IN THE

Supreme Court of the United States

October Term, 1963

No. 9

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

—v.—

CITY OF COLUMBIA.

No. 10

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

—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

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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

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[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.[15] (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).

[15] 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]

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[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 *Slaughter-house 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]

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[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-

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[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," [33] 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-

[33] *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 socal 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

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[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:

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". . . 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

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[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.[39] *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.

[39] 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*

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[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[5] 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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[5] 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.