8] See pollitt, *op. cit.*, *supra*.

[9] An analysis of informal reports through October 15, 1963, indicates that many communities have desegregated lunch counter, but not other eating places, or hotels or theatres. It is also clear that, while many of the larger cities of the Southern and Border States have abandoned segregation in at least some accommodations, there has been very little desegregation in the smaller cities and towns, where most of the Negro population lives.

mony of the survival of the discrimination.[10] Indeed, the number of such cases in this Court alone is instructive.[11]

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[10] The Southern Regional Council asserts that more than 20,083 persons engaged in demonstrations against Negro discrimination in the 11 Southern States were arrested during 1963. See *Civil Rights: Year-End Summary* (Southern Regional Council, Inc., Dec. 31, 1963, mimeograph), p. 1. Another report by the same organization indicates that during the first nine months of 1961 at least 1190 persons were arrested in Florida and South Carolina alone in connection with protests against racial discrimination in places of public accommodation. See, *The Student Protest Movement: A Recapitulation* (Southern Regional Council, Inc., September, 1961), pp. 5, 10.

[11] 1960 Term: *Boynton* v. *Virginia*, 364 U.S. 454; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715.

1961 Term: *Garner* v. *Louisiana*, *Briscoe* v. *Louisiana*, *Hoston* v. *Louisiana*, 368 U.S. 157; *Bailey* v. *Patterson*, 368 U.S. 346, 369 U.S. 31; *In re Shuttlesworth*, 369 U.S. 35; *Turner* v. *City of Memphis*, 369 U.S. 350; *Taylor* v. *Louisiana*, 370 U.S. 154.

1962 Term: *Peterson* v. *Greenville*, 373 U.S. 244; *Shuttlesworth* v. *City of Birmingham*, 373 U.S. 262; *Lombard* v. *Louisiana*, 373 U.S. 267; *Gober* v. *Birmingham*, 373 U.S. 374; *Avent* v. *North Carolina*, 373 U.S. 375 (remanded); *Randolph* v. *Virginia*, 374 U.S. 97 (remanded); *Henry* v. *Virginia*, 374 U.S. 98 (remanded); *Thompson* v. *Virginia*, 374 U.S. 99 (remanded); *Wood* v. *Virginia*, 374 U.S. 100 (remanded); Cf. *Edwards* v. *South Carolina*, 372 U.S. 229; *Wright* v. *Georgia*, 373 U.S. 284.

1963 Term: *Drews* v. *Maryland*, No. 3; *Williams* v. *North Carolina*, No. 4; *Fox* v. *North Carolina*, No. 5; *Griffin* v. *Maryland*, No. 6, certiorari granted, 370 U.S. 935, reargument ordered, 373 U.S. 920; *Mitchell* v. *Charleston*, No. 8; *Barr* v. *Columbia*, No. 9, certiorari granted, 374 U.S. 804; *Bouie* v. *Columbia*, No. 10, certiorari granted, 374 U.S. 805; *Bell* v. *Maryland*, No. 12, certiorari granted, 374 U.S. 905; *Robinson* v. *Florida*, No. 60, probable jurisdiction noted, 374 U.S. 803; *Hamm* v. *Rock Hill*, No. 105; *NAACP* v. *Webb's City*, No. 362; *Lupper* v. *Arkansas*, No. 432. Cf. *Ford* v. *Tennessee*, No. 15 (leased municipal auditorium).

Nor does the discrimination result from a temporary and accidental concurrence of independent decisions by the operators of the establishments involved. Though not immemorial,[12] the prevailing practices have persisted for 60 or 70 years without interruption, often as part of the statutory law, almost invariably, it would appear, with official encouragement.[13] It is today a public custom, in many respects a legal institution. The consequence is a rigid system which imposes itself with very little regard for the personal choice of the business operator.

Typically, the storeowner or restaurateur is not shaping his own policy, but deferring to broader pressures. He may be governed by the will of the community, including his customers, or he may be acting in part through loyalty to his fellows who expect him to "hold the line." Usually, he also is influenced by official pleas or attitudes.[14] As the records in these very cases make plain, the proprietor who segregates is almost never deciding for himself: he is merely adhering to a preexisting custom,[15] which often, until very recently, was embodied in the official legal code. Nor is there an entirely free choice whether to conform or not. In many instances, no doubt, acquiescence is willing, even enthusiastic. But those who are otherwise inclined are carried with the

[12] As we show later, pp. 50–53, *infra*, segregation in its present pervasive and rigid form is a relatively recent phenomenon. See, generally, Woodward, *The Strange Career of Jim Crow* (1955).

[13] See Section B, *infra*.

[14] See, *e.g.*, *Lombard* v. *Louisiana*, 373 U.S. 267.

[15] See the government's initial brief in these cases, pp. 11, 13, 16, 22.

tide. Experience shows that no change in the established pattern can be expected without the concerted action of most of the businessmen in the locality in any given group.[16]

While the records are not conclusive, it seems plain that the discrimination was part of a community-wide practice in the present cases. The 1957 annual report of the Commission on Inter-racial Problems and Relations to the Governor and General Assembly, p. 13, reveals that 91 percent of all public facilities in Baltimore then excluded or segregated Negroes. Even in 1962, change had been "slow and inconsistent." *Id.*, 1962, p. 23. In *Robinson* v. *Florida,* No. 60, the Shell's City restaurant was following "the customs and traditions and practice in this county—not only in this county but in this part of the state and elsewhere, not to serve whites and colored people seated in the same restaurant" (R. 30). The record in the *Barr* and *Bouie* cases is less explicit, but there appears to be little doubt that segregation was the rule in Columbia, South Carolina, at the time of the incidents in question.

Furnishing food and entertainment in a place of public accommodation does not involve any selection of customers or business associates in the usual sense of the word, even when Negroes are excluded, nor

[16] See, *e.g.*, the testimony of Mayor Morris of Salisbury, Md., Hearings before the Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., pp. 324–326.

does the practice of discrimination turn upon any judgment concerning the character or even the color of the persons whom the owner is willing to permit upon his premises. The unique quality of the choice to establish arbitrary racial segregation at lunch counters and in restaurants and amusement parks results partly from the public character of the premises and partly from the evanescent nature of the relationship between the proprietor and his customers.

We notice first the public character of the establishment. Whether it is a lunch counter, a restaurant, a hotel or place of amusement or entertainment, it is open to the public at large. The fact is reflected in several aspects of the law. The establishment is usually licensed and is often minutely regulated by the State or a municipal subdivision.[17] That was true even before the modern proliferation of State regulation. What is more, the law has traditionally concerned itself with regulating admission to such establishments. Beginning with the early common law rule requiring innkeepers, "victuallers" and public

[17] See Brief for Petitioners in Nos. 9, 10 and 12, p. 53, n. 28; Brief for the Appellant in No. 60, pp. 19–21, nn. 6–17.

carriers [18] to serve all, the right to service in places of public accommodation has been viewed as a question of public interest, the resolution of which should not depend on the wishes of the business owner. The early State public accommodation laws of the Nineteenth Century, both North [19] and South,[20] the federal Civil Rights Act of 1875,[21] and, indeed, the compulsory segregation laws affecting this area, all disclose the same attitude, which is today reflected in public ac-

[18] "* * * if an innkeeper, or other victualler, hangs out a sign and offers his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller." 3 Blackstone, *Commentaries* (Lewis ed., 1897), p. 166.

"A Victualling house is a house where persons are provided with victuals, but without lodging." 3 Stroud, *Judicial Dictionary* (1903), p. 2187.

See also Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 Col. L. Rev. 514 (1911); Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156 (1903). Cf. Conard, *The Privilege of Forcibly Ejecting an Amusement Patron*, 90 U. of Pa. L. Rev. 809 (1942).

[19] Between 1865 and 1897, Massachusetts, Kansas, New York, Connecticut, Iowa, New Jersey, Ohio, Colorado, Illinois, Indiana, Michigan, Minnesota, Nebraska, Rhode Island, Pennsylvania, Washington, Wisconsin and California enacted more or less comprehensive laws barring discrimination in places of public accommodation. For a detailed study of those statutes, see Stephenson, *Race Distinctions in American Law* (1910), pp. 111–153. Such a law was also passed in the District of Columbia. See *District of Columbia* v. *Thompson*, 346 U.S. 100; see, also, *Railroad Company* v. *Brown*, 17 Wall. 445.

[20] As we show later, during the period of Reconstruction, Louisiana, South Carolina, Georgia, Arkansas, Mississippi and Florida adopted more or less broad public accommodation laws. See notes 83–85, *infra*.

[21] 18 Stat. 335.

commodation laws in 30 of the 50 States [22] and the District of Columbia.[23]

The public character of such places is also reflected in other aspects of the legal system. They are treated as public under criminal laws prohibiting gaming, vulgar language and similar misconduct in "public places." [24] Tort liability for negligence is imposed as

[22] Alaska: Stat. § 11.60.230 (1962); California: Civ. Code § 51; Colorado: Rev. Stat. § 25–1–1 (1953); Connecticut: Gen. Stat. § 53–35 (1962 Supp.); Idaho: Code § 18–7301 (1963 Supp.); Illinois: Stat. § 38–13.1 (1961); Indiana: Stat. § 10–901 (1963 Supp.); Iowa: Code § 735–1 (1962); Kansas: § 21–2424 (1961 Supp.); Maine: Rev. Stat. § 137–50 (1963 Supp.); Maryland: Code § 49B–11 (1963 Supp.); Massachusetts: Laws § 272–92A (1956); Michigan: Stat. § 28.343 (1962); Minnesota: Stat. § 327.09 (1947); Montana: Rev. Code § 64–211 (1962); Nebraska: Rev. Stat. § 20–101 (1954); New Hampshire: Rev. Stat. § 354.1 (1963 Supp.); New Jersey: Stat. § 10:1–2 (1960); New Mexico: Stat. § 49–8–3 (1963 Supp.); New York: Civ. R. § 40; North Dakota: Code § 12–22–30 (1963 Supp.); Ohio: Rev. Code § 2901.35 (1954); Oregon: Rev. Stat. § 30.670 (1961); Pennsylvania: Stat. § 18–4654 (1963); Rhode Island: Gen. Laws § 11–24–1 (1957); South Dakota: ch. 58, Laws 1963; Vermont: Stat. § 1451 (1958); Washington: Rev. Code § 49.60.215 (1962); Wisconsin: Stat. § 942.04 (1958); Wyoming. Stat. § 6–83.1 (1963 Supp.).

[23] D.C. Code § 47–2907 (1961).

[24] See, *e.g.*, *Drews* v. *Maryland*, 167 A. 2d 341 (Md. 1961), pending on petition for certiorari, No. 3, this Term (conviction for refusal to leave amusement park under statute prohibiting disorderly conduct in a "place of public resort or amusement"); *Nelson* v. *Natchez*, 19 So. 2d 747 (Miss. 1944) (conviction for profanity in restaurant under ordinance prohibiting profanity in a "public place"); *Hamilton* v. *State*, 104 So. 345 (Ala. 1925) (conviction for profanity at carnival under statute prohibiting profanity in a "public place"); *Yarbrough* v. *State*, 101 So. 321 (Ala. 1924) (same). See, also, *Garner* v. *Louisiana*, 368 U.S. 157 ("disturbing the peace" at lunch counters); *Thompson* v. *Louisville*, 362 U.S. 199 ("loitering" and "disorderly conduct" in café).

if the premises were a street or public square. For example, the owner of Shell's City or the Taylor Drugstore would be liable to one passing through the premises as a shortcut even though he had no intention to make a purchase. *Restatement Torts,* Section 330(d); *Renfro Drug Co.* v. *Lewis,* 149 Tex. 507, 235, S.W. 2d 609; cf. *Carlisle* v. *J. Weingarten, Inc.,* 137 Tex. 220, 152 S.W. 2d. 1073 ("The most essential factor to be considered in determining this issue is whether the premises were public or private.").

If the law has long regulated admission to places of public accommodation, it is because they are truly public service establishments. They perform an important function in serving the commonplace needs of the whole community. Appropriately, they hold themselves out as open to the general public; and they are open in fact, except for the color line. Neither in theory, nor in practice, is there any basis for the claim made here that such businessmen "select" their customers. Their admission policy is wholly indiscriminate. As Professor Thomas P. Lewis has said:

> There is probably no expectation, with or without a legal basis, which is more firmly established than the expectation of the average person that he will be served in places of public accommodation. The expectation is cemented in the private enterprise system which created the accommodations. They exist to serve; it would be absurd in the extreme to imagine that a place built and designed to serve the people would be used in a way inconsistent with the purpose for which it was built and inconsistent

with the use which will allow it to survive and prosper.[25]

The establishments in question are also public in another respect. Not only do they perform a service of public importance and invite the community at large to enjoy it, but they are public places in something of the same sense as are the public streets, the public squares, the public parks. This is particularly true of an amusement park like Glen Echo (No. 6) and of public conveyances (not here involved), but to some extent it also characterizes drugstore lunch counters (Nos. 9 and 10), a department store restaurant (No. 60), and a sizable urban restaurant (No. 12), which are mere temporary resting places on a journey "downtown." In each instance, a relatively large group congregates and the service is offered and received "in public." It is a place where the relationship between the manager and his customers, and between one customer and another (unless they choose a closer association) is distant. There is no privacy, no intimacy. It is the relationship of strangers engaged in a public transaction.

The public locale has another relevance. It transforms the discrimination against the Negro who is excluded or ejected into a public affront, performed before an audience and usually with reference to that

[25] The quoted excerpt is from a paper entitled *The Role of Law in Regulating Discrimination in Places of Public Accommodation* (p. 14), which was delivered at a conference on "Discrimination and the law," sponsored by the University of Chicago and the Anti-Defamation League of B'nai B'rith, November 22–23, 1963. Publication is pending.

audience. The humiliation is the greater. The openness of the locale also discourages any violation of the prevailing code, for no breach of the color line can pass unnoticed.

It is absurd here to speak of an intrusion on privacy. Nor is there any real question of "association." The relationship is too casual, too ephemeral, too public, for any such claim. The proprietor makes no choice, except for the color line. This is not a home or club where private, personal, social intercourse is involved. It is unlike almost any other business relationship. Most economic relationships involve a significant personal factor—for example, those between an author and his publisher, a lawyer and his client, the owner of a home and his lodger, employers of many descriptions and their employees. In many instances, also, the relationship is one of considerable duration; again, the employment relationship is a case in point. Here there is no element of trust and confidence, no continuity, no personal association. The activity involved is as "everyday" and automatic as walking down the street, boarding a bus or posting a letter. When the ordinary citizen enters a drugstore and asks for a cup of coffee at the lunch counter, he assumes that his ancestry, his attributes and his personal qualities are wholly irrelevant and that the only requirement is the possession of ten cents. The same is true when he takes his child for a ride on the carousel in the local amusement park. One who goes to the back door of a restaurant to ask for a job as cook or waiter or to obtain a contract for supplying meat to the proprietor assumes, as a matter of common experience,

that the owner may make his decision to accept or reject the offer partly on the basis of personal considerations, perhaps wholly irrational or unworthy ones, but the reverse is true when one enters the front door as just another customer, cash in hand. If this seems so commonplace as hardly to require statement, it is because the absence of personal selection in places of public accommodation is an integral and unquestioned aspect of modern society.

Three of the cases now before the Court (Nos. 9, 10 and 16) demonstrate the truth of these observations. At Shell's City, at the Eckerd's Pharmacy and at the Taylor Drug Store, the Negro applicant for lunch-counter service is freely admitted in the other departments of the same store, or (as in No. 9) permitted to enter the lunchroom and order food but only for consumption off the premises. Elsewhere, the anomalies are even more pointed, as when Negro patrons are allowed to eat standing, but not seated, or at the stool counter, but not in a booth.[26] And the same distinctions apply in other accommodations. We need only cite the familiar exception of the train or street car Jim Crow laws which permit a Negro woman to ride in the forward section of the car if accompanying

[26] See Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 Duke L. J. 315, 317; C. Johnson, *Patterns of Segregation* (1943). See, also, *The Student Protest Movement, Winter 1960*, Southern Regional Council Special Report (mimeograph).

A drugstore in Danville, Virginia, while serving Negroes Pepsi-Cola in paper cups (for which there was a one-cent additional charge), refused them Coca Cola and would not furnish a glass. *Cook* v. *Patterson Drug Co.*, 185 Va. 516, 39 S.E. 2d 304 (1946).

a white child.[27] The Negro is acceptable as licensee upon the premises and as a customer. All that is objectionable is the assertion of human equality involved in breaking bread with other men.

The only possible conclusion is that segregation in places of public accommodation is a symbolic act, the sole purpose and effect of which is to stigmatize the Negro as an inferior race, not entitled to full equality even in the public life of the community. The notion of the racial inferiority of the Negro dates from the earliest days of slavery. It was conceived to justify the continued bondage of the African who had been enslaved as a "heathen" but was now a Christian.[28] And, whether supported by Biblical citations [29] or biological theories,[30] it prevailed as an official philosophy through the mid-Nineteenth Century. Chief Justice Taney stated that, when the Constitution was adopted, Negroes "had for more than a century before been regarded as being of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." *Scott* v. *Sandford,* 19 How. 393, 407.

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[27] See, *e.g.*, S.C. Code (1962), § 58–1333.

[28] See Frazier, *The Negro in the United States* (1957), pp. 24–25; Woodson, *The Negro in Our History* (6 ed., 1932), pp. 82–87.

[29] See, *e.g.*, *Pirate* v. *Dalby*, 1 Dallas 167, 168. The Biblical references are examined in Weyl, *The Negro in American Civilization* (1960), pp. 14–15.

[30] For some of these doctrines, see Weyl, *op. cit.*, pp. 114–115.

The supposed inferiority of the race at once explained its enslavement and was demonstrated by the slave status of most Negroes.[21] But the principle of course applied also to free Negroes and they were accordingly viewed and treated as inferiors.[22] The attitude is illustrated by an opinion of Chief Justice Lumpkin of the Georgia Supreme Court in 1853:

> [W]e maintain, that the *status* of the African in Georgia, whether bond or free, is such that he has no civil, social, or political rights or capacity, whatever, except such as are bestowed upon him by Statute; * * * that the social and civil degradation, resulting from the taint of blood, adheres to the descendants of Ham in this country, like the poisoned tunic of Nessus; that nothing but an Act of the Assembly can purify, by the salt of its grace, the bitter fountain—the "*darkling sea.*"[23]

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[21] As George Bernard Shaw observed, the same rationale prevailed long after slavery was abolished. In 1903, he said that "the haughty American Nation * * * makes the negro clean its boots and then proves the moral and physical inferiority of the negro by the fact that he is a shoeblack." Shaw, *Man and Superman* (1916 ed.), p. xviii.

[22] The degraded state of the free Negro before the Civil War is treated at some length in Weyl, *op. cit.*, pp. 52–62; Frazier, *op. cit.*, pp. 59–81; Dumond, *Antislavery* (1961), pp. 119–132; Wright, *The Free Negro in Maryland* (1921).

[23] *Bryan* v. *Walton*, 14 Ga. 185, 198. It is needless to add that the Georgia Assembly granted few rights to the Negro, free or slave. See the relevant statutes collected in II Hurd, *The Law of Freedom and Bondage in the United States* (1862), pp. 101–109.

It is basically the same doctrine that survives today in the institution of segregation.[84] We have only to listen to its modern exponents.[85] The argumentation of the late Senator Bilbo will sufficiently show the line of descent:

> The principle of segregation of the white and Negro races in the South is so well known that it requires no definition. Briefly and plainly stated, the object of this policy is to prevent the two races from meeting on terms of social equality. By established practice, each race maintains its own institutions and promotes its own social life. The residential areas of the towns are segregated; separate schools are maintained;

[84] See, *e.g.*, Konvitz & Leskes, *A Century of Civil Rights* (1961), pp. 3–37, 255–272; Frazier, *op. cit.*, pp. 671–674; Tumin, *Desegregation* (1958), pp. 190–191; Myrdal, *An American Dilemma* (Rev. ed., 1962), pp. 577–589, 592–599; Cash, *The Mind of the South* (1941), pp. 123–139; Woofter, *Southern Race Progress—The Wavering Color Line* (1957), pp. 135–145; Dollard, *Caste and Class in a Southern Town* (1957 ed.), pp. 62, 351–353; Handlin, *Race and Nationality in American Life* (1957), pp. 44–47; Allport, *The Nature of Prejudice* (1954), pp. 304, 438; Saenger, *The Social Psychology of Prejudice* (1953), pp. 256–257.

[85] See, *e.g.*, Cleghorn, "The Segs," *Esquire* (January 1964), pp. 71, 133–136 (interviews with leading exponents of segregation); George, *The Biology of the Race Problem* (1962) (Report Prepared by Commission of the Governor of Alabama); Putnam, "This is the Problem!", *The Citizen* (Citizens' Councils of America, Nov. 1961), pp. 12–33; Collins, *Whither Solid South* (1947), pp. 75–81; Bilbo, *Take Your Choice, Separation or Mongrelization* (1947), pp. 54–55, 82–93; Shufeldt, *The Negro, A Menace to American Civilization* (1907), pp. 105–123; Page, *The Negro: The Southerner's Problem* (1904), pp. 54–55, 292–293; Lewinson, *Race, Class, and Party* (1932), pp. 82, 84 (statements by post-Reconstruction Southern legislators). See also statements quoted in Lomax, *The Negro Revolt* (1962), p. 27.

separate accommodations are provided for the members of each race in public places and on the trains, busses and street cars.

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* * * demands [for equality] must necessarily be based on the acceptance of the doctrine of the equality of the two races and the denial of the inferiority of the Negro. If racial differences do not exist, then these writers are asking for equality for equal races, but if differences do exist, then they are asking for equality for unequals and the very basis of their argument is refuted. * * *

* * * * *

History and science refute the doctrine of the equality of the white and Negro races which is proclaimed by the proponents of racial equality in the United States today. There are inequalities and differences between the white and black races, and all the history of civilization affirms that the superior position belongs to the Caucasian. * * *

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If any Negro reads this chapter and has just reason to think that he does not possess the inferior qualities of mind, body, and spirit which the greatest and most reliable scientists—students of the comparative qualities of the races—have pointed out, then let him thank God for that portion of white blood which flows through his veins because of the sin of miscegenation on the part of one or more of his ancestors.[88]

[88] Bilbo, *op. cit.* at 49, 82, 93.

The notion of racial inferiority doubtless pervades all contemporary discrimination against the Negro. Yet, it is often disguised in other fears and prejudices, and sometimes plays only a small part in the hostility of the white.[37] Here, however, in the area of public accommodations, the dogma of Negro inferiority is obviously the only operative force. Denying the Negro the right to sit to eat in a public place, because white persons are eating, is plainly to tell him he is "not good enough."[38] It is a pure symbolism, directly borrowed from the etiquette of slavery.[39] There can be no doubt that the unvarying repetition of such a gratuitous insult in denying a common privilege marks the public degradation of the race.

B. THE STATES HAVE SHARED IN ESTABLISHING THE SYSTEM OF RACIAL SEGREGATION OF WHICH DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION IS AN INSEPARABLE PART

In the communities from which these cases arise and in thousands of other cities and towns forced segregation in places of public accommodation is practiced without the legal compulsion upon the proprietors found in such instances as *Peterson* v. *Greenville,* 373 U.S. 244. To portray it as a purely private custom, however, is quite erroneous. As the *Peterson* case shows, the practice has often been required by law in the very kind of establishments with which

[37] See, *e.g.*, Myrdal, *op. cit.*, pp. 582–586; Cash, *op. cit.*, pp. 123–139.

[38] L. Smith, *Killers of the Dream* (1949), pp. 19, 29.

[39] Doyle *The Etiquette of Race Relations in the South* (1937), pp. 18–20, 22, 60.

these cases are concerned. Far more important, the practice of segregation at places like lunch counters, restaurants and amusement parks is an inseparable aspect of the entire system of public racial segregation, and that system is the product of a combination of private action and State action violative of the Fourteenth Amendment.

We are not concerned with the distant past. State action prior to the Fourteenth Amendment is irrelevant. The interrelationships between segregation where food and amusement are furnished and other parts of the system cannot be understood, however, nor can the full significance of the States' activities be described, without a sketch of the historical background.

Slavery and the Free Negro before the Civil War

Of slavery itself little need be said. It is enough to remember that slaves were treated in law as the property of their masters and were accordingly wholly deprived of any social, civil or political rights. To say they were viewed as "inferiors" is to understate. As the spirit of abolition increased, and perhaps as a sense of guilt grew stronger, the defense of the institution not unnaturally grew more severe. If the Supreme Court of Florida represented the official attitude, it is difficult to exaggerate the temper of the times:

> There is no evil against which the policy of our laws is more pointedly directed than that

> of allowing slaves to have any other status than that of pure slavery. * * * [40]

More revealing for our purpose, however, is the legal status of the free Negro in the United States before the War, for here the disabilities inflicted could only be justified on the ground of the inferiority of the whole race. Whatever their motives,[41] the fact is that most of the States (including many that had abolished slavery) seriously disadvantaged the "free person of color" and thereby branded him an inferior being. He was generally disenfranchised, was barred from coming into most States, and his movements, even within his own State, were seriously curtailed.[42] But it was in the slave States that the law treated him most harshly.

Thus, in Maryland, every Negro was presumed a slave unless he could prove otherwise.[43] Even when recognized as a freeman, he could neither vote[44] nor

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[40] *Miller* v. *Gaskins*, 11 Fla. 73, 78 (1864).

[41] The free Negro was a source of anxiety for a number of reasons: he might arouse the slaves to dissatisfaction and insurrection; might enter into competition with white labor; might plunder, rob, or murder whites; and finally might offend simply by being a misfit in an otherwise bifurcated society. See Dumond, *Antislavery* (1961), pp. 119–125; Weyl, *The Negro in American Civilization* (1960), pp. 52–58; Doyle, *The Etiquette of Race Relations in the South* (1937), pp. 85–93.

[42] See II Hurd, *The Law of Freedom and Bondage in the United States* (1862), pp. 2–218; Dumond, *op. cit.;* Weyl, *op. cit.;* Doyle, *op. cit.*

[43] *Burke* v. *Joe*, 6 Gill. & Johns. 136 (1834); *Hall* v. *Mullin*, 5 Har. & Johns. 190, 192 (1821). For the similar rule obtaining elsewhere, see cases reported in Wheeler, *Law of Slavery* (1837), pp. 392–408.

[44] Md. Laws, 1801, ch. 90; 1809, ch. 83; 1810, ch. 33; Md. Constitution, 1851, Art. I, § 1. These provisions, and those cited in notes 45–49, *infra*, are set out in II Hurd, *op. cit.*, pp. 19–24.

testify in court, except as against another Negro.[44] He could not engage in certain occupations,[45] or freely contract with respect to his own labor;[46] and he was subject to greater pains and penalties for offenses,[47] liable to being sold as a slave and deported from the State.[48] We refer to the opinion of Roger Taney (later Chief Justice) while Attorney General of the United States:

> The African race in the United States even when free, are everywhere a degraded class, and exercise no political influence. The privileges they are allowed to enjoy, are accorded to them as a matter of kindness and benevolence rather than of right. They are the only class of persons who can be held as mere property, as slaves. And where they are nominally admitted by law to the privileges of citizenship, they have no effectual power to defend them, and are permitted to be citizens by the sufferance of the white population and hold whatever rights they enjoy at their mercy. They were never regarded as a constituent portion of the sovereignty of any state. But as a separate and degraded people to whom the sovereignty of each state might accord or withhold such privileges as they deemed proper. They were not looked upon as citizens by the contracting parties who formed the Constitution. They were evidently not supposed to be

[44] Md. Laws 1801, ch. 109; 1846–1847, ch. 27.
[45] *Id.*, 1805, ch. 80; Code 1860, Art. 66, § 74.
[46] Md. Laws 1854, ch. 273; Code 1860, Art. 66, §§ 76–87.
[47] Md. Laws 1825–1826, ch. 93.
[48] *Id.*, 1826–1827, ch. 229, § 9; Code 1860, Art. 66, § 53.

> included by the term *citizens*. And were not intended to be embraced in any of the provisions of that Constitution but those which point to them in terms not to be mistaken.
>
> * * * Our constitutions were not formed by the assistance of that unfortunate race nor for their benefit. They were not regarded as constituent members of either of the sovereignties and were not therefore intended to be embraced by the terms, *citizens of each state.*[50]

In Florida, his condition was no better. There the free Negro required a "guardian" without whom he could not contract.[51] Encouraged to re-enslave himself,[52] he was taxed for the privilege of remaining free.[53] Worst of all was the lot of the freedman in South Carolina: there, too, Negroes were taxed and required to have guardians.[54] The official hostility of South Carolina toward the free Negroes is best shown in the enactment of 1823 (7 Stat. 463) which provided for the imprisonment of colored seamen during the stay of any vessel in a local port, a law enforced in defiance of the judgment of Mr. Justice Johnson, sitting on circuit, and an opinion of the Attorney General, that it was unconstitutional.[55] We add only the report of a law passed on the eve of secession which required every free Negro in South Carolina

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[50] Swisher, *Roger B. Taney* (1936), p. 154.

[51] Fla. Laws 1847–1848, ch. 155; 1856, ch. 794, 795. For these provisions and those cited in notes 52 and 53, *infra*, see II Hurd, *op. cit.*, pp. 190–195.

[52] *Id.*, 1858–1859, ch. 860.

[53] *Id.*, 1842, ch. 32.

[54] 7 S.C. Stat., 461, §§ 2, 7 (1822). See II Hurd, *op. cit.*, p. 97.

[55] Weyl, *The Negro in American Civilization* (1960), pp. 60–61; 1 Op. Atty. Gen. 659 (1824).

literally to wear a badge, identifying him by name, occupation and number.[46]

Emancipation and its aftermath

It is against this background that the Thirteenth Amendment was adopted. In light of the condition of the nominally free Negro in the South, it is fair to suppose that it was viewed as a charter of freedom for all Negroes, slave or not. Indeed, the Civil Rights Act of 1866,[47] passed as implementing legislation, does not distinguish between the new freedman and the old. It was the Negro as a race that was intended to be given civil equality, to be freed of the badge of inferiority which had been imposed on all persons of color. So also, when the slaveholding States enacted their Black Codes in 1865 and 1866, recognizing the abolition of slavery as such, but subordinating the Negro in a hundred other ways, they did not distinguish between the former slave and the free person of color. They dealt indiscriminately with every person "tainted" with Negro blood, to the extent of ⅛th or even 1/16th.[48] All were equally disadvantaged and set apart as an inferior people.

The tenor of these post-war codes is sufficiently known. Some openly and directly disabled the Negro

[46] II Hurd, *op. cit.*, p. 100 (these enactments are not to be found in the laws of 1860. Hurd states they were reported in the "public journals" of the time).

[47] 14 Stat. 27.

[48] The substance of most of these codes is given in McPherson, *Political History of the United States During the Period of Reconstruction* (1871), pp. 29–44, and in 1 Fleming, *Documentary History of Reconstruction* (1906), pp. 273–312 (1906).

from meaningful participation in the public life of the community. Thus, in Mississippi, the freedman was effectively kept a servant on the plantation by provisions which recognized his right to purchase and inherit personal property, but not real property,[59] and forbade his renting or leasing real estate except in incorporated towns, where authorized by the local authorities;[60] which required him to be employed by a written contract,[61] except by official license, revocable at will;[62] permitted minor Negroes to be forcibly "apprenticed";[63] and provided for the arrest and return of both classes to their employer for breach of the contract.[64] The injustice here was flagrant: While the Negro was sparingly granted some new rights—the right to marry, but not with whites,[65] the right to testify, but only when Negroes were involved in the proceeding[66]—they were, at the same time, held to "the same duties and liabilities existing among white persons—to support their indigent families, and all colored persons," and were accordingly taxed for that purpose.[67]

The laws of Mississippi are perhaps extreme in their unwillingness to allow the Negro to find a new life, in freedom. But other codes reflect the same at-

[59] Mississippi Laws 1865, ch. 4, § 1.
[60] *Ibid.*
[61] *Id.*, ch. 4, § 6.
[62] *Id.*, ch. 4, § 5.
[63] *Id.*, ch. 5, § 1.
[64] *Id.*, ch. 4, §§ 7, 8; ch. 5, § 4.
[65] Id., ch. 4, §§ 2, 3.
[66] *Id.*, ch. 4, § 4.
[67] *Id.*, ch. 6, § 6.

titude, differing only in degree. The legislation of South Carolina, for instance, was plainly calculated to preserve the old order, the parties now being denominated "master and servant."[68] The series of laws there begins with one entitled "An Act preliminary to the legislation induced by the Emancipation of Slaves," which officially creates a class, including all Negroes, mulattoes and mestizoes, and their descendants, who have not 7/8ths or more "Caucasian blood," labelled "persons of color," and declares that "although such persons are not entitled to social or political equality," they shall enjoy certain specified rights, including the benefit of legal proceedings, "subject to * * * modifications" to be made.[69] There follow statutes creating special crimes for "persons of color,"[70] imposing different penalties for crimes common to both races,[71] and establishing separate judicial procedures,[72] regulating in detail the relationship of "master and servant,"[73] and disabling the Negro from engaging in the sale, for his account, of any agricultural product,[74] from manufacturing or retailing spirits,[75] or, for that matter, from carrying on any trade or business, "besides that of husbandry, or that of a servant," except by special license from

[68] See S.C. Acts 1865, p. 295 (No. 4733, § XXXV).

[69] *Id.*, p. 271 (No. 4730).

[70] *Id.*, pp. 271, 276 (No. 4731, §§ I, XXII).

[71] *Id.*, pp. 271, 272, 277 (No. 4731, §§ I, IV, XXIV, XXVII).

[72] *Id.*, pp. 279–280, 281, 283, 286, 286–287 (No. 4732, §§ V, VII, XX, XXIX, XXXI, XXXII, XXXIII).

[73] *Id.*, pp. 292–299 (No. 4733, §§ XV–LXXI).

[74] *Id.*, p. 274 (4731, § X).

[75] *Id.*, p. 275 (4731, § XIV).

the district judge."[76] Finally come the "pauper" and "vagrancy" laws[77] which appear to have served much the same purpose as enactments of a more recent day against "disturbing the peace," "disorderly conduct," and "trespass."[78]

In Florida, the situation was much the same.[79] We need only notice the law enacted in January 1866, making it a misdemeanor for any "person of color" to "intrude himself into any religious or other public assembly of white persons, or into any railroad car or other public vehicle set apart for the exclusive accommodation of white people."[80] The rest was left to the towns and cities where "the free white male inhabitants over the age of twenty-one years" were permitted to elect a local government "with full power and authority * * * to license and regulate retailers of liquor and taverns," to "license and regulate theatrical and other public amusements," and to "provide for the interior police and good government" of the community.[81]

It was to combat the spirit of these black codes that Congress enacted the Civil Rights Act of 1866 and proposed the Fourteenth Amendment. Reconstruction followed. While segregation in schools

[76] *Id.*, p. 299 (No. 4733, § LXXII).

[77] *Id.*, pp. 300–304 (No. 4733, §§ LXXXI–XCIX).

[78] See, *e.g.*, testimony taken by the Joint Committee on Reconstruction, House Report No. 30, 39th Cong., 1st Sess., Testimony, Part II, pp. 61, 126, 177; *Freedom to the Free* (United States Commission on Civil Rights, 1963), p. 33.

[79] See Fla. Laws 1865–1866, pp. 23–39.

[80] *Id.*, p. 25, ch. 1,466, § 14.

[81] *Id.*, pp. 41–43, ch. 1,479, §§ 1, 8.

sometimes remained,[42] several Southern States enacted more or less broad laws banning racial discrimination in places of public accommodation.[43] South Carolina enacted such laws in 1869, and 1870, covering common carriers and all businesses "for which a license is required by law" or "under a public rule" and expressly referring to theatres and "places of amusement or recreation."[44] The Florida statute of 1873[45] provided:

> * * * no citizen of this State shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished by innkeepers, by common carriers, whether on land or water, by licensed owners, managers, or lessees of theatres or other places of public amusement; by trustees, commissioners, superintendents, teachers, and other officers of common schools and public institutions of learning, the same being supported by moneys derived from general taxation, or authorized by law, also of cemetery associations and benevolent associations, supported or authorized in the same way: *Provided,* That private schools,

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[42] See *e.g.*, Ala Laws 1868, p. 148; Ala. Laws 1873, p. 176; Ala. Const. 1875, Art. XIII, § 1, Ark Laws 1873, p. 423; Ga. Laws 1872, p. 69; Ky. Laws 1873–1874, p. 63; Tenn. Laws 1868–1869, p. 14.

[43] Ark. Laws 1873, pp. 15–19; Ga. Laws 1870, pp. 398, 427–428; La. Const. 1868, Art. 13; La. Acts 1869, p. 37; La. Acts 1873, p. 156; Miss. Laws 1873, p. 66. For South Carolina and Florida statutes, see notes following.

[44] 14 S.C. Stat. 179, 386.

[45] Fla. Laws 1873, p. 25, ch. 1947.

cemeteries, and institutions of learning established exclusively for white or colored persons, and maintained respectively by voluntary contributions, shall remain according to the terms of the original establishment.

Jim Crow and segregation

As soon as Reconstruction ended in 1877, and often before, segregation in public schools was established or resumed. That is true of the three States at bar,[36] where the official policy continued uninterruptedly, at least until this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483.[37] The undeviating public example must have had its effect. And segregation in the schools doubtless educated a new generation in the theory of the Negro's inferiority which required his being kept apart. So, also, the reiterated legal ban on interracial marriages, or miscegenation,[38] must have impressed upon any who were otherwise disposed that the "accepted," "official" doctrine viewed the Negro as an untouchable. Yet, for a time, there was little segregation, in fact or in law, in

[36] Maryland: Laws 1870, ch. 392, pp. 555–556; Laws 1872, ch. 377, pp. 650–651; Laws 1898, ch. 273, pp. 814–817; South Carolina: Const. 1895, Art. XI, § 8; Acts 1896, No. 69, p. 171; Acts 1906, No. 86, pp. 133–137; Florida: Const. 1885, Art XII, § 12; Laws 1895, ch. 4335, p. 96.

[37] See Fla. Stat. (1960), § 228.09; S.C. Code (1962), §§ 21–751, 21–809, 22–3; Md. Code (1957), Art. 65A, § 1; Art. 77, §§ 226, 279.

[38] Maryland: Laws 1884, ch. 264, p. 365; South Carolina: Acts 1879, p. 3; Const. 1895, Art III, § 33, p. 20; Florida: Laws 1881, ch. 3283, pp. 86, 753; Const. 1885, Art. XVI, § 24; Laws 1903, ch. 5140, p. 76.

places of public accommodation.[89] Neither Florida nor South Carolina, though now free of federal interference, immediately repealed its anti-discrimination statute,[90] and Maryland (though never "reconstructed") acquiesced in the removal of such Jim Crow regulations as had existed.[91]

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[89] See, Woodward, *The Strange Career of Jim Crow* (1955), pp. 15–26.

[90] The Florida law is preserved in the codification of 1881. Fla. Digest 1881, ch. 19, pp. 171–172, and was not repealed until 1892. See Fla. Laws 1891, ch. 4055, p. 92; Fla. Rev. Stat. 1892, p. VIII. The similar South Carolina statute was retained in the 1882 Code (§§ 1369, 2601–2609) and was repealed in 1887 and 1889. See S.C. Acts 1886–1887, No. 288, p. 549; *id.* 1888–1889, No. 219, p. 362. See, also, Tindall, *South Carolina Negroes, 1877–1900*, pp. 291–293.

[91] Prior to 1870, the street car company in Baltimore had followed the practice of relegating Negroes to the front platform of the cars where they were unable to sit and were exposed to the elements. In April, 1870, U.S. Circuit Court Judge Giles ruled this practice discriminatory, awarded damages to a Negro who had been ejected from a seat inside the street car and held that the railway company was required to furnish its Negro passengers with accommodations comparable to that furnished white passengers. *Thompson* v. *The Baltimore City Passenger Railway Co.*, reported in *Baltimore American*, April 30, 1870, p. 1, col. 6, p. 2, col. 1. Pursuant to this ruling the railway company designated certain cars for "colored persons" but editorial comments in the *Baltimore American* indicate that voluntary desegregation on these cars took place at the initiative of white patrons. *Baltimore American*, November 11, 1871, p. 2, col. 2; November 14, 1871, p. 2, col. 1. In 1871, a Negro challenged the establishment of separate cars and the jury, charged by Judge Bond that a person seeking transportation might not be ejected from a car "because of color only," awarded him $40. *Fields* v. *Balitimore City Passenger Railway Co.*, reported in *Baltimore American*, November 14, 1871, p. 4, col. 3; *Baltimore Sun*, November 13, 1871, p. 4, col. 2.

But this more benevolent official attitude was not to endure. Jim Crow laws applicable to trains and street cars began to appear. Among the States here involved, Florida leads with an 1887 statute requiring separate first-class railroad cars for the two races.[92]

This decision was widely approved as illustrated by the following editorial comment from the *Baltimore American*, November 14, 1871, p. 2, col. 1:

"THE COLORED CAR QUESTION

"We congratulate our community on the disappearance yesterday of the sign-boards on the cars of the City Passenger Railway—'*Colored Persons admitted to this Car.*'

"We think that our most intelligent merchants, as well as all others who are looking to the commercial and industrial advancement of Baltimore, will heartily thank Judge Bond for his decision in the Passenger Railway case, at least so far as it has caused the prompt disappearance from the cars of the Company of those badges of a dead prejudice, which ought to have been removed long since. * * *

"When our city was crowded with strangers from all parts of the country attending the great convocations here, this relic of a dead prejudice was the subject of constant remark. It had disappeared from the cars everywhere except here in Baltimore, and although assured it rather represented the prejudice of a private corporation than the sentiment of the people, they expressed surprise that our Courts allowed them to thus trifle with law and justice. It was at this time that we appealed to the Company to cease flaunting in the face of strangers this badge of shame, and not to await the action of the Courts to compel an impartial enforcement of the law. We cannot keep pace with the progress of the age in liberal and humanitarian sentiment if such things are allowed, and it becomes the duty of all who are looking to a brighter future for our city to make haste to get rid of any remnant of feeling that would indicate that we are not a law-abiding and liberal-minded people."

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[92] Fla. Laws 1887, ch. 3743, p. 116.

A decade later, in 1898, South Carolina adopted a similar provision,[93] specifying, however, that "any first-class coach may be divided into apartments, separated by a substantial partition, in lieu of separate coaches."[94] It is typical of the general pattern toward pervasiveness and rigidity that two years later the divided coach was decreed insufficient separation, the new law requiring altogether separate cars, and that the Jim Crow rule was extended to the entire train, not solely the first-class coaches.[95] The Maryland legislation, beginning in 1904,[96] followed the same course.[97]

Once begun, the march of segregation legislation continued. The Jim Crow rule was now applied to all common carriers, including steamboats[98] and street cars.[99] While once only the conveyances themselves had been segregated, the new laws decreed separate waiting rooms and ticket windows.[100] The injunction and the penalty, originally running against the carrier alone, were now made applicable to the reluctant passenger also: not only must the company furnish

[93] S.C. Acts 1898, No. 483, p. 777–778.

[94] *Id.*, § 2.

[95] S.C. Acts 1900, No. 262, pp. 457–459.

[96] Md. Laws 1904, ch. 109, p. 186.

[97] Md. Laws 1908, ch. 292, p. 86. See, also, Fla. Laws 1909, ch. 5893, § 1, p. 407, banning the divided care except by special permission from the railroad commission.

[98] See, *e.g.*, Md. Laws 1904, ch. 110, p. 188; Md. Laws 1908, ch. 617, p. 85; S.C. Acts 1904, No. 249, p. 438.

[99] See, *e.g.*, Fla. Laws 1907, ch. 5617, p. 99; Md. Laws 1908, ch. 248, p. 88; S.C. Acts 1905, No. 477, p. 954.

[100] See, *e.g.*, Fla. Laws 1907, ch. 5619, p. 105.

separate accomodations, but the user must obey the sign under the threat of criminal sanctions.[101]

The State next turned to its own institutions. Public school segregation was continued, and separation was decreed for State prisons,[102] reformatories,[103] asylums,[104] hospitals.[105] Later, they would enact segregation in public parks, playgrounds and beaches.[106] But the legislators did not concern themselves only with governmentally operated facilities. We have already noticed the continuing official bar on interracial marriages.[107] Very early, the State also expressly prohibited mixed private schools,[108] and Florida, at least, made it a crime for white teachers to teach Negro children or the reverse.[109] While the regulation of privately owned places of public accommodation, other than common carriers, was, quite naturally, largely left to the municipalities, statewide leg-

[101] See Fla. Laws 1905, ch. 5420, p. 99; Fla. Laws 1907, ch. 5617, § 6, p. 100; Md. Laws 1904, ch. 109, § 4, p. 187; Md. Laws 1904, ch. 110, § 3, p. 188; S.C. Acts 1900, No. 262, § 5, pp. 457–458.

[102] See, *e.g.*, Fla. Laws 1905, ch. 5447, § 1, p. 132; Fla. Laws 1909, ch. 5967, p. 171; S.C. Acts 1906, No. 86, pp. 133, 136–137; S.C. Acts 1911, No. 110, p. 169.

[103] S.C. Acts 1898, No. 483, p. 777–778.

[104] Md. Laws 1870, ch. 392, p. 706; Md. Laws 1882, ch. 291, p. 445; Fla. Laws 1897, ch. 4167, pp. 107–108; Fla. Laws 1909, ch. 5967, pp. 171–172; S.C. Acts 1900, No. 246, pp. 443–444.

[105] Baltimore Ordinances 1888, § 34–43; Md. Laws 1910, ch. 250, pp. 234, 237–240; S.C. Acts 1918, No. 398, pp. 729, 731.

[106] Md. Code 1912, § 199A.

[106] S.C. Acts 1934, No. 893, p. 1536.

[107] See note 88, *supra*.

[108] Fla. Laws 1895, ch. 4335, p. 96.

[109] Fla. Laws 1913, ch. 6490, p. 311.

islation sometimes set the example here too. Thus, in 1906, South Carolina required segregation of station restaurants and "eating houses" serving passengers,[110] and later enjoined circuses and travelling shows to provide separate entrances for each race.[111] There was, finally, a law keeping the races apart in poolrooms and billiard halls.[112]

Where the central State government did not act directly, segregation was promulgated by the municipal authorities. Illustrative are the segregation provisions of the City Code of Greenville, South Carolina, repealed on May 28, 1963, after this Court's decision in *Peterson* v. *Greenville,* 373 U.S. 244. An entire chapter of that Code is devoted to "Segregation of Races." Explicitly announcing an "intent and purpose * * * to provide for the separation or segregation of races in the city,"[113] it proceeds, methodically, to define "white" and "colored" blocks,[114] and decrees segregation in housing,[115] churches,[116] schools,[117] hotels,[118] stores,[119] restaurants, cafes, and all other places serving food, including lunch counters,[120] and transportation.[121] Elsewhere in the Code it is made generally unlawful "for any colored person to

[110] S.C. Acts 1906, No. 52, p. 76

[111] S.C. Acts 1917, p. 48 (S.C. Code (1962), § 5–19).

[112] S.C. Acts 1924, p. 895 (S.C. Code (1962), § 5–503).

[113] Greenville City Code (1953), § 31–4.

[114] *Id.*, § 31–1.

[115] *Id.*, § 31–2, 9, 10.

[116] *Id.*, § 31–5.

[117] *Id.*, § 31–6.

[118] *Id.*, § 31–7.

[119] *Id.*, § 31–7.

[120] *Id.*, § 31–8. See, also, *id.*, § 16–35, requiring restaurants to provide separate toilets for white and colored employees.

[121] *Id.*, § 31–12 *et seq.*; § 37–30.

enter upon or go through any of the city cemeteries or grounds connected therewith, used exclusively for the burial of white persons * * *." [122]

While the number of similar municipal regulations is not known, it is clear that the example just recited is not atypical.[123] The City Code of Greenwood, S.C., amended only last June, was quite similar.[124] Some of the provisions elsewhere are truly bizarre.[125] One

[122] *Id.*, § 8-1.

[123] See, *e.g.*, Birmingham, Ala. Code (1944): restaurants (§ 369); theatres (§ 859); poolrooms (§ 939); restrooms (§ 1110); housing (§ 1604); Montgomery, Ala. Code (1952): restrooms (§ 13-25); restaurants (§ 10-14); theatres (§ 34-5); poolrooms (§ 25-5); parks and swimming pools (§ 28A-2); athletic contests (§ 28A-5); Selma, Ala. Code (1956 Supp.): recreational facilities (§ 627-1); restaurants (§ 627-6); Atlanta, Ga. Code (1942); public assemblies (§ 36-64); parks (§ 38-31); theatres (§ 56-15); Augusta, Ga. Code (1952): barbershops (§ 8-2-26); Monroe, La. Code (1958): cemeteries (§ 7-1); bars (§ 4-24); New Orleans, La. Code (1956): bars (§ 5-61.1); Shreveport, La. Code (1955): housing (§ 8.2); toilets (§§ 8.3, 11-47); loitering by whites in Negro districts a form of vagrancy (§ 24-56); restaurants (§ 24-36); Meridian, Miss. Code (1962): jails (§ 17-97); Natchez, Miss. Code (1954): cemeteries (§ 5.6); Jackson, Miss. Code (1938): cemeteries (§ 546); Asheville, N.C. Code (1945): housing (§ 3-23-636); cemeteries (§ 2-5-109); sexual relations (§ 2-7-120); Charlotte, N.C. Code (1961): restrooms (§ 13-13-11); poolrooms (§ 11-11-2(b)); Danville, Va. Code (1962): cemeteries (§ 18-13); Norfolk, Va. Code (1950): cemeteries (§ 9-30). Some of these ordinances have been repealed or amended during 1962 and 1963.

[124] Greenwood City Code (1952), ch. 24.

[125] See, *e.g.*, Montgomery, Ala., Code (1952) ch. 20-28 and Gadsden, Ala., Code § 8-18 (1946), which provide in pertinent part:

"It shall be unlawful for a negro and a white person to play together * * * in the city in any game of cards, dice, dominoes or checkers * * *."

Charlotte, N.C., Code (1961) § 13-13-15(a) provides in pertin-

obviously degrading provision common to most Southern municipalities, and perhaps to all, is the requirement of the "Southern Standard Building Code" that "where negroes and whites are accommodated there shall be separate toilet facilities provided for the former, marked 'For Negroes Only'." [126] By virtue of a regulation of the State Administrative Code,[127] that is the law of Florida even today. And where municipal laws do not explicitly provide for segregation in places of public accommodation, there are related laws. Thus, in addition to a rather recent regulation providing for segregation in bars and in restaurants serving liquor,[127a] Baltimore City at one time or another decreed segregation in housing and

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ent part: "No person shall give a public exhibition * * either on canvas or otherwise, of any prize fight * * * wherein the contestants * * * are persons of different races."

In 1917, the New Orleans, La., Commission Council adopted an ordinance prescribing a specific area of the city wherein Negro houses of prostitution could be maintained and prohibiting peripatetic Negro prostitutes from plying their trade in other parts of the city. New Orleans, La., Comm'n Council Ord. No. 4485 (1917).

[126] Southern Standard Building Code 1957–58, § 2002.1. See *e.g.*, Spartanburg, S.C., City Code (1958), §§ 28–45, 28–76(a); Spartanburg Plumbing Code (1961), § 921.1.

[127] Fla. Adm. Code, ch. 170C, § 8.06. See *Bohler* v. *Lane* (S.D. Fla.), 204 F. Supp. 168, 172–173. The same practice obtained in Maryland until 1960. See *Jones* v. *Marva Theatres, Inc.* (D. Md.), 180 F. Supp. 49.

[127a] See *DeAngelis* v. *Board* (Baltimore City Ct.), 1 R.R.L.R. 870 (1955), holding the regulation unconstitutional.

use of land,[128] in municipal parks and playgrounds [129] and in a free library.[130] Tampa, Florida, prohibits the operation of any "public inn, restaurant, or other place of public accommodation and refreshment" serving Negroes in a "white community," without the consent of a majority of the white residents.[131] Until 1961, Jacksonville, in the same State, segregated buses [132] and taxicabs,[133] and, for a time at least, expressly required separation of the races in all taverns.[134]

While there are important variations from State to State, and even from one town to another, the basic pattern has been the same. Some communities, like those here involved, have not explicitly compelled racial segregation in places of public accommodation. Yet, there can be no doubt that each of the States at bar, until very recently, has encouraged those practices.

Here, as elsewhere, the official philosophy of the Negro's inferiority was affirmed in the legal defini-

[128] Ordinance #610, December 19, 1910; Ordinance #654, April 7, 1911; Ordinance #692, May 15, 1911; Ordinance #339, September 25, 1913.

[129] See *Boyer* v. *Garrett* (4th Cir.), 183 F. 2d 582, certiorari denied, 340 U.S. 912; *Law* v. *Mayor and City Council of Baltimore* (D. Md.), 78 F. Supp. 346; *Dawson* v. *Mayor and City Council of Baltimore City* (4th Cir.), 220 F. 2d 386, affirmed, 350 U.S. 877.

[130] *Kerr* v. *Enoch Pratt Free Library of Baltimore City* (4th Cir.), 149 F. 2d 212, certiorari denied, 326 U.S. 721.

[131] Tampa City Code (1937), § 18–107.

[132] Jacksonville City Code (1953), §§ 39–65, 39–70.

[133] *Id.*, §§ 39–15, 39–17.

[134] Jacksonville City Code (1917), § 439. While the provision is not incorporated in the more recent codes, no express repeal was found.

tion of the race, branding as "tainted" any person with so much as 1/8th Negro ancestry,[126] in the strict ban on interracial marriages,[126] and by a construction of the libel law which recognized it as an insult, actionable *per se*, to be wrongly called a Negro.[127] Here, as elsewhere, compulsory school segregation laws taught white children from the first that Negroes were inferiors and impressed on colored children that they were not fit to share a schoolhouse with the white. Here, as elsewhere, the State set an example by officially segregating all its own facilities. And here, as elsewhere, until very recent days, the story of segregation legislation has had only one direction, becoming ever more rigid and more pervasive, as though to give legal support to a threatened institution.

We do not mean to disparage the differences even among the former slave-holding States in their past and present laws dealing with segregation. Maryland's laws and official policies have been far less rigid than those of South Carolina. Some states have vehemently pursued an official policy of segregation, while others have taken first steps to adapt themselves to constitutional requirements: Louisiana's rigid insistence upon preserving segregation, which illustrates one extreme, is described at pages 59–78 of our brief

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[126] Fla. Stat. § 1.01(6) (1961); Md. Code 27, § 398 (1957); S.C. Const. Art. III, § 33.

[126] Fla. Const., Art. XVI, § 24; Fla. Stat. 741.11–741.16 (1964); Md. Code (1957), Art. 27, § 398; S.C. Const., Art. III, § 33; S.C. Code § 20–7 (1962).

[127] See Annotation, 46 A.L.R. 2d 1287 (1956); *Bowen* v. *Independent Publishing Company*, 230 S.C. 509, 96 S.E. 2d 564.

in *Avent* v. *North Carolina* and companion cases (Nos. 11, 58, 66, 67, and 71, October Term, 1962). Although thirty States have equal public accommodations laws, neither respondents nor any of the States that promoted segregation have wiped the slate clean.[138]

We are concerned with institutions—not with blame. If there is to be blame for the revival of the caste system in the face of the Thirteenth, Fourteenth and Fifteenth Amendments, it should rest upon the Nation. Our point is that the respondents and some sister States massively contributed to the system of segregation by laws and official action. Between State law and private custom there was a symbiotic relation; they nourished each other and together produced the institution.

There can be no doubt that the State laws discussed above contributed to the establishment and practices of segregation in places of public accommodation. The legislation requiring segregation in public conveyances and upon carriers came too close to restau-

[138] Thus, each of the respondent States still retains school segregation laws on its statute books. See note 87, *supra*. With respect to Florida, see, also, *Florida* ex rel. *Hawkins* v. *Board of Control*, 347 U.S. 971, 350 U.S. 413, 355 U.S. 839. Segregation on common carriers remains the statutory law of Florida and South Carolina. Fla. Stat. (1958), §§ 352.03–352.18; S.C. Code (1962), §§ 58–714 through 58–720, 58–1331 through 58–1340, 58–1491 through 58-1496. South Carolina's law requiring segregated eating at station restaurants is still on the books. S.C. Code (1962), § 58–551. And all three States still prohibit miscegenation and interracial marriages. See Md. Code (1957), Art. 27, § 398; Fla. Stat. (1964), §§ 741.11–741.16; S.C. Code (1962), § 20–7. While Maryland has recently adopted a public accommodations law, it is expressly inapplicable to several counties of the State. Md. Laws 1963, ch. 227.

rants, theatres and other public places to have no influence upon them. No one can seriously argue that the South Carolina law requiring segregation in station restaurants and "eating houses" serving passengers [139] did not strengthen the practice of stigmatizing Negroes as inferiors by denying them the privilege of eating with whites; nor is it unlikely that the State law encouraged municipalities and licensing authorities to adopt similar local regulations.[140] Even as the discriminatory laws were being enacted, Florida and South Carolina were repealing earlier laws, applicable to places of public accommodation. The South Carolina laws of 1869 and 1870 banning racial discrimination by all licensed businesses were eliminated in 1887 and 1889.[141] Florida followed suit in 1892,[142] and, in 1957, expressly declared restaurants and hotels "private" establishments, free to exclude as they chose.[143] Such enactments cannot be read as legal abstractions. In the context of "private attitudes and pressures" toward Negroes at the time of their enactment a "repressive effect" was bound to follow the "exercise of

[139] S.C. Code (1962), § 58–551.

[140] We have already noticed ordinances in Greenville and Greenwood, S.C., requiring segregation in places of public accommodation. See notes 113–122, 124, *supra*.

[141] See note 90, *supra*.

[142] *Ibid.* Other States waited longer. See, *e.g.*, La. Acts 1954, No. 194, repealing former La. R.S. 4:3–4 (originally La. Acts 1869, p. 37).

[143] See Fla. Stat. (1962) § 509.092. See, also, the statute involved in No. 60, Fla. Stat. (1962). § 509.141. Four other States (all former slave States) have comparable laws expressly permitting places of public accommodation to refuse service. Ark. Stat. Ann., § 71–1801; Del. Code Ann., § 24–1501; Miss. Code Ann. § 2046.5; Tenn. Code Ann. § 62–710.

governmental power." See *Anderson* v. *Martin*, No. 51, this term, decided January 13, 1964, slip opinion, p. 4.

One aspect of the inevitable interaction between segregation in restaurants and other aspects of the system finds a current illustration in Florida. As recently as 1962 the State Board of Health reissued a revised regulation requiring restaurants to provide separate toilet and lavatory rooms wherever colored persons are accommodated (Florida Administrative Code, Chapter 170C, Section 8.06).[144] Not only does this official statement of State policy promote the view that colored persons should be segregated from whites as inferiors, but it has the very practical consequence of discouraging restaurants from accommodating all members of the public equally. Excepting very large restaurants, the financial burden of providing duplicate facilities would be too heavy.

Institutionally, segregation in restaurants, lunch counters and amusement parks is part and parcel of the pervasive, official system of segregation which carries literally from cradle to grave.[145] If it were

[144] The substance of the earlier regulation was identical. See p. 2, *supra*. The text of the current regulation is set out at pp. 99–100, *infra*.

[145] See, *e.g.*, the Louisiana pattern of laws set forth in the concurring opinion of Mr. Justice Douglas in *Garner* v. *Louisiana*, 368 U.S. 157, at 179–181. For similar laws elsewhere, see Murray, *States Laws on Race and Color* (1950), and Greenberg, *Race Relations and American Law* (1959), pp. 372–400. See, generally, Mangum, *The Legal Status of the Negro* (1940).

While there are not explicit statutes in each State for each activity, those set out below doubtless reflect the official view, at least until very recently, in the States at bar.

otherwise possible to view the practices reflected in the cases at bar as individual instances of truly private preference, that assumption becomes absurd in a community which until very recently required the Negro to begin life in a segregated neighborhood,[146] attending separate schools,[147] using segregated parks, playgrounds, swimming pools,[148] which later kept him apart at work,[149] at play,[150] at worship,[151] even at court[152] and while going from one place to another,[153] which confined him in segregated hospitals[154] and prisons,[155] and finally relegated him to a separate burial place.[156] It is this rigidity, this pervasiveness, which makes unique in the American context the discrimination against the Negro. There is no comparable instance in this country of a massive phenomenon which affects some 10 million people in every aspect of life. It has been infused with State support throughout its history.

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[146] See, *e.g.*, City Code of Spartanburg, S.C. (1949), § 23–51.

[147] See, *e.g.*, Fla. Stat. (1961), § 228.09.

[148] See, *e.g.*, the action of the City Commission of Miami directing the resegregation of municipal swimming pools, reported at 4 R.R.L.R. 1066.

[149] See, *e.g.*, S.C. Code (1962), § 40–452, requiring separation in cotton textile factories.

[150] See, *e.g.*, Emergency Ordinance No. 236 of the City of Delray Beach, Fla., reprinted in 1 R.R.L.R. 733 (1956), excluding Negroes from the public beaches.

[151] See, *e.g.*, City Code of Greenville, S.C. (1953), § 31–5.

[152] See, *e.g.*, *Johnson* v. *Virginia*, 373 U.S. 61.

[153] See, *e.g.*, City Code of Greenville, S.C. (1953), § 31–12.

[154] Md. Code Ann. (1939), Art. 59, § 61.

[155] See, *e.g.*, Fla. Stat. (1960), §§ 950.05–950.08; Md. Code (1957), Art. 78A, § 14.

[156] See, *e.g.*, City Code of Danville, Va. (1962), § 18.13.

II

FOR A STATE TO GIVE LEGAL SUPPORT TO A RIGHT TO MAINTAIN PUBLIC RACIAL SEGREGATION IN PLACES OF PUBLIC ACCOMMODATION, AS PART OF A CASTE SYSTEM FABRICATED BY A COMBINATION OF STATE AND PRIVATE ACTION, CONSTITUTES A DENIAL OF EQUAL PROTECTION OF THE LAWS

We have shown that the refusal to allow Negroes to eat or mingle with whites in these places of public accommodation is a community-wide practice enforced, with State support where necessary, in places regulated by the States and heavily affected with a public interest, and that the practice is an integral part of a system of segregation established by a combination of governmental and non-governmental action and designed to preserve the very caste system that the Thirteenth, Fourteenth and Fifteenth Amendments sought to eradicate. We now submit the legal proposition that for a State to support that practice, either by arrests and criminal prosecution or by recognizing a privilege of self-help, violates the Fourteenth Amendment.

The argument is essentially that where racial discrimination becomes operative through a combination of State and private action the State's responsibility depends upon an appraisal of the significance of all the elements of State involvement in relation to the elements of private choice. Thus, while we stress the presence of the State in the arrests and prosecution, we do not urge that such State action in support of private discrimination is alone enough

to constitute a State denial of equal protection of the laws. Similarly, although it might be argued that the State's influence upon the system of segregation, of which discrimination in places of public accommodation is an integral part, is enough to bring the cases within the principle of *Peterson* v. *Greenville,* 373 U.S. 244, and *Lombard* v. *Louisiana,* 373 U.S. 267, we do not press the argument that far. We rely upon the State's antecedent involvement only as one of the elements in the total complex. Again, while we do not assert that a State violates the Fourteenth Amendment merely by failing to require the proprietor of a place of public accommodation to serve Negroes equally with other members of the public, we do nevertheless urge that the States' close association with such establishments through licensing and regulation constitutes a further element of State involvement and also indicates that the imposition of State responsibility would effectuate the basic purpose of the Thirteenth, Fourteenth and Fifteenth Amendments.[167]

[167] It may be useful also to distinguish another line of analysis. There is considerable ground for arguing that the Fourteenth Amendment imposes upon the States a duty to provide equality of treatment under the law for all members of the public without regard to race in establishments which the proprietor voluntarily throws open to the general public to such an extent that legal protection of the public is a normal part of the legal system. Although there is little direct evidence, the history of the Reconstruction Period furnishes no little support for that thesis. In addition to materials cited at pp. 114–143 below, see Roche, *Civil Liberty in the Age of Enterprise,* 31 U. of Chi. L. Rev. 103, 107–112; Peters, *Civil Rights and State Action,* 3 Notre Dame Lawyer 303; cf. Harris, *The Quest for Equality* (1960), 42–43. The trend of constitutional

A. WHERE RACIAL DISCRIMINATION BECOMES EFFECTIVE BY CONCURRENT STATE AND INDIVIDUAL ACTION, THE RESPONSIBILITY OF THE STATE UNDER THE FOURTEENTH AMENDMENT DEPENDS UPON THE IMPORTANCE OF THE ELEMENTS OF STATE INVOLVEMENT COMPARED WITH THE ELEMENTS OF PRIVATE CHOICE.

Petitioners were convicted as a result of racial discrimination. There was discrimination when they were refused service. It became operative again when they were arrested, tried and convicted of crime. The

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thinking after 1877 points in the opposite direction, but the decisions invalidating direct federal legislation do not require the latter conclusion because all appear to be based upon the absence of any showing that the State failed to provide a remedy for the alleged invasions of individual rights. In the *Civil Rights Cases*, 109 U.S. 3, the Court expressly assumed the availability of a State remedy. See pp. 73–77 below. In *United States* v. *Cruikshank*, 92 U.S. 542, apparently there was no allegation of a wilful default in State protection. *United States* v. *Harris*, 106 U.S. 629, 639–640, states that the gravamen of the charge was that the accused "conspired to deprive certain citizens of the United States and of the State of Tennessee of the equal protection accorded them by the laws of Tennessee." The Solicitor General's brief in the *Harris* case made no contention based upon a technical or practical lack of State protection.

If a State's failure to provide equal protection violates Section 1, then Congress, under Section 5, has power to enact legislation appropriate to securing the equality. In default of Congressional action the victims might lack a direct remedy, for the refusal of the proprietors could be distinguished from the default of the State, but certainly the Court would invalidate any State action, such as arrests and convictions, that enhanced the inequality which the State was constitutionally required to eliminate.

In view of the elements of affirmative State involvement present in these cases, we mention but do not pursue the foregoing line of analysis.

facts can hardly be disputed. Though one may argue the legal consequences, neither the State authorities nor this Court could blind itself to what all the world knows.

If the State, in addition to making the arrests and entering the convictions, had fixed the rule that no Negro should be served there would be a plain violation of the Fourteenth Amendment. If the State had never intervened, and had no duty to act,[158] there would equally plainly be no violation of constitutional rights. The difficulty in the present case is that the discrimination becomes operative through a combination of State and private action.

The resulting problem, though novel in the present particular, is not unfamiliar. In a complex society governmental and private action are increasingly often entwined as well as interdependent. The State acts in many forms and through many channels. Private activity may not only depend upon State permission and State sanctions, but it may benefit from or be stimulated by State subsidies, State regulation and other forms of aid or direction. The cases that have reached the courts are alone enough to demonstrate that invidious discrimination and interference with aspects of individual liberty are increasingly often the product of combinations of private *and* gov-

[158] We do not argue that there is such a duty. See pp. 9–10, 65, no. 157, 20–21, above.

ernmental action.[169] In such a situation there is no

[169] Cases where lessees of or buyers from the State have discriminated: *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (refusal to serve Negro in private restaurant located in public building and leased from the State); *Muir* v. *Louisville Park Theatrical Ass'n.*, 347 U.S. 971, reversing and remanding 202 F. 2d 275 (C.A. 6) (municipally owned amphitheater leased to private association); *Jones* v. *Marva Theatres, Inc.*, 180 F. Supp. 49 (D. Md.) (city owned theater leased to private corporation); *Coke* v. *City of Atlanta, Ga.*, 184 F. Supp. 579 (N.D. Ga.) (city owned restaurant leased to private corporation); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W. Va.) (city owned swimming pool leased to private corporation); *McDuffie* v. *Florida Turnpike Authority* (not officially reported, see 7 R.R.L.R. 505) (restaurant leased by private party from State turnpike authority); *Department of Conservation & Development* v. *Tate*, 231 F. 2d 615 (C.A. 4) (threatened lease of state park to private persons who would discriminate); *Smith* v. *Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M.D. Tenn.) (private motel located on urban renewal land sold to proprietor who refused to accommodate Negroes); *Derrington* v. *Plummer*, 240 F. 2d 922 (C.A. 5) (refusal to serve Negroes in cafeteria leased from state and located in courthouse).

Cases where the State required or encouraged segregation by statute or official conduct: *Lombard* v. *Louisiana*, 373 U.S. 267 (refusal to serve Negro in private restaurant in city where public officials encouraged and recommended restaurant segregation); *Peterson* v. *Greenville*, 373 U.S. 244 (refusal to serve Negro in private restaurant in city where ordinance required restaurant segregation); *Gayle* v. *Browder*, 352 U.S. 903, affirming 142 F. Supp. 707 (M.D. Ala.) (State law requiring private common carrier to segregate passengers); *McCabe* v. *A.T. & S.F. Ry Co.*, 235 U.S. 151 (racial discrimination by railroad permitted by state law); *Turner* v. *City of Memphis*, 369 U.S. 350 (State law requiring segregation in private restaurant located in public airport).

Cases where private groups whose power to act derives from State or federal law discriminated: *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192 (federal law conferred exclusive

simple formula for distinguishing State denials of equal protection from individual invasions of the same interests.

Mindful of the variety and complexity of the forms of State action and their relation to racial discrimination and other invasions of fundamental rights, the Court has eschewed the "impossible task" of formulating fixed rules and has sifted the facts and weighed the circumstances of each case in order to attribute "its true significance" to "nonobvious involvement of the State in private conduct." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722. "The ultimate substantive question is * * * whether the character of the State's involvement in an arbitrary discrimina-

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bargaining rights on union which discriminated against Negroes).

Cases where the State delegated a governmental function to a private entity: *Terry* v. *Adams*, 345 U.S. 461 (delegation of election function by State to private group which excluded Negroes); *Smith* v. *Allwright*, 321 U.S. 149 (same); *Marsh* v. *Alabama*, 326 U.S. 501 (delegation by State of power to exclude religious solicitors from "company town" and conviction for trespass for refusal to leave).

Cases where the State was involved financially or otherwise in creating or maintaining the private entity which discriminated: *Simkins* v. *Moses H. Cone Hospital*, No. 8908 (C.A. 4, November 1, 1963) (private hospital refusing Negro patients pursuant to statutory authorization although hospital constructed under federal and state plan); *Smith* v. *Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M.D. Tenn.) (private motel located on urban renewal land sold to proprietor who refused to accommodate Negroes); *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (C.A. 4) (large-scale public financial support of library which excluded Negroes).

tion is such that it should be held *responsible* for the discrimination." Mr. Justice Harlan concurring in *Peterson* v. *Greenville,* 373 U.S. 244, 249. The required judgment *upon the whole* seems not essentially different in method from the determination of other forms of legal liability for the results of mingled causes.

One of the guiding principles is that a State cannot exculpate itself merely by showing that a private person made the effective determination to engage in invidious discrimination or some other invasion of fundamental rights. Just as there may be two legal causes of injury to the person or property, so State and private responsibility are not mutually exclusive. There are numerous decisions, both in this Court and elsewhere, holding that a State has violated the Fourteenth Amendment where its participation facilitates or encourages discrimination but leaves the decision to private choice. In *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, the State was involved through ownership of the building and there was continuing mutual interdependence as well as association between the State parking facility and the private restaurant; the actual decision to exclude Negroes from the restaurant was made by the restaurant alone. In *Lombard* v. *Louisiana,* 373 U.S. 267, government officials encouraged the discrimination but the decision was private. Mr. Justice Harlan urged in dissent that the State involvement was insufficient if

the decision to discriminate was private, but his view was rejected by the Court.[100]

The principle is not confined to cases of racial discrimination. In *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225, the federal statute merely removed legal obstacles to private agreements which the parties might conclude or reject, but this was unanimously held sufficient to subject the consequences of the resulting agreements to scrutiny under the First and Fifth Amendments. Compare *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192; *International Ass'n of Machinists* v. *Street*, 367 U.S. 740. See, also, *Public Utilities Comm.* v. *Pollak*, 343 U.S. 451.

States have also been held responsible where their sole participation was to permit and carry out an exercise of private right. In the *Girard Trust* case the public authorities did no more than give effect to a private individual's testamentary instructions concerning the disposition and use of his property as a public trust. *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230. The State, through a municipal subdivision,

[100] See, also, *Baldwin* v. *Morgan*, 287 F. 2d 750 (C.A. 5) (signs designating "white" and "colored" terminal waiting rooms unlawful despite lack of enforcement since signs encourage segregation); *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (C.A. 4) (library supported mainly with public funds); *Simpkins* v. *Moses H. Cone Hospital*, C.A. 8908 (C.A. 4, November 1, 1963) (private hospital constructed with federal funds according to state plan and authorized by law to discriminate); *Derrington* v. *Plummer*, 240 F. 2d 922 (C.A. 5) (leased restaurant in courthouse building); *Department of Conservation & Development* v. *Tate*, 231 F. 2d 615 (C.A. 4) (lease of state park to private persons); *Smith* v. *Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M. D. Tenn.) (sale of urban renewal land to private motel corporation).

was continuously and intimately involved because it acted as trustee; the element of individual freedom was diluted by the lapse of a century since the testator's death; but the fact remains that the State was only giving effect to a private decision. *Shelley* v. *Kraemer,* 334 U.S. 1, is still closer to the point for there the State : ction consisted solely of a legal system which recognized a private right to negotiate covenants running with the land and which enforced such private covenants even when racially discriminatory. Manifestly, there would have been no racial discrimination but for the private choice; and the State did nothing to encourage it. The core of the decision appears to be the judgment that, in that instance of discrimination, which was a product of private contract combined with jural recognition, the elements of law were so significant in relation to the elements of private choice as to require the conclusion of State, as well as private responsibility. See pp. 88–89 below. Accord: *Barrows* v. *Jackson,* 346 U.S. 249.[161]

[161] It may be suggested that in the *Girard Trust* case the State was required to determine whether an applicant was white or Negro, and that in *Shelley* v. *Kraemer* and other cases of restrictive covenants the State gave judgment to the plaintiff only after satisfying itself of the race of the prospective purchaser; whereas in the present cases, the States were evicting the persons deemed objectionable by the managers without the States' inquiring into race or color. Other cases show this difference to be unimportant. In *Peterson* and *Lombard*, as here, the State could say that it proceeded against persons identified as objectionable by the managers without asking their race or color. While those cases can be distinguished on the ground that the vice was anterior State intervention looking to race, the distinction is not applicable to *Burton*, where the State could have proved a criminal tres-

There is nothing to the contrary in the *Civil Rights Cases*, 109 U.S. 3, even though they deal with discrimination in places of public accommodation. There the State was not involved in the discrimination either by action or inaction. In issue was the power of Congress under the Thirteenth and Fourteenth Amendments to require the operators of inns, public conveyances, theatres and other places of public amusement to make their facilities equally available to citizens of every race and color, even though there was no showing that the State law failed to secure such rights. The decision was that Congress lacked power to enact the legislation (*id.* at 13).

> * * * until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority.

The refusal of service was then held to be only a private wrong against the argument that the carriers, inns and theatres involved were quasi-public concerns acting for the State. The predicate of the rul-

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pass without showing Burton's color. In a case like *International Association of Machinists* v. *Street*, the reason for the employees' failure to pay dues would not have to be proved to invoke the union shop agreement; yet the employees were allowed to offer the proof in challenging the constitutionality of the governmental action.

ing, however, was that the States not only gave no support to the discrimination but would afford the injured party a remedy.

Discussing in general terms the need for some State involvement to invoke the civil rights guaranteed by the Constitution, the Court reasoned that the wrong done by one individual to another did not impair the constitutional right because the individual aggressor, unless shielded by State law or State authority, "will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed" (109 U.S. at 17). Coming to the Civil Rights Act of 1875, the Court assumed that "a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of citizens which no State can abridge or interfere with." It observed that, far from positing State failure to secure those rights, the Act of 1875 (*id.* at 19)—

> supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation and assumes that the matter is one that belongs to the domain of national regulation.

The rather plain implication that the Court knew, or at least assumed the States to have laws protecting the very rights in question was made explicit shortly after (*id.* at 25):

> Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to fur-

> nish proper accommodation to all unobjectionable persons who in good faith apply for them.

The same understanding, including also places of amusement, is the predicate of the key passage expressing in the form of a rhetorical question the Court's final judgment upon the issue of State responsibility for the allegedly individual acts of discrimination (*id.* at 24):

> Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, *properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?* [Emphasis added.]

The foregoing passages appear essential to the Court's reasoning. Justice Bradley, who wrote the opinion, had earlier expressed in private correspondence the view that the Fourteenth Amendment laid upon the States an affirmative obligation to secure equality for the freedmen, including the duty to enact protective legislation. Although he later modified his view—but not in relation to businesses normally under a duty of public service—still there is no indication that he was slow to find State involvement.[162]

[162] "* * * Congress has a right, by appropriate legislation, to enforce and protect such fundamental rights, against unfriendly or insufficient State legislation. I (?) say unfriendly or insufficient; for the XIVth Amendment not only prohibits the *making* or *enforcing of laws* which shall *abridge* the privileges of the citizen; but prohibits the states from *denying* to all persons within its jurisdiction the equal protection of the laws. *Deny-*

The assumption that State law, evenly administered, would usually provide redress for the denial of access to the inns or hotels, carrier, opera house and theatre was not unreasonable. The common law covered most situations within the Act. Many States were enacting still broader equal public accommodation laws.[163] Of

ing includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection." From an unpublished draft of a letter by Justice Bradley to Circuit Judge (later Justice) William B. Woods, March 12, 1871, on file, The New Jersey Historical Society, Newark, New Jersey. Attached to the drafts of two letters, including the one to Judge Woods, was a note by Justice Bradley stating: "The views expressed in the foregoing letters were much modified by subsequent reflection, so far as relates to the power of Congress to pass laws for enforcing social equality between the races."

The most convenient source of the pertinent excerpts from the Bradley Papers is *Roche, Civil Liberty in the Age of Enterprise*, 31 U. of Chi. L. Rev. 103, 108–110.

[163] See, for instance: Acts and Resolves of Massachusetts, 1865, ch. 277, p. 650 (no distinction, discrimination or restriction on account of race or color in any licensed inn, public place or amusement, public conveyance, or public meetings); *Ibid;* Jan. sess., 1866, p. 242 (theatres) (Stephenson, *Race Discriminations in American Law* (1910), p. 112.)

New York Statutes, IX, pp. 583–84 (prohibition of race distinctions in inns, public conveyances, theaters, other public places of amusement, common schools, public institutions of learning, cemeteries) (Stephenson, p. 115).

Laws of Florida, 1873, chapt. 1947 (prohibited discrimination on account of race, color, or previous condition of servitude in full and equal enjoyment of the accommodations of inns, public conveyances, licensed theaters, other places of public amusement, common schools, public institutions of learning, cemeteries, benevolent associations supported by general taxation) (Stephenson, pp. 115–116).

Acts of Louisiana, 1869, p. 37; 1870, p. 57 (prohibited discrimination on account of race or color by common carriers,

the five cases before the Court, two involved plain violations of a State statute and two may well have been covered by the common law. Only in one instance—the case involving refusal of a parlor coach seat on a railroad in Tennessee—is it probable that the State would have denied redress, and plainly the Court did not examine that case separately to ascertain whether the State had sanctioned discrimination.[164]

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inkeepers, hotel keepers, keepers of public resorts.); *Id.*, 1878, pp. 156–57 (provided that all persons, without regard to race or color must have "equal and impartial accommodations" on *public conveyances, in inns, and other places of public resort)* (Stephenson, p. 116).

Acts of Arkansas, 1873, pp. 15–19 (same accommodations to be furnished to all by common carriers, keepers of public houses of entertainment, inns, hotels, restaurants, saloons, groceries, dram-shops or other places where liquor was sold, public schools, and benevolent institutions supported in whole or in part by general taxation) (Stephenson, p. 116).

See also notes 19, 83–85, *supra;* notes 228–236, 241–243, infra.

[164] *United States* v. *Stanley* involved a Kansas inn (hotel). Probably it was covered by the common law but Kansas Laws 1874, p. 82, specifically barred racial discrimination.

United States v. *Ryan*, involved a California theatre. The earliest legislation prohibiting discrimination in theatres was Laws 1893, p. 220. See also, Laws 1897, p. 137. However, the common law duty was extended broadly; for example, to a watering place. See *Willis* v. *McMahon*, 89 Cal. 156 (1891).

In *United States* v. *Nichols*, the Missouri inn or hotel was presumably subject to the common law duty. Indeed, in his brief in the *Civil Rights Cases*, the Solicitor General said: "I premise that upon the subject of *inns* the common law is in force in Missouri * * *." Brief for the United States, Nos. 1, 2, 4, 460, Oct. Term, 1882, p. 8.

United States v. *Singleton* involved the New York opera house. A State statute barred racial discrimination by "theatres or other places of amusement." Laws 1873, p. 303; Laws 1881, p. 541.

The basic distinction between State and private action, stemming from the *Civil Rights Cases*, has important implications in determining what degree of State involvement will carry State responsibility for the purposes of the Fourteenth Amendment. See pp. 84–88 below. The cases hold, however, only that the Amendment gives the federal Congress no power to deal with individual wrongs (not affecting interstate commerce) where there is no State involvement hostile to the right to equal treatment and where State law is available to secure redress. As we read the facts and the opinion, the cases do not even reach the question whether the State is sufficiently involved for there to be a violation of the Fourteenth Amendment when the State fails to secure a right of equal treatment in places of public accommodation. *A fortiori* those decisions do not deal with State recognition of, and sanctions for, an asserted private right to evict Negroes from places of public accommodation as members of an untouchable caste. *A multo fortiori* they do not deal with the only question here—State recognition and sanctions for discrimination in public places where the racial practices of the

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Robinson v. *Memphis*, etc. *R.R.* was a private suit growing out of the refusal of accommodations in a railroad parlor coach. The common law duty seems plain but Tennessee Laws 1875, p. 216, expressly repealed the common law rule. Laws 1881, p. 211, however, amended the 1875 statute to require a carrier to furnish separate but equal first class accommodations. The pertinent dates in the *Robinson* case do not appear in the official report, but the Court stated that, as far as it was aware, the public carrier was bound to furnish equal accommodations. 109 U.S. at 25.

proprietors are an integral part of a system of segregation, as a mark of caste, which was adopted and promoted by a mixture of governmental and private action.

There are no other decisions in this Court even arguably inconsistent with our submission that where racial discrimination becomes operative through State and individual action, the State cannot insulate itself from responsibility merely by showing that the decision to discriminate was private. In such a situation, as in other instances of intermingled State and private action, the judgment depends, in the last analysis, *upon the size and importance of the elements of* State involvement in relation to the elements of private action, both measured from the standpoint of the fundamental aims of the constitutional guarantee.

In the present cases the elements of State involvement, measured from that standpoint, outweigh the elements of private action. The State is involved through the arrests and prosecution, where the effect was to enforce the community-wide stigma in virtually all places of public accommodation. The State is also involved because, in weaving the fabric of forced segregation as a means of preserving a caste system, its laws and official policies helped to fill the warp laid down by private prejudice. The State is intimately associated with systematic racial discrimination in places of public accommodation because it has traditionally assumed responsibility over their duties to the public to which they open their business, and the State actually regulates most aspects of the relation-

ship. Conversely, the special character of these establishments emphasizes the minimal significance of the elements of private choice.

We elaborate these points in the next section.

B. IN THE PRESENT CASES THE ELEMENTS OF STATE INVOLVEMENT ARE SUFFICIENTLY SIGNIFICANT, IN RELATION TO THE ELEMENTS OF PRIVATE CHOICE, TO CARRY RESPONSIBILITY UNDER THE FOURTEENTH AMENDMENT.

1. *The States are involved through the arrest, prosecution and conviction of petitioners*

It is beyond dispute that the respondents have provided official sanctions for the imposition of a racial stigma through the intervention of the police, the prosecutor and the courts. While any proprietor is legally free to abandon the practice of racial segregation, the substantial effect of the States' intervention in support of the community-wide practice whenever it is challenged, is to give the practice the force of law insofar as Negroes are concerned, much as if it were an ordinance forbidding Negroes to enter and seek service in any restaurant or lunch counter where whites are eating. Respondents may not deny knowledge of what all the world knows—that they are prosecuting those whose sole offense was peacefully to insist on being treated like other members of the public in a place to which the general public was invited. Cf. *Child Labor Tax Case,* 259 U.S. 20, 37; *United States* v. *Rumely,* 345 U.S. 41, 44.

Before turning to the other elements of State involvement, it is important to digress, first to empha-

size that we would equate police intervention and criminal prosecution with any State recognition of a legal privilege to engage in aggression against a Negro who has peacefully entered and peacefully seeks the same service the proprietor is offering to the public at large, and second, to mark the limits to our reliance upon the arrests and judicial proceedings.

(a) We are not contending that the intervention of the police and the subsequent convictions are a *sine qua non* of State involvement. If the State is involved when it supplies sovereign or physical power in the form of a policeman, the State must be involved when it gives the proprietor the privilege to use force as his own policeman. The reasoning that interdicts State action in the form of arrests and criminal prosecution, when sufficiently associated with the other elements of State involvement as in the present cases, is equally applicable to any jural recognition of a privilege to engage in private aggression. State action for the purposes of the Fourteenth Amendment may take the form of judge-made law as well as legislation. *American Federation of Labor* v. *Swing*, 312 U.S. 321; *Cantwell* v. *Connecticut*, 310 U.S. 296.

We distinguish here between (i) the State's failure to impose an affirmative duty, thus leaving the proprietor of the place of public accommodation free to refuse service, and (ii) the State's creation of a privilege authorizing the proprietor to invade what would normally be the protected interests of another, notably the interest in bodily security. The former

implies indifference. The latter puts the State's *imprimatur* upon the aggression.[165]

In our view, therefore, the Supreme Court of Delaware erred in *State* v. *Brown,* 195 A. 2d 379, in saying that the proprietor of a place of public accommodation has a privilege of using reasonable force to remove Negroes from his establishment pursuant to a policy of racial discrimination. If the Negro seeks police assistance or sues for a battery, State law becomes no less involved than when the proprietor invokes its assistance. The normal rule is that the State will give relief against personal aggression. To make an exception, based upon the proprietor's decision to enforce the community's caste system, is no less a State denial

[165] The foregoing distinction does not involve the complexity present in *Rice* v. *Sioux City Memorial Park Cemetery*, 347 U.S. 942, and *Black* v. *Cutter Laboratories*, 351 U.S. 292. In those cases the party complaining of deprivation of constitutional rights had no cause of action unless based upon contract—the contract for the cemetery lot in one case and the promise not to discharge without just cause in the other. The defendant was asserting an exception—the clause excluding non-Aryans in the one case and the supposed reservation, written in by the State court, making Communist affiliations ground for discharge in the other. Thus, the argument for respondents was essentially that no more State action was involved in the refusal to excise part of the contract and enforce the remainder than in standing entirely aside. The dissenting Justices concluded that there was a distinction. See the dissenting opinion of Mr. Justice Douglas joined by the Chief Justice and Mr. Justice Black in *Black* v. *Cutter Laboratories*, 351 U.S. 292, 302.

of equal protection than substituting State assistance for private force.[106]

Of course, no one has a privilege of self-help to gain service in a place of public accommodation or to enter by force over the owner's objection. The rule applies whether the refusal be rightful or wrongful. Even if the right exists (which we do not argue), it cannot be enforced by aggression.

These principles go far to meet any problem of maintaining public order that might be supposed to result from reversal of these convictions. Whoever first resorts to violence is guilty of a breach of the peace be he a Negro seeking to enter and obtain service or a proprietor seeking to evict him. The police may quell, and the State may punish, such disturbances of public order without discrimination. Any failure of public officials to act because of racial prejudice would be unconstitutional discrimination subject to redress under the Civil Rights Act, 28 U.S.C. 1343. *Lynch* v. *United States,* 189 F. 2d 476 (C. A. 5); *Catlette* v. *United States,* 132 F. 2d 902 (C. A. 4); *Picking* v. *Pennsylvania Railroad Company,* 151 F.

[106] The above principle was quickly recognized in cases involving restrictive covenants. Although the cases in this Court involved affirmative State action providing sanctions for the covenants, it was soon held that they were not available as a defense. *Clifton* v. *Puente,* 218 S.W. 2d 272 (Tex. Civ. App.); *Capitol Federal Savings & Loan Ass'n* v. *Smith,* 316 P. 2d 252 (S. Ct. Colo.) (action to quiet title).

2d 240 (C.A. 3). See, also, *Monroe* v. *Pape*, 365 U.S. 167.

In the absence of legislation by Congress the net result may be that some proprietors of places of public accommodation find themselves unable to evict Negroes whom they are unwilling to serve. The dilemma is of their own making. One who pursues a public calling in which he permits the general public to enter his premises is hardly in a position to complain of the incongruity if he then refuses upon invidious grounds to serve some members of the same public to which he opened his business. Though only legislation can provide a complete solution, the resulting stand-off is no more likely, in our judgment, to result in demonstrations and disturbances than a decision rejecting the argument we have presented.

(b) In arguing that the State's provision of legal sanctions is an element of State involvement pointing towards State responsibility, we do not urge that such State action is always enough to implicate the State for the purposes of the Fourteenth Amendment, leaving for analysis only the question whether the result conforms to the substantive requirements of the Fourteenth Amendment (*i.e.*, involves an invidious classification or a deprivation of other fundamental rights).[167]

[167] Henkin, *Shelley* v. *Kraemer*, *Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. Cal. L. Rev. 208 (1957); Van Alstyne and Karst, *State Action*, 14 Stan. L. Rev. 3 (1961). Cf. Williams, *The Twilight of State Action*, 41 Texas Law Review 347 (1963).

The latter argument seems to invite sharp curtailment of the scope for State and private choice and would certainly increase the role of constitutional adjudication.

To hold that a householder, lawyer or businessman may admit or exclude guests at his absolute discretion, however wise, capricious or immoral, but that he may not look to public authority to safeguard the right where the State could not constitutionally make the same choice, would deny the right to the poor and powerless and invite the rich or strong to recall the age of private armies. Manifestly, the same is true of business premises and a wide variety of places maintained by institutions such as schools, colleges, and charitable institutions. The constitutional doctrine expounded in *State* v. *Brown,* 195 A. 2d 379, also raises grave prospects of public disorder, for we feel no confidence that the owners of places of public accommodation would not be challenged and then exercise a privilege of self-help.

One escapes the latter difficulty, but only at the expense of increasing the former, by saying that a State acts not only through its police, prosecutors and judicial commands but also when its law recognizes a right, privilege or immunity; and that recognition of a privilege of self-help would therefore violate the Amendment. We agree that recognition of a privilege of self-help, like the intervention of the police, is indubitably State action (see pp. 20, 81–84 above), but to say that either form of State action is alone enough to make the State responsible for the private person's discrimination would subject a wide

variety of heretofore private decisions to the limitations of the Fourteenth Amendment as if they were made by the government. May a lawyer select clients, and a doctor patients, whimsically or only upon reasonable grounds? May a private school, endowed by its founders as a charitable corporation for the education of Episcopalians, prefer applicants of that faith over Jews or Roman Catholics? May it terminate the tenure of a teacher who avows atheism? May a popular distributor of detergents discharge an executive whose speeches and political associations with right or left wing extremists, in the judgment of the management, injure its public relations? Would the case be different if there were no risk of injury to the business but the other executives found the association highly distasteful? A State could not constitutionally command such discrimination and interference with individual freedom. Must its law therefore withhold all legal recognition of the right of private persons to engage in them?

The extent of such difficulties would depend upon whether the rule was that the State is responsible under the Fourteenth Amendment whenever its law failed to protect the claimed constitutional right, *i.e.*, did not impose a legal duty upon others in favor of the claimant, or only when the State recognized a privilege to take aggressive action. We consider the distinction significant (see pp. 65, 81–84 above), but we do not pause to consider it in this context because it is clear that the withholding of criminal sanctions, civil remedies and the privilege of affirmative self-help would greatly reduce the field for private choice.

Of course, the State would be required to withhold recognition of a right of private choice only when the ensuing discrimination or interference with other fundamental interests is not counterbalanced by a constitutional interests of the actor equal to that which he has invaded, such as the householder's constitutional right of privacy, which would include the right to choose his guests. For although there is State responsibility in such case, it is said, the State is barred only from arbitrary and capricious action.[168] If the requirement of a counterbalancing interest of constitutional magnitude is seriously proposed, then the contention is really that wherever a State can legislate to prohibit discrimination or to secure civil liberties, the issue cannot be left to private choice without offending the Amendment. If other interests will suffice, the substantive restriction upon private action is less severe, but there remains the difficulty that imposing State responsibility upon the basis of jural recognition of a private right turns all manner of private activities into constitutional issues, upon which neither individuals nor the Congress nor the States—but only this Court—could exercise the final judgment.

The preservation of a free and pluralistic society would seem to require substantial freedom for private choice in social, business and professional associations. Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind. And even if that view

[168] See Henkin, *op. cit. supra.*

were questioned, the philosophy of federalism leaves an area for choice to the States and their people, when the State is not otherwise involved, instead of vesting the only power of effective decision in the federal courts.

Nothing in the Court's decisions or elsewhere in constitutional history suggests that the Fourteenth Amendment's prohibitions against State action put such an extraordinary responsibility upon the Court. It seems wiser and more in keeping with our ideals and institutions to recognize that neither the jural recognition of a private right nor securing the right through police protection and judicial sanction is invariably sufficient involvement to carry State responsibility under the Fourteenth Amendment.

To go to the other extreme and hold that State sanctions for private choice are irrelevant to the question of the State's responsibility is untenable upon both precedent and principle. See pp. 67–72 above. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance" (*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722).

We read *Shelley* v. *Kraemer* as an instance of this moderate view. The more extreme argument may find support in some language in the opinion and has been espoused by a few commentators [169] and two State courts,[170] but in our view the decision rests more

[169] See n. *167*, *supra*.

[170] *State* v. *Brown*, *supra*; *Abstract Investment Co.* v. *William O. Hutchinson*, 22 Cal. Reptr. 309 (D.C. App. 2d Dist., 1962).

solidly upon narrower grounds. The elements of law involved in the enforcement of restrictive covenants running with the land greatly outweigh any elements of private choice. The sting of restrictive covenants is the power to bind unwilling strangers to the initial transaction. Nor are they typically found in isolation. Their function is to cover whole neighborhoods. The developer of a housing tract and his immediate grantees who execute the covenants have usually scattered long before enforcement of their covenant is sought by newcomers in the neighborhood against a willing buyer and willing seller who are strangers to the original transaction. The series of covenants becomes in effect a local zoning ordinance binding those in the area subject to the restriction without their consent. *Cf. Buchanan* v. *Warley,* 245 U.S. 60. Where the State has delegated to private persons a power so similar to law-making authority, its exercise may fairly be held subject to constitutional restrictions. Essentially the same principle has been applied in quite different contexts. *E.g., Railway Employees' Dept.* v. *Hanson,* 351 U.S. 225; cf. *Steele* v. *Louisville & N. R.,* 323 U.S. 192; *International Ass'n of Machinists* v. *Street,* 367 U.S. 740.

In *Shelley* v. *Kraemer* there were no elements of State involvement except the force that State law gave to private covenants. The State was found to be significantly involved, however, because the elements of law bulked large, for the reasons just stated, in relation to the elements of private freedom. A similar argument might be made in the present case. We do

not rely upon it, however, or even urge that the provision of criminal sanctions for an exercise of normal private choice is ever enough, standing by itself, to implicate the State in a denial of equal protection. For in the present cases there are two additional elements of State involvement.

2. *The States are involved in the practice of discriminating against Negroes in places of public accommodation because of their role in establishing the system of segregation of which it is an integral part*

For many years the States commanded segregation on a wide front. Between official policy and the prejudices and customs of the dominant portions of the community there was a symbiotic relation. The prejudices and customs gave rise to State action. Legislation and municipal ordinances, as well as executive policy, confirmed and strengthened the prejudices, and often forbade individual variations from the solid front. We summarized these elements of State involvement at pages 40–63 above.

Peterson v. *Greenville,* 373 U.S. 244, and *Lombard* v. *Louisiana,* 373 U.S. 267, establish the principle that a State is responsible for discrimination which it has commanded or officially encouraged even though segregation might be the proprietor's choice if uninfluenced. Where the discrimination is the product of a combination of State and private action, the State cannot disclaim responsibility upon the ground that the discrimination would have occurred even though the State had stayed its hand.[171]

[171] Compare the familiar rule applicable to joint or concurrent tortfeasors. Prosser, *Torts* (1941 ed.), pp. 323–325, 330.

In the present cases there are no laws commanding segregation in these places of public accommodation. The State's encouragement of the system is more remote in time and place, and in its influence upon the conduct of the proprietors."[17] Nevertheless, the State's prior involvement is material in determining its responsibility for the discrimination inherent in the challenged convictions. Having shared in the creation of a practice depriving Negroes of the kind of equality the Fourteenth Amendment was intended to secure, the State should not be free to turn its back and deny involvement through the momentum its action has generated. The law is filled with instances of liability for the consequences of negligent or wrongful acts until the connection between the wrong and the consequences becomes too attenuated.

In one sense, every event forever influences the course of history. A boy throws a stone into a pond; the ripples spread; the water level rises; the history of that pond is forever altered. We urge no such doctrine. Our view is that here, as with personal liability for the consequences of wrongful conduct, the issue "is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent." 1 Street, *Foundations of Legal Liability* (1906) 110. The necessity for judgment is inescapable. The question is whether a State's previous action still carries a momentum making it a "substantial factor" in the cur-

[17] But see Florida Administrative Code, Chapter 170C, Section 8.06, discussed pp. 2–3, 62 above and pp. 99–100 below.

rent practice of discrimination which the State is now helping to enforce. Cf. *Restatement Torts,* § 431. Here the State's previous action was so massive and continued so long as to leave no doubt that the official policy still exerts substantial influence upon the customs of the community.

Nor is the question one of fault. Even one who without fault puts another in a position of exposure to injury has a duty to act to prevent the danger from eventuating or to minimize the damage if harm occurs. *Simonsen* v. *Thorin,* 120 Neb. 684, 234 N.W. 628; *Slavin* v. *State,* 249 App. Div. 72, 291 N.Y. Supp. 721; *Restatement Torts* § 321. One who makes an innocent misrepresentation must communicate the truth to the recipient as soon as he learns that the representation was false. Prosser, *Torts* (1941 ed.), p. 723; *Restatement Torts* § 551(2). Similarly, until time and events have attenuated that connection, the State continues to bear constitutional responsibility for the conditions it has shared in creating by branding Negroes as an inferior caste.

Again, the point must not be pressed too far. We do not say that prior State support for the system of racial segregation always makes the proprietor's action State action, or even that the involvement shown here would alone carry State responsibility. There are other important elements of State involvement in these cases, and we rely upon them equally. What we do say here is that the past legislation has constitutional materiality because its momentum is still substantial in the realm of public accommoda-

tions. To that extent, a State which has drawn a color line may not suddenly assert that it is color blind.

3. *The States are involved in the discrimination because of their traditional acceptance of responsibility for, and detailed regulation of, the conduct of the proprietors of places of public accommodation towards the general public to which they have opened their businesses*

Petitioners were convicted of trespass for remaining in establishments which the proprietors had thrown open to the general public whose patronage they solicited. The invitation ran to the general public. There is no other way to describe it, unless it be to say that the invitation was to all members of the public except Negroes, and not even the proprietors were willing to announce their policies publicly in that fashion.[173] The invitation is a critical element in several aspects of the cases,[174] but not least because the resulting concern of the State brings important elements of State involvement.

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[173] The record in each of these cases shows that there was no public notice at the entrance or similar announcement that Negroes would not be served. No. 6, R. 44–46; No. 9, R. 20, 37; No. 10 (no evidence of any sign or notice); No. 12 (policy communicated only by oral statements), R. 23–24, 27–28; No. 60, R. 15–17, 19.

[174] The discrimination occurs in a public place which is part of the normal public life of the community. The opening of the premises to public use gives the resulting relationship that casual and evanescent nature that distinguishes it from virtually all others. The proprietor who thus opens his premises thereby subjects himself to a greater degree to the constitutional rights of others. See pp. 12–13, 17, 19–20, 29–36, *supra*, and 104–111, *infra*.

(a) At common law those who engaged in such callings had a duty to serve all members of the public equally to the limits of their capacity. Special rules were applicable to their rates and liability. Such was the innkeeper who, if he had available room, could not refuse to receive a guest who was ready and able to pay him a reasonable compensation. *White's Case* (1558) 2 Dyer 158b; *Warbrook* v. *Griffin* (1609), 2 Brownl. 254; *Lane* v. *Cotton* (1701), 12 Mod. 472; *Bennett* v. *Mellor* (1793), 5 Term R. 273; *Thompson* v. *Lacy* (1820), 3 Barn. & Ald. 283; see, generally, Storey, *Bailments,* §§ 475, 476 (7th ed., 1863); 5 Bacon, *Abridgement of the Law—Inns and Innkeepers,* pp. 230, 232 (1852); 3 Blackstone, *Commentaries,* p. 166 (Lewis ed., 1897). But the list was not so limited; at one time or another it apparently included the common carrier, the miller, the ferryman, the wharfinger, the baker, the farrier, the cartman and the hackney-coachman each of whom, it was said, "pursues a public employment and exercises 'a sort of public office.'" See *Munn* v. *Illinois,* 94 U.S. 113, 131–132. We do not urge the discountenanced argument that such establishments are *per se* State instrumentalities (*Civil Rights Cases, supra*),[178] but say only that the State's traditional relation to businesses that hold themselves and their premises out to the public at large distinguishes other business activities and puts the businesses affected with a public interest in a segment of community life where the relationship between proprietor and customer is less a product of

[178] But see Mr. Justice Douglas concurring in *Lombard* v. *Louisiana,* 373 U.S. 267, 274, 281–282.

contract or voluntary association than of the legal system.

Indeed, it is a fair inference that in a relationship so dominated by law, rather than contract or private choice, the State, if it did not approve the practice, would require its abolishment. Compare *Public Utilities Comm.* v. *Pollak*, 343 U.S. 451, 462. The inference is confirmed by experience. During the debates upon civil rights measures between 1865 and 1880 it seems to have been assumed that such businesses had a duty to serve all members of the public not subject to racial disabilities, and that the guarantee of equal protection therefore would secure the same right for Negroes.[176] This Court made the assumption in the *Civil Rights Cases*.[177] During that same period equal public accommodations laws were widely adopted outside the former slave-holding States.[178] They fell into comparative desuetude during a period of indifference to civil equality but are effective in thirty States today.[179] The course of events in two of the three States at bar is even more illustrative. South Carolina and Florida both enacted equal public accommodations laws in the period prior to the *Civil Rights Cases*, but repealed them later.[180] The Florida State Board of Health is presently enforcing an order requiring separate wash rooms and toilet facilities for whites and Negroes.

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[176] See pp. 123–136, *infra*.
[177] See pp. 73–77, *supra*.
[178] See nn. 19, 163, *supra*.
[179] See n. 22, *supra*.
[180] See notes 84, 85, 90.

From this standpoint it is irrelevant that the States have chosen not to subject restaurants, amusement parks and similar establishments to the duty of inns and common carriers to serve all members of the public without discrimination. The class of "businesses affected with a public interest" is not closed for constitutional purposes. Restaurants and amusement parks, like inns and public conveyances, hold themselves out to the general public and open up their premises for public use. This characteristic distinguishes them from the many other activities which the State may constitutionally regulate because of their effect upon the general welfare but which do not involve opening the business or premises to the public. For our argument is not that the State is constitutionally responsible for all non-governmental action which it has the power to prevent,[181] but only that its traditional supervision of the special class of businesses whose relation to the public is largely defined by law quickens the readiness to find responsibility through other elements of State involvement.

(b) The detailed State supervision over the establishments in which petitioners were arrested constitutes an element of State involvement. For where a State regulates most aspects of a business's relation-

[181] To say that the possession of State powers to prohibit any private discrimination which would be invidious in a State official is enough to render the State responsible under the Fourteenth Amendment would raise grave concern about the possibility of preserving a distinction between public and private action. There are few activities or institutions in which a State lacks power to prohibit racial discrimination. Such a view of State action therefore raises, still more sharply, the difficulties raised by broad interpretations of *Shelley* v. *Kraemer*. See pp. 84–88 above.

ship to the general public to which it has opened its premises, the State can hardly say that it has no relation to the narrow segment in which it chooses to stay its hand.

In *Robinson* v. *Florida,* No. 60, petitioners were arrested in a Miami restaurant operated by Shell's City, Inc. The State has assumed pervasive responsibility for the conduct of restaurants towards the general public to which they have opened their premises. Chapter 509 of the Florida Statutes Annotated provides for the appointment of a Hotel and Restaurant Commissioner with power to inspect at least twice annually "every public lodging and food service establishment," and to issue such rules and regulations as may be necessary to carry out the chapter (Sec. 509.032). Chapter 509 itself establishes a detailed code of regulation for "public lodging establishments" and "public food service establishment." No restaurant may be operated without licenses from both the State and municipality (Sec. 509.271; Code of Miami, Chap. 35). Section 509.221 prescribes general sanitary measures and like requirements for protecting the public health, including plumbing, lighting, heating, ventilation and cooling. An infinitely more detailed set of regulations has been issued by the Commissioner. Florida Administrative Code, ch. 175–1, 175–2, 175–4. The State, County and City Boards of Health also appear to have jurisdiction.[183]

[183] Fla. Stat. Ann., Chs. 381, 154; Sanitary Code of Florida, ch. 170C–16; Dade County Code, § 2–77; Code of Miami, ch. 25; *A Manual of Practice for Florida's Food and Drink Services based on the Rules and Regulations of the Florida State Board of Health and State Hotel and Restaurant Commission,* published by the State Board of Health and State Hotel and Restaurant Commission, 1960.

Section 509.211 of the Florida Statutes prescribes safety regulations and requires all plans for the erection or remodeling of any building for use as a public food service establishment to be submitted for approval by the Hotel and Restaurant Commission.

The State's supervision extends beyond health and safety. For example, it covers representations concerning the food and other forms of advertising. Section 509.292 forbids misrepresenting "the identity of any seafood or seafood products to any of the patrons or customers of such eating establishments." The Commissioner, under his power to issue regulations, has prohibited the publication or advertisement of false or misleading statements relating to food or beverages offered to the public on the premises (Florida Administrative Code, Sec. 175–4.02). There is also general and ill-defined supervision over the character, and thus the practices, of the proprietors of public eating establishments. House Bill No. 86, approved May 16, 1963, authorizes the suspension or revocation of a restaurant's license when any person interested in its operation "has been convicted within the last past five years in this state or any other State, or the United States, of * * * any * * * crime involving moral turpitude." The Commissioner's regulations provide that licenses may be issued only "to establishments operated, managed or controlled by persons of good moral character," and the Commissioner is instructed to ascertain that "no establishment licensed by this commission shall engage in any misleading advertising or unethical practices as de-

fined by this chapter and all other laws now in force or which may be hereafter enacted" (Sec. 509.032).

Florida's official involvement goes still farther. The Commission's regulations require that "[a]chievement rating cards shall be conspicuously displayed." Florida Administrative Code, Sec. 175–1.03 The State has created an Advisory Council for Industry Education which employs a Director of Education for the lodging and food service industry whose basic role is "to develop and blend together an educational program offered for the entire industry." We do not know the details of the achievement rating program or of the work of the Advisory Council but, while they may not deal explicitly with racial discrimination, they undoubtedly cover every other aspect of the relationship between a "public food service" establishment and all members of the public.

Florida law even touches upon, although it does not deal directly with, discrimination in the selection of clientele. A related statute prohibits advertising that an establishment practices religious discrimination, although it permits similar advertisements of racial discrimination. Fla. Stat. (1962 Supp.), § 871.04. The State Board of Health has an outstanding regulation applicable to restaurants, which provides (Florida Administrative Code, Chapter 170C, Section 8.06):

> Toilet and lavatory room shall be provided for each sex and in case of public toilets or where colored persons are employed or accommodated separate rooms shall be provided for their use. Each toilet room shall be plainly marked, *viz.*: "White Women," "Colored Men," "White

> Men," "Colored Women;" *provided,* that separation based upon race shall be waived where such separation is determined to be in conflict with federal law or regulation.[183]

The regulation plainly puts the State approval on racial discrimination. As a practical matter it encourages the exclusion of Negroes from restaurants that serve white persons by putting the proprietors of other establishments to the expense of supplying dual facilities.[184]

A State that has so pervasively regulated the conduct of public food service establishments cannot disclaim association with the racial practices of their proprietors in the admission and exclusion of members of the public. The reason, we think, is this: Under most circumstances the Fourteenth Amendment permits a State to close its eyes to private conduct either upon the ground that the problem lacks sufficient public importance or because it should be left to the interplay of a free society. However, when widespread discrimination exists in businesses which have been thrown open to the general public by their proprietors and are being regulated by the State in pervasive detail, one can be reasonably certain that the State's failure to act results not from distaste for interference

[183] *A Manual of Practice for Florida's Food and Drink Services based on the Rules and Regulations of the Florida State Board of Health and State Hotel and Restaurant Commission*, published by the State Board of Health and State Hotel and Restaurant Commission, 1960, also sets forth this requirement (§ 4.6.7).

[184] This regulation alone may well be ground for reversing the convictions in the Florida case. See pp. 2–3 above.

with private determinations, but from a willingness to have the public discrimination continue. Compare *Public Utilities Comm.* v. *Pollak,* 343 U.S. 451, 462.

Whatever the logical rationale there is little room for dissent from the practical judgment that detailed State supervision over a business as a whole creates a closer degree of involvement in the enterprise's treatment of a segment of the public than if the State had stood aside. One who intrudes into a situation voluntarily cannot disclaim further responsibility with the same ease as a bystander. The volunteer who takes an injured person into his charge has a duty to use care even though he was free to play the Levite rather than the Good Samaritan. " * * * he is regarded as entering voluntarily into a relation of responsibility, and hence as assuming a duty." Prosser, *Torts,* p. 194 (1941). The owner of land may leave it to nature even though rocks careen into a village,[185] but he is liable for harm done by what is put there by himself or his predecessors in possession.[186] The master who appoints a servant cannot disclaim responsibility for acts causing harm closely related to what he authorized even though he forbade that particular conduct;[187] nor can a principal deny liability upon contracts made by his agent in violation of his instructions if they are within the general area in which the

[185] *Pontardawe, R.C.* v. *Moore-Gwyn,* 1 Ch. 656, 98 L.J. Ch. 424; See Prosser, *Torts* (1955) p. 430.

[186] *Restatement Torts,* § 364.

[187] See, *e.g., Hinson* v. *United States,* 257 F. 2d 178, 181, 183 (C.A. 5).

agent was authorized to contract.[188] Much the same notion underlies the doctrine that one who voluntarily assumes control over the conduct of another is liable to third persons for the harm the other does, even though there may be no element of reliance; as where the owner of a car fails to restrain the driver [189] or a hospital permits a charlatan to treat a patient on the premises.[190] And where one voluntarily assumes a relationship such as that of a carrier to its passenger, or a warden to his prisoner, or a department store to persons on the premises,[191] there is a duty to use care to protect them from injuries by strangers. Here the State both undertook control over the conduct of public restaurants and also assumed the role of public protector.

A similar intuitive appraisal lies behind *Burton* v. *Wilmington Parking Authority*, *supra*. There the State's presence was felt in the ownership of the property, in the close relation, both physical and commercial, between its activities and the restaurant's business, and in the State's continuing relation as the landlord who selected the tenant. Here, the State's involvement is felt in its continuous supervision over the premises and virtually all aspects of the business, in the traditional legal duties of businesses affected with a public interest, in the influence which its offi-

[188] See, *e.g.*, *Kidd* v. *Thomas A. Edison, Inc.*, 239 Fed. 405 (S.D.N.Y.) (L. Hand, J.).

[189] See *Grant* v. *Knepper*, 245 N.Y. 158, 160, 161, 156 N.E. 650 (Cardozo, J.); Mechem, *Outlines of the Law of Agency* (4th ed.) § 382.

[190] *Hendrickson* v. *Hodkin*, 276 N.Y. 252, 11 N.E. (2d) 899.

[191] Prosser, *Torts* (1955) pp. 188–189, and cases cited.

cials can exert through their wide discretionary power both as licensing authority and through performance ratings. As in *Burton* the State flag over the building, though legally irrelevant, seemed to signify its involvement in the discrimination, so here the State "licenses" held by these places of public accommodation, while perhaps also legally irrelevant, still symbolize the State's substantial involvement in all aspects of their treatment of the public.[192]

The degree of actual regulation of restaurants in Maryland [193] and South Carolina,[194] and of amusement

[192] There are too many kinds of licenses to attribute constitutional significance to the possession of any license. Some licenses give the holders a special privilege to conduct for the benefit of the public a business in a field not open to unrestricted entry. In such cases the grant of one license excludes other applicants, and the possession of a State license by one who follows a practice of invidious discrimination against part of the public in effect shuts off the victims from facilities that would otherwise be available. In such a case, the State is responsible under the Fourteenth Amendment. See, *e.g.*, *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192; *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 535 (C.A. 5). In most cases, however, the license is only a technique of examination, taxation or regulation. It carries no duty to serve any member of the public. The State's responsibility for the licensee's conduct is surely no greater than if the business were taxed, inspected or regulated without the issuance of a license. *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 (C.A. 4); *Wood* v. *Hogan*, 215 F. Supp. 53, 58 (W.D. Va.); *McKibbin* v. *Michigan C. & S.C.*, 369 Mich. 69, 119 N.W. 2d 557, 566; *Madden* v. *Queens County Jockey Club*, 296 N.Y. 249, 72 N.E. 2d 697, certiorari denied, 332 U.S. 761.

[193] Md. Code (1957), Art. 56, §§ 178–179; Art. 43, §§ 200, 202, 203, 209; Baltimore City Code (1950), Art. 12, §§ 24 and 107.

[194] S.C. Code (1962), §§ 35–51 through 35–54, 35–130 through 35–136, 35–142; Ordinances of the City of Columbia, §§ 12–27 through 12–33; § 2–73.

parks in Maryland,[195] is much less than in Florida. The State's association with their practices is proportionately diluted but not, we think, to the point where it ceases to be relevant. South Carolina, like Florida, enacted and later repealed a law requiring public establishments serving food to refrain from racial discrimination.[196] Maryland recently enacted such a statute.[197] Both the Maryland and South Carolina restaurants and the Maryland amusement park are in the special category of enterprises that issue a general invitation to the public, and are therefore affected with a public interest.

4. These cases involve no substantial element of private choice

Where racial discrimination becomes operative through a combination of private and governmental action, the elements of private choice and State involvement tend to be opposite sides of the same coin; as the latter increase in importance the former tend to recede. It is useful, nonetheless, to sift the facts and weigh the circumstances from the private point of view.

The salient feature is still that the proprietor of the place of public accommodation, like a carrier, has thrown his premises open to the public at large and invited its members, without personal selection, to be his business guests. Few enterprises, if any, issue a

[195] Md. Code (1957), Art. 25, § 14, Art. 27, § 506; Montgomery County Code (1960), §§ 15–7, 15–8, 15–11; Chapter 75.

[196] See notes 84, 90, *supra*.

[197] Maryland Laws (1963), Chs. 227, 228 (adding §§ 11 through 15 to Article 49B of the Code).

similar invitation. Even the largest corporations do not hold themselves out as offering employment to the public at large, nor do they forego all elements of personal selection. Doctors, lawyers, architects and accountants limit their clientele by one standard or another. Private schools and colleges reserve the right to pick and choose. The proprietor of a place of public accommodation however, as well as a public conveyance, expects to take and is expected to take all orderly persons, subject to rare restrictions pertaining to such matters as attire.[196] The character of his decor, advertising and service, as well as his prices, may influence the character of his patrons. Publishers and writers may frequent one restaurant and "the fight crowd" another; but if a table is available, even a philistine will be served among litterateurs.

The invitation is general and individual choice is excluded because the relationship between proprietor and customer in a place of public accommodation is entirely casual and evanescent. The inevitable consequence is that lunch counters, restaurants, theatres, amusement parks and like enterprises exercise the technical legal right to select their customers only to the extent of enforcing an impersonal racial ban, excluding or segregating Negroes. Furthermore, although there are areas in which some places of public accommodation serve all members without discrimination while others enforce segregation, the instant cases come from communities in which segregation has been an almost community-wide custom. The individual proprietor exercises little personal choice.

[196] See pp. 28–36 above.

It is also plain that the custom of excluding or segregating Negroes in places where whites are served is not really even a choice concerning the races with whom one will do business, or whom one will license to enter his property. The insubstantiality of the legal concepts of private property and choice of customers in this context is vividly demonstrated by the practice of three of the stores in which petitioners were arrested. It appears that Shell's City, the establishment involved in *Robinson* v. *Florida*, No. 60, is a large store whose Vice President and General Manager testified that "Shell's City does not have the official opinion that it is detrimental to their business for Negroes to purchase products in other parts of their store;" that "Negroes are permitted in the premises;" and that "they are permitted to do business with Shell's City" (R. 24). In *Bouie* v. *City of Columbia*, No. 10, the petitioners were arrested in Eckerd's Drug Store. The manager testified that the store was open to Negroes and that Negroes were "welcome to do business with Eckerd's" (R. 24). The facts in the *Barr* case are even more striking. It too involved a drug store that advertised itself as being a complete department store. The co-owner and manager testified that he invited Negroes into the store just like all other members of the public; that they traded in large numbers; and that they were even invited into the back area where food was served, provided that they took "an order to go" instead of eating food among whites (R. 19). These and other cases which previously have come before the Court show that the proprietors solicit the patronage of

Negroes, invite them onto the property and into the store, make sales in other departments—some even furnish food to eat away from the counter—but then they deny the Negro the privilege of breaking bread with other men. Manifestly, it is the stigma—the brand of inferiority that is important—not presence on the premises or reluctance to enter into a business relation. The legal concepts are merely a tool for enforcing obeisance.

The real particulars behind abstract nouns become crucial when striking the balance between "liberty" and "equality" inherent in determining whether there is enough State involvement to carry State responsibility under the Fourteenth Amendment.[100] See Mr. Justice Harlan concurring and dissenting in *Peterson* v. *Greenville,* 373 U.S. 244, 248, 250. The equality is freedom from caste. The liberty is freedom of personal choice, but for the most part only in the sense of a choice to act or refrain from acting in concert with others in maintaining the fabric of a caste system.

No doubt there are some instances in which the proprietor would decide to exclude Negroes upon truly individual grounds even though there were no system of segregation and the customary practice were to serve all members of the public. Obviously the opportunities for this kind of arbitrary choice are

[100] In his concurring and dissenting opinion in *Peterson* v. *Greenville*, 373 U.S. 244, 250, Mr. Justice Harlan said—

"Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality."

reduced by treating State recognition of a privilege to evict Negroes as a denial of equal protection of the law on the ground that the racial discrimination occurs in the public life of the community and is a cornerstone in a State-supported caste system. At least until the consequences of the State's prior involvement died out, the proprietor who has an idiosyncratic prejudice against Negroes remote from the caste system would be denied State support along with others whose preferences were affected by the caste system. If it were possible to isolate the community practice, and the community practice had no significant influence on the individual's decision, the special cases, perhaps, should be the subject of a special rule.[200] Since the effort would be fruitless, the extraordinary case must yield to the general rule, as was held in *Peterson* and *Lombard* when the Court rejected Justice Harlan's view.

There is no significant unfairness in this conclusion. When the proprietor of a place of public accommodation discriminates against Negroes in a community which practices segregation, he knows that he is joining in the enforcement of a caste system. He takes the system as he finds it, infused with State sponsorship and support. That his motives may be different, his individual action innocent, is not controlling. When they become part of a community pattern so infused with prior State action as to

[200] Such is not the case here. In addition to the managements' disavowal of antipathy to Negroes, there is considerable indication that the policy was adopted in conformity to community practice. See p. 28, *supra*.

render further State sanctions a denial of equal protection of the law, the unique proprietor's acts take on the color of the community practice and suffer the common disability resulting from the community wrong. "[T]hey are bound together as the parts of a single plan. The plan may make the parts unlawful." *Swift & Co.* v. *United States,* 196 U.S. 375, 396; *Terry* v. *Adams,* 345 U.S. 461, 470, 476 (Mr. Justice Frankfurter concurring). The risk that some proprietors may lose State protection for an arbitrary choice not influenced by the State's previous conduct is not great enough to permit the continuance of support for the tainted system. When an employer has dominated and supported a labor organization, the organization will be forever disestablished even though the employer's misconduct has ceased, even though some employees may freely prefer it, and even though a majority of the employees might vote to have it represent them. *Texas & N.O. R. Co.* v. *Brotherhood of Railway & S.S. Clerks,* 281 U.S. 548; *National Labor Relations Board* v. *Southern Bell Co.,* 319 U.S. 50. When the overwhelming tendency is clear, but no exact solution can be tailored because of the impracticability of a detailed psychological inquiry into the current effect of past events and community attitudes upon each individual mind, the necessity of dealing with the situation in the large justifies a remedy going somewhat beyond the exact consequences of the wrongdoing.

These problems, moreover, lie in an area where there is little appeal to the plea of private right. The proprietors of places of public accommodation open

their property and business to public use as part of the normal public life of the community. Segregation in such places is like segregation in a park or on the street: it is akin to a restraint against circulating as freely as other members of the public. Indeed, it is not without significance that the opening of a business affected with a public interest at common law was likened by Chief Justice Waite, quoting Lord Chief Justice Hale, to a man's setting out a street upon his own land. *Munn* v. *Illinois*, 94 U.S. 113, 150. While the dedication alone cannot supply affirmative elements of State involvement, it is relevant in weighing the significance of those elements of State involvement that are present against the possible interference with private right, for the purpose of determining whether those elements are sufficient to implicate the State in violation of the Fourteenth Amendment. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama*, 326 U.S. 501, 506. Petitioners have a constitutional right to be free from the consequences of all significant State encouragement or support for discrimination in places of public accommodation, whether the encouragement be past or present. When that right conflicts with the proprietor's claim of private right in a place of public accommodation, *Marsh* v. *Alabama* teaches that the former should prevail.

When one goes behind the abstract nouns it becomes apparent, therefore, that any balance to be

struck here between "liberty" and "equality" is no different from the balance struck by the framers of the Fourteenth Amendment and by this Court in earlier cases. Freedom from association with Negroes in places of public accommodation—the only freedom actually asserted—is indistinguishable from freedom from such association in government buildings,[201] in the court house,[202] or, indeed, on the streets and in public squares.[203] In performing civil duties, such as serving on a grand or petit jury,[204] or in attending public schools,[205] the equality asserted is the same—freedom from the stigma of inferiority. We are not asking the Court to strike a novel balance.

C. THE IMPOSITION OF STATE RESPONSIBILITY WOULD GIVE EFFECT TO THE HISTORIC PURPOSES OF THE THIRTEENTH, FOURTEENTH AND FIFTEENTH AMENDMENTS

The central fact of these cases is that the States seek immunity to support the continuance of a caste system in the public life of the community that it was the central purpose of the Thirteenth, Fourteenth and Fifteenth Amendments to destroy. The three Amendments cannot be severed from their history or from each other in dealing with the tragic consequences of Negro slavery. Other forms of invidious discrimination, even by reason of race, creed or nationality, have a different significance in the community and therefore may have a different constitutional status. The

[201] *Derrington* v. *Plummer*, 240 F. 2d 922 (C.A. 5).
[202] *Johnson* v. *Virginia*, 373 U.S. 61.
[203] See pp. 122–123, 136–137, *infra*.
[204] *Strauder* v. *West Virginia*, 100 U.S. 303.
[205] *Brown* v. *Board of Education*, 349 U.S. 294.

ment after it had been vetoed by President Johnson;[206] the second supplementary Freedmen's Bureau Bill, varying in minor respects from the first, which was enacted into law and extended the life, and enlarged the powers, of the Freedmen's Bureau;[207] and the Civil Rights Act of 1866 which originated as a companion measure to the first supplementary Freedmen's Bureau Bill),[208] the Fourteenth and Fifteenth Amendments, the Ku Klux Act of 1871,[209] and the Civil Rights Act of 1875[210] were all parts of a continuing legislative process. Many of the same Senators and Congressmen had the leading roles throughout the debates. Oftentimes, what they said and did in connection with one proposal helps to show their understanding of another.[211]

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[206] S. 60, 39th Cong., 1st Sess., Cong. Globe, p. 943.

[207] 14 Stat. 173.

[208] 14 Stat. 27.

[209] 17 Stat. 13.

[210] 18 Stat. 335.

[211] In view of the pressure of time, we do not attempt to summarize the Congressional history of the Thirteenth, Fourteenth and Fifteenth Amendments. The most pertinent studies are: Supplemental Brief for the United States on Reargument and the Appendix thereto in *Brown* v. *Board of Education*, Nos. 1, 2, 4, 8, and 10, October Term, 1953; Kendrick, *Journal of the Joint Committee on Reconstruction* (1914); James, *The Framing of the Fourteenth Amendment* (1956); Flack, *The Adoption of the Fourteenth Amendment* (1908); tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951); Harris, *The Quest for Equality* (1960); Collins, *The Fourteenth Amendment and the States* (1912); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131 (1950); Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955); Graham, *Our "Declaratory" Fourteenth Amendment*, 7 Stan. L. Rev. 3 (1954); Warsoff, *Equality and the Law* (1938); Randall, *The Civil War and Reconstruction* (1937); Nye, *Fettered Freedom* (1949).

The thrust of the movement was to make Negroes free and equal members of the community sharing the public rights and privileges and enjoying the opportunities of other men. During slave-holding days Negroes were not only held in bondage as if chattels; even when free they were subjected throughout the country to the elaborate disabilities of a caste system. See pp. 42–45 above. After the Civil War, Southern States promptly enacted "Black Codes" imposing disabilities so harsh as to make the emancipated Negroes "slaves of society," even though no longer the chattels of individual masters.[22] See pp. 45–48 above. Those disabilities, both the old and the new, were the central target of a movement whose ideal was to apply to all men the Declaration that "all men are created equal."

The legislation began in the Thirty-Ninth Congress.[23] One group, apparently a majority, found authority to remove the disabilities by federal legislation under Section 2 of the Thirteenth Amendment. *E.g.*, Cong. Globe, 39th Cong., 1st Sess., 322, 474–476 (remarks of Senator Trumbull), 503 (remarks of Senator Howard), 1124, 1159. Representative Ward had articulated that view while the Thirteenth Amend-

[22] Cong. Globe, 39th Cong., 1st Sess., p. 39.

[23] The 39th Congress considered (1) a bill introduced by Senator Wilson of Massachusetts (S. 9, 39th Cong., 1st Sess.) to maintain the freedom of the inhabitants in the rebelling States; (2) the first supplementary Freedmen's Bureau Bill (S. 60), which originated, in part, from the Wilson bill; and (3) S. 61, the bill which became the Civil Rights Act of 1866 (14 Stat. 27). It also enacted (after the submission of the Fourteenth Amendment to the States), the second supplementary Freedmen's Bureau Bill (14 Stat. 173).

ment was under consideration (Cong. Globe, 38th Cong., 2d Sess., p. 177):

> . . . we are now called upon to sanction a joint resolution to amend the Constitution so that all persons shall be equal under the law without regard to color, and so that no person shall hereafter be held in bondage.[n4]

Another group doubted the sufficiency of existing constitutional authority and sought a new amendment. *E.g.*, Cong. Globe, 39th Cong., 1st Sess., pp. 500, 1120, 1268, 1290–1293. Among the latter was Representative Bingham, later the principal author of section 1 of the Fourteenth Amendment. *Id.*, at 1290–1293. But for both groups the overall purpose was clear; it was to remove the disabilities, old and new, North and South, that belied the equality announced in the Declaration of Independence.

To secure that ideal the proponents sought to guarantee equal "civil rights." The exact contours of the term went undefined. "Civil rights" were contrasted with "social rights," for which the proponents disclaimed concern (*id.*, 1117, 1159), and "political rights," which at first they were reluctant to espouse (*id.*, 476, 599, 606, 1117, 1151, 1154, 1159, 1162, 1263), although the more liberal view prevailed in the Fifteenth Amendment. Quite possibly "civil rights," in

[n4] See also *id.* at 154; Cong. Globe, 38th Cong., 1st Sess., p. 2989. Senator Yates expounded this view in the debates on the Fourteenth Amendment. He asserted that the Thirteenth Amendment "did not confer freedom upon the slave, or upon anybody, without conferring upon him the muniments of freedom, the rights, franchises, privileges that appertain to an American citizen or to freedom, in the proper acceptation of that term." Cong. Globe, 39th Cong., 1st Sess., p. 3037.

this context, meant rights in areas conventionally ruled by law (*id.*, 476–477, 1117, 1122, 1291), which would include the relationships between members of the public and businesses affected with a public interest. Whatever the difficulty of exact definition, there is no doubt of the purpose to obliterate both the vestiges of slavery and also the caste system. "'All men are created equal' excludes the idea of race, color, or caste," Senator Morrill of Maine declared. (*Id.*, 570–571.) Representative Hubbard of Connecticut similarly asserted that the words "caste, race, color" were unknown to the Constitution. He viewed the various proposals to protect the civil rights of freedmen as evidence that the nation was "fast becoming what it was intended to be by the fathers—the home of liberty and an asylum for the oppressed of all the races and nations of men." (*Id.* at 630.)[218] To Mr. Donnelly of Minnesota, it was "as plain * * * as the sun at noonday, that we must make all citizens of the country equal before the law; that we must break down all walls of caste; that we must offer equal opportunities to all men." (*Id.* at 589.) Senator Wilson declared, "The whole philosophy of our action is * * * that we cannot degrade any portion of our population, or put a stain upon them, without leaving heartburnings and difficulties that will endanger the

[218] Mr. Garfield of Ohio spoke in a similar vein, declaring that "The spirit of our Government demands that there shall be no rigid, horizontal strata running across our political society, through which some classes of citizens may never pass up to the surface; but it shall be rather like the ocean where every drop can seek the surface and glisten in the sun" (*id.*, App. p. 67). See also *id.* at 111.

future of our country. * * * [T]he country demands * * * the elevation of a race." (*Id.* at 341.) Senator Trumbull, who was not one of the so-called Radicals, described the purpose as to "secure to all persons within the United States practical freedom" and "privileges which are essential to freemen" (*id.* at 474–475).

The Civil Rights Act of 1866 was passed over President Johnson's veto, although its most sweeping terms were narrowed.[216] The Act links the Thirteenth and Fourteenth Amendments, for the Fourteenth Amendment put an end to the debate over the powers of Congress under the Thirteenth. Sections 1 and 5 of

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[216] Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, provided:

"*That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States;* and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." (Emphasis added.)

The original bill contained, in lieu of the italicized material above, the following clause:

"That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color or previous condition of slavery."

The circumstances and significance of the change are discussed at p. 139 *infra*.

the Fourteenth Amendment, according to one group in Congress, would put the principles of the Civil Rights Act of 1866 into the Constitution beyond the reach of a new Congress. See Cong. Globe, 39th Cong., 1st Sess., pp. 2459, 2462, 2465, 2467, 2538; see, also, *Monroe* v. *Pape,* 365 U.S. 167, 171; Harris, *The Quest for Equality* (1960), p. 40. Others thought that it would provide the Act with a surer constitutional foundation. *Id.* at 2461, 2511, 2961; Flack, *The Adoption of the Fourteenth Amendment* (1908), p. 94. It is not unnatural, therefore, that the aim to abolish the inequalities associated with caste found expression in the debates on the Fourteenth Amendment. Senator Howard of Michigan, in reporting the resolution to the Senate on behalf of the Joint Committee on Reconstruction, announced that it "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another" (Cong. Globe, 39th Cong., 1st Sess., p. 2766). Senator Doolittle wished "to put an end forever not only to slavery but to the aristocracy that was founded upon it * * *." (*Id.* at 2897.) [21]

The broad generalizations must be read in the light of history and applied to current institutions with an

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For many similar references, see, *id.* at 2498, 2508, 2530, 2531, 2459, 2510, 2539, 2961, 3034. In the debates on the Stevens "apportionment" amendment, which was a precursor of the present section 2 of the Fourteenth Amendment, Senator Sumner indicated that, in his view, Congress had decreed, in the Civil Rights Act of 1866, "that colored persons shall enjoy the same civil rights as white persons; in other words, that, with regard to civil rights, there shall be no Oligarchy, Aristocracy, Caste, or Monopoly, but that all should be equal before the law without distinction of color" (*id.* at 684).

understanding of their underlying significance. The declarations of equality were aimed at well-known disabilities, associated with caste, that barred Negroes from being equal members of the public. In 1865 a Negro who was barred from a train or other public conveyance, or from an inn or like place of public accommodation, was subjected to a special disability because of his race. In 1960, these petitioners were subjected to an identical stigma because of their race. In each case the discrimination was solely a mark of caste.

We do not overlook either the force of the direct opposition or the doubts of the moderates, both of which helped to shape the Fourteenth Amendment. See pp. 137–143 below. It will be helpful, however, first to note the evidence bearing upon the specific problem of equality in places of public accommodation. The evidence convincingly shows, despite the paucity of direct references, that unequal access to public places, including inns, hotels, public conveyances, and places of public amusement, fell in the general category of disabilities with which the framers were concerned.

1. The framers were undoubtedly concerned about freedom of movement in the broadest sense. In the Thirty-Ninth Congress, while denouncing the Black Codes as "inconsistent with the idea that these freedmen have rights," Senator Wilson asserted that the freedmen were as free as he was "to work when they please, to play when they please, *to go where they please* * * *" (*id.* at 41) (emphasis added). The Black Codes should be annulled so that

> [T]he man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; *that he can go where he pleases,* work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; *that the rights and guarantees of the good old common law are his,* and that he walks the earth, proud and erect in the conscious dignity of a free man * * *. [*Id.* at 111; emphasis added.] [218]

Senator Sherman of Ohio, who objected to the Wilson bill because it did not specify what rights were to be protected, favored an attempt at a more precise definition. "For instance," he explained, Congress could agree that every man should have the right, *inter alia,* "to go and come at pleasure * * *" (*id.* at 42). That was "among the natural rights of free men" (*ibid.*). Senator Trumbull thought it was "idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, and who cannot enforce his rights" (*id.* at 43). Introducing the first supplementary Freedmen's Bureau Bill, Trumbull pronounced it to be the duty of Congress to declare null and void all laws which would not permit the Negro, *inter alia,* "to buy and sell, and to go where he

[218] Wilson's bill would have rendered null and void all State laws, statutes, acts, ordinances, rules and regulations "whereby or wherein any inequality of civil rights and immunities * * * is recognized, authorized, established or maintained," by reason of color, race, or previous condition of servitude (Globe, 39th Cong., 1st Sess., p. 39).

pleases" (*id.* at 322).[219] Again in the debates upon S. 61, the bill which became the Civil Rights Act of 1866, Senator Trumbull, who introduced it, mentioned "the right to go and come at pleasure" as one of the fundamental rights secured by the bill. *Id.* at 477.[220]

[219] Sections 7 and 8 of the first supplementary Freedman's Bureau Bill applied only to those States in which the ordinary course of judicial proceedings had been interrupted by the rebellion. Under section 7 the President was given the duty to extend military protection and jurisdiction over all cases where any of the civil rights or immunities of white persons were denied to anyone in consequence of local law, custom or prejudice, on account of race, color, or previous condition of servitude; or where different punishment or penalties were inflicted on Negroes than were prescribed for white persons committing like offenses. The rights specifically enumerated in the section were the right to make and enforce contracts; to sue; be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property, and "to have full and equal benefit of all laws and proceedings for the security of person and estate * * *." The eighth section made it a misdemeanor for any person "under color of any State or local law, ordinance, police, or other regulation or custom," to deprive anyone on account of race or color or previous condition of servitude "of any civil right secured to white persons * * *." (Cong. Globe, 39th Cong., 1st Sess., p. 318.)

[220] As originally introduced, the Civil Rights Bill (S. 61) contained a provision stating that "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery or involuntary servitude * * *." (Cong. Globe, 39th Cong., 1st Sess., p. 474.) This provision was in the bill when Trumbull uttered the words quoted in the text. The provision was deleted before enactment, *id.* at 1366, but plainly the Act invalidated any racial restrictions upon freedom of movement. See p. 117 n. 216 *supra*.

Some of the Black Codes barred Negroes from towns or other specified areas, and forbade their movement at certain hours,[221] but the purpose of securing the "right to come and go at pleasure" must have been to remove barriers to freedom of movement in the public life of the community.[222] Even in 1866 equal opportunities to use trains and public conveyances and to stop at inns and hotels were essential to civil equality. The soda fountain, the lunch counter and the roadside restaurant were unknown, but today the premises of those places of public accommodation

[221] An ordinance of the City of Opelousas, Louisiana, referred to in the Report of General Schurz on conditions in the South (Senate Executive Document No. 2, 39th Cong., 1st Sess., pp. 92–93) and in the Congressional debates (Cong. Globe, 39th Cong., 1st Sess., pp. 516–517), provided, *inter alia*, that "no negro or freedman shall be allowed to come within the limits of the town of Opelousas without special permission from his employers, specifying the object of his visit and the time necessary for the accomplishment of the same"; that "every negro or freedman who shall be found on the streets of Opelousas after ten o'clock at night without a written pass or permit from his employers shall be imprisoned and * * * pay a fine"; that "[n]o negro or freedman shall reside within the limits of the town * * *" if not "in the regular service of some white person or former owner * * *"; nor, with narrow exceptions, engage in public meetings or congregations within the town limits without permission of the mayor or the president of the Board of Police; nor "sell, barter, or exchange any articles of merchandise or traffic within the limits of Opelousas without permission in writing from his employer or the mayor or president of the board * * *."

[222] A witness before the Joint Committee on Reconstruction testified that the people of Virginia were "reluctant even to consider and treat the negro as a free man, to let him have his half of the sidewalk or the street crossing." House Report No. 30, 39th Cong., 1st Sess., Testimony, Part II, p. 4.

serve a function little different from the public square a century earlier. See pp. 136–137 below.

2. Both the civil rights legislation and the Fourteenth Amendment sought to guarantee equality before the law. Members of the public not suffering from racial disability had long had a legal right to use public conveyances and to enter and obtain service in inns, hotels and, quite possibly, places of public entertainment and amusement. Removal of the racial disability, therefore, would extend that same legal right to enter and be served, to Negroes. The logic is so inescapable that we may feel sure that any member of Congress would have answered affirmatively if he had been asked in 1868 whether the Civil Rights Act of 1866 and the Fourteenth Amendment would have the effect of securing Negroes the same right as other members of the public to use hotels, trains and public conveyances.[223]

The Congressional debates between 1864 and 1874 reflect an awareness of the right conferred by the common law to nondiscriminatory service in many places of public accommodation, such as inns, hotels,

[223] There is also some indication that the courts followed this reasoning. In *Ferguson* v. *Gies*, 82 Mich. 358, 365 (1890), where a Negro had sued for damages arising from the refusal of a restaurant owner to serve him at a table reserved for whites, the Michigan Supreme Court held that a Michigan statute enacted in 1885, prohibiting the denial of "full and equal" privileges of inns, restaurants, eating houses, barber shops, public conveyances and theatres to any citizen, was only declaratory of the common law; that prior to the time when Negroes were made citizens of the State unjust discrimination in such public places would have given a white man a claim for damages; and that the Negro had gained a similar right on becoming a citizen.

and common carriers.[224] The subject was discussed at some length in connection with bills to ban discrimination and segregation on trains and street cars in the District of Columbia.[225] Some thought that theatres and places of public amusement generally were also subject to the common law rule.[226] While perhaps they were wrong, such institutions, it was well known, were regulated, and in a sense created, by the law and therefore subject to special responsibilities. See the debates on the Civil Rights Act of 1875, discussed pp. 130–135 below.

3. The proponents of the abortive Freedmen's Bureau Bill and the Civil Rights Act of 1866 never denied the frequent charge that those measures would grant Negroes the right to equal treatment in places of public accommodation. The apparent reason is that they regarded the "charge" true; as we have explained, it was the inevitable consequence of making Negroes equal with other members of the public before the law even in the narrowest sense of the words.

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[224] See the remarks of Senator Sumner (Cong. Globe, 42nd Cong., 2d Sess., p. 381–383); remarks of Senator Harlan of Iowa (38th Cong., 1st Sess., p. 839); remarks of Senator Pratt of Indiana (2 Cong. Rec. 4081–4082).

[225] Note especially the argument of Reverdy Johnson, a conservative Senator and notable constitutional lawyer. (Cong. Globe, 38th Cong., 1st Sess., p. 1156–1157.) For a general discussion of this legislation and the attitude of the post-Civil War Congresses towards discrimination in public conveyances and places of public accommodation, see Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131.

[226] 2 Cong. Rec. 4081.

During the debate in the House on the first supplementary Freedmen's Bureau Bill, Representative Rousseau, of Kentucky, who opposed the bill, suggested that the grant of equal "civil rights and immunities" gave Negroes the same privileges in theatres and railway cars. With respect to the latter, he expressly defied the proponents of the bill to "combat that position." (Cong. Globe, 39th Cong., 1st Sess., App. 70). Although he was frequently interrupted, his construction of the bill was not disputed. (*Id.* at App. 68–71.) Representative Dawson, of Pennsylvania, observed that the bill constituted only a part of a broad policy to enforce equality for Negroes so that they should be "* * * admitted to the same tables at hotels [and] to occupy the same seats in railroad cars." (*Id.* at 541.)

After the Freedmen's Bureau Bill passed the House, it was vetoed by the President, in part because it failed to define the " 'civil rights and immunities' which are thus to be secured to the freedman by military law. * * * " (*Id.* at 916.) Senator Davis of Kentucky, speaking in support of the veto, protested that "commingling with [white persons] in hotels, theaters, steamboats, and other civil rights and privileges, were always forbid to free negroes," until recently granted by Massachusetts. (*Id.* at 936.) Although Senator Trumbull delivered a long speech in opposition to the veto, he did not question Senator Davis's assertion that such rights were secured by the bill. (*Id.* at 936–943.) Indeed, Senator Trumbull remarked that he should "rejoice" when the Southern States "shall abolish all civil distinctions between

their inhabitants on account of race or color; and when that is done one great object of the Freedmen's Bureau will have been accomplished." (*Id.* at 943.)

The first Freedmen's Bureau Bill failed to become law, although, on July 16, 1866, it was re-enacted with minor changes over a second presidential veto. 14 Stat. 173. After the first veto was upheld, the Civil Rights Bill was taken up, debated at length, passed by both Houses and then vetoed. (*Id.* at 1679.) In the course of the debate on the veto, Senator Davis objected to the bill, declaring, as he had declared with respect to the Freedmen's Bureau Bill, that it obliterated discrimination between the races with respect to the facilities of steamboats, railway cars, and hotels.[227] The veto was overriden, without debate in the House.

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[227] Sen. Davis said (*id.* at Appendix 183):

"[T]his measure proscribes all discriminations against negroes in favor of white persons that may be made anywhere in the United States by any 'ordinance, regulation, or custom,' as well as by 'law or statute.'

* * * * *

"But there are civil rights, immunities, and privileges 'which ordinances, regulations, and customs' confer upon white persons everywhere in the United States, and withhold from negroes. On ships and steamboats the most comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections of the edifices; on railroads, national, local, and street, not only seats, but whole cars, are assigned to white persons to the exclusion of negroes and mulattoes. All these discriminations * * * are established by ordinances, regulations, and customs. This bill proposes to break down and sweep them all away, and to consummate their destruction * * *."

4. The general public understanding of the Civil Rights Act of 1866, which was the direct precursor of the Fourteenth Amendment (see pp. 117–118 above), seems to have been that it would open to Negroes public conveyances and places of public accommodation and amusement. The best survey is Flack, *The Adoption of the Fourteenth Amendment* (1908), pp. 11–54. Flack concludes (p. 45)—

> There also seems to have been a general impression among the press that negroes would, by the provisions of the bill, be admitted, on the same terms and conditions as the white people, to schools, theaters, hotels, churches, railway cars, steamboats, etc.

He also cites (pp. 46–47) accounts of numerous incidents showing a similar widespread belief among members of the public.

5. The understanding is further reflected in the equal public accommodations laws enacted during the Reconstruction Period. Many of the Southern States passed such laws between 1868 and 1873. Thus, as early as April, 1868, the people of Louisiana ratified a new constitution expressly providing that:

> All persons shall enjoy equal rights and privileges, upon any conveyance of a public character; and all places of business, or of public resort, or for which a license is required by either State, parish, or municipal authority, shall be deemed places of a public character, and shall be opened to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color. * * *

And the constitutional [218] mandate was carried out by implementing legislation in 1869, [219] in 1870, [220] and again in 1873.[221] South Carolina followed with a similar enactment in 1869.[222] In the ensuing years, equal public accommodation laws were passed in Georgia (1870), [223] Arkansas (1873), [224] Mississippi (1873), [225] and Florida (1873).[226]

There can be no doubt that these measures were enacted in response to the Fourteenth Amendment. To be sure, they were the product of "reconstructed" legislatures, in which Negroes, for the first time, participated. In some cases, perhaps, they were dictated by federal authorities. At the least, they reflect a contemporary view that freedom from discrimination in public places of accommodation was part of the promise of equal protection. This was the view of the military authorities administering the Reconstruction program,[227] presumably in accordance with the will of

[218] La. Const. 1868, Art. 13.

[219] La. Acts 1869, p. 37. See *Hall* v. *De Cuir*, 95 U.S. 485.

[220] La. Acts 1870, p. 57.

[221] La. Acts 1873, p. 156. In addition, the Louisiana legislature asked to adopt Sumner's supplementary civil rights bill (*infra*, p. 132), pending in 1872. La. Acts, 1872, p. 29.

[222] 14 S.C. Stat. 179. See, also, the statute of 1870 reprinted in 2 Fleming, *op. cit.*, pp. 285–288.

[223] Ga. Laws 1870, pp. 398, 427–428.

[224] Ark. Laws 1873, pp. 15–19.

[225] Miss. Laws 1873, p. 66.

[226] Fla. Laws 1873, p. 25, ch. 1947.

[227] See, *e.g.*, G. O. No. 32, 2d Military District (applicable to North Carolina and South Carolina), in 1 Fleming, *op. cit.*, pp. 435, 437:

"8. In public conveyances on railroads, highways, streets, or navigable waters no discrimination because of color or caste shall be made, and the common rights of all citizens thereon shall be recognized and protected. * * *"

Congress. It was a view that apparently gained some general acceptance in the South.[228] The most perceptive exposition was made by Justice Horatio Simrall for the Supreme Court of Mississippi, in 1873, in *Donnell* v. *State,* 48 Miss. 661. A Kentuckian by birth, Justice Simrall was a law professor, plantation owner and a Mississippi State Legislator before the Civil War. He served for nine years on Mississippi's highest court, the last three as Chief Justice, and later lectured at the University of Mississippi which granted him an honorary doctorate.[229] In upholding the equal public accommodation law of Mississippi, Justice Simrall, after noting that "The 13th, 14th and 15th amendments of the constitution of the United States, are the logical results of the late civil war, now more distinctly seen than immediately succeeding its termination" (*id.* at 675), pointed out that "The fundamental idea and principle pervading these amendments, is an impartial equality of rights and privileges, civil and political * * *" (*id.* at 677), and he then sustained the Mississippi equal public accom-

[228] We have already noticed that these equal accommodation laws were not immediately repealed when Reconstruction ended. See note 90, *supra.* Nor were they mere dead-letter, at least for a time. See, *e.g.*, *Donnell* v. *State*, 48 Miss. 661; *Sauvinet* v. *Walker*, 27 La. Ann. 14, affirmed, 92 U.S. 90; *Joseph* v. *Bidwell*, 28 La. Ann. 382. It is also worth noting that some responsible Southerners were arguing for freedom from racial discrimination in places of public accommodation. See, *e.g.*, Cable, "The Freedman's Case in Equity" (1884) and "The Silent South" (1885), in Cable, *The Negro Question* (Turner ed., 1958), pp. 56–82, 85–131.

[229] V *National Cyclopedia of American Biography* (1907), p. 456. See also, XXXVIII *id.*, pp. 225–226; Rowland, *Courts, Judges and Lawyers of Mississippi* 1798–1935 (1935), pp. 98–99.

modations law as applied to a theatre which sought to segregate a Negro patron.[240] Cf. *Coger* v. *The North West. Union Packet Co.*, 37 Iowa 145 (1873) (refusal of a steamship company to serve Negro in main cabin violated both State constitution and the Fourteenth Amendment).

Nor were those in the "occupied" States of the Confederacy alone in this understanding of the Fourteenth Amendment. Other States, subject to no federal intervention, were responding in similar vein to the command of the Amendment. Massachusetts had already enacted an equal accommodation law in 1865.[241] New York did so in 1873,[242] Kansas in 1874,[243] and fifteen other States were to follow their lead before the turn of the century.[244]

6. Granting that the membership of both Houses of Congress had undergone some changes and that opinions expressed after the event must be read with caution, the presence of Senators and Representatives who had been prominent on the Committee of Fifteen on Reconstruction and in the consideration of the Fourteenth Amendment gives both the debate upon, and the enactment of, the Civil Rights Act

[240] The argument of the Attorney General of Mississippi is even more explicit in relating the public accommodations law to the Thirteenth and Fourteenth Amendments; he argued that without such a statute there would be a plausible pretext for interference by the federal government to enforce by appropriate legislation the equal protection of the laws. 48 Miss. at 664–673.

[241] Mass. Acts 1865, p. 650.

[242] N.Y. Laws 1873, p. 303.

[243] Kan. Laws 1874, p. 82.

[244] See n. 19, *supra*.

of 1875 significance as an exposition of the original understanding. Both confirm the view that the Fourteenth Amendment was expected to bring equality in places of public accommodation and amusement, and to authorize Congress to enact appropriate legislation when a State denied this form of equal protection of the laws.

The Civil Rights Act of 1875 originated with a bill introduced by Senator Sumner on December 20, 1871, to amend the Civil Rights Act of 1866. The bill in its original form provided that all persons, without distinction of race or color, should be entitled to "equal and impartial" enjoyment of any accommodation, advantage, facility, or privilege furnished by inns, public conveyances, theaters, or other places of public amusement, public schools, churches and cemeteries.[244a] In explaining his bill, Sumner declared:

> The new made citizen is called to travel for business, for health, or for pleasure, but here his trials begin. The doors of the public hotel, which from the earliest days of our jurisprudence have always opened hospitably to the stranger, close against him, and the public conveyances, which the common law declares equally free to all alike, have no such freedom for him. He longs, perhaps, for respite and relaxation at some place of public amusement, duly licensed by law, and here also the same adverse discrimination is made.[245]

[244a] Cong. Globe, 42d Cong., 2d Sess., p. 244.
[245] Cong. Globe, 42d Cong., 2d Sess., p. 381.

After quoting Holingshed, Story, Kent and Parsons on the common law duties of innkeepers and common carriers to treat all alike, Sumner continued:

> As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so it must be with the theatre and other places of public amusement. Here are institutions whose peculiar object is the "pursuit of happiness," which has been placed among the equal rights of all.[246]

Sumner's bill, which had been adversely reported in 1870 and 1871, was introduced on December 20, 1871, and attached as an amendment to the Amnesty Bill. The Amnesty Bill, as amended, failed to secure the requisite two-thirds vote, but there were thirty-three affirmative to nineteen negative votes, which seemingly indicates that a great majority thought that the amendment was constitutional. Among the majority were fifteen Senators who had participated in the consideration of the Fourteenth Amendment.[247]

Senator Sumner's bill was not considered in the House at that Congress. A resolution was offered declaring that it would be contrary to the Constitution

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[246] *Id.* at 382–383. See also 2 Cong. Rec. 11 ("Our colored fellow-citizens must be admitted to complete equality before the law. In other words, everywhere, *in everything regulated by law*, they must be equal with all their fellow-citizens. There is the simple principle on which this bill stands.") [Emphasis added.] See, also, Cong. Globe, 42d Cong., 2d Sess., p. 381 ("The precise rule is Equality before the Law; * * * that is, that condition before the Law in which all are alike—being entitled *without any discrimination to the equal enjoyment of all institutions, privileges, advantages and conveniences created or regulated by law* * * *.") [Emphasis added.]

[247] Flack, *The Adoption of the Fourteenth Amendment* (1908), 259–260.

for Congress to force mixed schools upon States or to pass any law interfering with churches, public carriers, or innkeepers, such subjects of legislation belonging exclusively to the States. The resolution was defeated by a vote of eighty-four to sixty-one. Among those voting against the resolution—and thus to sustain the power of Congress—were Representatives Bingham, Dawes, Garfield, Hoar and Poland, all active in Congress' submission of the Fourteenth Amendment to the States.[348]

In the Forty-third Congress Representatives Butler of Massachusetts, Chairman of the House Judiciary Committee, reported a bill which was in all material respects the same as Sumner's bill, and which ultimately (after the provisions with respect to schools, churches, and cemeteries were eliminated in committee) was enacted as the Civil Rights Act of March 1, 1875. Butler, like Sumner, declared that the purpose of the bill was to secure equality in public establishments licensed by law:[349]

> The bill gives to no man any rights which he has not by law now, unless some hostile State statute has been enacted against him. He has no right by this bill except what every member on this floor and every man in this District has and every man in New England has, and every man in England has by the common law and the civil law of the country. Let us examine it for a moment. Every man has a right to

[348] Cong. Globe, 42d Cong., 2d Sess., 1582.

[349] 2 Cong. Rec., 43d Cong., 1st Sess., 340. See, also, 3 Cong. Rec., 43d Cong., 2d Sess., 1005, 1006.

> go into a public inn. Every man has a right to go into *any place of public amusement or entertainment for which a license by legal authority is required.* [Emphasis added.]

During the same session, Senator Sumner again presented his bill. It was reported to the Senate on April 29, 1874, by Senator Frelinghuysen, who argued that Congress had power to pass the bill under its power to implement the equal protection clause:[250]

> Inns, places of amusement, and public conveyances are established and maintained by private enterprise and capital, but bear that intimate relation to the public, appealing to and depending upon its patronage for support, that the law has for many centuries measurably regulated them, leaving at the same time a wide discretion as to their administration in their proprietors. This body of law and this discretion are not disturbed by this bill, except when the one or the other discriminates on account of race, color, or previous servitude.

In addition to Senator Frelinghuysen, Senators Morton,[251] Edmunds,[252] and Boutwell,[253] who had been a member of the Reconstruction Committee, all ex-

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[250] 2 Cong. Rec., 43d Cong., 1st Sess., 3452.

[251] Senator Morton said (*id.* at Appendix 361):

"* * * the very highest franchise that belongs to any citizen of the United States as such is the right to go into any State and there to have the equal enjoyment of every public institution, whether it be the court, whether it be the school, or whether it be the public conveyance, or whether it be any other public institution, for pleasure, business, or enjoyment, created or regulated by law."

[252] *Id.* at 4171.

[253] *Id.* at 4116.

pressed the opinion that the rights enumerated in the Sumner Bill were secured by the Fourteenth Amendment. The Sumner Bill passed the Senate on May 23, 1874, by a vote of 29 to 16.[254] There were nine Senators supporting the bill who had taken part in the enactment of the Fourteenth Amendment. Only two Senators who voted for the Amendment were opposed.[255]

The House, however, took up the Butler bill, which was almost identical with the Sumner bill. It passed the House on February 4, 1875,[256] the Senate on February 27, 1875,[257] and became law on March 1, 1875.[258]

The Civil Rights Act of 1875 manifestly went beyond the power of Congress under the Fourteenth Amendment insofar as it attempted to create a direct federal right to equal service in places of public accommodation without a finding that a State had denied equal protection of its laws. *Civil Rights Cases,* 109 U.S. 3. Curiously, the bill's sponsors appear to have been proceeding upon the theory that the legislation was necessitated by the failure of some States to secure that equality (see p. 133 above), yet they failed to recite the justification in the bill and the Solicitor General did not urge it in his argument. The Court then assumed both that the right to nondiscriminatory treatment in places of public accommodation was secured by the Fourteenth Amend-

[254] *Id.* at 4176.

[255] Flack, *Adoption of the Fourteenth Amendment* (1908), 270, 271.

[256] 3 Cong. Rec., 43d Cong., 2d Sess., 1011.

[257] *Id.* at 1870.

[258] *Id.* at 2013.

ment and, also, that the right was in fact protected by the States. The decision rests upon those assumptions. 109 U.S. at 19, 21, 24. See also pp. 73–77 above.

Taking together all the evidence under the foregoing heads, it is an inescapable inference that Congress, in recommending the Fourteenth Amendment, expected to remove the disabilities barring Negroes from the public conveyances and places of public accommodation with which they were familiar, and thus to assure Negroes an equal right to enjoy these aspects of the public life of the community. The disability, then, as now, was plainly of caste. Removing it was within the broad purposes of the Amendments.

While the thrust of history points towards the conclusion that the Amendments were intended to secure Negroes equal treatment in places of public accommodation, in two respects events outstripped the framers' foresight. First, a whole new class of establishments grew up, notably the lunch counters, soda fountains, restaurants and numerous places of amusement now so familiar in the public life of the community. Second, the law of many jurisdictions, instead of extending to these new public enterprises the traditional duty of those engaged in public callings, retrenched and gave no person a legal right to enjoy their facilities.[289]

The first development hardly affects the case. It is a constitution we are interpreting, and the framers

[289] But see the remarks of Representative Lawrence upon the Civil Rights Act of 1866 for implied general recognition of a State's power to enlarge or contract the civil rights of all citizens. Cong. Globe, 39th Cong., 1st Sess., 1832.

of the Amendments appear to have been well aware that they were writing a constitution. See Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 59–64 (1955). Today's widely known places of public accommodation have some characteristics of the inn and common carrier, and some of the streets and public squares. Both were within the conception of the framers. If the proliferation of commercial establishments has made men less dependent than formerly upon the proprietor who pursues a public calling, the easier access to the premises and the increasingly casual nature of the contacts in the new places of public accommodation now make exclusion even more plainly a mark of caste. In the circumstances of our times eviction from a lunch counter, public restaurant or amusement park is scarcely different from the earlier inhibitions against coming and going upon the street or in the public square. Any personal contacts are more casual and evanescent than the relationships between travelers in the carriers and inns of the mid-nineteenth century.

The second development raises a serious difficulty. The expectation, as we have said, was that Negroes would be secured a right to equal treatment in places of public accommodation under State law by virtue of the constitutional compulsion to extend to them the same familiar legal right possessed by other members of the public. Withholding the legal right from everyone cut part of the ground from under the expectations and thus raises a question whether the dominant intent was to secure equality in places of

public accommodation as segments of public life closely regulated by law, or was to provide such equality only to the extent of applying the same legal doctrines to members of both races without regard to the resulting discrimination in fact.

The answer would be easier if the question did not involve one of the critical issues in the evolution of the Fourteenth Amendment. The dominant purpose of its sponsors was to eradicate the caste system. Dealing with constitutional rights, they must have been concerned with substance, not form; and plainly racial discrimination in places of public accommodation was a substantial mark of caste. Yet across the forward thrust of the dominant purpose cut two arguments which had considerable influence upon the Senators and Representatives who held the balance of power. One argument was that the civil rights bills asserted, and the proposed constitutional amendments would give Congress, excessive power to legislate directly concerning rights and duties which had been, and ought to be, the domain of the States (Cong. Globe, 39th Cong., 1st Sess., pp. 113, 363, 499, 598, 623, 628, 936, 1268, 1270–1271, 2940; App. p. 158). The other was that the radicals' excessive zeal was leading them to impose equality upon the whole community, not only in civil rights but also in social and political rights (*id.* at 343, 477, 541, 606, 1122, 1157). In this context there was criticism of the vagueness of the measures (*id.* at 41, 96, 342, 1157, 1270–1271) and possibly some tendency to exaggerate their scope (*id.* at 601–602; App. p. 70).

At one time the latter objection seems to have carried weight with the moderates and to have influenced Representative Bingham, who was the principal author of Section 1 of the Fourteenth Amendment.[260] Before the Civil Rights Act of 1866 could be enacted, general language forbidding "discrimination in civil rights or immunities" was eliminated so that the Act conferred equality in respect of specific rights plus "full and equal benefit of all laws and proceedings for the security of person and property." [261]

Whether this criticism also influenced the drafting of the Fourteenth Amendment seems questionable, but the effect of the argument against superseding State laws is plain. Representative Bingham's original equal rights amendment as reported by the Joint Committee on Reconstruction on February 26, 1866 read:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th amendment).[262]

Had that language been adopted, Congress would have had unquestionable power to secure "equal protection

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[260] Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 22–24 (1955).

[261] See n. 216, *supra*.

[262] Journal of the Joint Committee on Reconstruction, S. Doc. No. 711, 63d Cong., 3d Sess., p. 17, hereafter cited as "Committee Journal."

in the rights of life, liberty and property," without regard to State law. Within the area of "the rights of life, liberty and property" there would have been no room for arguing a technical equality of no-right; substantial equality, as Congress judged it, would have become the test.

The Bingham equal rights amendment was abandoned in the face of overwhelming opposition to giving Congress direct power to legislate regardless of the States, but its core was carried forward into the first and fifth sections of the Fourteenth Amendment with important modifications:

> *Section 1.* * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> *Section 5.* The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The revision makes it plain that Congress may legislate to secure equal protection only when there has been a denial of equal protection by a State.

It is more difficult to sense where the balance was struck upon the question of the scope of the promised equality. Professor Bickel, whose reading of the history is more restrained than that of many current commentators, concludes that "the new phrase, while it did not necessarily, and certainly not expressly, carry greater coverage than the old, was neverthe-

less roomier, more receptive to 'latitudinarian' construction" (Bickel, *op. cit.*, 61), but he also emphasizes the phrase *"of the laws"* (*id.* at 45). Quite possibly the upshot was that the framers, by granting exact equality in the formal rules of law and nothing more, sidestepped the problem of defining "civil rights" except as it might enter into the interpretation of the privileges and immunities clause.[163] Certainly the proponents of the amendment emphasized the idea of equal laws. This was the explanation given by Thaddeus Stevens, who introduced the resolution in the House (Cong. Globe, 39th Cong., 1st Sess., p. 2459):

> This amendment * * * allows Congress to correct the unjust legislation of the States, insofar that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way. * * * Whatever law protects the white man shall afford "equal" protection to the black man. *Whatever means of redress is afforded to one* shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.

Senator Howard, opening the debate in the Senate, explained that the equal protection clause (*id.* at 2765):

> abolishes all class legislation in the States and does away with the injustice of subjecting one

[163] A thorough historical investigation of the intent of the framers with respect to equality of treatment in places of public accommodation would have to go behind the *Slaughter-House Cases*, 16 Wall. 36, to consider whether this was not originally conceived to be one of the privileges and immunities of citizens

> caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.

Yet the guarantee of equal protection suggests more than a guarantee of equal legal formulas. It was read later to mean equality "in everything regulated by law" and "the equal enjoyment of all institutions, privileges, advantages and conveniences created or regulated by law."[364] At that time the area thus described was well defined; it was roughly coextensive with the public life of the community. Nor was some vagueness objectionable. The amendment was primarily intended to lay a foundation for future congressional action; then, as now, men were willing to resolve differences by leaving the final incidence of imprecise words to be unfolded by the future. There is ample evidence that the framers intended to give Congress power to act when the States failed to give equal protection in the actual administration of the laws,[365] and so well informed a man as Justice Bradley believed at one time that the obligation involved a duty to enact protective legislation.[366] Beyond doubt the scope of the guarantee was limited, but there is scant reason to suppose that it was limited to techni-

[364] 2 Cong. Rec., 43d Cong., 1st Sess., p. 11; Cong. Globe, 42d Cong., 2d Sess., p. 381.

[365] Cong. Globe, 39th Cong., 1st Sess., pp. 2465, 2542.

[366] See p. 75, *supra*; see also Harris, *The Quest for Equality* (1960), p. 37.

cal inequalities in the laws themselves and did not extend to segments of public life that the laws customarily regulated. The narrower reading, as applied to today's places of public accommodation, poses the stark incongruity of a community-wide stigma of racial inferiority, in a State-regulated area of public life, flourishing in the face of the promise of the Amendments.

We pursue the inquiry no further. There is no need to determine in these cases whether a State's failure to grant Negroes a right to equal treatment in places of public accommodation involves a denial of equal protection of the laws, and, if so, whether Congress, in order to remedy a State's default, may provide the right by direct legislation. Wherever the purposive and limiting forces that shaped the Amendment reached equilibrium as applied to a situation in which the State has scrupulously refrained from acting, the consensus surely was not one of reluctance to provide for the invalidation of the slightest affirmative State interference on the side of caste. The very closeness of the balance with respect to the duty to provide equality in all public vehicles or places of public accommodation implies ready condemnation, at least in that area, of any product of unequal legislation.

Here respondents have never been truly neutral. The community-wide fabric of segregation is filled with threads of law and governmental policy woven by the State through a warp of custom laid down by historic prejudice. Discrimination in places of public accommodation is an indivisible part of that fabric.

It cannot be severed from the community-wide system of segregation and examined in isolation even in areas where State law never dealt with it directly. Past involvement in the larger scheme forbids a present posture of aloof indifference in places thrown open by the proprietor to the public life of the community. The States must at least take the trouble to notice what they have done and what is the effect of their current action. If the real consequence of a suit, whether civil or criminal, is to lend support to discrimination against the Negro in places of public accommodation—discrimination that the State has helped to encourage—then the State must stay its hand. Whether or not the State must act, it may not, under such circumstances, keep its finger on the scale in favor of the caste system.

That is the whole of our argument. That much, we submit, is compelled by the legitimate expectation of the framers of the Amendments in the light of contemporary realities. It is unimportant that the framers failed to foresee either the succession of events or the precise forms of State involvement. "* * * no human purpose possesses itself so completely in advance as to admit of final definition. Life overflows its moulds and the will outstrips its own universals. * * * It should be, and it may be, the function of the profession to manifest such purposes in their completeness if it can achieve the genuine loyalty which comes not from obedience, but from the according will, for interpretation is a mode of the will and understanding is a choice." L. Hand, *The Speech of Justice,* 29 Harv. L. Rev. 617, 620 (1916).

After a century it is not too much to say that the States must scrupulously avoid continuing to support, even indirectly, a stigma serving no function but to preserve public distinctions of caste which the Amendments promised to eliminate.

CONCLUSION

The judgments of conviction should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
BURKE MARSHALL,
Assistant Attorney General.
RALPH S. SPRITZER,
LOUIS F. CLAIBORNE,
Assistants to the Solicitor General.
HAROLD H. GREENE,
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Attorneys.

JANUARY 1964.

ROBERT BELL, et al.,

Petitioners,

—vs.— No. 12

STATE OF MARYLAND,

Respondent.

Washington, D. C.
Monday, October 14, 1963

The above-entitled matter came on for oral argument, pursuant to notice,

BEFORE:

EARL WARREN, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
TOM C. CLARK, *Associate Justice*
JOHN M. HARLAN, *Associate Justice*
WILLIAM J. BRENNAN, JR., *Associate Justice*
POTTER STEWART, *Associate Justice*
BYRON R. WHITE, *Associate Justice*
ARTHUR J. GOLDBERG, *Associate Justice*

APPEARANCES:

JACK GREENBERG, ESQ., *10 Columbus Circle, New York 19, New York, for the Petitioners.*

LORING E. HAWES, ESQ., *Assistant Attorney General of Maryland, One Charles Center, Baltimore 1, Maryland, for the Respondent.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: No. 12, *Robert Bell, et al.*, petitioners, versus *Maryland.*

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Greenberg?

ORAL ARGUMENT OF JACK GREENBERG, ESQ., ON BEHALF OF PETITIONERS

MR. GREENBERG: May it please the Court:

This case is here on writ of certiorari to the Court of Appeals of Maryland. Petitioners have been convicted of violating Article 27, Section 577 of the Public General Laws of Maryland, a trespass statute which is the same statute that was read to you by Mr. Rauh, and was the statute that was involved in the *Glen Echo* case. They were indicted on a two-count indictment, which appears on page six of the record, stating that the petitioner:

> . . . unlawfully did enter upon and cross over the land, premises and private property of a certain corporation in this State, to wit, Hooper Food Company, Inc., a corporation, after having been duly notified by Albert Warfel, an agent, not to do so.

The second count of the indictment charges that they entered this property, which was then and there posted against trespassers.

They were found guilty on count one, fined ten dollars and costs, the fine being suspended. They were acquitted on count two.

Petitioners claim that their conviction violates the equal protection clause of the Fourteenth Amendment in that the criminal proceedings and judgment enforce racial segregation against them. They also claim that the judgments below violate the due process clause of the Fourteenth Amendment in that there was no evidence to sustain the conviction under the indictment and statute which have just been read, or, if it were to be held that there was sufficient evidence, the indictment and the statute did not give them fair notice required by the due process clause.

MR. JUSTICE BRENNAN: Was that question raised in the state court?

MR. GREENBERG: It was raised, I believe, sufficiently to present it here, particularly in terms of the free speech argument; and I think the vagueness argument and the free speech argument are really different ways of saying the same thing in a case such as this.

MR. JUSTICE BRENNAN: Well, I understand the state supreme court to say it was not raised in terms.

MR. GREENBERG: It was not raised in terms. But I think it was raised sufficiently to be here, as in *Wright* against *Georgia* and other cases where free speech and vagueness in a case such as this are intimately linked.

MR. JUSTICE GOLDBERG: Does that mean you are adopting the Solicitor General's argument on vagueness? You go along with it?

MR. GREENBERG: I go along with that. I think we argued it first. I don't want it to be said that we're adopting it. It appears at length in our certiorari petition and in our brief.

MR. JUSTICE STEWART: He's adopting your argument?

MR. GREENBERG: Well, I would let him characterize it. But it is an argument upon which we rely. However, we will not argue it orally, because this is the only argument the Solicitor makes, and I suppose this is the one he will be arguing orally.

The facts of the case are in many respects similar to the facts of the other cases which have just been argued. June 17th, 1960, a group of 15 to 18 Negro students, among whom were the petitioners, who number a dozen, entered the lobby of Hooper's Restaurant in Baltimore. They were met by the hostess at the door—rather, within the restaurant beyond the door—and she stated: "I am sorry, but we haven't integrated as yet." The restaurant manager, Mr. Warfel, whose name appears in the indictment, came up at this point and began to talk to the petitioners. He testified that he told them it was company policy, that "We haven't integrated the restaurant." And then he said: "In the process of translating the company policy, the group broke. They brushed by us and sat at various tables in the restaurant. And after they were seated, they proceeded to hedgehog", which is explained as them spreading out and sitting at various other tables in the restaurant.

The owner of the corporation operating the restaurant arrived and instructed Warfel to call the police. When the police arrived, petitioners were seated at various tables, some upstairs,

which was a restaurant, and downstairs, which was a cafeteria and grill. Warfel read the Maryland Code to the petitioners; clerks and waitresses took down their names; and then Mr. Hooper went to the magistrate to obtain warrants.

There is no question that they were refused service and an effort was made to eject them from the restaurant, solely on the basis of their color. Hooper made it clear that he agreed with the petitioners' objective. He testified that: "I go on record that I favor what you people are trying to do." He also said: "I told Mr. Quarles," who is one of the petitioners here, "that I thought personally that it was an insult to human dignity. I sympathize with it, and also told them that my customers governed my policy."

Petitioners' equal protection argument in this case is presented in three parts, and it's essentially the same as petitioners have made in the cases preceding this one; that is, that we submit that the arrest and conviction here serve only to enforce the racially discriminatory decision of the owner, and that consequently, under *Shelley* against *Kraemer*, which was argued at length by Mr. Rauh, and other cases holding similarly, the State has participated to some significant extent in enforcing and encouraging racial segregation, and that such state action is forbidden by the Fourteenth Amendment. We wholly urge such an argument upon the Court. But in view of the fact that it has been argued at length previously, we would prefer to concentrate in this oral argument upon other aspects of the question.

Petitioners submit also, as in the other cases, that the choice of the proprietor was not an authentically private decision, but, as is abundantly demonstrated by the record, was influenced by the custom of the community. In fact, in this case it is more clear than in any other, because Mr. Hooper says that: "I wholly believe in what you are trying to do. I completely agree with you and sympathize with you. But my choice is influenced by the community."

This choice of the community in turn, we submit, was, to some significant extent—and that is the term of *Burton*, "to a significant degree", and we submit that in this case it is significant—has been influenced by an historic pattern of Maryland laws which had the purpose of sustaining a segregated society. I think it should be recognized that at the time these convictions occurred Maryland had not, in the sense that has been suggested here, turned the corner and started enacting public accommodations legislation and so forth. At this time Maryland was a State without laws of that sort. And we say that, under such circumstances, at the very least, state action should be held to have a role in state custom, unless something to the contrary, something contrary to common

experience, is shown. We say that it is beyond belief that a State such as Maryland, although its policy is now in the process of change, has not helped to create and shape the existing statewide segregation custom, when for many years it has had a statutory policy of requiring racial segregation in many institutions of public life.

This is not to charge the present regime in the State with wrongdoing, but rather, simply to recognize that state responsibilities or customs, having once attached, continue to play a role in what occurs in life. And to this extent, we submit, the State continues, or at least at the time of this conviction certainly did continue, to be involved to a significant degree in the manifestation of the custom which it helped to create, shape, and perpetuate.

It may be that a simple analogy would be instructive or descriptive. It's as if one has poisoned a well and then later repented and sought to cleanse it. Nevertheless, some of the residue of poison remains and members of the public drink it. All we're saying is that the man who poisoned the well is, to some significant degree, involved in the illness that has befallen those who drank the water, even though he has repented and made efforts to undo what he did.

MR. JUSTICE STEWART: I suppose this is a silly question. It's already been made in the previous case, and that is, whether customs produce laws or laws produce customs.

MR. GREENBERG: I think both occur, obviously. Customs produce laws and laws produce customs. But to the extent that laws produce or shape customs, the State is significantly involved in them.

MR. JUSTICE STEWART: Generally speaking, laws reflect the mores of the community, don't they, rather than create them?

MR. GREENBERG: Well, I think sometimes they do. Sometimes they represent either the enlightened or unenlightened views of the community leaders, who are either ahead or behind the community. I think it depends on the law and the situation. Sometimes one, sometimes the other. But I think it is beyond doubt that, once the law is on the books, it then plays a role in influencing and educating and encouraging and shaping.

MR. JUSTICE STEWART: There's no law of any kind here directly affecting this restaurant, was there?

MR. GREENBERG: Not in the segregation sense, no.

MR. JUSTICE STEWART: That's what I mean. The laws you have collected in footnotes on page 31 and 32 are what you've

been able to find, I suppose?

MR. GREENBERG: That's correct.

MR. JUSTICE STEWART: And now, as I understand it, Maryland has a law looking the other way, requiring nondiscrimination?

MR. GREENBERG: Covering some of the counties. And Baltimore has an ordinance. This happened since these convictions.

In addition to the custom argument already argued, petitioners urge upon the Court other fundamental considerations; and that is that in this case, as in the other cases at bar, the State has upheld the claim of the proprietor, in this case called a property right, against the claim of the petitioners for equal treatment. The criminal court of the City of Baltimore has held, as a matter of Maryland law, in the absence of appropriate legislation forbidding racial discrimination, the operators of privately-owned restaurants, even though generally open to the public, may discriminate against persons of another color or race, however unfair or unjust such policy may be deemed to be. And the Maryland Court of Appeals has held, in the context of the racial issue in this case, that private citizens retain the right to choose their guests or customers; and furthermore, that this then may be enforced by the criminal law of the State. And we submit that this is not the neutral declaration of a common law that always was and eminated from nowhere, but rather the expression of a ranking of values on behalf of the State, which, in the terms of *Erie*, quoted in our brief:

> There is no transcendental body of law outside of any particular State that is obligatory within it, unless and until changed by statute.

And Justice Holmes a number of times has written to the same effect, as quoted in *Erie* and in our brief.

But the law of property in a State and its ranking of property claims as against others is, we submit, subject to the requirements of the Fourteenth Amendment. It was held in *Marsh* against *Alabama* and *Shelley* against *Kraemer* that property rights must be created and enforced subject to the Fourteenth Amendment. We submit that the values of the Fourteenth Amendment, by the nature of their constitutional position, are dominant. The State denies equal protection of the laws when it ranks above these values the claim of a proprietor open to the public and licensed by the State for the purpose of being open to the public, the right to exclude some persons from his establishment solely on the grounds of race.

MR. JUSTICE GOLDBERG: What would your ranking be in the case of a house?

MR. GREENBERG: Well, I would say that the Fourteenth Amendment, *Mapp* against *Ohio*, Mr. Justice Harlan's opinion in *Poe* against *Ullman*, and other cases, indicate that there is a constitutional right of privacy, which, in the case of a private home, I would submit, would be dominant against something of this sort. I think a public place can make no such claim. And in fact, it's so thoroughly regulated that it's not the same sort of situation.

MR. JUSTICE GOLDBERG: What about a private club?

MR. GREENBERG: Well, I think if it were a genuinely private club, yes, it would partake of the privacy protection. If it were a sham, a place open to the public under the name of a club—and there have been cases under public accommodations statutes to this effect; when it's been found to be a club, it's been held to have the right to make choices of this sort, no matter how reprehensible, and when it's been found to be a case going under the name of a club just to be able to discriminate, state commissions have said you can't do that. And I think it would be the same kind of result.

MR. JUSTICE GOLDBERG: What about a buying cooperative?

MR. GREENBERG: A buying cooperative? Well, I would think, again—I am not too familiar with the operation of that type of an operation. I just wouldn't know. I think it would depend upon how genuinely public or private it was. I just don't know. I once belonged to a cooperative grocery store, and as far as I could tell it was like any other grocery store, and I don't think that it should be permitted to discriminate. On the other hand, if there were some element of privacy in it, it might be different.

Church cases, as discussed earlier this morning, would involve First Amendment rights of religion. And again, I don't feel that it's necessary to argue how something like that would come out at a time like this. I think that the values to—the considerations to be taken into account are fairly clear.

It is the position of petitioners that, to the extent that this ranking is in the form of an abdication of state power or a refusal to act to protect the Negro citizen in his claim to equal service, that the State has as much responsibility as if it has affirmatively sanctioned the exclusion in terms of positive legislation. State inaction in various circumstances has been held to deny equal protection of the laws. In *Burton* the failure of the State to insist upon a nondiscrimination clause in the lease played a role in the decision and was so characterized. *Terry* against *Adams*, of course,

was a case in which in most views the State did nothing and thereby state action in the constitutional sense appeared. Various cases in the courts of appeals, *Catlette* and the *Lynch* case are cited in our briefs.

Indeed, in the *Civil Rights Cases* themselves, this Court assumed that the states were living up to their responsibilities, taking the affirmative action necessary to protect the Negro citizens, and only in view of this was the judgment of the Court rendered as it was.

The form that the state protection would have to take is not in issue at this point. The only thing petitioners submit is that *a fortiori* certainly a criminal conviction cannot be imposed under these circumstances.

The principal argument made against this type of position is that the logic leads too far, that there is no state responsibility here because it would lead to an absurd result in the case of a club or a church or a home. I notice everybody gives the case in terms of a little boy asking for cigarettes or somebody being thrown out of a home or somebody being thrown out of a church; whereas the case we have here is the case of a place fully open to the public, fully subject to regulation. Indeed, due process of law is not taken away from such a property owner when a State requires him to serve Negroes. I would submit due process of law would be taken away from a homeowner if he were required to have a guest in his home no matter what the race. And we submit that these *reductio ad absurdum* arguments are self-defeating, because by being so far removed from the type of case that we have at hand here, they indicate that the type of case that we have at hand is one surely within the protections of the Fourteenth Amendment.

MR. JUSTICE GOLDBERG: Mr. Greenberg, you would not change your argument if the proprietor wasn't going to serve in any department?

MR. GREENBERG: No, I would not. In fact, that's my case. I have a case involving not a lunch counter, but a restaurant. That's correct, yes.

MR. JUSTICE GOLDBERG: So your argument would be that any area, regardless of the problem, regardless of the department, the public must be included?

MR. GREENBERG: Yes, I would say the State has an affirmative responsibility to protect. And the form that would take involves other questions. But certainly, *a fortiori*, we can't have an arrest and a conviction. We would submit that, for these reasons, the conviction in this case should be reversed.

ORAL ARGUMENT OF LORING E. HAWES, ESQ., ON BEHALF OF RESPONDENT

MR. HAWES: Mr. Chief Justice, may it please the Court:

The facts in this case are certainly different, we believe, from the other cases presented here, particularly on the application of the trespass statute, for here there was a warning given. The petitioners have perhaps glossed over the matter of giving the warning. But it's perfectly clear from the testimony of the leader of the group, Quarles, in the record, that they were not permitted to seat themselves in the restaurant due to the statement of the hostess that they had not integrated yet. And the trial court took this into consideration. If you will note the opinion of Judge Byrnes in the court below, where he noted that they were refused seats in this restaurant.

The physical layout of the restaurant is perhaps important to the Court's decision here, in that there was a lobby. The petitioners entered the restaurant through a revolving door and came into a room known, or referred to in the record, as the "lobby". At the end of the lobby, opposite the door, there were steps. At the top of these steps the hostess was stationed; and it is the common practice in this restaurant for the hostess to seat all customers coming into the dining area. There is a fence separating the dining room and the lobby in this restaurant.

Now, the Maryland trespass statute not only prohibits entry, but it prohibits crossing over. These petitioners crossed over a portion of the premises, of the restaurant premises, after being warned not to do so. Not only did they enter the dining area and go downstairs after the warning; they crossed over a portion of the premises. This is precisely what the Maryland statute prohibits.

There is another element in this case which is of significance, we believe, and that is that the police refused to arrest the petitioners. The police were called by the owner some time after the petitioners had entered the restaurant, and after the owner and the manager of the restaurant had at length conversed with the leader of the group to try to persuade them to leave peaceably. He explained his policy to them. He stated that he was segregating, refusing service, simply because his customers did not want to eat with Negroes. That is the only reason he gave.

The police were called by the owner after he could not persuade these persons to leave; and when the police arrived they refused to even read the trespass statute. This was done by the restaurant manager himself. The police took no part whatsoever in

the goings on in the restaurant itself. The owner had to go all the way down to the police station to swear out warrants. He went down to the police station and the magistrate apparently called, or was called—it's not clear from the record which—by the petitioners, and they made arrangements to voluntarily come down to the court the following Monday on their own recognizance. There was no custody taken. There was no arrest.

The State in this situation is certainly a neutral party. Now, we feel that, under the facts and circumstances of this case, that this Court is faced with a square decision on whether a State criminal trespass conviction of Negroes protesting racial segregation policy in a private restaurant, in a private building, constitutes state action proscribed by the equal protection clause of the Fourteenth Amendment, where neither local laws nor customs require segregation.

Now, the mere recitation of this statute does not, in our view, constitute any state custom on the part of the State of Maryland. As far back as 1960, Chief Judge Thompson of the United States District Court for the District of Maryland, in a case in which custom was a factual matter before the court, decided, in *Slack* versus *Atlantic White Tower System*, that as far back as 1957 there was no custom of segregation in Maryland.

Furthermore, there is no evidence before the Court in support of the petitioners' contention that there was such a custom. On the other hand, the petitioners' leader admitted that on a previous occasion or on several previous occasions, in the same general area, in the same community, they had sat and had been served in restaurants. This is certainly a very damaging admission on the part of the chief witness for the defendants—the petitioners, that is—in this case. If they had been served in other restaurants in the community, certainly this negates any community custom of segregation. There is no other evidence to the contrary, either.

The owner in this case would not be penalized in any way because he admitted Negroes. There would be no state action that could be taken to force him to admit Negroes. He had no contract with any other restaurant owners. There was no state law; there was no state policy; there was no state action in any respect that could compel the restaurant owner here to segregate his facility.

On the question of licensing, in Maryland there is no difference between the licensing of a club in which persons are excluded and a restaurant, except where the facility, no matter what it may be, is operated without profit to the operators. This is the only distinction made in the licensing statute, which is Section 8(a) of Article 56, the Maryland Code. The health statute, which involves the regulation by the State on the grounds of sanitation, etcetera,

applies to all facilities, whether they be country clubs, private eating clubs, whatever they may be.

MR. JUSTICE STEWART: I suppose all statutes apply to private homes as well—I am sorry. I should say, I suppose the health statutes apply to private homes as well, do they not, in Maryland?

MR. HAWES: Yes. In that case there was a rat infestation in the home; and this Court ruled that, where there was evidence outside the home that there was such a rat infestation, that a health inspector could enter the house.

Now, the Maryland statute certainly isn't directed at sit-in demonstrations or segregated facilities or any of this sort of thing. As a matter of fact, there's a prior case in the Maryland Court of Appeals in which the statute was tried to be applied. It was overruled by the court. In *Krause* against *Maryland* the court stated that the statute at least would have been applicable if notice had been given in a case where there was a repossession of an automobile on a man's property. The only question involved there was whether there was notice given; and the court there found there was no such notice, the owner wasn't there at the time, and that the people who went on the property, the only forewarning they had was that he had a lien on the car.

All trespassers, regardless of their race, color, sex, color hair or whatever manner, whatever characteristics they have that the owner of private property in Maryland wishes to call into play to forbid their entry, are equally guilty under the Maryland trespass statute. The woman wants to go into a stag bar and the owner doesn't wish to let her enter; I don't think that she could call upon the Fourteenth Amendment in this situation.

The Fourteenth Amendment says nothing about race or color. It merely says the State shall not deny equal protection. In fact, this Court in *Brown* versus *Board of Education* said that, after an exhaustive study of the debates in Congress and other materials available, that at the time the Fourteenth Amendment was passed, the time that the civil rights bills were enacted, that this Court could not determine with any certainty what the Fourteenth Amendment was aiming at. That was stated in a unanimous opinion of this Court in *Brown* versus *Board of Education*. So I think that the remarks of Mr. Justice Goldberg in this regard, that the Fourteenth Amendment and the Thirteenth Amendment must be read together, is not quite the meaning which was given to the Fourteenth Amendment on that occasion.

MR. JUSTICE GOLDBERG: You're not contending that the Thirteenth and Fourteenth and Fifteenth Amendments don't have to do with Negro rights?

MR. HAWES: No, they certainly had something to do with Negro rights. But that is not the only thing that they had to deal with.

MR. JUSTICE GOLDBERG: The drift of your argument for the moment is that you are trying to play down the significance of these Amendments to be considered on the status of the Negro.

MR. HAWES: I'm not saying that they're not applicable. In fact, it's perfectly clear that they're applicable to the Negro situation. But the example that was cited by Mr. Justice Goldberg, I believe, was the *Civil Rights Cases*, and I believe that the discussion there, as in the *Slaughterhouse Cases*, was on the privileges and immunities.

MR. JUSTICE GOLDBERG: But it's not restricted to it.

MR. HAWES: It's not restricted to it. In fact, the Fifteenth Amendment, again, in your *Terry* and *Smith* versus *Allwright*, does state that the right to vote shall not be denied on the grounds of race or color, and that's clearly such a case. The Fourteenth Amendment includes the whole bundle. This Court has used it to enforce the rights of the First Amendment, the Fifth Amendment, and other Amendments to the Constitution. It's not simply a protection due to—the expression that's been used in some of the cases—"the badge of slavery." The Amendment just hasn't been determined to be that in all the cases.

Now, it can hardly be said here, then, that the State compelled or coerced or commanded the discrimination. The State here had no connection whatsoever with the decision of this owner to segregate his particular restaurant. Nor were rights that are constitutionally protected denied to the petitioners. Now, in the *Civil Rights Cases* it was made clear that there must be an abrogation or denial of rights for which the State alone could be held responsible. This was the fundamental wrong that was intended to be remedied.

The distinction that can be applied to *Shelley* versus *Kraemer* here, I think, should be looked at in the light of some other situations, for instance, where there is a will in which there is a testimentary clause which prohibits a share of the estate to go to "one of my sons who marries out of the Hebrew faith". Such was the case in *Gordon* versus *Gordon*, which came up to this Court after Massachusetts had stated that such a discriminatory clause in the will, which was given effect by the courts of Massachusetts, was perfectly valid. This Court denied certiorari in that case.

And in other situations—the *Girard Trustees* case which came up to this Court from the courts of Pennsylvania. In that case it was held that there was no prohibited state action when the provi-

sions in the testamentary instrument, there the will of Girard, set up a trust to be exercised in the first instance, when the case came up before this Court, by the City of Philadelphia. Thrown out on those grounds, the court in Pennsylvania then appointed individual trustees which continued the discriminatory policy of Girard College, which was set up under the trust. When the case again came before this Court on certiorari, the Court denied certiorari. Now, it's hard to look at those cases—it's hard to justify the results in those cases with the result sought by the petitioners here on the grounds of state action.

Another case is the *Black* versus *Cutter Lab*, in which there was a discriminatory provision in the collective bargaining agreement, which actually was decided in this Court not to be a ground of state action. There are other examples that perhaps could be raised.

Now, several cases have been mentioned to this Court today which I think deserve a little comment. And one is *Marsh* versus *Alabama*, comparing that with *Terry*, for instance, to find that some positive action on the part of the State is called for. First, it should be borne in mind that these cases involve rights that were reserved by other Amendments in the Constitution. In the *Terry* case it was the Fifteenth Amendment, which certainly has a definite connection with the racial issue, due to the words of the Amendment itself, and perhaps calls for a stronger state action. The other involves the First Amendment. And here we don't have any such thing. Here the parties that came onto the property and were refused service didn't have any rights to be there. Now, the mere denial of rights by the failure to give them redress certainly shouldn't amount to state action. I don't think the Court has ever gone that far.

MR. CHIEF JUSTICE WARREN: Don't they have the right to go on the property until they're told to get off?

MR. HAWES: Well, that's a question—yes, I believe that's so. They were inside the door.

MR. CHIEF JUSTICE WARREN: And what did they say?

MR. HAWES: What did who say?

MR. CHIEF JUSTICE WARREN: What did they tell them about getting off the property at that time?

MR. HAWES: They were told they weren't desegregated, they weren't integrated yet, and they were refused to be seated at that time.

MR. CHIEF JUSTICE WARREN: Beg your pardon?

MR. HAWES: They were not permitted to be seated.
But the question is—

MR. CHIEF JUSTICE WARREN: I thought they never got in there.

MR. HAWES: No, but they disregarded what the hostess said, and they crossed over to where the seats were.

MR. CHIEF JUSTICE WARREN: Half of them didn't even come in, did they?

MR. HAWES: They all came in the same door.

MR. CHIEF JUSTICE WARREN: But they weren't all there.

MR. HAWES: I think, according to the record, they were. Quarles' testimony—

MR. CHIEF JUSTICE WARREN: There were a number of them who did not go through that entrance at all.

MR. HAWES: Your Honor, probably you're speaking of the testimony of the owner about a previous incident in the restaurant where some of the people went into a bar. In this case they all came into the same door, in through the lobby.

MR. CHIEF JUSTICE WARREN: I thought some of them came in through another—

MR. HAWES: No, sir. They all came in through the same door, and they congregated in the lobby. After the refusal to let them be seated, part of them pushed by the hostess and were seated in the dining room at various tables, and the other went down the steps to a grill which is in the basement. But they had been warned prior to doing this, and this is evident from their own leader's testimony, pages 42 and 43.

MR. CHIEF JUSTICE WARREN: Who had warned them?

MR. HAWES: Both the hostess and the manager had warned them.

MR. CHIEF JUSTICE WARREN: By saying they hadn't integrated the place yet?

MR. HAWES: Yes, sir.

MR. CHIEF JUSTICE WARREN: And that means they were prohibited from being on the property.

MR. HAWES: I think it was understood to mean that, yes, sir.

MR. CHIEF JUSTICE WARREN: Under the statute?

MR. HAWES: Yes, sir.

MR. CHIEF JUSTICE WARREN: So that's when the crime was committed; when they moved from that spot?

MR. HAWES: That's right.

MR. CHIEF JUSTICE WARREN: The crime was committed right then?

MR. HAWES: And one of the petitioners, if I remember correctly, in the record says that they were refused seats. And at another point he says that they knew they were going to be arrested. This is part of their technique of demonstrating in this restaurant. It could be said that they had actual intent to be arrested in this case as part of their technique for the—

MR. JUSTICE GOLDBERG: The crime did not take place at the point where the hostess said, "We are not integrated"? In your opinion, it took place at the point where they pushed past her and went and sat down?

MR. HAWES: I believe, in this case, it would be crossing over. It could be entry, too. Either one.

MR. JUSTICE GOLDBERG: And then you rely upon cross over?

MR. HAWES: That's right.

MR. JUSTICE GOLDBERG: Do you think the statute was intended to cover that, when it said cross over? Do you consider that?

MR. HAWES: That's right, very definitely, simply because—there is another Maryland statute, Section 576, I believe it is, which says that where signs are posted and there is entry, then that's the crime. Now, it would be—

MR. CHIEF JUSTICE WARREN: Were there signs here?

MR. HAWES: There were no signs, no, sir. But whether the actual crime took place at the street or at the—inside the lobby doesn't particularly matter here, as long as the facts show that there was a crime committed. Merely moving it out to the street doesn't help them.

On the question of vagueness, certainly this Court's decision in *Alford* versus the *United States* is far more difficult to understand than what the Maryland Court of Appeals did in this case. Now, the Maryland Court of Appeals found that there was a crime committed and that the statute was violated, whereas in *Alford*—and this was the first instance that anyone had come up under this situation—in *Alford* there was a statute which prevented the construction or the building of a fire near a forest in the

public domain. That's all the statute said. And that man was convicted for building a fire near a forest. Now, he was the first one to come before this Court or any court in which an appellate court, anyway, determined what that statute meant. And the Court upheld the conviction. Now, certainly the Maryland statute is not only clear, the words are easy to understand; but there was, without a doubt, a warning not to enter the particular parts of the restaurant where the petitioners went, after which they entered and crossed over those portions.

MR. JUSTICE GOLDBERG: Don't you have a more recent case of this Court that leads you in that connection—the *National Dairy* case, last term?

MR. HAWES: I'm not aware of that case, Your Honor.

MR. JUSTICE GOLDBERG: That was a case where the Court held, under the statute prohibiting sales at unreasonable prices, that a man could be convicted on the information that he sold below cost. That construction was made in this Court and the conviction sustained. Some of us dissented. But that was a holding of this Court.

MR. HAWES: I think that perhaps in that case you have a little bit different construction of the wording. Isn't that a case where there was an agency which determined what the words were?

MR. JUSTICE GOLDBERG: No, there was not. But I am just suggesting that it might be helpful to you in your argument in this connection.

MR. HAWES: I appreciate your suggestion, Your Honor.

In summary, I would say that if the basis of the constitutionality of such a conviction is neutrality on the part of the states, which under the decisions of this Court for the past hundred years appears to be the standard, then the State of Maryland cannot be held responsible for this conviction. If anything, the officers of the State here discouraged the owner from bringing the case even into court. They required him to go down to the police station, which in a number of cases the owner wouldn't even do. There was no evidence at all that the police had any forewarning of the incident that took place, or that there was any state encouragement of the segregation policies of the restaurant. They had no ownership rights in the building or in the restaurant itself. There was no one in the State employ that was working there. All the mitigating factors that seem to have bothered this Court in rendering its decisions in this field are absent in this case. There doesn't seem to be an easy way to reach the decision one way or the other on the primary constitutional issue raised. Therefore,

the State of Maryland respectfully submits that the judgment below should be affirmed.

[Whereupon, the proceedings recessed, to be reconvened the following day.]

ROBERT BELL, et al.,

Petitioners,

—vs.— No. 12

STATE OF MARYLAND,

Respondent.

Washington, D. C.
Tuesday, October 15, 1963

Oral Argument in the above-entitled matter was resumed, pursuant to recess,

BEFORE:

EARL WARREN, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
TOM C. CLARK, *Associate Justice*
JOHN M. HARLAN, *Associate Justice*
WILLIAM J. BRENNAN, JR., *Associate Justice*
POTTER STEWART, *Associate Justice*
BYRON R. WHITE, *Associate Justice*
ARTHUR J. GOLDBERG, *Associate Justice*

APPEARANCES:

RALPH S. SPRITZER, ESQ., *Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the United States as Amicus Curiae.*

RUSSEL R. RENO, JR., ESQ., *Assistant Attorney General of Maryland, One Charles Center, Baltimore 1, Maryland, for the Respondent.*

JACK GREENBERG, ESQ., *10 Columbus Circle, New York 19 New York, for the Petitioners.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: Mr. Spritzer?

ORAL ARGUMENT OF RALPH S. SPRITZER, ESQ., ON BEHALF OF THE UNITED STATES AS *AMICUS CURIAE*, URGING REVERSAL

MR. SPRITZER: Mr. Chief Justice, may it please Your Honors:

In addressing myself to the five cases which are before the Court, I shall attempt first to set forth the general approach which we follow, one which is common to all of the cases. I then propose, if Your Honors please, to discuss the Florida case, which stands, in our view, somewhat apart from the others because the statute is unique. Then I would like to turn to the specific arguments we make in the South Carolina and Maryland cases, which from the standpoint of our analysis, at least, may be considered somewhat as a group. After setting forth the arguments I've outlined, I shall also attempt to state briefly why I think the points that we argue were adequately comprehended by the arguments made in the state courts and why, in any event, they are here.

Let me say in that connection at the outset that, even if this Court should conclude in one or more of these cases that the point which is argued in the *amicus* brief was not sufficiently presented, not presented with sufficient explicitness, in the state courts, it does not follow from that, or would not follow from that, that the issue drops out of the case, as was suggested yesterday. In the *Avent* case, which was here last term, the case was obviously within the jurisdiction of this Court because various constitutional arguments were raised and duly preserved. However, the petitioner in that case did not raise at any stage of the litigation an argument based upon an allegation that the City of Durham, which was the place where he was convicted, had an ordinance requiring segregation. Indeed, he had made no attempt to prove the existence of such an ordinance. Nonetheless, this Court, having jurisdiction of the case, concluded that that issue ought to be considered. It vacated the judgment accordingly and remanded the case

to the Supreme Court of North Carolina in the light of its decision in one of the companion cases, the *Peterson* case. Having jurisdiction of these cases, this Court has it within its power under the certiorari jurisdiction to make such disposition as the justice of the case may require.

Let me also say at the outset that our brief does not address itself and I shall not in oral argument address myself to the broad and undeniably very serious and important question whether there should be a redefinition of the concept of state action for purposes of administering the provisions of the Fourteenth Amendment. I need hardly dwell upon the rule so often emphasized by the Court, that it will not ordinarily reach broad constitutional issues if more limited principles are dispositive—particularly so, I take it, where those more limited principles are themselves well-settled. We believe that these cases fall under that precept.

In this connection, I would also say that we are mindful of the fact that the President is speaking at this very time, and that the Congress is considering legislation, of course, national in scope, which, if it were adopted, would be directed at the very problems which underlie this kind of litigation.

Before leaving these preliminaries, I would also remind the Court that the Solicitor General has expressed his readiness in his brief, should the Court, contrary to our present expectation, find that the grounds of reversal which we urge are not dispositive, his readiness to address himself further, at the suggestion of the Court, to the broader constitutional issues which have been mooted.

Now, in each of these cases, of course, as the Court has heard at length, a group of Negro citizens, in some instances accompanied by white sympathizers, unsuccessfully sought service at a private place of business open generally to the public. In all of the cases, as we read these records, the petitioners were invitees. In none of the cases had they received any warning before coming on the premises that they were not to enter. Yet, in four of the cases, excluding only Florida, we deal with statutes which, on their face, condemn nothing more than entry after warning not to enter.

MR. JUSTICE GOLDBERG: What about the Maryland statute with the phrasing regarding "and crossing over"?

MR. SPRITZER: I don't read it as adding anything, and neither did the Maryland courts. The Maryland courts in these cases decided the issue before it solely on the basis that these had entered without notice, but that the statute covered remaining after notice to leave as well as entering after notice not to enter. I shall attempt to develop that further when I get to that case, Your Honor.

Now, the Florida statute, of course, does proscribe remaining after notice to leave. It imposes such a duty, however, only when the entrant has behaved objectionably, by engaging in specified types of misconduct, or when his presence is found detrimental to business. As has already been stated by the parties to that case, the Florida appellants were never told that their exclusion was based upon any one of the limited statutory grounds which alone would make their act of remaining an offense, even though they made repeated inquiry as to why they were being directed to leave.

Broadly, then, we shall argue in all of these cases that there was a denial of due process, a lack of adequate warning from the statute that the conduct subsequently charged as unlawful was in fact a violation of the state's criminal law.

We are not, of course, questioning the role of the state supreme court in interpreting state statutes. We are dealing with the constitutional right of fair notice or forewarning.

MR. JUSTICE GOLDBERG: Does that mean that in all future cases you would regard fair warning to be given, but that in this series of cases fair warning is not given? Is that the necessary import of your argument?

MR. SPRITZER: I think a different question would arise if the statute had previously been interpreted. We don't have that question here, because these statutes, as I shall develop, were interpreted for the first time in what we regard as this novel fashion in the cases now here.

MR. JUSTICE GOLDBERG: Where do you find that distinction drawn in the decisions of this Court? The reason I mention that is, you cite Amsterdam a few pages prior to that, his note on vagueness, and he says quite the contrary, summarizing the Court's decisions. He says:

> The Supreme Court, in passing on these penal statutes, has invariably allowed them the benefit of whatever clarifying gloss state courts may have given them in the course of litigation in the very case at bar.

—citing a number of decisions in this Court. And that seems to me to reach the whole basis of your argument, doesn't it?

MR. SPRITZER: If adequate notice in the constitutional sense were provided by the conviction rather than by the statute, then the concept of fair notice, to my mind, would disappear. And I would reject that completely.

MR. JUSTICE GOLDBERG: You disagree with that analysis of the cases?

MR. SPRITZER: I do. I am not speaking in reference—with reference to the particular cases which he cites, because I don't know the context from which that comes. But I certainly believe that if a statute on its face fails fairly to give any warning, that it would be a destruction of the whole concept of the protection which the due process clause has been said to guarantee to say that that notice is adequately provided when the judge gives sentence.

MR. JUSTICE GOLDBERG: What about *National Dairy*?

MR. SPRITZER: *National Dairy*, for one thing, involved the requirement of scienter, specific knowledge by the defendant. There is no basis for saying that there was any scienter in this case. So I think that falls into a quite different category.

I would like to make this general observation before getting further into the specifics of these cases, as to why we think it's eminently proper to read these statutes with a scrutinizing eye and to apply here with purposeful strictness the requirement of fair notice. In the first place, of course, we are dealing with criminal statutes. These are not simply acts relating to the laws of property. And this Court has said in *Cline* against *Frink Dairy* that the Fourteenth Amendment imposes upon the state an obligation to frame its criminal statutes so that those to whom they are addressed may know precisely what standard of conduct is required. The state is obliged, in its statute, this Court has held.

Secondly, we are not dealing with conduct which, by any stretch of the imagination, is inherently or morally wrong. The people involved in these cases were seeking what is no more than common bread in the life of the community. In the *Barr* case, the testimony of one of the defendants, I think, epitomizes the feeling that one gets from a reading of these records. He was on the stand exlaining what happened when he sought service at the drugstore counter. He says that a white lady was occupying the adjoining place at the counter. And then he goes on—I will use his words: "She sat there and began eating just as if I was a human being sitting beside her, which I was."

We agree with Professor Freund's observation that in applying the rule against vagueness or overbroadness, something should depend on the moral quality of the conduct.

A third reason why these statutes should be carefully scrutinized in their application is that petitioners here were engaging in a peaceful and orderly protest against discrimination. As Mr. Justice Harlan observed in his opinion in the *Garner* case, such a demonstration is as much a part of the free trade in ideas as is verbal expression. The right of speech and inarticulate protest are preferred rights.

MR. JUSTICE HARLAN: Of course, you have to recognize that that was in the context of a situation where the record, as I saw it, showed that the demonstration was going on with the owner's consent.

MR. SPRITZER: Yes. I would add, nonetheless, since I don't think the force of the point is destroyed by Your Honor's correct observation, that my point here is that a vague statute is a threat to the exercise of such First Amendment rights also. Because if the citizen cannot be sure when his conduct falls within a statutory ban, more than likely he will timidly forfeit his right to express what the law does not or cannot prevent.

There is another side, I think, to that coin. To the overzealous policeman, the loose prohibition is an invitation to the abuse of power or to discriminatory enforcement. I think it apparent that the misuse of authority to arrest or to order exclusion or to order dispersion may effectively deny the exercise of First Amendment rights, whatever the ultimate disposition of the matter should it go to court.

For all of these reasons, then, we urge that the statutes involved in these cases should be sustained in their application only if they gave clear forewarning that the conduct ultimately charged was of a prohibited kind.

Let me turn, then, without further delay, to the specifics of the Florida case.

The counsel in that case have already referred to the statute. It's set forth in the Government's brief, beginning at page 18. I would like to take a moment to stress once again the structure of that statute. The first numbered paragraph provides in substance that the proprietor or the manager of a hotel, restaurant, apartment house, motor court, and various other establishments, shall have the right to remove a guest who is intoxicated, immoral, profane, lewd, brawling. Also one who engages in language calculated to disturb the peace and comfort of other patrons, or to damage the reputation of the establishment. And then finally, the management is authorized to require the departure of one who, in its opinion, is a person whom it would be detrimental to business to serve.

Now, I think by plain, I would say necessary, implication this statute says that there is no right to remove one who is not obnoxious in his conduct and whose presence is not detrimental to the operation of the business. It does not confer a right to exclude a patron of an inn or a restaurant for any reason. If that were the purpose, there would have been no reason for the statute. There were already criminal trespass laws in the State of Florida.

We don't think it authorizes, for example, exclusion for reasons of racial prejudice, or that it can be so read.

MR. JUSTICE BLACK: Suppose the exclusion—I want to get precisely to the scope of the argument—suppose that exclusion was made because the owner thought it would be detrimental to his business, in his opinion?

MR. SPRITZER: Then I think that it would meet the terms of the statute, yes.

Now, it was not—well, let me pause a moment before getting to the information. As the Court has heard—and I would emphasize again—the invitees of this establishment, the 18 Negroes and whites who walked in and were permitted to sit down and who sat there for some half hour, were not told at any point, though they made repeated inquiry, as to why they were being excluded. It was stated for the first time when the trial took place, by the manager, that his reason for excluding the group was that he considered their presence detrimental to business.

It was not charged, of course, that the appellants had engaged in any objectionable conduct. It was alleged only in the information that the manager was of the opinion, when he ordered the appellants to leave, that serving them would be detrimental to the restaurant. I say, therefore, that we have here a case in which there is no objective standard by which the appellants could tell if they were being excluded for a reason permissible under the statute.

MR. JUSTICE STEWART: Well, the statute makes it a subjective standard, does it not? That is the fourth category.

MR. SPRITZER: I agree. Their obligation to leave depended entirely upon the subjective determination by the manager that their continued presence would be detrimental to business. And I say further that since the manager adamantly refused to state his reason when asked to do so, that the appellants had no means whatever of ascertaining whether he had a reason recognized by Florida law or some reason which was not recognized by Florida law, such as racial prejudice.

MR. JUSTICE STEWART: I should think that the very request to leave inherently—

MR. SPRITZER: Shows that he wishes them to leave.

MR. JUSTICE STEWART: —in his opinion, that—

MR. SPRITZER: That he wishes them to leave.

MR. JUSTICE STEWART: Subjectively.

MR. SPRITZER: But the trespass statute in Florida, unlike this statute, gives a right to have people leave for any reason. This statute implies clearly that a patron of a restaurant or a hotel cannot be excluded for any reason. Therefore, it is not enough to say, "Leave." The question is whether he is ordering them to leave, since these people are charged with a violation of this statute, for a reason which Florida says is a permissible reason.

MR. JUSTICE BLACK: The statute itself says he doesn't have to tell them, doesn't it?

MR. SPRITZER: The statute says after notice. It does not say—

MR. JUSTICE BLACK: First notify him that he no longer desires to entertain him. That's what it says.

MR. SPRITZER: Yes. I would assume that if he was notifying someone who was obviously intoxicated to leave, that perhaps he would have to say no more.

MR. JUSTICE BLACK: Why do you limit it? The statute itself says, "first notify such guest that the hotel, apartment house . . . no longer desires to entertain him or her." That's all it says. I'm not saying it shouldn't. But how can you escape the fact that that's what it says, that's the only duty it imposes?

MR. SPRITZER: Well, my argument is that the statute, to give fair notice where it depends upon a subjective determination, must also be read to require, to escape constitutional objection, to require that the basis of that determination be made known to the person whose conduct will be made criminal.

MR. JUSTICE WHITE: There's a written notice specified in the statute, if the owner wants to use a written notice.

MR. SPRITZER: There is. It's presumably designed for the situation of overnight guests in a hotel, I would suppose.

MR. JUSTICE WHITE: Well, whatever it happens to be designed for, it has a specific notice which would satisfy the statute, and that notice is singularly lacking in any explanation for the request to leave.

MR. SPRITZER: I assume that in the case where somebody's conduct is measurable by an objective standard, as in the case of most of the reasons for exclusion—

MR. JUSTICE WHITE: But this notice is such that it would not be an adequate statutory notice? It would be adequate only in the cases you just mentioned?

MR. SPRITZER: Where the conduct is described in the statute.

In other words, I am suggesting that if my criminality under a state law depends upon someone else's believing something, and if, contrariwise, I am acting entirely within my rights under the state law, if he believes something else, then surely due process, at the least, must require that liability does not attach until I am informed what he does in fact purport to believe. Putting it concretely, if the manager had answered the inquiries put to him by these appellants, and had said, "I want you to leave because I don't like Negroes," I would say that it would seem clear that that is not an offense as proscribed by this statute, or at least that no one reading this statute could so conclude.

How, then, could these appellants know that, by the simple act of their continued presence, they were committing an offense under this law?

MR. JUSTICE HARLAN: You would have a somewhat different case, wouldn't you, if the statute had read, "who in the reasonable opinion of the management"? Then you would have had a so-called objective standard. The statute doesn't say that.

MR. SPRITZER: I am not suggesting that the statute requires that the manager's opinion, if he held one, that someone's presence would be detrimental need be one that was rationally determined. Maybe it would be foolishly determined and it still might satisfy the statute. I do say that the statute on its face accords a right to the patron of establishments of this type to come on such premises and to remain there unless they are excluded for a reason specifically set forth in the statute. And I say further that these appellants could not know that the manager purported to have a reason which Florida law would say was a sufficient reason under this statute, when the only basis would be a subjective determination which he refused to communicate.

MR. JUSTICE WHITE: Don't you really accept the fact that the notice here was adequate under the statute, that it was all the notice the statute required; and your real point must be that if that is true the statute is unconstitutional?

MR. SPRITZER: Oh, my basic point is that if you read the statute otherwise, that it certainly runs afoul of the requirement of forewarning.

MR. JUSTICE HARLAN: By the same token, why aren't the trespass statutes, for the same reason, unconstitutional?

MR. SPRITZER: They don't require or limit the owner to have a particular reason for exclusion.

MR. JUSTICE HARLAN: But Justice White's just pointed out to

you that what was done here does satisfy the terms of the statute; and your argument is that, even so, it's unconstitutional.

MR. SPRITZER: I do not read the statute as being satisfied by a directive to leave without an explanation, in circumstances where there is no objective conduct which comes within the statute.

MR. JUSTICE HARLAN: But the state court, apart from the language of the statute, Mr. Spritzer, the state court has construed it that way in this case.

MR. SPRITZER: The state court has said, in one word, that this statute is nondiscriminatory.

MR. JUSTICE HARLAN: That assumes, certainly, that the statute was complied with and an offense was stated under the statute.

MR. SPRITZER: I go further and say, whether one can read the opinion as subsuming that or not, I say further that the statute, if so construed, fails to provide any forewarning to the appellants who are excluded that they could be excluded for such reasons.

MR. JUSTICE HARLAN: Then I come back to the question as to why the trespass statutes, for the same argument, aren't unconstitutional for vagueness?

MR. SPRITZER: The trespass statutes do not make the conduct criminal depending upon the reason, depending upon the conduct, of the particular persons who are on the premises.

MR. JUSTICE HARLAN: Nor does this statute, in the last clause.

MR. SPRITZER: Well, so viewed, I would disagree with your interpretation of the statute, Your Honor, because I think a fair reading of this statute is that one can only lose his right to remain on the premises for specified reasons, and the thrust of the last clause, as I see it, is that the manager must have a permissible reason; and if the appellants have no basis for knowing whether the reason which the manager entertains is a permissible one under Florida law or not, if the appellants can't know whether they are within their rights in remaining, or whether the manager is violating the statute by directing them to leave because he has an impermissible reason, then I don't think that they have received the notice which the fundamentals of due process would require.

MR. JUSTICE WHITE: If he had written out the notice just exactly as the statute requires and handed it to them, would you make the same argument?

MR. SPRITZER: I would interpret the statute, the written form

of notice, doubtless to cover the cases in which the appellants have engaged in conduct which is already made known because it is specifically described in the statute. Whether it's designed to apply to a restaurant or not is, of course, questionable, also.

MR. JUSTICE BLACK: You're confusing me a little, in this respect: I can understand that you say that if this statute means what the other side says it means and it would apply there, it violates due process. But are you also asking that we send the case back to Florida to take a new look at the statute, or that we ourselves reconstrue the statute as meaning what you now say it means?

MR. SPRITZER: I was talking in terms of what the statute appears to say in relation to the question whether it gives fair warning, which is ultimately the constitutional issue of due process.

MR. JUSTICE BLACK: You are not, then, asking that we construe the statute as you think they should have construed it?

MR. SPRITZER: No, I am not.

MR. JUSTICE BLACK: Then we are bound to reach your constitutional questions as to vagueness.

MR. SPRITZER: Yes, and I've been referring to the language of the statute only in relation to the constitutional issue as to whether it gives warning. Perhaps I did not make that as clear as I should have.

MR. JUSTICE GOLDBERG: Mr. Spritzer, does your argument mean that a proprietor may state in terms of the statute itself the ultimate conclusion? Let me put this case to you: The trial judge, he says, as I read his opinion, that he often has been refused service because he did not wear a tie. Now, suppose that the restaurant owner had a rule based upon his opinion that it was detrimental to his business to have a customer who did not wear a tie. Suppose he came in and he said—without a tie—and the restaurant owner said, "You cannot come in because you are not wearing a tie." And then he is prosecuted under this statute. Is that fair warning?

MR. SPRITZER: It seems to me that it suffices for purposes of this case, Your Honor, to point out that it's fully agreed that there was nothing indecorous, no less criminal, in the conduct of the appellants in this case; that they did not fit within any of the described categories, brawling, obscene, and so on; that the only basis conceivably for their exclusion under the statute would have been that the manager believed that their mere presence would be

detrimental to his business. In these circumstances, I will say that when they put to him, by specific inquiry, the question why they were being required to leave, and he refused to answer, I would say that in these circumstances that they had no way of knowing that they were committing an offense by remaining. Because it was at least as likely, viewed from their standpoint at the time, that he was excluding them for what I would consider an impermissible reason under the statute, namely racial prejudice—that was at least as fairly inferable as the explanation which he volunteered for the first time at the trial of the case; namely, that he thought it would be bad for business.

MR. JUSTICE BLACK: In effect, you're asking us to escape one constitutional question while holding that a state statute is unconstitutional on another ground, aren't you?

MR. SPRITZER: It is certainly a constitutional issue also. It is a familiar and traditional constitutional issue, whether a statute gives fair notice that the conduct is criminal.

MR. JUSTICE DOUGLAS: Is it raised in each of these cases?

MR. SPRITZER: I had planned—I will go to the point now, if Your Honor prefers. I planned to deal, after setting forth my specific arguments in the Maryland and South Carolina cases, to get to that question.

MR. JUSTICE BRENNAN: Mr. Spritzer, if I may say so myself—I know your time is fleeting and I do hope you'll get to the question whether the issue is before us in any of these cases.

MR. SPRITZER: I will, and I would like to state, before I leave Your Honor's question, that I think it is necessarily within the jurisdiction of the Court in all of the cases, on the basis that I indicated earlier in my discussion of the *Avent* case, because even if the Court should conclude that this issue was not raised, that these issues were not raised, with sufficient explicitness in the state court, this Court may consider whether it should dispose of the case by reaching the broader constitutional issues which are tendered, or whether it should remand the case for further consideration of the more limited issue by the state tribunals, as was done in the *Avent* case.

Turning to the entry after warning statutes, the South Carolina statute is in our brief at page eight, and, as the Court has heard, provides that the entry upon lands of another, after notice from the owner or tenant, shall be a misdemeanor. Now, from context which I've omitted, the statute appears to refer to open lands rather than business premises. But whether or not it is so restricted, it plainly requires, according to its terms, an advance notice. In the *Barr* and *Bouie* cases, in both of which the petitioners

were indisputably invitees at the time of entry into the drugstores, the county court dealt with that by—that was the intermediate court of appeals—by citing a civil case which states that one who refuses to depart when ordered to do so is a trespasser *ab initio*.

The instant cases, however, do not involve the common law of trespass. They involve a criminal statute prohibiting a precise act, entering after warning or notice not to enter.

MR. JUSTICE GOLDBERG: Generally, wouldn't we be blind to the actual facts in all of these cases if we closed our eyes to what was happening; that in all of these cases the proprietor did not want to serve Negroes, demonstrations were going on against this, that the petitioners in all cases knew that they were not invited for the particular service that they desired; and that, knowing this, they nevertheless entered upon the premises? Would not we be blind to close our eyes to those obvious facts?

MR. SPRITZER: I think that the petitioners may well have supposed that they would not be welcomed in these establishments. I think, as Mr. Justice Black intimated yesterday in the discussion, the operation of these criminal laws does not depend on whether the persons entering would have reason to think they might not be welcomed. They depend upon a specific notice or warning not to enter, and no such warning was given in any of these cases.

I think also Mr. Justice Frankfurter addressed himself to this type of problem in the *Garner* case, in his concurring opinion. He suggests there that one has a right to presume, even though he has not been welcomed in the past, that an owner may change his policies if nonviolently challenged. Experience, he said, teaches that such modifications do occur. And, I would say, these cases teach that. As we were told at the bar yesterday, at least two of these establishments, the Glen Echo Amusement Park and the Eckerd Pharmacy in Columbia, voluntarily changed their practice. And I think it a fair supposition that instances such as these, the efforts to obtain service, played a prominent role in that change.

MR. JUSTICE GOLDBERG: Am I wrong in my recollection of the record, that in at least two of these cases the petitioners themselves picketed with signs saying that, "This restaurant does not serve Negroes"?

MR. SPRITZER: The record does not show that these petitioners, so far as I'm aware, picketed. It does show that there were pickets outside. Whether the petitioners were involved does not appear. Indeed, in the *Bell* case in Maryland, the picketing began only after the refusal to serve. Now, there was picketing in the *Glen Echo* case. I do not recall anything to indicate one way or the other whether the particular petitioners involved in those cases were

on the picket lines. My recollection may be wrong. I do not recall that.

Now, I'd like to say also, about the Maryland cases, that there's no question that the Maryland courts affirmed the convictions on the basis that these statutes could be read, although in terms they prohibited entry after warning, as if they said, "remaining after notice". Thus the—

MR. JUSTICE HARLAN: That's true in all of the cases.

MR. SPRITZER: Yes, yes.

It was suggested, I think, in the Maryland cases, that they had actual notice. This is not—I don't think the record bears that out. But in any event, it is not the basis of the court's disposition, because the trial court in the *Griffin* case, record 74, stated:

> The evidence shows that defendants have trespassed upon this corporation's property not by being told not to come on it, but after being on the property they were told to get off.

That was in the *Griffin* case. And in the *Bell* case, the court of appeals disposed of the statutory question simply by reference to its decision in *Griffin*. In other words, the Maryland courts consistently have taken the view that these convictions were valid because these statutes, though in terms they forbade entry after warning, could be read, according to the courts' interpretation, to forbid remaining after notice to leave.

As I have indicated earlier, I cannot take the time now to develop the point that Maryland and South Carolina construed these statutes in that manner for the first time in these cases, though heretofore the requirement of strict notice had been strictly imposed. We've also noted in our briefs that the jurisprudence of other states and the statutes of other states have traditionally drawn a distinction between a statute which proscribes entry after warning and a statute which comprehensively proscribes what would be taken in by civil trespass or which deals in separate categories with entry after warning or remaining after notice to leave.

Let me, without attempting to elaborate our contentions in these cases further, turn to the matter of how and to what extent these issues were presented in the state courts. Now, in the *Griffin* and *Bell* cases, certainly the parties presented to the court the question whether this statute, which proscribed only entry after warning, could be applied to their conduct. In presenting the question, they did not take the further step and say, if the statute is read to apply to this conduct, it would offend the due process clause of the Fourteenth Amendment because it would not give

clear forewarning. They did argue vigorously that the statute didn't apply by their terms. And the Maryland courts, both the lower courts and the court of appeals, considered that issue. The parties also placed emphasis upon the fact that they were invitees. They also claimed the benefits of the due process clause; but I must in candor state that the arguments based upon the due process clause were cast in terms of state aid of discrimination or the doctrine of *Shelley* against *Kraemer*, rather than with any specific reference to the matter of statutory notice.

I think it is perfectly plain that the Maryland courts considered the meaning and the substance of their statute when the argument was made to those courts that the statute did not apply to the conduct involved; and one could hardly conceive that a court which had just said, "This statute applies to such and such conduct, despite the words which might lead one to conclude otherwise," would then turn around and say, "We have now adopted such a strained and bizarre construction of the statute that it's unconstitutional from the standpoint of the Fourteenth Amendment." So in substance, certainly, the Maryland court has considered whether this statute may be applied to this conduct.

MR. JUSTICE BLACK: Suppose the courts had disagreed with you as to one of the cases, the one you've just cited. What would you say then would be the weight of your argument as to reaching this second constitutional question in the other cases?

MR. SPRITZER: I'm not sure I understood what Your Honor meant by "the second"—

MR. JUSTICE BLACK: Suppose the Court should decide that the Florida statute gave them ample notice and wasn't ambiguous. It would still have to decide the other cases. What would your argument be about what they should be decided on?

MR. SPRITZER: Well, the other cases are the Maryland and South Carolina cases.

MR. JUSTICE BLACK: That's right.

MR. SPRITZER: I would say they should clearly be decided, or can properly be decided, on the basis that those entry after warning statutes failed to give adequate notice, consistent with the Fourteenth Amendment; that remaining, as distinguished from entering, after notice to leave constituted an offense.

MR. JUSTICE BLACK: However, if we were to decide the other, it would cut out the ground of your argument that we could thereby escape decision of the constitutional question.

MR. SPRITZER: I assume that if the Court reached a broad issue, found it necessary or appropriate to reach a broad issue in the Florida case, that that issue might well be dispositive of the other cases also. It depends, I would suppose, upon which broad issue and how broadly the broad issue was decided. But I think, from the standpoint of broader contentions made—

MR. JUSTICE BLACK: I'm unable to follow your measurement between the narrower and the broader issue.

MR. SPRITZER: I've been speaking on the narrower issue. Perhaps I should say a more familiar issue, the question whether a statute gives adequate notice of the criminal conduct which it forbids. I view it as narrower in that sense.

Now, the South Carolina cases—

MR. JUSTICE HARLAN: I'd like to ask you a question. Assuming that the Court does reach one or more of these issues, the broader issues, would the Government request, or has the Solicitor General requested, to file a brief on those issues, or to be heard further orally on those issues, or do you leave these questions for the Court?

MR. SPRITZER: Well, we would, of course, think that that was for the Court to decide. The intention was to express, of course, the complete readiness of the Government to submit further briefing or argument if the Court should so desire.

MR. JUSTICE BLACK: It's not the intention to urge the Court to postpone these cases until next year, is it, in order to have been given an opportunity to argue them again if they should disagree with this argument?

MR. SPRITZER: I think our answer, Your Honor, would be that we certainly would feel that it is for the Court and the Court alone to decide whether any further briefing or argument would be helpful. And we do not mean to imply any view as to what the Court would find most expedient from the standpoint of conducting its business. If I may overstep for one moment, Your Honor—

MR. CHIEF JUSTICE WARREN: It's adjournment time, but I think the Court probably would like to hear a few more minutes of argument on whether the cases are properly here under your presentation. Suppose you take ten minutes when we come back, and the appellees may have ten minutes, also.

MR. SPRITZER: Thank you, Your Honor.

[Whereupon, the proceedings in the above-entitled matter were recessed, to be reconvened that afternoon.]

AFTERNOON SESSION

MR. CHIEF JUSTICE WARREN: Mr. Spritzer?

MR. SPRITZER: Thank you, Your Honor. I shall be very brief.

As to the two Maryland cases—I'm sorry, as to the two South Carolina cases, counsel for the State agrees in his brief that the question of the application of the South Carolina entry after notice statute to the kind of conduct charged in these cases was presented to the trial court and to the intermediate court of appeals. The county court in that case did discuss the issue whether this statute could be applied to one who had permission as of the time he entered, and concluded that it could. The State's contention is that this question was not adequately presented to the state supreme court.

Now, as to the disposition by the state supreme court, in the *Barr* case, as was mentioned yesterday, the South Carolina high court stated that the exceptions which were presented to it in terms of a *prima facie* case not having been made out and, as the phrase is used in South Carolina, the *corpus delicti* not having been proved, the South Carolina court said in the *Barr* case that those assignments of error were too general.

Nonetheless, in the *Bouie* case, which was a companion case as argued in the South Carolina courts, but was decided some weeks after the *Barr* case, the court refers to identical assignments of error—the language the same—and it does go on to say on the merits that the trespass statute does apply. Moreover, in a third case which was argued with these two cases, the *Charleston* against *Mitchell* case involving an alleged violation of the same statute in Charleston, in that case the Supreme Court of South Carolina discusses specifically the question whether the statute which we are concerned with in *Barr* and *Bouie* can be applied to conduct of the kind charged here, or whether it is defective because of the uncertainty or vagueness of its application. And the South Carolina Supreme Court in the *Charleston* against *Mitchell* case resolves this question of vagueness in favor of the State's contentions. Now,

the *Mitchell* case was decided—was not only argued, as I understand it, before the South Carolina Supreme Court, with the *Barr* and *Bouie* cases, it was actually decided a day before *Barr* and some weeks before *Bouie*. So I take it that there can be no question that the South Carolina Supreme Court was fully aware, and that it did consider, when it had all of these cases under advisement, the issue whether these statutes may fairly be applied to an entry which was made without warning or without notice not to enter.

MR. JUSTICE BRENNAN: Do you know what the status of the case is?

MR. SPRITZER: *Mitchell* is the case I was referring to. It is pending on petition now.

MR. JUSTICE BLACK: When was petition filed? About the time of these petitions?

MR. SPRITZER: Later, I believe. I don't have the date. The number of the case is cited in the index to our brief, Your Honor.

MR. JUSTICE CLARK: Was it the same assignment of error?

MR. SPRITZER: No, there is a much more specific assignment of error in the *Mitchell* case, directed to the vagueness question.

MR. JUSTICE WHITE: And in *Bouie* I gather that the point that you were talking about was argued in the brief at some length, even though the assignment may not have been specific.

MR. SPRITZER: I think the brief concentrated largely on the resisting arrest point, but I would have to refresh my recollection on that, Your Honor.

That brings me back to the Florida case. It is perfectly clear from the assignment of error in that case that the Florida appellants claimed that they were excluded for a reason which was not permissible under the statute. It is also clear, however, that they related this claim to a contention based upon *Shelley* against *Kraemer*, rather than to a contention in terms of adequate forewarning by the statute. The Court can refer very readily to the assignment of error in that case for itself. The question appears at page nine of the Florida record.

Perhaps I should say one further word, if I may, about the essence of our forewarning contention in relation to the Florida case. I don't know that I have made our position on that as clear as I should like. We start with the point that this statute, by any fair reading, necessarily applies to a person who wants to know what is forbidden and what is not forbidden; that he has a right to

go to a motel or hotel or restaurant; that he cannot be excluded at will, but can only be excluded for one of a limited number of reasons specified in the statute. Starting from that, we question whether one who has done no act which is proscribed or specified as objectionable under the statute can be held to have adequate notice that he is in violation in circumstances where his being in violation depends on whether the proprietor believes one thing or another, and the proprietor fails to indicate which, and it is not fairly inferable which.

In those circumstances, we say that the persons who are in a restaurant have no way of telling whether they are engaging in conduct which is protected by this Florida statute, because this statute doesn't give a right to exclude for any reason, as the criminal trespass law does. It gives the owner of this type of establishment a much narrower right to exclude. We question whether in these circumstances he can tell whether he is being excluded for a permissible reason or one which is not recognized under Florida law. And in those circumstances, we think the fact is that he has no way of knowing that he has engaged in conduct which is forbidden by the statute.

Now, the written form of notice provision, I think, can certainly not be given a reading so broad as to convert what is apparent throughout the statute as a statute which only grants limited rights of exclusion to the owner—that written form of notice provision cannot be read as meaning that the proprietor can exclude for any reason. We think that, in circumstances where the reason is not apparent and cannot be known and in circumstances where the persons on the premises ask the reason, that they cannot be held criminal if they are not even told whether the manager of the establishment purports to have a reason for exclusion which is recognized by Florida law.

MR. JUSTICE WHITE: But you would make the same argument as to the last section of the statute if that particular reason wasn't there, wouldn't you?

MR. SPRITZER: I would.

MR. JUSTICE WHITE: And as long as the notice to leave is not accompanied by a reason, you say—

MR. SPRITZER: In circumstances where there is no way of knowing or ascertaining whether there is a permissible reason or not.

MR. JUSTICE WHITE: Well, there would be no way of ascertaining for which reason the manager was excluding them unless he told them, I suppose.

MR. SPRITZER: Well, I suppose if I were engaging in a fight or was drunk in the establishment and he told me to leave, that I would be able to surmise what the reason was.

MR. JUSTICE WHITE: But you might have some difference of opinion as to whether you were drunk or not.

MR. SPRITZER: Well, one might, and I'm not reaching the question whether there would be other circumstances in which the manager would be obliged to give a reason. I am suggesting that, at least in circumstances where the behavior is unimpeachable, that the manager has a duty to advise of the reason, and, putting it in constitutional terms, that the persons there cannot know that they are committing an offense under the terms of the statute if they're not given it.

MR. CHIEF JUSTICE WARREN: Mr. Reno?

ORAL ARGUMENT OF RUSSELL R. RENO, JR., ESQ., ON BEHALF OF RESPONDENT, STATE OF MARYLAND

MR. RENO: Mr. Chief Justice, may it please the Court:

Before addressing myself to the void for vagueness arguments, the doctrine as it's been argued by the Solicitor General, let me, at the risk of repeating ourselves, once again reaffirm the position of the State of Maryland, that, insofar as the *Bell* case is concerned, which is No. 12, we feel that it is abundantly clear that the conduct which took place in that case was clearly covered by the plain meaning of the Maryland trespass statute. As you know, the Maryland statute applies to not only entry upon, but also to crossing over. Now, in the *Bell* case, the *Bell* defendants entered the lobby of the Hooper's Restaurant involved. This lobby has been described as being just past the door, the revolving door to the premises; and it is at a different level from the restaurant area or the eating area of the restaurant. It's separated by four steps. One must go down some stairs to get to the grill in the basement.

The *Bell* defendants at first congregated in this lobby. The hostess who testified that she was the one who gave people their seats in the restaurant, that this was not the type restaurant where you could take your own seat, stood at the top of the stairs, and she told them, quote: "I'm sorry, but we haven't integrated as yet." The defendants replied: "Well, you mean you're not going to seat us?" The hostess replied: "Well, that's right. That's Mr. Hooper's orders."

Thereupon a colloquy ensued between the *Bell* defendants, one of the group, and the hostess and Mr. Warfel the manager.

While they were speaking, the five defendants brushed past—those are the words that the Maryland court opinion uses, "brushed past"—the hostess and the manager, crossed over into the eating area of the restaurant, and took places at seats. Some of them, instead of going up the four steps and crossing over into the eating area of the restaurant, went down some steps into the basement area.

But I think that it can be fairly said that the statute contemplates this sort of conduct. This would be a "crossing over" as that term is used within the Maryland statute; and therefore we respectfully suggest that, at least so far as the *Bell* case is concerned, the void for vagueness arguments which the Solicitor General makes do not apply.

MR. JUSTICE GOLDBERG: Mr. Spritzer indicated, didn't he, in his argument, that the Supreme Court of Maryland did not rely upon crossing over?

MR. RENO: Sir, I'm not—I don't think we can make that statement. I'll say this: When the Supreme Court of—or the Court of Appeals of Maryland, which is our highest court, heard the *Bell* case, the *Griffin* case had already been decided. Now, I must be frank with you. *Griffin* is a refusal to leave case. It's not an entry case, if you consider entry in the very limited sense in which it was argued by the Solicitor General. The opinion in the *Bell* case is quite short when it deals with this subject. It simply cites *Griffin* as authority.

MR. JUSTICE GOLDBERG: It does say something. It says something a little more than the Solicitor General, I think, indicated.

MR. RENO: All right, sir. This is certainly true. But may I make this point? I don't think that we can criticize the Court of Appeals of Maryland for being less specific than what, by hindsight, we may now wish they had been. And my reason for saying that is because the appellants, the *Bell* appellants, when they argued that case before the Maryland Court of Appeals, were not nearly as specific as perhaps the Solicitor General would now wish that they could have been. And certainly, the specificity required of the Maryland Court of Appeals certainly should be proportional to the specificity of the argument presented to them; and frankly, the arguments presented to them on that appeal were not finely drawn as they are now attempted to be drawn before this Court. So your point is a good one, but I think that that's the answer to it, sir.

Now, on the—

MR. JUSTICE WHITE: Even if the "crossing over" provision weren't in the statute, I suppose you would argue that entering

one part of the premises from another part of the premises after warning is in literal compliance with the statute.

MR. RENO: Yes, sir. That is true, sir. The entry need not be from the outer boundaries of the property. It could be from the lobby into the restaurant area of the property.

On the void for vagueness doctrine which is asserted by the Solicitor General, to the extent that it's applicable at all to the Maryland cases it would, we submit, only apply in the *Griffin case.*

MR. CHIEF JUSTICE WARREN: Does it apply to *Griffin*?

MR. RENO: No, sir. I shall now try to explain to you why I don't believe it applies. First of all, let me state the reasons that I can see for the growth of this doctrine. One reason that's been enunciated in cases by this Court is what the text writers refer to as the mousetrap reason. The criminal defendant who is faced with an ambiguous statute, he doesn't know how to govern his conduct under the statute because it is ambiguous. He does something, and then he finds himself in the criminal courts of the state being prosecuted. So that, from the point of view of the criminal defendant, this is one reason asserted for the doctrine.

The second reason which has been asserted for the doctrine, and the reason which I submit is the crucial reason and the real reason and the one that is most often employed, is that vague statutes, ambiguous and vague statutes, make for irregular and erratic law enforcement by police officers and *nisi prius*, because if they have cases which deal with statutes that don't have standards built into them, the jury itself is in the position of drawing the standards, and different juries may draw different standards in different cases.

Now, this is a particular problem for this Court, I think, in dealing with appeals from state courts, because the scope of your review of state court decisions, I think, is somewhat more limited than it is of review of decisions which come out of the district courts. This isn't because of any lack of power. Well, it is, I guess, because of some lack of power. The problem is, you must take statutes as they're construed by the state court and you must deal with them as the state court construes them. However, when you get a statute from the district court, you may construe that statute yourself. And as a result, I think that it can be fairly said that in many instances a statute which, to me, is a vague statute, has been upheld by this Court when it's a Federal statute. But if that statute had been a state statute, you might have applied the void for vagueness doctrine to strike it down. And the reason being, there is more opportunity for abuse when you have a state vague statute, because the actual facts may be somewhat hidden

by the standards which a jury might apply or by a construction that a court might apply, that make judicial review by you not as effective as it might be in a district court case.

Now these, I think, are two reasons for ambiguity; and I submit that the second reason is the one that is most important in this case. Now, there are two types of ambiguity, as I see it, and one of them I would refer to as the resolvable ambiguity. Now, this is the one I think we have in this case. This is the one, for example, that was present in the *Alford* case that was cited in our brief, where the crime was a crime to build a fire in or near timber upon the public domain. The person who built the fire was faced with the statute, and you couldn't tell from the statute whether the prohibition was against building a fire near timber on the public domain, *i.e.*, the fire had to be on the public domain; or whether the prohibition was against building a fire near a public domain. In other words, the question was not clear whether the fire had to be on the public domain to constitute the crime.

Now, that man was faced with what's referred to as the mousetrap situation there. He didn't know what to do. The Court, however, construed that statute as saying that the reference was to timber upon the public domain and that it would be a crime for the fire to be off the domain, although near it. That interpretation resolved the ambiguity in the statute. Now, forever after that, a person who was faced with this statute would know that it meant building a fire next to the public domain.

So this is an example of a resolvable ambiguity; and this, I would suggest, is what we have in the Maryland situation in the *Griffin* case. I'm not conceding that there is an ambiguity in the statute. But if there was one, it certainly was resolved by the Maryland case; and forever afterwards trespassers in restaurants will know that even though they are lucky enough to get into the door of the restaurant without being told to leave, once they're there and they're asked to leave and they don't, that this is encompassed within the Maryland trespass statute. So I would submit that the Maryland law is of the resolvable ambiguity type.

Now, the other type of ambiguity, I guess, could be—I'm going to refer to it as the omnibus ambiguity. That's the kind of ambiguity that is not resolved by judicial decision and which continues on from case to case, one which is inherently devoid of standards, one which it's difficult to assign standards to. Now, that, I think, is the worst kind of ambiguity to have, because that's the kind that leads to the erratic law enforcement in subsequent cases, because the jury has to draw the standards because no standards have been placed on it by the state courts.

This was the type ambiguity, I would submit, that can be

found in *Cline* versus *Frink Dairy*, which dealt with, which permitted combinations in restraint of trade where the sellers intended to market the product at reasonable prices, products which otherwise couldn't be so marketed. There was a case where the words "reasonable prices," I would submit, are just not susceptible of accurate standards being attached to it, and one which would be of the omnibus ambiguity type and would be struck down.

Now, I've already given you the example of the *Alford* case. This was a resolvable ambiguity, but it was a mousetrap type case. This man was mousetrapped. But this Court nevertheless said this was not void for vagueness and permitted the conviction to stand. Now, I cite this case as authority for the proposition that the mousetrap reason for void for vagueness is not the one that this Court is really the most concerned with. I'm not going to suggest that it is not a concern at all to the Court, but it is not the primary one. The primary situation where this Court's called upon to adopt the void for vagueness doctrine is one where you have an omnibus ambiguity, one which contributes to subsequent mousetrapping of a potential defendant, and one which is likely to give rise to erratic law enforcement in the State, particularly in the state courts, on subsequent occasions.

Other ambiguity statutes which have been upheld even though the mousetrap factor was present are *Vandanny Petroleum Company*, one which involved, which prohibited the unreasonable waste of natural gas. Now, on its face that seems like a somewhat ambiguous statutory reference. But the courts that applied the judicial gloss to that statute said that they would interpret "unreasonable waste" in the context of that amount of gas which was necessary to lift crude oil to the surface from the ground. Once the statute was given that standard, it became permissible or possible, with almost mathematical certainty, through the application of engineering formulas, for a person to determine exactly how much natural gas—what was and what was not waste. So there we have a judicial gloss which resolved the ambiguity, even though the initial defendant was trapped in that case. This Court nevertheless refused to apply the void for vagueness doctrine.

Now, let me make a few comments about the free speech argument which the Solicitor raised in his brief on the ambiguity point. He pointed out that where you're dealing with areas of free speech this Court is more likely to apply the void for vagueness doctrine than you might otherwise apply it in some other situation. I think as an abstract proposition this is probably true. But I don't think that this case is a free speech case of the type that the Court would apply the void for vagueness doctrine to, or at least not based on your past performance in this area. It seems to me

that the void for vagueness doctrine in free speech areas is one which would be applied where you have the unresolvable, the omnibus ambiguity type, which might conceivably include within its criminal scope certain areas of permissible free speech. This might discourage the person from exercising his free speech for fear of being dragged through the criminal courts of the state.

But even more important, a person exercising free speech properly, when he's tried, in the course of his trial—particularly if this is done in the state court—with an omnibus type statute may find himself convicted in a situation where this Court, because of its more limited scope of review of state court decisions, cannot give this man redress. So in that situation, where you have omnibus vague state statutes that deal in the area of free speech, then this Court, I think, is likely to apply the void for vagueness doctrine. But I submit that this is not the sort of case we have here. I think we have here a resolvable ambiguity situation and it would not be a proper one for the employment of that doctrine.

Now, let me make another comment about Mr. Solicitor's void for vagueness argument with respect to free speech. I think—this is difficult to articulate, but—it appears to me that the idea which these people are trying to disseminate by means of these sit-in demonstrations is that they should be permitted to eat in unsegregated restaurants. This is the idea they are seeking to communicate. Now, what Mr. Solicitor wants us to do is, this Court to recognize the validity of that idea. He says that they should be permitted to have the end which they are seeking to secure by their free speech. Otherwise, they will be denied this free speech.

Well, this may be so, but it seems to me the place to present that argument is to make the constitutional argument before this Court that refusing to seat Negroes in restaurants is a violation of their free speech. Well, this is not being done in this case. Instead, he seeks to apply the void for vagueness doctrine, which he says—I think he would say—would avoid the necessity of making a decision on that issue. In short, he is, I think, asking us to presuppose that Negroes have a right to be on the premises. This is the issue which is the primary issue in this case, which is being asserted by the appellants in this case. They think they do have a right. If that's the case, then that's the issue that should be decided and it should not be avoided by an attempted application of the void for vagueness doctrine.

Thirdly, on the question of free speech, I think this Court must take into account the other opportunities which these people had to exercise their free speech rights. There is a sidewalk in front of the Hooper Restaurant. There is an area there, as I understand it, in front of Glen Echo. In fact, the record shows that picketing

was carried on there. And this would, I think, give them opportunity to communicate their ideas to the people in the park as they came out, or in the restaurant as they came out. So that this is not like the company towns, for example, where people spend ninety percent of their time in their own home town. If you can't get in there to talk to them, it's unlikely that you'll ever be able to communicate your ideas to them. But when you're dealing with restaurants and amusement parks, this only consumes a very small fraction of a person's everyday life, and he must get in and out of the place, and if you can contact him at the gate I would think that this would satisfy the requirements of free speech.

I see my time is up. I would only make one further comment. As Justice Goldberg has already alluded to, there is an excellent, I think, law review note that appears in 109 of University of Pennsylvannia Law Review that deals with this void for vagueness subject. The theses which I have enunciated today certainly are not original with me. They're explored at great length in that note, which I would call to your attention.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Greenberg?

REBUTTAL ARGUMENT OF JACK GREENBERG, ESQ., ON BEHALF OF PETITIONERS

MR. GREENBERG: May it please the Court, this is a rebuttal argument in *Barr* and *Bouie* versus *South Carolina,* and *Bell* versus *Maryland.*

I think it's important at this stage of the case to focus on what these cases are really all about. During the argument yesterday and today there has been, and in previous cases of this sort, there has been considerable discussion about hypothetical discriminations against redheads in places of public accommodations. Discussion of that problem and the whole area of whimsical, irrational racial—irrational discrimination is virtually nowhere a real problem and certainly nowhere—it's not at all a problem connected with any of these cases. If such a case arose, society and the law and the courts probably would not be concerned with it at all.

But the pattern of racial discrimination is characteristic of great sections of our country, and this is the problem that the Fourteenth Amendment was designed to deal with. Recurrent throughout these cases—well, it is throughout the country, Mr. Justice Black, if that was the implication of your question. In some sections of the country it takes different forms and is more prevalent than in other sections of the country. In some sections

of the country, it's dealt with by positive state legislation; the states make an effort to deal with it. In other sections of the country, the states encourage it; and we feel that's a constitutional difference.

Recurrent throughout these five cases and in questions posed by the Court in arguments by opposition counsel has been the issue of whether the proprietor of the amusement park or lunch counter or the restaurant has the right to select his customers, and if not, what in the Constitution deprives him of that right. But we respectfully submit to the Court that these cases involve the question of whether these criminal convictions should be affirmed or reversed. When we speak of rights in such a context, what we mean is, can the proprietor invoke the full machinery of the state police, the prosecutor, the courts and so forth, to impose criminal sanctions on the Negro citizens who seek service in places of public accommodation open to all except Negroes. In that sense of the word "right", that question is as I have put it, and that question alone is involved here. We're not talking about homes, churches, clubs, car polls and so forth. We're talking about places of public accommodation.

But even in connection with the problem of the home, we have suggested to the Court that reasonable limitations on the doctrine can be found in constitutional considerations of privacy; and I don't think it is to be assumed, to paraphrase Mr. Justice Holmes in the case in which it was suggested that the power to tax involves the power to destroy, that, should the proposition be put to this Court that a decision saying that a Negro cannot be arrested for sitting at a lunch counter, that such a conviction cannot be reversed because then the home would be invaded. The answer would be, I am certain: Not so long as this Court sits.

This case is not even like *Burton* against *Wilmington Parking Authority*, in which the plaintiff sought an injunction to compel service. To be sure, we have expressed the view in our argument and brief that a Negro has a Fourteenth Amendment right to be served in a place of public accommodation or, to be more precise, a Fourteenth Amendment right not to be denied service because of his race. And we have found that right, as we have suggested in our brief and in our argument, in at least three different places: the fact that the State is involved to a significant degree in the *Burton* sense, the fact that the refusal stems from a community-wide custom generated and shaped by state law, and so forth; and we have argued that any right, the right in a jural sense, of a proprietor to be able to exclude a Negro or refuse to give him service, constitutes a denial of equal protection of the laws; and that, furthermore, the states have an affirmative obligation, which the *Civil Rights Cases* assumed they had fulfilled and would continue to

fulfil, to protect the Negro in these circumstances.

MR. JUSTICE WHITE: Mr. Greenberg, I take it your position does include the proposition that the proprietor has no privilege to exclude the Negro at all, that the Negro has an affirmative right to enter the restaurant and be served, and that he would have and should have, in the course of the case, have some remedy in the courts to enforce this right?

MR. GREENBERG: Yes. I think the *Civil Rights Cases* properly assumed that, either by state legislation or state common law, such a right would be recognized and upheld.

MR. JUSTICE WHITE: I thought the case said, whether or not there is such a right is a different question which we need not decide here.

MR. GREENBERG: Yes, but it says, we decide these cases on the assumption that such a right exists.

MR. JUSTICE WHITE: Exactly. And if there was such a right, then the case gave an answer to it. If there was no such right, there was no occasion for the opinion at all.

MR. GREENBERG: I'm not certain that I catch the force of your question or your comment. My understanding—

MR. JUSTICE WHITE: I'm just suggesting that the Court in that case did not decide—

MR. GREENBERG: Oh, certainly not. It did not decide the question.

MR. JUSTICE WHITE: It indicated it was quite a different question.

MR. GREENBERG: But when we get into the question of what cases hold and what they mean and sometimes make nice discriminations about what they stand for as a precedent, I think it's important to see the assumptions upon which courts proceeded. And they proceeded in that case upon a basis which meant that the Court thought that it was deciding a case in the context of a state law or state common law doctrine which protected Negroes in their right to service.

Now, how that affirmative obligation of the State is to be enforced is not the question here now. Congress certainly, we submit, could enact legislation to do that. But *a fortiori*, a Negro seeking service under such circumstances, we submit, should not be subjected to arrest, prosecution and so forth. The proposition we chiefly urge, and indeed, the only proposition—

MR. JUSTICE HARLAN: If your proposition is correct—[Inaudible][1].

MR. GREENBERG: No, Your Honor, because Federal legislation would provide a remedy. It would permit the Attorney General to bring a suit. There is a question to which I'm not certain I have the answer, and that is whether Title 42, Section 1983, which uses the term "under color of law" in the jurisdictional sense, is coextensive with state action, and consequently, whether such a Negro excluded from service could file an action to compel service in the Federal courts under existing Federal jurisdictional legislation. I don't know. But I say certainly this means Congress could enact a statute conferring such jurisdiction on the Federal courts.

But the only proposition we urge here today is that these criminal convictions here cannot stand, and they cannot stand, we say, because state enforcement of a businessman's racial prejudice cannot coexist with *Shelley* versus *Kraemer*. Indeed, because these cases are criminal cases and because they involve prejudices acted out in the public arena, that follows *a fortiori* from *Shelley*.

To say that the State acts neutrally in enforcing the businessman's prejudices ignores all that we know about the nature of law. And there is the celebrated quote in *Shelley* against *Kraemer* that the Fourteenth Amendment bars the indiscriminate imposition of inequality. And so here, the fact that so remote a fantasy can be entertained that South Carolina, Florida and Maryland might use their criminal processes against whites unwelcome to an anti-white lunch counter proprietor is a constitutional irrelevance.

Getting back to *Shelley* for a moment, this case is even closer to *Shelley* than has been suggested so far, because the man who brought the action for ejectment or sought the injunction against the Negro in the home in which he was an occupant was seeking to eject the Negro from his, the plaintiff's, own property. This plaintiff had a property right. It was characterized as a negative reciprocal easement. And that Negro was in there, physically present upon the plaintiff's negative reciprocal easement. That case was an action for injunction. It could have been an action for ejectment. It could have, under state remedy, it could have been an action for trespass. Nevertheless, this Court held that, under the circumstances, the plaintiff could not invoke the processes of the State to exclude the Negro from his, the plaintiff's, negative reciprocal easement.

Finally, we repeat our insistence in argument made earlier that giving *Shelley* its rightful scope in these cases, which arise in

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[1]Because of an imperfect taping system and aging tapes, some passages are inaudible.

the public areas, implies no weakening of general rights of privacy, which the Constitution recognizes, in the businessman's private office or indeed in the private office in Woolworth's, or, most insistently, in the home. The constitutional principle of privacy has been characterized in the elder Pitt's famed remonstrance: "The poorest man may in his cottage bid defiance to all the forces of the Crown." And not very long ago, this Court, in *Silverman* against the *United States*, quoted from Judge Frank's dissent in *On Lee*, which I'd like just for a moment to read to the Court, because I think it characterizes the privacy argument:

> A man can still control a small part of his environment, his house. He can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty, worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

And what *Shelley* does do under these circumstances and these cases at bar is to command that these criminal convictions be reversed, and it does not intrude into the genuinely private life.

Now, in conclusion, while the cases today have been argued as separate issues from Maryland, South Carolina and Florida, involving five different groups of young people seeking service at different kinds of establishments—an amusement park, a restaurant and a lunch counter—these are different examples of the single issue that has been before this Court now, viewed in its narrow sense, for at least three years, and indeed, viewed in its broader sense, all the way back to the *Civil Rights Cases* up through *Strauder*, through *Gaines, Sweatt, McLaurin, Brown*, and all the celebrated cases that we know so well. In 1960 there was *Boynton* versus *Virginia*, which, while involving the commerce clause and the Interstate Commerce Act, was a principle antecedent of much of what we have been hearing here today. In 1961 there was *Garner* and its companion cases against *Louisiana*, decided by this Court on the basis of the due process clause and the fact that there was no evidence to sustain the conviction. This past year there was *Peterson* and its companion cases, based upon the fact that there was an explicit city ordinance or municipal policy requiring the proprietor to discriminate racially, even though, as conceded in the argument, the ordinance was not worth the paper it was written on.

Common to the cases of these years past has been the argument that enforcement by a State of racial discrimination, even though it originated in the decision of the owner of a private restaurant or lunch counter, violated the equal protection clause of the Fourteenth Amendment.

MR. JUSTICE BLACK: Was that the *Boynton* case?

MR. GREENBERG: That was argued in *Boynton* also, yes.

MR. JUSTICE BLACK: But that wasn't common to all those decisions you cite.

MR. GREENBERG: No. I didn't say it was common to the decisions. No, certainly not. I would say it was a common issue in all the cases. But certainly *Boynton* was decided on the commerce clause and the Interstate Commerce Act.

MR. JUSTICE BLACK: Act.

MR. GREENBERG: Yes. Oh, yes. You wrote the opinion, Mr. Justice Black.

MR. JUSTICE BLACK: It was not the clause.

MR. GREENBERG: No. But I was trying to make the point that this has been a common thread of issues which this Court has recurrently faced.

Now pending on certiorari are, I would imagine, perhaps a dozen or more cases involving similar issues; and pending in lower courts and justice of the peace courts and state supreme courts there are cases involving thousands of persons, principally in the southern part of the United States. And that is the issue: Can the State, by arrest and conviction, enforce racial discrimination in the public life?

The decisions in *Boynton* and *Garner* and the seven cases of last term have affirmed the historic role of this Court as an expositor of the great Amendments of this Constitution, the Thirteenth, Fourteenth and Fifteenth Amendments, designed to expunge considerations of race from American life. The decisions of this Court have been met in part by the most encouraging reaction, in large part voluntary compliance on the part of proprietors and, indeed, whole communities. In fact, nowhere is the perception of *Barrows* against *Jackson* more eloquently vindicated than in our experience with sit-ins. *Barrows* held that for states to grant damages against the vendor would encourage racial discrimination in housing, even though, the Court observed, to enter into such agreements would not, in and of itself, be illegal. The constant policy of this Court in striking down convictions time after time in cases of this sort has discouraged community policies which are created by state customs and laws.

We would therefore respectfully suggest to this Court that to affirm these convictions below, on whatever grounds, can do nothing but give aid and comfort to attitudes and practices wholly antithetical to our most deeply cherished traditions of freedom. Conversely, to reverse the convictions below and to strike at the heart of the network of discrimination confronting us today—although it is fast dissolving—can only accelerate dissolution of the slave system which this nation set out to destroy one hundred years ago. And its role in this process has been one of this Court's greatest contributions to our constitutional system.

[Whereupon, argument in the above-entitled matter was adjourned.]