1964 Sit-In Cases

Harold H. Greene, Chief
Appeals and Research Section
Civil Rights Division

BM:FES:bg

Frank E. Schwelb

Further Sociological etc. Quotations for the Sit-in Brief

I. Gerhart, Saenger
The Social Psychology of Prejudice
(New York 1953)

[Referring to the period 1868-1937]:

> The opinions given in support of earlier Supreme Court decisions tending to preserve the caste system rather than to promote greater equality are irreconcilable with modern scientific theories. In a prejudiced society one cannot expect all juries to act impartially in a case involving a Negro defendant. With hardly any exception, social scientists today consider segregation a basic form of discrimination. On regulating the multitude of daily contacts between races, segregation has become the primary symbol of Negro inferiority. pp. 256-57

II. C. Van Woodward
The Strange Career of Jim Crow
(New York 1955)

> This extraordinarily excellent book describes the growth of Jim Crow legislation in the South and, by showing that it did not come about until twenty or so years after the end of Reconstruction, and that there was a considerable degree of integration in the South until the changes of the 1890's

and early 1900's demonstrates the fallacy of the argument that legislation had nothing to do with it. The following passages are significant

> The public symbols and constant reminders of his inferior position were the segregation statutes, or 'Jim Crow' laws. They constituted the most elaborate and formal expression of sovereign white opinion upon the subject. In bulk and detail as well as in effectiveness of enforcement the segregation codes were comparable with the black codes of the old regime, though the laxity that mitigated the harshness of the black codes was replaced by a rigidity that was more typical of the segregation code. That code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism eventually extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries. pp. 7-8

> My only purpose has been to indicate that things have not always been the same in the South. In a time when the Negroes formed a much larger proportion of the population than they did later, when slavery was a live memory in the minds of both races, and when the memory of the hardships and bitterness of Reconstruction was still fresh, the race policies accepted and pursued in the South were sometimes milder than they became later. The policies of proscription, segregation, and disfranchisement that are often described as the immutable 'folkways' of the South, impervious alike to legislative reform and armed intervention, are of a more recent origin. The effort to justify them as a consequence of Reconstruction and a necessity of the times is embarrassed by the fact that they did not originate in those times. And the belief that they are immutable and unchangeable is not supported by history. p. 47

At pages 77 et seq., Woodward makes the point that the literature of the period during which Jim Crow legislation grew pictured the Negro as altogether incompetent and undesirable, even subhuman. For example, at pages 78-79

> Scholarship of the period, particularly its sociology, anthropology, and history, likewise reflected the current deterioration in race relations and the new Southern attitudes. Charles Carroll, 'The Negro a Beast'; or, 'In the Image of God' (1960); William P. Calhoun, The Caucasian and the Negro in the United States (1902); William B. Smith, The Color Line: A Brief in Behalf of the Unborn (1905); and Robert W. Shufeldt, The Negro, A Menace to American Civilization (1907) were a part of the then current national racist literature of the 'Yellow Peril' school and the flourishing cult of Nordicism. Southern historians during the first decade and a half of the century completed the rewriting of Reconstruction history. Their work did not yield completely to the contemporary atmosphere of the white-supremacy movement, but some of it did not entirely escape that influence.

The nature of Jim Crow laws and the dates of their adoption, are described as follows:

> Within this context of growing pessimism, mounting tension, and unleashed phobias the structure of segregation and discrimination was extended by the adoption of a great number of the Jim Crow type of laws. Up to 1900 the only law of this type adopted by the majority of Southern states was that applying to passengers aboard trains. And South Carolina did not adopt that until 1898, North Carolina in 1899, and Virginia, the last, in 1900. Only three states had required or authorized the Jim Crow waiting room in railway stations before 1899, but in the next decade nearly all of the other Southern states fell in line. The adoption of laws applying to new subjects tended to take place in waves of popularity. Street

> cars had been common in Southern cities since the 'eighties, but only Georgia had a segregation law applying to them before the end of the century. Then in quick succession North Carolina and Virginia adopted such a law in 1901, Louisiana in 1902, Arkansas, South Carolina, and Tennessee in 1903, Mississippi and Maryland in 1904, Florida in 1905, and Oklahoma in 1907. These laws referred to separation within cars, but a Montgomery city ordinance of 1906 was the first to require a completely separate Jim Crow street car. During these years the older seaboard states of the South also extended the segregation laws to steamboats.
>
> The mushroom growth of discriminatory and segregation laws during the first two decades of this century piled up a huge bulk of legislation. Much of the code was contributed by city ordinances or by local regulations and rules enforced without the formality of laws. Only a sampling is possible here. For up and down the avenues and byways of Southern life appeared with increasing profusion the little signs: 'Whites Only' or 'Colored.' Sometimes the law prescribed their dimensions in inches, and in one case the kind and color or paint. Many appeared without requirements by law--over entrances and exits, at theaters and boarding houses, toilets and water fountains, waiting rooms and ticket windows. pp. 81-83

The significance of legislation of positive law is reflected in the following passage

> We have seen that in the 'seventies, 'eighties, and 'nineties the Negroes voted in large numbers. White leaders of opposing parties encouraged them to vote and earnestly solicited their votes. Qualified and acknowledged leaders of Southern white opinion were on record as saying that it was proper, inevitable, and desirable that they should vote. Yet after the disfranchisement measures were passed around 1900 the Negroes ceased to vote. And at that time qualified and acknowledged leaders of white opinion said that

it was unthinkable that they should ever be permitted to vote. In the earlier decades Negroes still took an active, if modest, part in public life. They held offices, served on the jury, the bench, and were represented in local councils, state legislatures, and the national Congress. Later on these things were simply not so, and the last of the Negroes disappeared from these forums.

It has also been seen that their presence on trains upon equal terms with white men was once regarded as normal, acceptable, and unobjectionable. Whether railways qualify as folkways or stateways, black man and white man once rode them together and without a partition between them. Later on the stateways apparently changed the folkways--or at any rate the railways--for the partitions and Jim Crow cars became universal. And the new seating arrangement came to seem as normal, unchangeable, and inevitable as the old ways. And so it was with the soda fountains, eating places, bars, waiting rooms, street cars, and circuses. And so it probably was with the parks in Atlanta, and with cemeteries in Mississippi. There must even have been a time in Oklahoma when a colored man could walk into any old telephone booth he took a notion to and pick up the receiver. pp. 91-92

The "caste" character of the laws--their one-sidedness and aggressively anti-Negro purpose--are revealed in the following passage

Barring those disappearing exceptions, the Jim Crow laws applied to <u>all</u> Negroes--not merely to the rowdy, or drunken, or surly, or ignorant ones. The new laws did not countenance the old conservative tendency to distinguish between classes of the race, to encourage the 'better' element, and to draw it into a white alliance. Those laws backed up the Alabamian who told the disfranchising convention of his state that no Negro in the world was the equal of 'the least, poorest, lowest-down white man I ever knew'; but not ex-Governor Oates, who replied: 'I would not trust him as quickly as I would a negro of intelligence and good character.' The Jim Crow laws put

the authority of the state or city in the voice of the street-car conductor, the railway brakeman, the bus driver, the theater usher, and also into the voice of the hoodlum of the public parks and playgrounds. They gave free rein and the majesty of the law to mass aggressions that might otherwise have been curbed, blunted, or deflected.

The Jim Crow laws, unlike feudal laws, did not assign the subordinate group a fixed status in society. They were constantly pushing the Negro farther down. In seeking to distinguish between the Southern white attitudes toward the Negro during Reconstruction and the era following and the attitudes later developed, Edgar Gardner Murphy in 1911 called the one 'defensive' and 'conservative' and the other 'increasingly aggressive' and 'destructive.' 'The new mood,' he wrote, 'makes few professions of conservatism. It does not claim to be necessary to the state's existence . . . These new antipathies are not defensive, but assertive and combative . . . frankly and ruthlessly destructive.' The movement had proceeded in mounting stages of aggression. 'Its spirit is that of an all-absorbing autocracy of race, an animus of aggrandizement which makes, in the imagination of the white man, an absolute indentification of the stronger race with the very being of the state.' pp. 93-94

Moreover, Woodward explicitly refers to segregation as a reflection of the caste system at page 86

The extremes to which caste penalties and separation were carried in parts of the South could hardly find a counterpart short of the latitudes of India and South Africa.

III. Handlin, Oscar
Race and Nationality in American Life
(New York 1957)

> Of the groups marked off by color the Negroes were most important, by virtue of their numbers, of their long history in the country, and of the tragic injustices to which they had already long been subject. Their progress since slavery had been painfully slow. Emancipation after the Civil War had stricken from them the shackles of legal bondage, but it had not succeeded in endowing them with rights equal to those of other citizens. Once the interlude of Reconstruction had passed, the white South, redeemed, had developed a way of life that maintained and extended the actual inferiority of the blacks. In the last decade of the nineteenth century one device after another had deprived them of the ballot and of political power; their own lack of skill and of capital, as well as discrimination, had confined them to a submerged place in the economy; and the rigid etiquette of segregation made their social inferiority ever clearer. In no aspect of his life could the Negro escape awareness that he was decisively below the white, hopelessly incapable of rising to the same opportunities as his former masters. If ever he lost sight of that fact central to his existence, the ever present threat of lynching and other forms of violence reminded him of it.
> p. 137

[illegible]

[illegible]
[illegible]
[illegible]

JAN [illegible]

[illegible]

Segregation statutes in the South Carolina Code, 1882-1962

There is being sent separately to you the text of the pertinent sections of the South Carolina Code relating to separation of the races. In searching through the decennially issued Code back to 1882, there are fewer laws dealing with segregation as one goes farther back. There is no evidence of any repeal. To the contrary, the evidence is that each new issue of the Code includes new statutes, in addition to continuing those which have been previously enacted.

The earliest statute dealing with segregation is the miscegenation statute enacted in 1879. In the 1882 Code, there are civil rights statutes still in force making it unlawful to discriminate on account of race, color or previous condition of servitude. Section 1369 of the 1882 Code prohibits any party engaged in any business, calling or pursuit for which a license or charter is required by law to discriminate on account of race. Sections 2601-2607, 1882 Code, prohibit discrimination by common carriers, and theaters. These do not appear in the later codes.

The only statute prohibiting the serving of meals in integrated restaurants is Sec. 58-551, 1962 Code, 1/ which applies to meals served at station restaurants or eating houses of common carriers. This provision was enacted in 1906. There is a general

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1/ All Code sections in this memorandum are for the 1962 Code unless otherwise specified.

cc: Records
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[illegible]

[illegible] miscegenation [illegible] Sec. [illegible], Supp. 1[illegible], Art. 2, Sec. 7, St. 3, Par. 30;

[illegible] separation of [illegible] in textile mills, Code Sec. 64-502;

[illegible] separate entrances for [illegible] circuses etc., Code Sec. 58-[illegible];

[illegible] giving a [illegible] permanent custody of a white child, Code Sec. 15-553.

Moving into the quasi-public field, you will find several statutes forcing common carriers to segregate coaches or cabins on ferries and railroads. Codes Secs. 58-714 through 58-740. There are statutes forcing separation of the races on street railways. Code Secs. 58-1331 through 58-1340. Motor buses must separate white and colored passengers. Code Secs. 58-1491 through 58-1496. There is a provision for marking waiting and rest rooms by public carriers as "white" or "colored", although the statute expressly provides that the waiting and rest rooms shall be for both races. Code Sec. 58-645.

Finally, there are statutes enforcing segregation in purely public institutions: schools, Const. Art. 11, Sec. 7, 2/ Code Secs. 21-751, 21-806, 22-3;

2/ This refers to the current constitution adopted in 1895. The constitution adopted in 1868, Article 12, Sec. 10 provided that public schools shall be open to all children without regard to race.

jails and chain gangs, Code Secs. 55-1, 55-303; and public parks, Code Secs. 51-2.1 through 51-2.4, 51-181 through 51-184.

T-1/16/64

Director, Federal Bureau of Investigation JAN 17 1964

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Burke Marshall
Assistant Attorney General
Civil Rights Division

Griffin v. Maryland, et al. (Sit-in Cases)

This is to confirm the conversation between Howard A. Glickstein of this Division and Mr. Fred Smith of your office in which we requested information relative to racial protests directed at privately-owned places of public accommodation in the following cities:

Alabama: Linden
Delaware: Smyrna
Florida: Lake Wales, Orlando, Palm Beach
Georgia: Pitzgerald, Warner Robins
North Carolina: Dunn, Davidson, Salisbury
Tennessee: Clarksville
Virginia: Charlottesville
West Virginia: Bluefield

cc: Records
Chrono
Greene
Glickstein

ULYSSES -

Please put in the Reason for postponing F.

January 9, 1964

FBS:swh

Harold H. Greene
Chief, Appeals and Research
Civil Rights Division

Frank E. Schwelb
Attorney
Civil Rights Division

Sociological Quotations on the Sit-In Cases

I. George Washington Cable, The Silent South (New York, 1885)

The first part of this book is entitled "The Freedman's Case in Equity" and pleads for decent treatment of the Negro. Mr. Cable is aware of the growing trend toward racial rule by the whites and of the function of Jim Crow as the expression of that rule. He advocates an approach which concerns itself with the rights of the individual citizen, be he Negro or white rather than with the supremacy of any race. The following quotations are particularly significant:

1. Concerning the argument that the achievement of civil equality should be postponed, Cable says this on page 62:

> Would our friends on the other side of the discussion say they mean only, concerning those indiscriminative civil rights, "Neither race wants them now"? This would but make bad worse. For two new things have happened to the colored race in these twenty years; first, a natural and spontaneous assortment has taken place within the race itself along scales of virtue and intelligence, knowledge and manners; so that by no small fraction of their number the wrong of treating the whole race alike is more acutely felt than ever it was before; and, second, a long, bitter experience has taught them that "equal accommodations,

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> but separate" means, generally, accommodations of a conspicuously ignominious inferiority. Are these people opposed to an arrangement that would give them instant release from organized and legalized incivility? -- For that is what a race distinction in civil relations is when it ignores intelligence and decorum.

2. At page 105 of his book, Cable advises the relation between slavery and what he calls civil caste - evidently referring to segregation:

> To go forward we must cure one of our old-time habits--the habit of letting error go uncontradicted because it is ours. It grew out of our having an institution to defend, that made a united front our first necessity. We have none now. Slavery is gone. State rights are safer than ever before, because better defined; or, if unsafe, only because we have grown loose on the subject. We have nothing peculiar left save civil caste. Let us, neighbor with neighbor, and friend with friend, speak of it, think of it, write of it, get rid of it. Ruskin's words seem almost meant for our moment and region: "For now some ten or twelve years," he says, "I have been asking every good writer whom I know to write some part of what was exactly true, in the greatest of the sciences, that of Humanity." We speak for this when we speak truly against civil caste. It is caste that the immortal Huber calls "a system which tends . . . to destroy the feelings of general benevolence." As far, then, as civil rights are concerned, at least, let us be rid of it. This done, the words North and South shall mean no more than East or West, signifying only directions and regions, and not antipodal ideas of right and government; and though each

of us shall love his own State with ardor, the finest word to our ear as citizens shall be America.

3. The one-sidedness of the system of segregation, and its relationship to caste are described by Cable in a passage which is rather similar to one from Gunnar Mydal's work sixty years later:

> As to churches, there is probably not a dozen in the land, if one, "colored" or "white," where a white person is not at least professedly welcome to its best accommodations; while the colored man, though he be seven-eighths white, is shut up, on the ground that "his race" prefers it, to the poor and often unprofitable appointments of the "African" church, whether he like it best or not, unless he is ready to accept without a murmur distinctions that mark him, in the sight of the whole people, as one of a despised and that follow him through the very sacraments. As to schooling, despite the fact that he is to-day showing his eager willingness to accept separate schools for his children wherever the white man demands the separation, yet both his children and the white man's are being consigned to illiteracy wherever they are too few and poor to form separate schools.

II. Thomas Nelson Page, <u>The Negro: The Southerner's Problem</u> (New York, 1904)

This is a virulently anti-Negro work which is predicated on the absolute superiority of the white race. Its basic theme is that Reconstruction and Federal interference barred the Negro because it put him in opposition to the white South. The author takes the position that the white man's inherent superiority makes it inevitable that he will win any contest with the Negro.

The following passages are illustrative:

1. At pages 292 to 293 of this work, Page explicitly states the "principle" of white supremacy which is the assumption underlying his book:

> One of these principles is the absolute and unchangeable superiority of the white race--a superiority, it appears to him, not due to any mere adventitious circumstances, such as superior educational and other advantages during some centuries, but an inherent and essential superiority, based on superior intellect, virtue, and constancy. He does not believe that the Negro is the equal of the white, or ever could be the equal. Race superiority is founded on courage (or, perhaps, "constancy" is the better word), intellect, and the domestic virtues, and in these the white is the superior of every race.
>
> Another principle is that many, if not most, of the difficulties of the race problem since the war have been caused, or at least increased, by the ignorance of those outside of the South, who, most cocksure of their position where they were most in error, have tried to force a solution on lines contrary to natural and unchangeable laws. The selfish politician and the cocksure theorist have equally contrived to create problems where none might have been but for their bigotry and their folly.

2. The equalitarian "error" on which Reconstruction was supposedly based is discussed as follows, at pages 47 to 48:

> However high the motive may have been, no greater error could have been committed; nothing could have been more

disastrous to the Negro's future than the teaching he thus received. He was taught that the white man was his enemy when he should have been taught to cultivate his friendship. He was told he was the equal of the white when he was not the equal; he was given to understand that he was the ward of the nation when he should have been trained in self-reliance; he was led to believe that the Government would sustain him when he could not be sustained.

3. Dealing with the aftermaths of the breakdown of the social order of slavery, Page writes as follows of what he regards as the unfeasibility of white-Negro relations on the basis of equality, at pages 34 to 35:

> The rule is a changed relation and a widening breach. The teaching of the younger generation of Negroes is to be rude and insolent. In the main, it is only where the whites have an undisputed authority that the old relation survives. Where the whites are so superior in numbers that no question can be raised; or again, where notwithstanding the reversed conditions, the whites are in a position so dominant as not to admit of question, harmony prevails.
>
> When the relations are reversed there is danger of an outbreak. The Negro, misled by the teaching of his doctrinaire friends into thinking himself the equal of the white, asserts himself, and the white resents it. The consequence is a clash, and the Negro becomes the chief sufferer so invariably that it ought to throw some light on the doctrine of equality.

III. R. W. Shufeldt, M.D., The Negro - A Menance to American Civilization (Boston, 1907)

I have not read all of this book yet and my spot-check through it has not yet turned up much that is directly applicable to our problem. However, the very title of the work and its persistent discussion of the Negro as something or somebody loathsome and sub-human suggest the basis for its opposition to social relation between the races. The title of Chapter V, "Half-breed, Hybridization, Atavism, Heredity, Mental and Physical Characters of Race Hybrids", and Chapter VI, "The Effects of Fraternization between the Ethiopian and Anglo-Saxon Races upon Morals, upon Ethics, and upon the Material Progress of Mankind," typifies the author's approach. The following passage referring to white-Negro sexual relations which were probably no more helpful than any others, is typical.

> All this is very degrading, injurious, and harmful to both races, though in very different ways. In the case of the whites it aids in this community, the adulteration of the higher stock by a baser material, and such practice is harmful under any and all conditions; whereas in the case of the negroes, the majority of whom believe that procreation and nature's method of insuring it, is about all that life means, it fosters in their minds the erroneous idea that they are ethnologically the whites' equals, and consequently become dissatisfied with the social plane they are obliged to occupy, and are restive under what they deem to be intentional barriers the whites place in their road to wealth and political power. It is impossible for them to appreciate the fact that nature is the author of such restrictions and limitations and not their Anglo-Saxon superiors. Brains, ability, and the power of achievement are the factors that are principally responsible for the status of the individual as well as the nation, and not that either simply possess human form and the power of speech,--a notion that appears to dominate the mind of the African in this country.

IV. Hillary A. Hubert, Why the Solid South? Or Reconstruction and its Results (Baltimore, 1890)

I have just paged through this book and it contains discussions of reconstruction in each of the Southern states and in Washington, D. C. by prominent southerners who were opposed to Carpetbagger rule. It may contain matters relevant to aspects of the case which are being investigated by attorneys other than myself.

V. The dissent in the case of Plessy Ferguson contains several passages which recognize segregation as being an expression of caste.

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF JUSTICE

TO : Harold H. Greene, Chief
Appeals and Research Section
Civil Rights Division

DATE:

DR:mep

FROM : David Rubin
Attorney

SUBJECT: Sit-in Cases

I have read the report of the Joint Committee on Reconstruction (House Report No. 30, 39th Cong., 1st Sess.) and half of the testimony before that Committee, which testimony is appended to the report. 1 /

The Report of the Committee states that "[a] large proportion of the population had become [by virtue of the Thirteenth Amendment], instead of mere chattels, free men and citizens." They had remained loyal during the war and in large numbers had fought on the Union side. "It was impossible to abandon them, without securing their rights as free men and citizens. . . Hence it became important to inquire what could be done to secure their rights, civil and political." (Id. at XIII). The committee declared that it "should appear affirmatively" that the states seeking restoration "are prepared and disposed in good faith to accept the results of the war, to abandon their hostility to the government, and to live in peace and amity with the people of the loyal States, extending to all classes of citizens equal rights and privileges, and conforming to the republican idea of liberty and equality" (Id. at XVI).

Reviewing the evidence taken by the committee, the Report notes that (Id. at XVII):

> It is found to be clearly shown by witnesses of the highest character and having the best means of observation, that the Freedmen's Bureau,

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1 / I will continue to read the testimony and submit another memorandum on the second half shortly.

> instituted for the relief and protection of freedmen and refugees, is almost universally opposed by the mass of the population, and exists in an efficient condition only under military protection, while the Union men of the south are earnest in its defence, declaring with one voice that without its protection the colored people would not be permitted to labor at fair prices, and could hardly live in safety. They also testify that without the protection of United States troops, Union men, whether of northern or southern origin, would be obliged to abandon their homes. The feeling in many portions of the country towards emancipated slaves, especially among the uneducated and ignorant, is one of vindictive and malicious hatred. This deep-seated prejudice against color is assiduously cultivated by the public journals, and leads to acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish. There is no general disposition to place the colored race, constituting at least two-fifths of the population, upon terms even of civil equality. While many instances may be found where large planters and men of the better class accept the situation, and honestly strive to bring about a better order of things, by employing the freedmen at fair wages and treating them kindly, the general feeling and disposition among all classes are yet totally averse to the toleration of any class of people friendly to the Union, be they white or black; and this aversion is not unfrequently manifested in an insulting and offensive manner.

With such evidence before them, it was the Committee's opinion:

> That Congress would not be justified in admitting such communities to a participation in the government of the country without first providing such constitutional or other guarantees as

> will tend to secure the civil rights of all citizens of the republic. . . (Id. at XVIII).

It was also the opinion of the committee that before allowing the Confederate States to be represented in Congress,

> adequate security for future peace and safety should be required; that this can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic. . .

The significant thing about the Report is the emphasis placed upon protecting the freedmen from the acts of private individuals. A reading of the testimony taken by the committee reinforces the view that this was one of the committees principal concerns. Witness after witness testified that, if the protection extended by the Freedmen's Bureau were withdrawn, the freedmen would be without any protection, i.e., left to the hostility of the whites and without remedy, either under the terms of State law or because state law would not be enforced in such circumstances. One is convinced, from reading the testimony, that when the Committee used the language "equal protection of the laws" they meant to require the states affirmatively to afford protection to the Negro from the private action of white men at least to the extent that such action was illegal under state law. 2 / The word "protection" was used repeatedly by witnesses in testifying to abuses of Negroes (and Union men) by private white citizens. For example, one witness testified as follows:

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2 / I am enclosing the preliminary print of Vol. 365 of No. 2 of the U.S. reports, which contains the opinion in Monroe v. Pape, 365 U.S. 167. The opinion recounts, at pp. 171-183, the legislative history of the Ku Klux Act of 1871, the first section of which is contained 42 U.S.C. 1983. The legislative history fully supports the conclusion that in this early interpretation of the Fourteenth Amendment Congress viewed the equal protection clause as imposing a duty on the State to provide redress for the Negro from the private illegal actions of white persons.

> Question. Suppose the restraint arising from the presence of Union forces in Virginia was withdrawn, and suppose the Freedmen's Bureau was withdrawn, what would be the condition of the loyalists and freedmen in Virginia?
>
> Answer. There would be no protection for Union men, and the freedom would necessarily suffer much.
>
> Question. Would there be scenes of riot and violence?
>
> Answer. I think it probable. You have heard of the riot which took place on Christmas Day, almost under the eye of the military, in Alexandria. From that you can judge what it would be if the military were withdrawn. (Id., Testimony, part II, p. 19) (emphasis added).

A Negro witness testified that Negroes who had left their neighborhoods were not allowed to come back; that in Surrey County, Virginia, white people were tying Negroes up by the thumbs to force them to work for six dollars a week, that Negroes were whipped by the whites, and that whites would kill anyone who established a colored school. Moreover, the witness testified:

> A party of twelve or fifteen men go around at night searching the houses of colored people, turning them out and beating them. I was here as a delegate to find out whether the colored people down there cannot have protection. They are willing to work for a living; all they want is some protection. . . (Id. at 55).

Another Negro witness stated that "we feel down there [in Williamsburg] without any protection" (emphasis added) and "in danger of our lives, of our property, and of everything else" because of the spirit manifested by the rebels. (Id. at 57). A white man, testifying that Negroes were often "assailed and treated badly" by a certain class of white

persons, though that "but for the Freedmen's Bureau" the Negroes "would have no protection at all" (Id. at 61) (emphasis added). According to this witness:

> The protection of the Freedmen's Bureau does not extend as generally throughout the country as it is hoped it will; and in some of these places where the bureau does not extend these people are treated very badly. They are employed, and, when their time expires, they are turned off without clothing or any remuneration, and very often the vagarant laws, as they are termed, have been attempted to be enforced, and have been to some extent, although I think the Freedmen's Bureau are looking up these matters so as to extend protection to the freedman (Id. at 61) (emphasis added).

A Major General commanding the area which included Richmond testified as follows:

> Question. In case of the withdrawal of military protection from Virginia, what would be the condition of the loyal people of Virginia and of the blacks?
>
> Answer. I think they would be in a lamentable condition. Such is the prejudice entertained, expecially against those who were faithful to the government during the war, that I do not think they would receive any adequate protection for their rights of person or property from the people or from the courts; and I think that they would be persecuted through the machinery of the courts as well as privately. (Id. at 143) (emphasis added).

See also id. at 202, 203, 206 and 207.

Although there was some testimony with respect to discriminatory state laws, by far the great part of the testimony deals with private action. Thus far I have not come across any

testimony specifically relating to the exclusion of Negroes from places of public accommotation. There was some testimony concerning the inability of ladies who wanted to teach at Negro schools to find rooms. One witness testified that Southern [apparently white] ladies who sent to Staunton, Virginia, as teachers of colored schools found it "almost impossible to get quarters; people will not take them in to board." Another witness testified to the inability to find accommodations (rooms) for northern ladies (apparently white) who sent to Raleigh, North Carolina to teach at Negro schools. 3 /

Most of the testimony involved violence or threats of violence against Negroes and Union men. But some of the testimony, as indicated above, was directed toward private action which stopped short of violence. Several witnesses for example, referred to conspiracies, to keep down the wages of the freedmen (e.g., Id. at 175). What is unclear is the extent, if any, to which the committee wished to require the States to afford protection to the Negro from private acts which, while legal under constitutional state law, were directed only at Negroes. This is the category in which exclusion from public accommodations falls. Reference to this type of private action is sporadic. In addition to the incidents involving the inability of teachers of Negro schools to get accommodations and the conspiracies to keep down wages, which might have been illegal under state law, there is the testimony of a Mail Agent in the United States Post Office Department to the following effect:

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3 / A Major General in command of a district including the City of Richmond did state that the white people were:

> Extremely reluctant to grant to the negro his civil rights -- Those privileges that pertain to freedom, the protection of life, liberty, and property before the laws, the right to testify, etc. They are all very reluctant to concede that; and if it is ever done, it will be because they are forced to do it. They are reluctant even to consider and treat the Negro as a free man, to let him have his half of the side walk or the street crossing (Id. at 4) (emphasis added).

> Question. Do you discover a willingness or unwillingness upon the part of the whites to recognize the right of the freedmen to hold or own property, real or personal?
>
> Answer. I think there is a great unwillingness on the part of the people to allow them to own property. I judge from the fact that it is with great difficulty that a negro can rent land to tend himself. They allow him no privileges in that respect. If the negores will work for them, but they are not willing to rent them lands or recognize them as citizens in any respect. (Id. at 154)

The few references to this type of private action seem insufficient to justify the conclusion that the Committee, in proposing the equal protection clause, intended to require the States to protect the Negroes from such action. Whatever further support there is in the testimony for such a theory, however, I will submit in my forthcoming memorandum.

January 3, 1964

Harold H. Greene, Chief
Appeals and Research Section
Civil Rights Division

FES:ewj

Frank E. Schwelb
Attorney
Civil Rights Division

Additional Materials re Caste System, etc.
for Sit-in Cases

W. J. Cash, The Mind of the South (1941)

Referring to the post-Reconstruction era, Cash wrote (at p. 108):

> For these thirty years, the South was to live with unparalleled plexus of ideas of which the center was an ever growing will to mastery of the Negro.

Gordon W. Allport, The Nature of Prejudice (1954) at p. 304:

> The Negro in America is socially a better example of caste than he is of race. Since many Negroes are more Caucasian in their racial descent than they are African, it makes poor sense to assign them to the Negro race. The handicaps they suffer (even those individuals with only a trace of 'Negro blood') are typically the socially imposed handicaps peculiar to lower caste--not natural handicaps engendered by racial inheritance. Discrimination in employment, segregation in housing, and all other stigmata are marks of caste alone. The fact that the Negro is expected to 'know his place'

cc: Records
Chrono
Dear
~~Intel~~ File
(Rm. 1140)

> is also a caste requirement--a folkway intended to enforce ascribed lower status. Legal sanctions enforce the caste system in Southern states today, but informal sanctions are even more powerful.

at p. 438:

> . . . While it is true that unless a fairly large percentage of the people are in favor of a law it will not work, yet it is false to say that folkways must always take precedence over stateways. It was the Jim Crow laws in the south that in large part created folkways. (emphasis the author's)

John Dollard, Caste and Class in a Southern Town (1957 edition; first published 1937)

This book identifies the Negro in the south as a member of an "inferior caste" and is devoted to an analysis of his situation. The author is, or was, Professor of Psychology, Yale University. Particularly applicable passages include:

p. 351 (citing William B. Smith, The Color Line (1905) p. 7-8)

> . . . The various Jim Crow customs which isolate the colored people socially make Negro aggression more difficult and reduce the occasions for white retaliation. Let us note in passing that we are not, again, deploring or criticizing these customs, but rather attempting to see how they function in patterning individual emotion. The southern conception of the

> matter plainly is that without such segregation patterns for Negroes the amount of open violence between the races would be greatly increased. Their existence is therefore a manner of holding aggression in check. These customs do actually carry to the Negro, whether intentionally or not, the sense of being inferior, of not being worthy to participate fully in American social life, and also of being a feared and dangerous object in a fearsome and threatening situation.
>
> The commonest of these taboos are those against eating at a table with Negroes, having them in the parlor of one's house as guests, sitting with them on the front porch of one's home, and the like. Any of these acts would imply social equality instead of social inferiority for the Negro. The white-caste view on this matter is simple and logically consistent. It is felt that social equality would lead directly to sexual equality . . . .

p. 352-353:

> . . . Negroes are not in general allowed in restaurants where whites go; in the case of some of the poorer restaurants, there is a separate entrance for them and a curtain is drawn so that whites and Negroes cannot see one another eating. In the long narrow theater in Southerntown Negroes buy tickets at the same box office (and pay the same admission) but they have a

> separate entrance and sit on the balcony. Sometimes in larger towns they have theaters of their own where, it is said, whites, by convention, do not go, although the taboo in whites participating in Negro social events is not ordinarily as stringent as in the reverse case. In the county courthouse we see the caste isolation of the Negro externalized in the signs over toilet doors, 'For White Men Only,' 'For White Women Only,' 'For Colored Men,' 'For Colored Women.'

Dollard also speaks of the rigor with which white people who violate caste mores (e.g. by addressing or referring to Negroes by courtesy titles) are subjected to ostracism, caste pressure, and even violence. Professor Dollard sees the relationship between slavery and the present caste system as follows: p. 62

> Caste has replaced slavery as a means of maintaining the essence of the old status order in the South. By means of it racial animosity is held at a minimum. Caste is often seen as a barrier to social contact or, at least, to some forms of social contact. It defines a superior and inferior group and regulates the behavior of the members of each group. In essence the caste idea seems to be a barrier to legitimate descent. A union of members of the two castes may not have a legitimate child. All such children are members of the lower caste and cannot be legitimated into the upper caste by the fact that they have an upper-caste father or mother.

Office of the Solicitor General
Washington, D. C.

December 31, 1963

MEMORANDUM FOR HAROLD GREENE

Attached is a very rough draft of some pages for the "sit-in" brief--already much revised and corrected. It is useful to indicate some of the points on which I need assistance. I have put a number in the margin equivalent to the explanatory notes that follow.

1. I need a rather long footnote listing cases illustrating the extent to which violations of constitutional rights are the product of combinations of private and governmental action. Ideally, each case would have after it in parenthesis a few pithy phrases indicating the combination in that instance. If that is too difficult, it would serve my purpose to have a very short abstract prepared from this point of view. Obviously, some of the cases will be used later in the text--Burton and Lombard, for example.

2. Are there any other commentators who have espoused Lou Henkin's view?

3. Again, I need a long footnote collecting illustrative cases. My thought should be plain from the Burton, Lombard and Hanson cases in the text, but there are a great many others in the lower courts, such as the Eaton case, a recent Maryland decision involving the use of school property by cub scouts or some such organization--I was never a den mother--restaurants in municipal airports, etc.

4. Are there any cases that sustain this proposition other than Shelley v. Kraemer and the Girard Trust case--cases in the State or lower federal courts?

5. We need some citations for the common law duty imposed on businesses affected with a public interest. Am I right in thinking that farriers are people who keep boars?

6. The parenthetical note on page 12 is self-explanatory.

7. and 8. We ought to have some references to statutes illustrative of the various kinds of licenses, or else citations from a law review article or two where their characteristics are discussed--nothing exhaustive.

Archibald Cox

Attachment

III

FOR A STATE TO GIVE LEGAL RECOGNITION TO A RIGHT TO MAINTAIN PUBLIC SEGREGATION IN PLACES OF PUBLIC ACCOMMODATION AS PART OF A CASTE SYSTEM WHICH IS, BOTH IN THIS PARTICULAR AND IN GENERAL, A PRODUCT OF STATE ACTION, CONSTITUTES A DENIAL OF EQUAL PROTECTION OF THE LAWS

The central fact in the present cases is that the organized refusal to allow Negroes to eat or mingle with whites in these places of public accommodation is a measure, stemming partly from State law, enforced in places heavily affected with a public interest, and designed only to preserve with State support the very caste system that the Amendments sought to eradicate. We submit that for a State to support that discriminatory measure, either by arrests and criminal prosecution or by recognizing a privilege of self-help, violates the Fourteenth Amendment. The question, being res nova, is not free from doubt, but our submission is wholly consistent with traditional constitutional principles laid down in the decisions of the Court.

There is no simple formula for distinguishing State denials of equal protection of the law and State deprivations of life, liberty or property from private, i.e. non-governmental, invasions of interests protected against the State. In our

complex society, governmental and private action are often entwined as well as interdependent. The State acts in many forms and through many channels. Private activity not only may depend upon State permission and State sanctions but it may benefit from or be stimulated by State subsidies, State regulation and other forms of aid or direction. The cases that have reached the courts demonstrate beyond any reasonable doubt that invidious discrimination and interference with aspects of individual liberty is increasingly often the product of combinations of private and governmental action. (1) Mindful of the variety and complexity of the forms of State action and their relation to racial discrimination and other invasions of fundamental rights, the Court has eschewed the "impossible task" of formulating fixed rules and has sifted the facts and weighed the circumstances of each case in order to attribute "its true significance" to both obvious and non-obvious "involvement of the State in private conduct" (Burton v. Wilmington Parking Authority, 365 U.S. 715, 722). "The ultimate substantive question is . . . whether the character of the State's involvement in an arbitrary discrimination is such that it should be held responsible for the discrimination"

(Mr. Justice Harlan concurring in Peterson v. Greenville, 373 U.S. 244, 249). The required judgment upon the whole seems not essentially different in method from the determination of other forms of legal liability for the results of mingled causes.

In the present case the elements of State action outweigh the aspects of private freedom of choice.

First, the State has provided official sanctions for the imposition of a racial stigma through the intervention of the police, arrests, prosecution and conviction of crime. By thus supporting whenever it is challenged a community practice of imposing segregation in virtually all places of public accommodation, the State gives the practice the effect of law much as if it were an ordinance forbidding Negroes to enter and seek service in any restaurant or lunch counter where whites are eating.

In emphasizing the State's provision of legal sanctions as an element of State involvement leading to the conclusion of State responsibility, we refrain from arguing that such State action is always enough to implicate the State for the purposes of the Fourteenth Amendment and reduce the analysis to an

inquiry into whether the action is reasonable or unreasonable in the light of all the circumstances including the assertion of any counterbalancing constitutional right such as the householder's right of privacy. The argument may find support in the language of Shelley v. Kraemer, 334 U.S. 1, and has been espoused by some commentators and one State court. It seems to us, however, that the decision in Shelley v. Kraemer rests more solidly upon narrower grounds. The elements of law in the enforcement of restrictive covenants running with the law, created and enforced by the State, greatly outweigh any elements of private choice. The thrust of restrictive covenants is the power to bind unwilling strangers to the initial transaction./ Typically the developer of a housing tract and his immediate grantees have long scattered from the area subject to the covenant, and enforcement is sought against a willing buyer and willing seller who were strangers to the original transaction. The series of covenants imposed upon the unwilling parties to later transactions becomes in effect a local zoning ordinance with all the power of law to bind those subject to the restriction without their consent. Where the State has delegated a power so similar to law-making

Nor are restrictive covenants typically found in isolation. Their function is to cover whole neighborhoods.

authority to private persons, its exercise may fairly be held subject to constitutional restrictions. Essentially the same principle has been applied in quite different contexts. E.g., Railway Employees' Dep't. v. Hanson, 351 U.S. 225; cf. Steele v. Louisville & N. Ry., 323 U.S. 192; Street v. International Ass'n of Machinists, 367 U.S. 740.

To interpret Shelley v. Kraemer more broadly raises extraordinary difficult problems.

Precedent apart, the suggestion that the State is involved for the purposes of the Fourteenth Amendments whenever it gives the support of its police or courts to an exercise of private choice raise too many apparently insoluble difficulties for us to urge it as an acceptable principle of constitutional adjudication. To hold that a householder, lawyer or businessman may admit or exclude guests at his absolute discretion, however wise, capricious or immoral, but that he may not look to public authority to safeguard the right where the State could not constitutionally make the same choice, would be to deny the right to the poor and powerless and to invite the rich or strong to recall the age of private armies. The constitutional doctrine expounded in State v. Brown, A.2d (Del. 1963) raises grave prospects of public disorder.

Perhaps one can escape that difficulty by saying that a State acts not only through its police, prosecutors and judicial commands but also when its law recognizes for any purpose a right, privilege or immunity. Such recognition is, like the intervention of the police, indubitably State action but to say that such State action is alone enough to make the State responsible for the private person's exercise of his legal rights would ~~be~~ subject a wide variety of heretofore private decisions to the limitations of the Fourteenth Amendment as if they were the action of a State. Must a lawyer select clients and a doctor patients whimsically or only upon reasonable distinctions? May a private school endowed by its founders as a charitable corporation for the education of Episcopalians prefer applicants of that faith over Jews or Roman Catholics? May it terminate the tenure of a teacher who avows atheism? May popular distributors of soap and detergents discharge an executive whose speeches and political associations with right or left wing extremists, in the judgment of the management, injure its public relations? Would the case be different if there were no risk of injury to the business but the other executives found the association highly

distasteful? A State could not constitutionally command such discrimination and interference with individual freedom. Must its law therefore withhold all legal recognition of the right of private persons to engage in them?

It is suggested that the State need withhold such recognition only when the discrimination or interference is not counter-balanced by another constitutional interest of equal magnitude such as the householder's constitutional right of privacy, which would include the right to choose his guests; if the requirement of a counterbalancing interest of constitutional magnitude were taken seriously the analysis would be back close to the contention that wherever a State can legislate to prohibit discrimination or to secure civil liberties, the issue cannot be left to private choice without offending the Amendment for although there is State responsibility in such case, the State is barred only from arbitrary and capricious action. If other interests will suffice, the substantive restriction upon private action is less severe, but there remains the difficulty that imposing State responsibility upon the basis of <u>any</u> recognition of a private right turns all manner of private activities into constitutional issues upon which

neither individuals, the Congress nor the States can exercise the final judgment. Nothing in this Court's decisions or elsewhere in constitutional history suggests that the Fourteenth Amendment's prohibitions against State action put such an extraordinary responsibility upon the Court. It seems wiser and more in keeping with our ideals and institutions to recognize that neither recognition of a private right in a State's jurisprudence nor securing the right through police protection and judicial sanctions is invariably sufficient involvement to impose upon the State responsibility upon the Fourteenth Amendment.

To go to the other extreme and hold that State sanctions for private choice are irrelevant to the question of the State respondent is untenable upon both precedent and principle. A State cannot exculpate itself merely by showing that a private person made the effective decision to engage in invidious discrimination or some other invasion of fundamental rights. There are numerous decisions both in this Court and others holding that a State had violated the Fourteenth Amendment where its participation facilitated or encouraged discrimination but left the decision to private choice. In Burton v. Wilmington

(3)

Parking Authority, 365 U.S. 715, the State was involved through ownership of the building and there was continuing mutual interdependence as well as association between the State parking facility and the private restaurant but the actual decision to exclude Negroes from the restaurant was made by the restaurant alone. In Lombard v. Louisiana, 373 U.S. --- government officials encouraged the discrimination but the decision was individual. Mr. Justice Harlan urged in dissent that the State involvement was insufficient if the decision to discriminate was private, but his view was rejected by the rest of the Court. The principle is not confined to cases of racial discrimination. In Railway Employees Dep't. v. Hanson, 351 U.S. 225, the federal statute merely removed legal obstacles to private agreements which the parties might conclude or reject, but this was unanimously held sufficient to subject the consequences of the resulting agreements to scrutiny under the First and Fifth Amendments. Compare Steele v. Louisville & N. R. Co., 323 U.S. 192; International Ass'n. of Machinists v. Street, 367 U.S. 740.

States have also been held responsible where their sole participation was to permit and carry out an exercise of private right. In the Girard Trust case the public authorities

(4)

did no more than give effect to a private individual's testamentary instructions concerning the disposition and use of his property. Pennsylvania v. Board of Trusts, 353 U.S. 230. The State, through a municipal subdivision, was continuously and intimately involved; the element of individual freedom was diluted by the lapse of a century since the testator's death; but the fact remains that the State was participating only to give effect to a private decision. Shelley v. Kraemer, 334 U.S. 1, is still closer to the point for there the State action consisted solely of a legal system that recognized a private right to negotiate covenants running with the land and would enforce such agreements even when racially discriminatory. Manifestly, there would have been no racial discrimination but for the private choice; the State did nothing to encourage it. The core of the decision, as suggested above, appears to be the judgment that, in that instance of discrimination which was a product of private contract combined with jural recognition and enforcement, the elements of law bulked so large and so important in proportion to the factor of private choice as to require the conclusion of State, as well as private, responsibility. Accord: Bolling v. Sharpe,

334 U.S. 1; Barrows v. Jackson, 346 U.S. 249. Our argument is essentially the same in the present case save that the elements of State involvement are by no means confined to the recognition and enforcement of the private right./

One of the additional elements is the high degree of accepted State responsibility for these places of public accommodation. The restaurants serve functions in a modern community not dissimilar to the innkeepers, carriers, ferries and farriers which at common law had a duty to serve all members of the public equally to the extent of their facilities. The amusement park invites the general public. Both businesses are not only subject to detailed State regulation, including the imposition of a duty to render service without regard to race, religion or national origin, but they closely resemble

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/ It may be suggested that in the Girard Trust case the State was required to determine whether an applicant was white or Negro, and that in Shelley v. Kraemer and other cases of restrictive covenants the State gave judgment to the plaintiff only after satisfying itself of the race of the prospective purchaser; whereas in the present cases, the States were evicting the persons deemed objectionable by the managers without the States' inquiring into race or color. Other cases show the difference to be unimportant. In the Burton, Peterson and Lombard cases the question of the petitioners' race was interjected only as part of their constitutional claim; in Peterson and Lombard, as here, the State could say that it proceeded against persons identified as objectionable by the managers without asking their race or color.

those enterprises historically regarded as so affected with a public interest as to be under a duty to serve all comers. In these cases, moreover, the States have actually undertaken detailed regulation of the enterprises where petitioners sought service. They are licensed and inspected. [Here should be filled in a detailed statement of all State and local regulation of the establishments in question. I am particularly anxious to know whether the State authorities place any limit on the number of licenses they will issue or the kinds of persons to whom they will issue licenses. For example, assuming that Glen Echo is licensed, would the Montgomery County authorities license another amusement park one mile away?]

(6)

In pressing these elements of State involvement, we do not go to the point of urging that the possession of any license, the potentiality of State regulation, or even the actuality of detailed regulation of other aspects of a business is alone enough to carry State responsibility for the owners' practices in selecting customers. The weighty support which the opinions of the first Mr. Justice Harlan and Justice Douglas give the argument require its careful

consideration, but we have been unable to resolve to our own satisfaction the difficulties inherent in the implications of that analysis when carried to the point ~~of asserting that~~ the grant of any license or the power of regulation is the only element of State involvement. Some licenses give the holders a special privilege to conduct for the benefit of the public a business in a field not open to unrestricted entry. In such cases the grant of one license excludes other applicants, and the possession of a State license by one who follows a practice of invidious discrimination against part of the public in effect shuts off the victims from facilities that would otherwise be available. In such a case, the State is responsible under the Fourteenth Amendment. In most cases, however, the license is only a technique of examination, taxation or regulation. It carries no duty to serve any member of the public. The State's responsibility for the licensee's conduct is surely no greater than if the business were taxed, inspected or regulated without the issuance of a license.

To say that the possession of State power to prohibit private discrimination which would be invidious in a State official is enough to render the State responsible under the

Fourteenth Amendment would seem to obliterate any distinction between public and private action. There are few activities or institutions in which a State lacks power to prohibit racial discrimination. Charitable corporations, like schools and hospitals, are undoubtedly subject to the State's constitutional power to prohibit racial or religious discrimination. The suggested doctrine would seem to mean that because the State could deny them their present freedom of choice, the Fourteenth Amendment denies it. Again, a State doubtless has the same power topprohibit discrimination in employment in any sizeable private business or to require lawyers and doctors to select all clients and patients without regard to race, color and religion as it has to require places of public accommodation to render service without individual discrimination. Furthermore, the principle would seem to extend beyond invidious discriminations. In all likelihood, a State has power to require the operators of public halls to license their use for public meetings of organizations of every political complexion. Similarly, the States must have power to require schools and colleges to grant students and teachers a trial type hearing with the privilege of facing their accusers when

facing dismissal or expulsion. It can hardly be supposed, however, that the Fourteenth Amendment presently imposes such requirements. Yet, we discern no way of escaping that conclusion if the potentiality of State regulation is sufficient to subject the private action to the test of the Fourteenth Amendment. The preservation of a free and pluralistic society would seem to require some freedom for private choice in social, business and professional associations. Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind. And even if that view be wholly wrong, the philosophy of federalism leaves the choice to the States and their people instead of vesting the only power of effective decision in the federal courts.

DEPARTMENT OF JUSTICE

HONORABLE WILLIAM MEDFORD
UNITED STATES ATTORNEY
ASHEVILLE, NORTH CAROLINA

PLEASE PROCURE THE TEXT, CITATION, DATE, ANY AMENDMENT OR REPEAL, OF ANY PRESENT AND PAST Asheville ORDINANCES, GOING BACK TO 1865, ~~IN ASHEVILLE,~~ PERTAINING TO RACIAL SEGREGATION, DISCRIMINATION, SEPARATION OF THE RACES, OR EXCLUSION OF NEGROES, IN RESTAURANTS, HOTELS, INNS, THEATERS, PLACES OF AMUSEMENT, PUBLIC TRANSPORTATION FACILITIES (INCLUDING RAILROADS, BUSES, AND STREETCARS), AND PLACES OF PUBLIC ACCOMMODATION GENERALLY, AND ANY OTHER ORDINANCES PURPORTING TO PROVIDE FOR THE RACIAL SEGREGATION OF PRIVATELY-OWNED FACILITIES.

THIS MATERIAL SHOULD BE FORWARDED AS SOON AS RECEIVED BUT IN ANY EVENT NOT LATER THAN MONDAY, JANUARY 6, 1964. IF YOU HAVE ANY QUESTION OR PROBLEM CALL ME OR ASSISTANT ATTORNEY GENERAL BURKE MARSHALL.

NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

1 1

Harold H. Greene, Chief, Appeals & Research Section, Civil Rights Div. 2175
g

12/30/63 7:25 p.m.

DEPARTMENT OF JUSTICE

HONORABLE WILLIAM H. MURDOCK
UNITED STATES ATTORNEY
GREENSBORO, NORTH CAROLINA

PLEASE PROCURE THE TEXT, CITATION, DATE, ANY AMENDMENT OR REPEAL, OF ANY PRESENT AND PAST ORDINANCES, GOING BACK TO 1865, IN WINSTON-SALEM AND GREENSBORO, PERTAINING TO RACIAL SEGREGATION, DISCRIMINATION, SEPARATION OF THE RACES, OR EXCLUSION OF NEGROES, IN RESTAURANTS, HOTELS, INNS, THEATERS, PLACES OF AMUSEMENT, PUBLIC TRANSPORTATION FACILITIES (INCLUDING RAILROADS, BUSES, AND STREETCARS), AND PLACES OF PUBLIC ACCOMMODATION GENERALLY, AND ANY OTHER ORDINANCES PURPORTING TO PROVIDE FOR THE RACIAL SEGREGATION OF PRIVATELY-OWNED FACILITIES.

THIS MATERIAL SHOULD BE FORWARDED AS SOON AS RECEIVED BUT IN ANY EVENT NOT LATER THAN MONDAY, JANUARY 6, 1964. IF YOU HAVE ANY QUESTION OR PROBLEM CALL ME OR ASSISTANT ATTORNEY GENERAL BURKE MARSHALL.

NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

1 1

Harold H. Greene, Chief, Appeals & Research Section, Civil Rights Div. 2175

12/30/63 7:35 p.m.

DEPARTMENT OF JUSTICE

HONORABLE ROBERT H. COWEN
UNITED STATES ATTORNEY
RALEIGH, NORTH CAROLINA

PLEASE PROCURE THE TEXT, CITATION, DATE, ANY AMENDMENT OR REPEAL, OF ANY PRESENT AND PAST ORDINANCES, GOING BACK TO 1865, IN RALEIGH AND FAYETTEVILLE, PERTAINING TO RACIAL SEGREGATION, DISCRIMINATION, SEPARATION OF THE RACES, OR EXCLUSION OF NEGROES, IN RESTAURANTS, HOTELS, INNS, THEATERS, PLACES OF AMUSEMENT, PUBLIC TRANSPORTATION FACILITIES (INCLUDING RAILROADS, BUSES, AND STREETCARS), AND PLACES OF PUBLIC ACCOMMODATION GENERALLY, AND ANY OTHER ORDINANCES PURPORTING TO PROVIDE FOR THE RACIAL SEGREGATION OF PRIVATELY-OWNED FACILITIES.

THIS MATERIAL SHOULD BE FORWARDED AS SOON AS RECEIVED BUT IN ANY EVENT NOT LATER THAN MONDAY, JANUARY 6, 1964. IF YOU HAVE ANY QUESTION OR PROBLEM CALL ME OR ASSISTANT ATTORNEY GENERAL BURKE MARSHALL.

NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

1 1

Harold H. Greene, Chief, Appeals & Research Section, Civil Rights Div. 2175

12/30/63 7:48 p.m.

HONORABLE CHARLES L. GOODSON
UNITED STATES ATTORNEY
ATLANTA, GEORGIA

PLEASE PROCURE THE TEXT, CITATION, DATE, ANY AMENDMENT OR REPEAL, OF ANY PRESENT AND PAST Atlanta ORDINANCES, GOING BACK TO 1965, PERTAINING TO RACIAL SEGREGATION, DISCRIMINATION, SEPARATION OF THE RACES, OR EXCLUSION OF NEGROES, IN RESTAURANTS, HOTELS, INNS, THEATERS, PLACES OF AMUSEMENT, PUBLIC TRANSPORTATION FACILITIES (INCLUDING RAILROADS, BUSES, AND STREETCARS) AND PLACES OF PUBLIC ACCOMMODATION GENERALLY, AND ANY OTHER ORDINANCES PURPORTING TO PROVIDE FOR THE RACIAL SEGREGATION OF PRIVATELY-OWNED FACILITIES, ~~WITH RESPECT TO ATLANTA.~~

THIS MATERIAL SHOULD BE FORWARDED AS SOON AS RECEIVED BUT IN ANY EVENT NOT LATER THAN MONDAY, JANUARY 6, 1964. IF YOU HAVE ANY QUESTION OR PROBLEM CALL ME OR ASSISTANT ATTORNEY GENERAL BURKE MARSHALL

NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

1 1

Harold H. Greene, Chief, Appeals & Research Section, Civil Rights Div. 2175

12/30/63 7:00 p.m.

DEPARTMENT OF JUSTICE

(Called 1 Mr. Culpepper 1/3/64 (Acting on this)

HONORABLE FLOYD M. BUFORD
UNITED STATES ATTORNEY
MACON, GEORGIA

PLEASE PROCURE THE TEXT, CITATION, DATE, ANY AMENDMENT OR REPEAL, OF ANY PRESENT AND PAST ORDINANCES, GOING BACK TO 1865, IN AMERICUS AND ALBANY, PERTAINING TO RACIAL SEGREGATION, DISCRIMINATION, SEPARATION OF THE RACES, OR EXCLUSION OF NEGROES, IN RESTAURANTS, HOTELS, INNS, THEATERS, PLACES OF AMUSEMENT, PUBLIC TRANSPORTATION FACILITIES (INCLUDING RAILROADS, BUSES, AND STREETCARS) AND PLACES OF PUBLIC ACCOMMODATION GENERALLY, AND ANY OTHER ORDINANCES PURPORTING TO PROVIDE FOR THE RACIAL SEGREGATION OF PRIVATELY-OWNED FACILITIES.

THIS MATERIAL SHOULD BE FORWARDED AS SOON AS RECEIVED BUT IN ANY EVENT NOT LATER THAN MONDAY, JANUARY 6, 1964. IF YOU HAVE ANY QUESTION OR PROBLEM CALL ME OR ASSISTANT ATTORNEY GENERAL BURKE MARSHALL

NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

1 1

Harold H. Greene, Chief, Appeals & Res. Section, Civil Rights Div. 2175

12/30/63 7:10 p.m.

Called Mr. Chadwick 1/3/64
1 Are dij it now

[Licen ordinance + Mayor's power + ...ce]

HONORABLE DONALD H. FRASER
UNITED STATES ATTORNEY
SAVANNAH, GEORGIA

PLEASE PROCURE THE TEXT, CITATION, DATE, ANY AMENDMENT OR REPEAL, OF ANY PRESENT AND PAST ORDINANCES, GOING BACK TO 1865, IN SAVANNAH AND AUGUSTA, PERTAINING TO RACIAL SEGREGATION, DISCRIMINATION, SEPARATION OF THE RACES, OR EXCLUSION OF NEGROES, IN RESTAURANTS, HOTELS, INNS, THEATERS, PLACES OF AMUSEMENT, PUBLIC TRANSPORTATION FACILITIES (INCLUDING RAILROADS, BUSES, AND STREETCARS), AND PLACES OF PUBLIC ACCOMMODATION GENERALLY, AND ANY OTHER ORDINANCES PURPORTING TO PROVIDE FOR THE RACIAL SEGREGATION OF PRIVATELY-OWNED FACILITIES.

THIS MATERIAL SHOULD BE FORWARDED AS SOON AS RECEIVED BUT IN ANY EVENT NOT LATER THAN MONDAY, JANUARY 6, 1964. IF YOU HAVE ANY QUESTION OR PROBLEM CALL ME OR ASSISTANT ATTORNEY GENERAL BURKE MARSHALL

NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

1 1

Harold H. Greene, Chief, Appeals & Research Section, Civil Rights Div. 2175

12/30/63 7:20 p.m.

DEPARTMENT OF JUSTICE

HONORABLE JOHN C. WILLIAMS
UNITED STATES ATTORNEY
POST OFFICE BUILDING
GREENVILLE, SOUTH CARLINA

PLEASE PROCURE THE TEXT, CITATION, DATE, ANY AMENDMENT OR REPEAL, OF ANY PRESENT AND PAST ORDINANCES, GOING BACK TO 1865, IN SPARTANBURG, GREENVILLE, AND GREENWOOD, PERTAINING TO RACIAL SEGREGATION, DISCRIMINATION, SEPARATION OF THE RACES, OR EXCLUSION OF NEGROES, IN RESTAURANTS, HOTELS, INNS, THEATERS, PLACES OF AMUSEMENT, PUBLIC TRANSPORTATION FACILITIES (INCLUDING RAILROADS, BUSES, AND STREETCARS), AND PLACES OF PUBLIC ACCOMMODATION GENERALLY, AND ANY OTHER ORDINANCES PURPORTING TO PROVIDE FOR THE RACIAL SEGREGATION OF PRIVATELY-OWNED FACILITIES. THIS MATERIAL SHOULD BE FORWARDED AS SOON AS RECEIVED BUT IN ANY EVENT NOT LATER THAN MONDAY, JANUARY 6, 1964. IF YOU HAVE ANY QUESTION OR PROBLEM CALL ME OR ASSISTANT ATTORNEY GENERAL BURKE MARSHALL.

Nicholas deB. Katzenbach
Deputy Attorney General

Harold H. Greene
Chief, Appeals & Research Section
Civil Rights Division

2175

12/30/63

7:30 p.m.

DEPARTMENT OF JUSTICE

HONORABLE TERRELL L. GLENN
UNITED STATES ATTORNEY
301 U.S. COURTHOUSE
COLUMBIA, SOUTH CAROLINA

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Nicholas deB. Katzenbach
Deputy Attorney General

Harold H. Greene, Chief, Appeals & Research Section, Civil Rts.Div. 2175 12/30/63 7:30p.m.

DEPARTMENT OF JUSTICE

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UNITED STATES ATTORNEY
OXFORD, MISSISSIPPI

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Nicholas deB. Katzenbach
Deputy Attorney General

Harold H. Greene, Chief, Appeals & Research Section, Civ. Rts. Div. 2175 12/30/63 7:30p.m.

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HONORABLE ROBERT E. HAUBERG
UNITED STATES ATTORNEY
JACKSON, MISSISSIPPI

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Nicholas deB. Katzenbach
Deputy Attorney General

Harold H. Greene, Chief, Appeals & Research Section, Civ.Rts. Div. 2175 12/30/63 7:30p.m.

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HONORABLE MACON L. WEAVER
UNITED STATES ATTORNEY
354 FEDERAL BUILDING
BIRMINGHAM 3, ALABAMA

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NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

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NAME AND TITLE OF ORIGINATOR (Type)
Harold H. Greene, Chief
Appeals and Research Section

ORIGINATOR'S TEL NO
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DATE AND TIME PREPARED
12/30/63 7:00 P.M.

SECURITY CLASSIFICATION

I certify that this message is official business, is not personal, and is in the interest of the Government

(Signature)

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CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE

HONORABLE BEN HARDEMAN
UNITED STATES ATTORNEY
216 U.S. POST OFFICE AND COURTHOUSE BUILDING
MONTGOMERY 4, ALABAMA

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NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

Harold H. Greene, Chief
Appeals & Research Sec. Civ. Rghts. 2175

12/30/63 7:20 P.M.

CIVIL RIGHTS DIVISION
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HONORABLE LOUIS C. LACOUR
UNITED STATES ATTORNEY
NEW ORLEANS 16, LOUISIANA

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NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

Harold H. Greene, Chief, Appeals & Research Section, Civil Rights Div. 2175 12/30/63 7:36 P.M.

CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE

HONORABLE VERNOL R. JANSEN
UNITED STATES ATTORNEY
311 FEDERAL BUILDING
MOBILE, ALABAMA

PLEASE PROCURE THE TEXT, CITATION, DATE, ANY AMENDMENT OR REPEAL, OF ANY PRESENT AND PAST ORDINANCES, GOING BACK TO 1865, IN SELMA, PERTAINING TO RACIAL SEGREGATION, DISCRIMINATION, SEPARATION OF THE RACES, OR EXCLUSION OF NEGROES, IN RESTAURANTS, HOTELS, INNS, THEATERS, PLACES OF AMUSEMENT, PUBLIC TRANSPORTATION FACILITIES (INCLUDING RAILROADS, BUSES, AND STREETCARS), AND PLACES OF PUBLIC ACCOMMODATION GENERALLY, AND ANY OTHER ORDINANCES PURPORTING TO PROVIDE FOR THE RACIAL SEGREGATION OF PRIVATELY-OWNED FACILITIES. THIS MATERIAL SHOULD BE FORWARDED AS SOON AS RECEIVED BUT IN ANY EVENT NOT LATER THAN MONDAY, JANUARY 6, 1964. IF YOU HAVE ANY QUESTION OR PROBLEM CALL ME OR ASSISTANT ATTORNEY GENERAL BURKE MARSHALL.

NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

Harold H. Greene, Chief, Appeals and Research Section, Civil Rights Div. 2175

12/30/63 7:26 P.M.

DEPARTMENT OF JUSTICE

HONORABLE JOSEPH D. TYDINGS
UNITED STATES ATTORNEY
506 POST OFFICE BUILDING
BALTIMORE 2, MARYLAND

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NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

Harold H. Greene, Chief, Appeals and Research Section, Civil Rights Div. 2175 12/30/63 8:01 P.M.

DEPARTMENT OF JUSTICE

HONORABLE EDWARD L. SHAHEEN
UNITED STATES ATTORNEY
408 POST OFFICE BUILDING
SHREVEPORT, LOUISIANA

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NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

1

Harold H. Greene, Chief, Appeals &
Research Section, Civil Rights Div. 2175

12/30/63 7:42 P.M.

DEPARTMENT OF JUSTICE

HONORABLE CLINTON N. ASHMORE
UNITED STATES ATTORNEY
TALLAHASSEE, FLORIDA

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IF YOU HAVE ANY QUESTION OR PROBLEM CALL ME OR PROBLEM CALL ME OR ASSISTANT ATTORNEY GENERAL BURKE MARSHALL. THIS MATERIAL SHOULD BE FORWARDED AS SOON AS RECEIVED BUT IN ANY EVENT NOT LATER THAN MONDAY, JANUARY 6, 1964.

NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

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Harold H. Greene, Chief,
Appeals and Research Section

2175

12/30/63 7:10 p.m.

DEPARTMENT OF JUSTICE

HONORABLE WILLIAM A. MEADOWS, JR.
FEDERAL BUILDING
300 N. E. FIRST AVENUE
MIAMI 32, FLORIDA

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NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

Harold G. Greene, Chief, Appeals and Research Section

2175

12-30-63 7:25 p.m.

DEPARTMENT OF JUSTICE

HONORABLE THOMAS B. MASON
UNITED STATES ATTORNEY
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NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

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Harold H. Greene, Chief,
Appeals and Research Section

2175

12-30-63 7:45 p.m.

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UNITED STATES ATTORNEY
TAMPA, FLORIDA

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NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

1

Harold H. Greene, Chief,
Appeals and Research Section 2175 12-30-63 7:35 p.m.

DEPARTMENT OF JUSTICE

HONORABLE CLAUDE V. SPRATLEY, JR.

UNITED STATES ATTORNEY
POST OFFICE BUILDING
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NICHOLAS deB. KATZENBACH
DEPUTY ATTORNEY GENERAL

1

Harold H. Greene, Chief,
Appeals and Research Section

2175

12-30-63 7:55 p.m.

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF JUSTICE

TO : Harold H. Greene, Chief
Appeals and Research Section
Civil Rights Division

DATE: December 30, 1963

DR:BR:icb

FROM : David Rubin and Battle Rankin

SUBJECT: Sit-in Cases

This memorandum contains a summary discussion of the extent to which the legislative history of the Fourteenth Amendment supports the following statements in the Solicitor General's memorandum of December 18, 1963, concerning the sit-in cases:

At p. 6:

> The Amendment was concerned not merely with what a State did, but with the effect of the State's action upon the opportunities for the former slaves to become equal with other men. It was concerned with conditions--with denials of equal civil rights as a consequence of State action. The right to equal treatment in places of public accommodation is one of the fundamental rights the Amendment was intended to secure against all forms of denial as a consequence of State action. The consequence does not end when the State action ceases. We do not suggest that the victim of the discrimination has a right to service that he can enforce against the proprietor of the private establishment. Our case is pitched upon the much narrower proposition that so long as the custom of practicing discrimination against Negroes in places of public accommodation survives as a proximate consequence of earlier discriminatory State laws, Congress has power to enact legislation appropriate to remedy the violation and the State may not, without a further violation, lend the aid of its police or courts to support the discrimination.

At p. 11:

> The Amendment was intended to grant power to enact broad civil rights legislation in situations in which the States had denied

> the freedmen equal protection of the laws. Congress is not limited under Section 5 to inhibiting the State's violations. It has the power to secure the right to civil equality by dealing with the consequences of the violation.

We have not yet completed the extensive discussion of the foregoing issues which we are presently preparing. That discussion will be completed within a few days. The present memorandum is intended only to summarize our conclusions.

I

The first question is the extent to which the legislative history of the Fourteenth Amendment affords support for the proposition that

> The Amendment was concerned not merely with what the State did, but with the effect of the State's action upon the opportunities for the former slaves to become equal with other men. It was concerned with conditions--with denials of equal civil rights as a consequence of State action. The right to equal treatment in places of public accommodation is one of the fundamental rights the Amendment was intended to secure against all forms of denial as a consequence of State action.

There is no doubt that the 14th Amendment was aimed at elevating the Negroes by securing them against the denial of equal civil rights as a consequence of state action. The critical question, however, is whether the right of equal access to places of public accommodation was one of the fundamental rights which the Amendment was intended to secure against such state action.

Unfortunately, there is not even the barest mention of the words "public accommodation", "hotel", "restaurant", "inn", "theater", "place of public amusement" or any other establishment of like nature in the congressional debates concerning the adoption of the 14th Amendment or in the Journal of the Joint Committee on Reconstruction. Members of the Committee which reported on the resolution

embodying the proposed Fourteenth Amendment to the Congress (Representative Stevens and Senator Howard) spoke primarily about the effect of the amendment in abolishing class legislation (Globe, 39th Cong., 1st Sess., pp. 2459, 2766).

There is general language in the debates which suggests that the Amendment was concerned with any form of inequality imposed as a consequence of state action. For example, Senator Howe of Wisconsin stated that it was a known fact that, except for federal authority, the Southern states would have "denied to a large portion of their respective populations the plainest and most necessary rights of citizenship", the right to own land, to collect wages by legal process, to appear in courts, to give testimony (Globe, Appendix, p. 219). Most of these states had abandoned their attempts to deny these basic rights, but

> these are not the only rights that can be denied; these are not the only particulars in which unequal laws can be imposed. (Ibid.)

Statements of this type, however, do not show that public accommodations were a special concern of the Congress.

We have examined the legislative history of the Civil Rights Act of 1866 because there were many statements in the debates on the Fourteenth Amendment which show that members of Congress thought that the rights guaranteed by the Civil Rights Act were to be secured by section 1 of the Fourteenth Amendment. We have found one statement by Senator Garrett Davis of Kentucky--a vehement opponent of the Act of 1866--suggesting that the bill would "sweep . . . away" distinctions between whites and Negroes in cabins, state-rooms and tables on ships and steamboats; in parlors, saloons, chambers, table and baths in public hotels, and in churches and railroads. 1/ No attempt was made by

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1/ The bill which became the Civil Rights Act of 1866 (S. 61) originally contained general language prohibiting "discrimination in civil rights or immunities among the inhabitants of any state. . . on account of race, color, or previous condition of servitude." The bill passed the Senate in this form,
(continued on following page)

proponents of the bill to deny that the bill had the effect attributed to it by Senator Davis. However, no proponent affirmatively stated that the bill would have this effect.

The Freedmen's Bureau Bill (S. 60), which was introduced by Senator Trumbull as a companion measure to the Civil Rights Bill, was vetoed by President Johnson, and failed to pass over the veto, contained a provision requiring the President to extend protection through the Freedmen's Bureau whenever it appeared that any of the civil rights or immunities of white persons were being refused or denied freedmen on the basis of color (Globe, 39th Cong., p. 209). Three opponents, but no supporters, of this measure made statements suggesting that it would prohibit discrimination in places of public accommodation (Globe, 39th Cong., p. 70, 541, 936). The statements of the opponents are not significant because the statements had reference to broad language similar to that which was deleted in the Civil Rights Act of 1866.

We conclude that support for the theory that the right to equal access to places of public accommodation was a fundamental right intended to be secured by the Fourteenth Amendment against all forms of state action is very meager and insufficient. Congress was concerned with remedying greater evils, such as State laws which kept the Negro in a state of virtual slavery by denying him such rights as the right to contract, sue, buy, hold or sell property, testify, move freely within town limits, congregate on the streets, or engage in business. The most that can be said is that since the framers stated they were abolishing class legislation, they would, had the problem been immediately before them, have contemplated that the Amendment would sweep away laws requiring exclusion of Negroes from places of public accommodation. 2/

1/ (continued from preceding page):
but the quoted language was deleted by the House. The statement by Senator Davis, however, was made after President Johnson had vetoed the bill and in the course of the post-veto debates which led to the overriding of the veto. Thus, at the time the statement was made, the bill was identical to the Act as passed.

2/ As the Supreme Court concluded in the Brown case with respect to school segregation, the history is inconclusive with regard to the framers' view of segregation laws.

II

The second question is whether the legislative history of the Fourteenth Amendment supports the proposition that:

> The Amendment was intended to grant power to enact broad civil rights legislation in situations in which the States had denied the freedmen equal protection of the laws. Congress is not limited under Section 5 to inhibiting the State's violations. It has the power to secure the right to civil equality by dealing with the consequences of the violation.

In the debates on the resolution reported by the Joint Committee on Reconstruction embodying the proposed Fourteenth Amendment, there was little discussion of the effect of the section authorizing Congress to enact appropriate legislation to enforce the Amendment. Senator Howard, a member of the Joint Committee, made the most complete statement on the purpose of the section, but his statement is inconclusive. After referring to the privileges and immunities to be secured by the Amendment from state denial, he declared that the section was "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." (Globe, p. 2766). He then went on to say that the section

> gives to Congress power to enforce, by appropriate legislation, all the provisions of this Article of Amendment. Without this clause, no power is granted to Congress by the Amendment or any one of its sections. It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the Amendment are carried out in good faith, and that no State infringes the rights of person or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the Amendment, to correct that legislation by a formal Congressional enactment. (Globe, p. 2768)

An opponent of the measure, Senator Hendricks of Missouri, stated that the section authorizing Congress to enforce the Amendment was dangerous, for in light of the liberal construction that had been claimed for the similar section of the Thirteenth Amendment in the debates over the Civil Rights and the Freedmens' Bureau bills, he feared that the section would be interpreted as authorizing Congress to invade the jurisdiction of the States. (Globe, p. 2944) A similar declaration that the section would transfer powers from the states to the federal government was made in the House by another opponent of the Amendment, Mr. Harding of Kentucky (Globe, p. 3147).

In the debates over the Bingham "Equal Rights" Amendment, which was reported by the Joint Committee and was a precursor of sections 1 and 5 of the Fourteenth Amendment, there was more discussion of the scope of the power given to Congress. This "Equal Rights" Amendment provided in its final form that:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th Amendment). (Committee Journal, p. 17).

This sweeping language suggests that the Equal Rights Amendment was intended to give Congress a general grant of legislative power. The use of the "necessary and proper" language suggests that there was no intent to limit congressional authority to "correcting" discriminatory state laws, as the Civil Rights Cases suggest. The legislative history, of the Equal Rights Amendment, however, is unclear on this point.

Two opponents of the measure (Mr. Hale and Mr. Davis, both Republicans) claimed it gave Congress power to legislate in areas traditionally regulated by the States. Mr. Stevens, a Committee member, seemed to

deny this interpretation, stating that the Amendment simply provided that "where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality," and that Congress could not interfere where there was no class legislation. (Globe, p. 1063) In answer to Mr. Hale's direct question if the Amendment conferred on Congress a "general power of legislation", Mr. Bingham, who first proposed the Amendment and was also a member of the Joint Committee, was evasive. He stated: "I believe that it does in regard to life and liberty and property, as I have heretofore stated it. . ." Mr. Hale then indicated that Mr. Bingham had misapprehended his point and rephrased the question. This time Mr. Bingham answered, "(The Amendment) certainly does this: it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life, liberty, and property." (Globe, p. 1094)

Thus, the history is inconclusive with respect to the powers which the "Equal Rights" Amendment was intended to confer upon Congress. It is, therefore, at best inconclusive with respect to the powers granted to Congress by section 5 of the ~~Amendment~~ subsequently adopted Fourteenth Amendment, which contained language which seems more restrictive.

We have not yet completed our research on the legislative history of the Civil Rights Act of 1875, and we have therefore refrained from discussing that history in connection with the issues previously dealt with herein. The history is of questionable significance. As the Government stated in its Supplemental Brief for the United States on Reargument in the Brown case (p. 85):

> The Congressional actions subsequent to 1866, which have been summarized above, have relevance as early interpretations of the scope of the Fourteenth Amendment. However, as evidence of contemporaneous understanding, their value is doubtful. Although only a few years

had elapsed since the adoption of the Amendment, there had occurred a substantial change not only in the membership of the Congress, but in the intensity of the movement, which had reached its high point in 1866 with the proposal of the Fourteenth Amendment, for securing through national action full protection of the Negro's right to equal treatment.

[illegible]
Appeals and Research
Civil Rights Division

December 2nd, 1963
FES:bjs

Frank E. Schwelb
Attorney

Sociological Aspects of the Sit-in Cases

I have been engaged in sociological and related research on the question whether segregation at places of public accommodation in the South is an expression of the caste system there rather than a matter of private choice by the individual enterpreneur. Our contention in the brief, as I understand it, will be that such a caste system in fact exists, that it is either a product of, or closely interwoven with, state action which is protective of that caste system, and that the repeal of formal laws requiring discrimination does not withdraw the state's involvement in the caste system, at least sufficiently to remove the requisite nexus of state action within the Fourteenth Amendment.

Research Done to Date

The magnitude, and, to some degree, the general character of the problem, have made it necessary for me to do a good deal of general reading around the subject, some of which has been unrewarding so far. I list first the volumes which I have examined to date:

A. Sociology & Anthropology, etc.

1. Myrdal, An American Dilemma (2 vols., 1944)
2. Barron, American Minorities A Textbook of Readings on Intergroup Relations (1957)
3. Dykeman, Neither Black Nor White (1957)
4. Senator Jacob Javits, Discrimination, U.S.A. (1962)
5. Dexter, What's Right With Race Relations (19[illegible])
6. Konvitz, A Century of Civil Rights, (1961)

[illegible] 1963

[illegible]

[illegible]

3. [illegible], [illegible] case, [illegible]

4. [illegible], The Case for the [illegible]

C. Historical

1. Franklin, Reconstruction After the War (anti-segregation)

2. Bowers, The Tragic Era (1929) (anti-Reconstruction)

3. Morison & Commagers, The Growth of the American Republic, (2 vols.) (1962)

4. Devine, The Emergence of Modern America (1940) (more objective)

5. Oberholtzer, A History of the United States Since The Civil War, 4 volumes (1937)

D. Legal

1. Scott v. Sanford 60 U.S. 393 (1854)

2. Civil Rights Cases, 109 U.S. 3

3. Hartmann, Racial and Religious Discrimination by Inkeepers in U.S.A., 12 Modern Law Rev. 449 (1949)

4. President's Committee on Civil Rights To Secure These Rights, (1947)

[illegible]

[illegible] An American Dilemma [illegible] study of the Negro problem in all of its aspects [illegible] the most comprehensive [illegible] conclusions [illegible] support the [illegible] that racial segregation [illegible] places of public accommodation [illegible] the South is an expression of [illegible] significant part of the system of [illegible] the Negro from the white".

Chapter 29 of Myrdal's work, "The Basis of Social Inequality", is devoted in large part to an appraisal of the role and significance of the segregationist's insistence on separate facilities, elimination of white-Negro social contacts, and opposition to "social equality". Recognizing the vagueness of the [illegible] phrase, Myrdal finds that the entire system and line of thought underlying these principles has its origin in slavery, and its frankest expression in the "Jim Crow" laws following Reconstruction.

Pointing out that in the American Creed, the state may not treat men unequally but the individual may select his own companions, Myrdal nevertheless believes that "the system of social segregation and discrimination against Negroes is a challenge to the American Creed". (p. 574). He points first to its one-sidedness. A Negro is never allowed to go to a white church, but the white man at the Negro church is an honored guest. (p. 575) The same is true at cinemas or restaurants or buses. In Mr. Myrdal's own words:

> When the white conductor on a train has told me occasionally that I was in the wrong car, the underlying assumption has also been the same, that the separation was made in order to save white people from having to tolerate Negro company. Contrary to the laws-which are all written on the fiction of equality- he has, with a shrug of his shoulders

* Whether, as a tactical matter, Myrdal would be a very good source to rely on is not dealt with in this memorandum.

[illegible] on the [illegible].

[illegible] "inherent in slavery as a social arrangement was the principle that the slave was inferior as a human being." (p. 577). In the days of slavery, as described by Myrdal,

> The slaves were provided with living quarters apart from the whites. Their religious activities also were usually separate. When allowed to attend religious services in the presence of white people, they had a segregated place in the church. They received no regular schooling. It was even forbidden by law to teach the slaves to read. They had their own amusements and recreations and never mixed in those of the whites.
>
> Most of these generalizations hold true also of the free Negroes in the South. They were forced into social isolation. White people did not, and could not in a slave society, accept them as equals.

After describing this social isolation of the Negro in the days of slavery, Myrdal turns to a discussion of the Jim Crow laws. This portion of his work is perhaps the most significant in connection with the present problem, since it deals to some extent with the relation between the practice of caste (as Myrdal sees it) and the legislation enacted to enforce it. Unfortunately, however, these pages are almost barren either of conclusions or of the essential facts from which conclusions can be drawn.

Myrdal believes that, after emancipation and by means of the Civil Rights Acts,

> There can be no doubt that Congress intended to give Negroes

[illegible] the way was left open for the [illegible] new legislation of the Southern states and municipalities. For a quarter of a century these systems of statutes and regulations separating the two groups in schools, on railroad cars and on street cars, in hotels and restaurants, in parks and playgrounds, in theaters and public meeting places-continued to grow, with the explicit purpose of diminishing, as far as was practicable, and possible, the social contacts between whites and Negroes in the region.

On the crucial -for our purposes- issue of whether or not these Jim Crow laws, rather than the underlying prejudices of the population, were primarily responsible for the caste system, Myrdal is inconclusive. He notes that "American sociologists, following the Sumner tradition of holding legislation to be 'inconsequential, are likely to underrate these effects [of legislation on the 'caste system']" (pp. 579-580) Myrdal says, however, that Southern Negroes tell quite a different story-

> "From their own experiences in different parts of the South they have told me how the Jim Crow statutes were effective means of frightening and freezing - in many cases of instigating segregation and discrimination." (p. 580)

Myrdal's most hopeful statement, from our point of view

> [illegible] depending upon their class and education. This tendency was broken by the laws which applied to all Negroes. The legislation thus strengthened the caste line and minimized the importance of class differences in the Negro group. This particular effect was probably the more crucial in the formation of the present caste system, since class differentiations within the Negro group continued and, in fact, gained momentum. As we shall find, a tendency is discernible again, in recent decades, to apply the segregation rules with some discretion to Negroes of different class status. If a similar trend was well under way before the Jim Crow laws, those laws must have [illegible] this particular social process for one or two generations.

In a footnote, the author concludes that "this problem of whether or not, and to what extent, the Jim Crow legislation strengthened and instigated Southern segregation and discrimination patterns is worthy of much more intensive study than has hitherto been given to it. The problem is important by itself as concerning a rather undnown phase of american history." Myrdal's observations appears still to be true.

In the following chapter, entitled "Patterns of Social Segregation and Discrimination", Myrdal treats the various situations and contexts in which this one-sided system of segregation finds its principal manifestations. In his words, "The main symbol of social inequality between the two groups has traditionally been the taboo against eating together." (p. 608) (The words here are misleading, since earlier in the chapter, Myrdal treats the sex taboo, which except for the exploitation of Negro women by white men, is by far the most violent of all.) In spite of the traditional informality of American eating, Myrdal

[illegible] aroused by violation of a series of relations which involve at least one of the elements of status: stylized expectations, settling down together, and engaging in sociable conversation.'

In the two chapters that follow, Myrdal discusses first the "Effects of Social Inequality", and then "Caste and Class." His conclusion is that the rigidly enforced system of social segregation results in the Negro being discriminated in all facets of life and his being forced into an "inferior" caste. In most of the southern states, any attempt to cross strict caste lines will meet with irresistible public or private pressures.

Historical Factors

The several histories dealing with the Reconstruction Period which I have examined (both general and specialized) have had little or nothing to say about the specific problem with which this memorandum is concerned. There is no doubt that under slavery, a formal and rigid caste system was enforced; that, after the war, the Black Codes sought to create a social order which would have differed from pre-war days more in designation than in practice; that during the Reconstruction Period an attempt was made by Congress to remove restrictions of caste as well as those of slavery; and that, after white control was re-established in the former confederate states, the system of white political and social supremacy was established, by the disfranchisement of the Negro and by the enforcement of strict segregation in public accommodations and in other facets of life.

Like Mr. Myrdal, I have found no discussion of the respective roles of legislation and folkways or mores in the practice and severity of the system of segregation which prevailed following the Reconstruction era. The legislation which is most frequently discussed is that involving the disfranchisement of the Negro (and this in connection with the earlier reduction, and in some instances, elimination of the Negro vote by fraud or private intimidation by the Ku Klux Klan). I am not outlining this process here because, at least for Mississippi and Louisiana, this has been done in considerable detail in our voting cases there. See also

[illegible] 18. [illegible]
[illegible] 413, [illegible]
relegated [illegible] the [illegible]
as merchant [illegible] who, although [illegible]
that the social [illegible] which [illegible]
at places of public accommodation [illegible], although, the
Black Codes, and post-Reconstruction Jim Crow coincided
with the period during which the Negro was disfranchised,
partially disfranchised. As Tyeral pointed out, Negro
reconstructed legislatures of the southern states,
elected in part by Negro suffrage, required desegre-
gated public accommodations (Louisiana and South Carolina
even had integrated schools). Negro suffrage and
desegregated accommodations both fell victim to the
reassertion of white control.

Professors Morison and Commager have summarized
the effect of the end of Reconstruction in their
Growth of the American Republic (1962).

> What all this meant--the end of Reconstruction, the restoration of white rule, the watering down of the Enforcement Acts and their judicial nullification--was that the Southern Negro was exiled to a kind of no-man's land halfway between slavery and freedom. He was no longer a slave; he was not yet free. He was tied to the soil by the sharecrop and crop-lien systems. He was excluded from most professions and from many jobs. He was fobbed off not only with segregated schools, but with schools that were palpably inferior, and with 'separate' accommodations that were rarely 'equal.' Socially he was relegated to a position of clear inferiority, and expected not only to accept the position without protest, but to rejoice in it by playing the role of 'Uncle Tom.' At first gradually, then with dramatic speed he was rendered politically impotent: 'grandfather' clauses, literacy tests, poll taxes, and--where these failed--naked intimidation deprived him of the vote.

The authors then, [illegible] Cable's article in the Century [illegible] January 1885, entitled The Freedman's Case in Equity, as follows:

> There is scarcely one public relation of life in the South where the Negro is not arbitrarily and unlawfully compelled to hold toward the white man the attitude of an alien, a menial, and a probable reprobate, by reason of his race and color. One of the marvels of future history will be that it was counted a small matter, by a majority of our nation, for six millions of people within it, made by its own decree a component part of it, to be subjected to a system of oppression so rank that nothing could make it seem small except the fact that they had already been ground under it for a century and a half. . . . It heaps upon him in every public place the most odious distinctions, without giving ear to the humblest plea concerning mental or moral character. It spurns his ambition, tramples upon his languishing self-respect, and indignantly refused to let him either buy with money or earn by any excellence of inner life or outward behavior, the most momentary immunity from these public indignities.

For an astonishingy sympathetic account of the disfranchisement of the Negro, see Oberholtzer, A History of the United States Since the Civil War, Volume V, pp 719-727 (1937). Even Mr. Oberholtzer, while not using the word "caste", recognized its applicability in substance when speaking of the Negro:

> Nevertheless it was undeniable that they were being treated unfairly in many particulars and did not enjoy that equal pro-politicians, who in the North, had become idealists for theirown ends, had earlier said

[illegible] this use in the [illegible]
[illegible] is the part of what was appro-
priate for the support of racial
policies.

Sectors involving the "Big Picture"

In view of the basic characteristic of the problem presented to me, I did some reading in the principal theoretical defenses of segregation to determine whether the practices at issue in the cases now before the Court are defended by their most articulate spokesmen in terms of caste. While I recognize that the unofficial character of these authors and the difficulty in attributing their ideas to anyone else, I thought that at least a cursory examination of their works would be helpful.

In my opinion, by far the most effective of these works is James Kilpatrick's The Southern Case for School Segregation (1962). Putnam's Race and Reason (1961) suffers from its reliance on "ad hominem" arguments (e.g."equalitarian" anthropologists are mostly minority group members themselves, and the deriding of opposing arguments the characterizes the logic of his adversaries as being equivalent to two plus two equals six). Jones Jorman's The Case for the South (1960) is strident and sarcastic in tone, far less documented than Putnam's work and far less comprehensive and reliable than Kilpatrick's. However, the general arguments and feelings expressed by these writers are the same. The Negro is inferior, at least in the sense that he is less adaptable to western civilization. He is innately less intelligent, his morals are lower, his disease rate is higher. He has never created a civilization, and when he intermarries with the white race, his inferior characteristics ruin the white man's civilization. Accordingly, social contacts must be minimized and the Negro must be segregated in schools and in other; otherwise, he wants the secret [illegible] white woman'.

[illegible] Southern [illegible] the [illegible] of conserving white [illegible] and white brotherhood [illegible] believe that in the [illegible] different fear, there would [illegible] maintaining of [illegible].

Here again comes into evidence the 'fear' among Negroes of the force of community public opinion, and of the restraints of self-discipline and self-control. In the absence of such factors, the Negro man requires an exterior discipline to keep him within the confines of acceptable conduct. Added to the official deterrents is the widespread realization that there is among white men what amounts to universal agreement that an all-inclusive protective mantle shall be maintained around all white women. This collective determination to safeguard white women from black men formerly was evidenced in the mob psychology of lynch crowds. Some of the thinking persists today, in more legal and less violent manifestations, in the white Southerner's insistence upon strict enforcement of laws barring interracial contacts, by whatever means accomplished.

The relevance of this passage to the sit-ins may be deemed oblique, and yet the words of this prominent South Carolina journalist reflect that "the barring of interracial contacts has as its goal the keeping

of the Negro in his place - surely an expression of "caste".

Some Legal Thoughts

While this memorandum is not devoted primarily to the reading of cases and statutes, a few thoughts which have occurred to me during my research might be helpful:

(1) The "caste" to which the Negro belonged under slavery is aptly described in the Dred Scott case by Chief Justic Janey. At 60 U.S. 393, in considering whether the Founding Fathers included Negroes within the term "citizens", the Chief Justice wrote of Negroes that

> "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit.

(2) The consistency with which public authorities in the deep south arrest sit-in demonstrators, etc. without ever being requested to do so by the proprietor (see earlier sit-in cases, also Nesmith v. Alford, F. 2d (5th Cir. 1963), Bowan v. Birmingham Transit Co., 280 F. 2d 531 (5th Cir. 1960); Baldwin v. Morgan, 251 F 2d 780 (5th Cir. 1958); United States v. City of Jackson F 2d (5th Cir.)) and probably a host of other cases, indicates that the formal legal requirement of segregation is not a pre-requisite of state involvement. While this proposition does not remove the necessity for showing significant involvement by the state in discriminatory conduct, yet cases of this kind do show that the tactical removal of the formal prohibition can often be something very different from abandonment of the state's total commitment to segregation.

OFFICE OF
THE SOLICITOR GENERAL

December 6, 1963

Assistant Attorney General Marshall

For your information.

A.C.

A TENTATIVE THESIS FOR ARGUMENT IN THE "SIT-IN" CASES

I

First, it is essential to understand the true nature of racial segregation at lunch counters, in restaurants and in other places of public accommodation. Viewed in isolation, a single refusal to permit a Negro to sit at a lunch counter open to other members of the public can be accurately described as a private businessman's exercise of the right to select his customers, or a private property-owner's exercise of the right to choose his guests. Such a description is as inaccurate as it is incomplete when applied to widespread customary segregation in virtually all places of public accommodation. Such segregation imposes a stigma of inferiority--a badge of servitude--the cruel function of which is to brand Negroes as a caste not entitled to social or political equality with other people.

This critical proposition can be demonstrated in many ways, but in none more vividly than the practice of department stores to solicit the patronage of Negroes, to invite them into the store and make sales in all departments but then to deny them the privilege of breaking bread with their fellow men. It must be remembered too that we are dealing with establishments in which any business relationship is very casual, utterly unlike employment or the lawyer-client or doctor-patient relationship; in places of public accommodation any orderly person, except those branded as members of the inferior race, is always and automatically served.

II

The customary stigma--the caste system with which these cases deal--was fostered and promoted by State action in the narrowest sense of the term. State statutes and municipal ordinances, on a wide scale, required segregation in places of public accommodation, upon common carriers, and in places of public entertainment. State laws provided for segregation in related areas such as schools, court houses and public institutions. State policy has long

expressed, in countless other ways, the notion that Negroes should be treated as an inferior caste. In every real sense, the custom of segregation is a product of State action.

The custom is now enforced chiefly of its own momentum in the sense that it is no longer compelled by law, but it is largely dependent upon State support in the form of police assistance and prosecution for criminal trespass. More important, having promoted by law a system of segregation in places of public accommodation, the States cannot now disclaim all further responsibility for its operation upon the ground that there is no present law requiring the particular establishments involved in these cases to engage in segregation. The excessively simple distinction between affirmative action and failure to act is no more adequate in applying the Fourteenth Amendment than in the law of torts. The concept of State action, that is to say of State responsibility, is a subtler principle requiring judgment upon the whole congery of facts. Burton v. Wilmington Parking Authority, 365 U.S. 715; Peterson v. Greenville, 373 U.S. 244; Shelley v. Kraemer, 334 U.S. 1.

Here, the central fact is that the custom or condition denying Negroes equal treatment in places of public accommodation is largely the product of State law, not only because of the earlier statutes and ordinances requiring segregation but because of the support given by laws in related areas. One who creates a condition violating or endangering the rights of others often has an affirmative duty either to take affirmative action or to suffer responsibility for the consequences. The analogy should be applicable here. It must be remembered, too, that the places of public accommodation with which we are concerned are very similar, in both practical and legal terms, to the old occupations, such as innkeeper or farrier, owing the public a duty of non-discriminatory service. They are also establishments that the State regulates for the benefit of the public in so many respects as to leave one with the moral certainty that it would impose this additional regulation if its policy were to treat Negroes as the equal of

whites. Nor should it be forgotten, in reaching the overall judgment as to the degree of State involvement, that there is no significant element of business choice or the ownership of private property involved in the continued imposition of a stigma of inferiority (see above).

Taking all these things together it is certainly fair to say that the custom of racial segregation is a condition in which the States are still responsible for the condition in which Negroes are denied a kind of equality the Fourteenth Amendment was intended to secure.

III

The fact that the present condition of widespread racial discrimination in places of public accommodation is a product of State violations of the Fourteenth Amendment can also be demonstrated by considering whether Congress has power under Section 5 of the Amendment to correct the condition by appropriate legislation. We would argue that it can; that Congress is not limited simply to forbidding the unconstitutional State action; and that the framers of the Fourteenth Amendment clearly intended Congress to have the power to secure this kind of civil right for Negroes whenever it had been denied by a State.

IV

The choice of an affirmative remedy may rest with Congress, but a State which has fostered the practice of racial segregation in places of public accommodation as a stigma of racial inferiority, and which thus has created a condition in which Negroes are denied the equality with other members of the public that the Fourteenth Amendment was intended to secure, may not, without further violating the Fourteenth Amendment, lend the aid of its law enforcement agencies and courts to the preservation of that unlawful condition. Whether the Negroes would have a direct action against such an establishment to secure the services of food or admission to entertainment need not be decided;

possibly there would be no affirmative relief in the absence of congressional legislation. Our contention is simply that a State that has created this unworthy custom by earlier laws may not constitutionally take steps to preserve it when invoked by public establishments without the compulsion of earlier laws. By the same token, a State would violate the Fourteenth Amendment if it gave the owners of such establishments a privilege of self-help in ejecting the members of the public against whom they desired to impose the unlawful stigma.

UNITED STATES GOVER. ıENT D. ARTMENT OF JUSTICE

Memorandum

12/63

TO : Director, Federal Bureau of Investigation DATE:

NdeBK:HHG:gmm

FROM : Nicholas deB. Katzenbach
Deputy Attorney General

SUBJECT: Text of local segregation ordinances for use in sit-in brief in the Supreme Court

Please procure the text, citation, date, any amendment or repeal, of any present and past ordinances, going back to 1865, pertaining to racial segregation, discrimination, separation of the races, or exclusion of Negroes in restaurants, hotels, inns, theaters, places of amusement, public transportation facilities (including railroads, buses, and streetcars) and places of public accommodation generally, and any other ordinances purporting to provide for the racial segregation of privately-owned facilities, with respect to the following cities: Birmingham, Selma, Montgomery, Gadsden, in Alabama; New Orleans, Shreveport, Baton Rouge, Monroe, in Louisiana; Jackson, Meridian, Clarksdale, Hattiesburg, Natchez, in Mississippi; Baltimore, Cambridge, Salisbury, in Maryland; Tallahassee, Jacksonville, Miami, Gainesville, Tampa, in Florida; Albany, Americus, Atlanta, Savannah, in Georgia; Charleston, Columbia, Greenville, Greenwood, Spartanburg, in South Carolina.

This material is urgently needed for use in the preparation of a brief the Supreme Court has requested the Department to file in the sit-in cases (Griffin v. State of Maryland). It should be forwarded as soon as received but in any event not later than Monday, January 6, 1964.

December 18, 1963

NOTE FOR:

Messrs. Marshall, Spritzer, Greene and Claiborne

Attached is a summary of my present tentative analysis of the "sit-in" cases.

It might be helpful to read it before our meeting at 11 a.m., Wednesday (this morning).

Archibald Cox

Attachment

Introduction and Summary of Argument

The fundamental issue in these cases is, under what circumstances and to what extent does the Fourteenth Amendment bar State enforcement of racial segregation in privately owned and operated places of public accommodation or entertainment. Millions of Negroes are subjected to racial discrimination in private businesses open to the general public. The "sit-in" demonstrations leading to these convictions were part of a widespread peaceful protest against the practice. Petitioners claim that the involvement of the States in their arrest, prosecution and conviction is enough to violate the Equal Protection Clause. Respondents, on the other hand, invoke the freedom and responsibility of individuals to make their own decisions concerning the use of private property and the choice of associates. In a civilized community, they say, where legal remedies have supplanted private force, private choice necessarily depends upon the support of sovereign sanctions, and consequently, when the State does no more than protect the owner against all unwanted and unprivileged intrusions, there is no denial of equal protection of the law.

In the Civil Rights Cases, 109 U.S. 3, 11, the Court drew a fundamental distinction between a State's denial of equal protection of the law and a private enterprise's discriminatory conduct, however odious:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.

We fully accept the fundamental distinction. The key to the resolution of the present conflict lies, we believe, in a full appreciation of the nature and sources, in many States, of the practice of subjecting Negroes to the stigma of segregation in places of public accommodation and entertainment. For when the true nature and sources of the practice are understood, it becomes apparent that the convictions at bar should be reversed upon grounds fully consistent with the distinction supported only by color-blind State remedies between private discrimination and State denial of equal protection of the laws.

For some purposes, an isolated refusal to permit a Negro to sit at a lunch counter open to white members of the public can be fairly described in legal concepts as a private businessman's exercise of the right to choose his

customers, or as a property-owner's exercise of the rights to choose whom he will permit on his premises or in specified areas. In these terms the practice of racial segregation in places of public accommodation seems to be no more than a series of private choices concerning the use of private property and the conduct of private business, all running in the same direction but nonetheless non-governmental. For the purposes of the Fourteenth Amendment, however, such a description is as inaccurate as it is incomplete when applied to widespread customary segregation in virtually all places of public accommodation and entertainment in States which adopted and enforced ppolicies of segregation in order to maintain the inferior status of the former slaves.

In the first place, segregation is enforced in places of public accommodation and entertainment as a stigma of inferiority--a badge of a subjection--the cruel function of which is to brand Negroes a caste not entitled to social or political equality with other people. The bare legal concepts are no more adequate to describe the truth of segregation in this context than chemical formulas to describe a man. Hitler's pogroms were more than assault, battery and

the malicious destruction of property. Auschwitz was not merely homicide.

Here, we are dealing with the most casual and evanescent of all business relationships. Places of public accommodation serve any orderly person, always and automatically, up to their capacity, except those branded as members of an inferior race. There is none of the continuity or selectivity that enters into employment; and none of the personal contact or need for mutual trust, confidence and compatibility that characterizes the doctor-patient and lawyer-client relationships. The virtual irrelevance of the legal concepts of private property and choice of customers is vividly demonstrated by the practice of many department stores. They solicit the patronage of Negroes, invite them onto the property and into the store, make sales in all departments but then deny them the privilege of breaking bread with other men. Manifestly, it is the stigma--the brand of inferiority that is important, not the use of the premises or choice of customers.

Second, the practice of segregation as a mark of inferiority was fostered and promoted by State action in the narrowest sense of the term. State statutes and municipal

(1)

ordinances, on a wide scale, required segregation in places of public accommodation, upon common carriers, and in places of public entertainment. State laws provided for segregation in related areas such as schools, court houses and public institutions. State policy has long expressed, in countless other ways, the notion that Negroes should be treated as an inferior caste. In every real sense, the custom of segregation is a product of State action.

These two critical elements, especially the second, distinguish the Civil Rights Cases from the cases at bar.

The objection will be raised that the laws commanding segregation have been repealed, that the laws in related areas are falling into disuetude, and that today discrimination or segregation in places of public accommodation is the result of the proprietor's private decision uncoerced by State action. The fact that many proprietors share the same prejudice, it will be said, cannot destory their individual right to choose; and State violations of the Fourteenth Amendment sometime in the past cannot deprive the individual proprietors of their private right once the unconstitutional State action has ceased. The repeal of the unconstitutional law, the argument concludes, takes the State out of the picture.

The operation of the Fourteenth Amendment is not shut off so easily. The Amendment was concerned not merely with what a State did, but with the effect of the State's action upon the opportunities for the former slaves to become equal with other men. It was concerned with conditions--with denials of equal civil rights as a consequence of State action. The right to equal treatment in places of public accommodation is one of the fundamental rights the Amendment was intended to secure against all forms of denial as a consequence of State action. The consequence does not end when the State action ceases. We do not suggest that the victim of the discrimination has a right to service that he can enforce against the proprietor of the private establishment. Our case is pitched upon the much narrower proposition that so long as the custom of practicing discrimination against Negroes in places of public accommodation survives as a proximate consequence of earlier discriminatory State laws, Congress has power to enact legislation appropriate to remedy the violation and the State may not, without a further violation, lend the aid of its police or courts to support the discrimination. In such cases the State is involved both in creating the

discriminatory practice and in supporting it by the criminal prosecution. It cannot say that the State's only involvement has been color-blind.

Whether an individual's discrimination against Negroes is to be regarded as a proximate consequence of the State's earlier violations of the Fourteenth Amendment presents a question of degree that can be resolved only by consideration of all the relevant circumstances. That the immediate decision to discriminate is private is inconclusive; the Amendment is violated if the State in any of its manifestations is sufficiently involved. Thus, a State may not enforce, by injunction or damages, a restrictive covenant against the sale of a parcel of real estate to non-Caucasians even though the covenant was the product of voluntary negotiations. Shelley v. Kraemer, 334 U.S. 1; Barrows v. Jackson, 346 U.S. 249. Nor may a municipal corporation serve as trustee under a charitable trust the terms of which, as executed by the private settlor, call for discrimination against Negro children. In Burton v. Wilmington Parking Authority, 365 U.S. 715, the Court held that the Equal Protection Clause was violated when a restaurant, privately owned and operated, refused to serve Negroes in the space it

rented in a municipally owned and operated parking facility. In Lombard v. Louisiana, 373 U.S. 267, even though the law left restaurant owners freedom to choose, it was enough that the Mayor and Chief of Police issued statements condemning demonstrations against the practice of racial segregation.

The central fact here is that the States commanded segregation for many years on a wide front. Between State policy and the prejudices and customs of the dominant portions of the community there was a symbiotic relation. The prejudices and customs gave rise to State action. Legislation and executive action confirmed and strengthened the prejudices, and also prevented individual variations from the solid front. State responsibility under such conditions is too clear for argument even though segregation might be the proprietor's choice in the absence of legislation. Peterson v. Greenville, 373 U.S. 244.

State responsibility should not end with the bare repeal of laws commanding segregation in places of public accommodation. Having shared in the creation of a practice depriving Negroes of the kind of equality the Fourteenth Amendment was intended to secure, the State cannot turn its

back and deny involvement through the momentum its action has generated. The law is filled with instances of liability for the consequences of negligent or wrongful acts. Until the connection between the wrong and the consequences becomes too attenuated. [Citations.] Nor can the State claim to be like an innocent bystander. Even one who without fault puts another in danger of injury has a duty to act to prevent the danger from eventuating or to minimize the damage if harm occurs. [Citations.] One who makes an innocent misrepresentation must communicate the truth to the recipient as soon as he learns that the representation was false. [Citations.] Similarly, until time and events have attenuated the connection, the State continues to bear responsibility for the conditions it has shared in creating that result in branding Negroes as an inferior caste.

~~In deciding whether the connection is too attenuated it is relevant~~ There can be little doubt even today that the practice of maintaining racial segregation as a stigma of imposed inferiority is, in many States, a consequence of the State's antecedent action.

We recognize that treating the practice as a consequence of State action for the purposes of imposing a measure of

State responsibility will, to a corresponding extent, lessen the opportunities and/or protection for private choice. Judgments concerning "legal cause" and the resulting legal responsibility inevitably involve considerations of policy. Here it is relevant to consider that we are dealing with businesses essentially similar to the public callings traditionally subject to the duty to serve all members of the public without discrimination. Whether to impose the duty is a matter for State law, and we do not mean to suggest that wherever a State has power to regulate a business so as to eliminate racial discrimination, its failure to exercise the power violates the Fourteenth Amendment. Our point is the much narrower submission that in deciding whether to hold that discrimination is the product of earlier State action, which would to some extent curtail individual freedom, it is relevant to consider that these are all businesses already subject to detailed regulation in the public interest.

balance

"The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Marsh v. Alabama, 326 U.S. 501, 506.

It is also relevant, we submit, that the only private right ~~xxxxxx~~ invoked in behalf of these businesses that have voluntarily dedicated their property to public use is the right to impose a stigma of inferiority. As pointed out above, the relationship between restaurant and patron involves neither the continuity nor the mutual trust, confidence and compatibility of professional relationships. The operator makes none of the judgments concerning reliability, competence and personal acceptability formed by an employer in selecting employees. And surely it cannot be seriously argued that the operator has any desire to close his property to the use of Negroes except as a means of branding them an inferior people.

There can be little doubt of the power of Congress to legislate under the Fourteenth Amendment with respect to widespread racial discrimination in places of public accommodation. The Amendment was intended to grant power to enact broad civil rights legislation in situations in which the States had denied the freedom of equal protection of the laws. Congress is not limited under Section 5 to inhibiting the State's violations. It has the power to secure the right to civil equality by dealing with the consequences of the violation. Section 5 of Amendment XIV(a),

like the "necessary and proper" clause in Article I, ~~must~~ carries authority to enact any measure suited to remedy unconstitutional State action even though it may have wider ramifications. The controlling principle was stated by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 421:

"The sound construction of the Constitution must allow the national legislature that discretion, with respect to which the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

While the choice of an affirmative remedy may rest with Congress, a State which has fostered the practice of racial segregation in places of public accommodation as a stigma of racial inferiority, and which thus has created a condition in which Negroes are denied the equality with other members of the public that the Fourteenth Amendment was intended to

secure, may not, without further violating the Fourteenth Amendment, lend the aid of its law enforcement agencies and courts to the preservation of that unlawful condition. Whether the Negroes would have a direct action against such an establishment to secure the services of food or admission to entertainment need not be decided; possibly there would be no affirmative relief in the absence of congressional legislation. Our contention is simply that aState that has created this unworthy custom by earlier laws may not constitutionally take steps to preserve it when invoked by public establishments without the compulsion of earlier laws. By the same token, a State would violate the Fourteenth Amendment if it gave the owners of such establishments a privilege of self-help in ejecting the members of the public against whom they desired to impose the unlawful stigma.

Introduction and Summary.

A. The fact: characteristics of the discrimination involved. (or How it is)

Generalities
(Our examination is confined to discrimination against the Negro as such in places of public accommodation in the South, particularly the States at bar -- Perhaps of a different character elsewhere -- Summary of findings)

1. Pervasiveness of the discrimination.

(a) Generality of the practice (at least in South) (not isolated instances)

(b) Concerted character of the discrimination ("holding the line")

(c) Rigidity of the practice
(Undeviating -- no exceptions -- all Negroes, no matter how unobjectionable).

(d) Antiquity of the practice
(old, frozen, settled practice)

(e) Part of a pervasive pattern
(Though in some respects distinct, the discrimination involved here is part and parcel of a cradle-to-grave system of exclusion and segregation directed against the Negro -- Thus unlike any other discrimination in this country, racial or otherwise -- millions of victims for 100 years and more).

2. Public character of the discrimination.

(a) Public place
(Define places of public accommodation -- Places licensed or regulated by law -- Places whose customers have often been determined by law: common law duty of inkeepers, carriers; public accommodation laws; compulsory segregation laws -- Places otherwise generally open to the public --)

(b) Public service --
(Important, everyday service, part of the public life of the community, usually taken forgranted)

(c) Public relationship --
(Impersonal relationship between proprietor and customers, and between customer and customer -- Absence of private communication or intimate contact)

(d) Public act of discrimination
(Discrimination is manifested in public, before an audience, with reference to that audience, which, as as we shall see, bears on its purpose and effect)

(e) Public origin of discrimination
(In the narrowest sense, discrimination is usually a response to the wishes of the customer public, rather than a purely private personal decision of the proprietor --

As we shall suggest, it is also a product of community pressures, of public policy, and, ultimately, of State action).

3. Irrationality of the discrimination.

(a) Discrimination against entire race --
(Operates against a class, not individuals -- Not a mere innocent idiosynchrasy (no redheads), but an invidious discrimination, part of a pervasive scheme aimed at a particular race).

(b) Discrimination against Negroes alone
(All others admitted indiscriminately, without exception)

(c) Discrimination against Negroes without pretext for any discrimination
(Whatever supposed justification is claimed for refusing to hire any Negroes because the chances are they will prove themselves "shiftless" or dishonest, or for barring them as tenants because they are assumed to be generally dirty or destructive, no such shadow of a pretext exists here, where there is no continuing or close relationship involved, but only the most temporary, casual, and impersonal association, in which almost all personal or "racial" attributes are irrelavant -- No "selection" of customers involved -- Nor is eating at a lunch counter or riding on a carousel a private "social" function -- No right of "privacy" or right of "association" is involved).

(d) Anomalies of the practice
(national chain store with inconsistent policies North & South -- Service at all departments except food department -- "Take-out" orders, but no consumption on the premises -- Eating standing, but not seated -- Stools, but not booths)

4. Invidiousness of the discrimination
(Precisely because it obviously has no necessary or legitimate purpose, because it is dramatic and public, because it works a severe hardship, discrimination in places of public accommodation is pre-eminently suited to serve as a symbolic act of degradation, constantly reminding the Negro of his "inferiority"aand hopefully crushing his hope ever to achieve full equality, and, at the same time, giving heart to the faltering white community that it is, indeed, superior.

B. The responsibility: evolution of the practice and the role of States (or How it came to be)

1. Slavery and the "free person of color"

(a) Slavery in America a legal institution
(Slave Codes -- Without State laws, slavery could not have survived -- Cf. Lord Mansfield's "Great Judgment")

(b) Justification of slavery on ground of inferiority of Negro race.
(Original justification for enslaving African as "heathen" soon gives way to racial theory -- Early anti-miscegenation laws)

(c) Inferior status of the free Negro
(Early anti-emancipation laws -- Legal disabilities of the "free person of color" -- Laws applicable to them model for post-emancipation "Black Codes" -- All blacks deemed inferior, whether slave or free, see Taney in Dred Scott and elsewhere)

(d) Separate eating, lodging and entertainment in slavery days
(Plantation celebrations and the etiquette of standing while the master ate alone -- separate lodging for field hands (but house servants?) -- In town, or traveling? Inns and taverns? Slaves on errands? Free Negroes?)

2. Emancipation, the Black Codes and Reconstruction

(a) The Thirteenth Amendment and the disappointed expectation of its framers
("First things first," but also some hope that a declaration of freedom would accomplish full equality -- The Southern States react through the Black Codes -- Demonstrated need for implementing legislation -- The Freedman's Bureau Bill -- The Civil Rights Act of 1866)

(b) The Fourteenth Amendment and its implementation
(No explicit purpose to eliminate discrimination in places of public accommodation, but so viewed by many contemporaries, witness (1) State public accommodation laws (Fla.? S.C.? Md.?); (2) Civil Rights Act of 1875, sponsored in 1870 -- Clear expectation that discriminatory practices would not subsist indefinitely)

3. Redemption without reaction.
(Practice of exclusion or segregation in places of public accommodation not immediately revived -- Evidence: cf. Woodward; S.C., Md., Fa.)

4. Jim Crowism revived or introduced by official action

(a) Late, gradual growth of Jim Crow practices
(Originally permissive segregation laws, then compulsory legislation -- Resisting proprietors?)

(b) Other areas first, public accommodation discrimination a recent development
(Largely a matter of local legislation (unlike RR, for obvious reasons) -- S.C., Md., Fla.)

(c) Ultimate pervasiveness of discriminatory pattern imposed by law
(Often pointless, except as a pointed badge of inferiority -- S.C., Md., Fla.)

(d) Recent and reluctant retreat by the States
(Attempted enforcement of plainly unconstitutional laws -- Failure to repeal -- Indirect official encouragement to continued discrimination -- S.C., Md., Fla.).

5. Continuing force of State action through surviving public policy and custom
(Practices and underlying prejudices partially attributable to State action -- S.C., Md., Fla.)

6. The legal consequence: The duty of the States and the power of Congress (or what is to be done)

1. The central purpose of the Reconstruction Amendments to free the Negro from public discrimination on account of his race and to assure him legal protection in the full, equal enjoyment of the public life

(a) Natural special concern for the Negro

(A matter of history -- Also, a question of undoing past injustices to the race -- Quote Slaughterhouse Cases, Strauder)

(b) Imposition of special obligation on the States with respect to the Negro.
(Here, they must at least revise their laws, repealing discriminatory provisions and amending protective laws to include the Negro -- Perhaps, also, some duty to take affirmative action to protect the "freedman," or, at least, not withdraw existing legal protections so as to put him at the mercy of "private" discrimination).

(c) Free access to places of public accommodation has become a matter of public right, entitled to legal protection.
(Early recognition as a "civil right", rather than "social privilege": Sumner, Civil Rights of 1875, common law, early public accommodation laws -- Always viewed by some, including Southern States, as a matter to be regulated by law, not private choice: do, compulsory segregation laws -- Contempory broad notion of the area subject to regulation by law -- places of public accommodation more "public" today -- Access now taken for granted -- Part of "public life of the community)

(d) Possible conclusion: The States today have a constitutional obligation to enforce a right of access
(It would follow, of course, they cannot do the opposite -- enforce a right to arbitrarily discriminate -- But we need not go so far)

2. The Constitutional obligation of the States as affected by past action promoting discrimination in this and related areas

[illegible]

[illegible] are in which the Supreme Court has taken no action.

You have requested that I ascertain the nature of the eleven cases pending before the Supreme Court in which the Court has taken no action. The cases are as follows:

1. Gillians v. North Carolina: This case arose in Fowler, North Carolina. The petitioner was convicted of trespass after warning under the same statute involved in the Avent case. The writ of the Court has written to consider in Augusta whether Fowler has a restaurant segregation ordinance.

2. Fox and Simpson v. North Carolina: This case arose in Raleigh, North Carolina. The petitioners were convicted of trespass after warning under the same statute involved in the Avent case. The writ of the Court has written to consider in this case to inquire whether Raleigh has a restaurant segregation ordinance.

3. Reese v. Maryland: These petitioners were convicted of disorderly conduct for refusing to leave the Cayton Bar somewhat back outside of Baltimore. One of the petitioners had to be carried out. Petitioners argue that up until the time of their arrest nothing that they did properly could be considered disorderly and that, consequently, there is no evidence to support their convictions.

4. Mitchell v. Charleston (S.C.): These petitioners were convicted of trespass in violation of Section 16-388, one of South Carolina's - the same provision involved in the Bell and Bouie case

cc: Records
Chrono
Greene (2)
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in which certiorari has been granted. The petitioners sat at a lunch counter for five and one half hours before they were ordered to leave. They were only asked to leave because the police had received a call that there was a bomb in the store. Prior to the call, the manager had determined not to interfere with petitioners. When petitioners were asked to leave, they were not told of the presence of the bomb. Essentially, the same arguments are advanced here as in the Barr and Bouie cases.

5. Hamm v. Rock Hill (S.C.): These petitioners' convictions were upheld as violative of Section 16-388, Code of South Carolina -- the same provision as was involved in the Peterson case. There appears to be no Rock Hill segregation ordinance. However in this case, the arrest warrants did not indicate what provision of law petitioners were charged with violating nor were they informed of the statute under which they were charged in the trial court. They could have been charged under Section 16-388, 16-386 (the Barr - Bouie statute) or 19-12 of the Rock Hill Code). Petitioners were merely found guilty of trespass. The appellate court, however, found petitioners' conduct violative of 16-388. Petitioners claim that they were entitled to know the specific provision of law under which they were charged. The petition for certiorari in this case was filed too late in the term for the Court to act on it.

the 1960 provision covering failure to leave after requested See Br 36

6. Ford v. Tennessee: These petitioners were convicted of violating 39-1204 of the Tennessee Code in that they wilfully disturbed a religious assembly. The incident occurred at the time the Assembly of God Church in Memphis held a city wide rally at Overton Park Shell -- an open air auditorium located in a publically owned park. The Church had leased the auditorium from the City of Memphis. Petitioners took seats in the auditorium. It is alleged that the crowd became disturbed. When petitioners refused to leave, they were arrested.. Petitioners argue that there is no evidence to sustain their conviction and that their acts occurred in a public facility where they had a right to be.

Effect of regulatory, taxing, and similar licenses

Williams v. Howard Johnson's Restaurant, 268 F. 2d 845, 847 (C.A. 4) (restaurant license is "designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served"); Simkins v. Moses H. Cone Memorial Hospital, 211 F. Supp. 628, 636 (M.D. N.C.) (hospital license "designed to protect the health of persons served by the facility, and do not authorize any public officials to exert any control whatever over management of the business of the hospital, or to dictate what persons shall be served by the facility."); Wood v. Hogan, 215 F. Supp. 53, 58 (W.D. Va) (hospital license; must distinguish between "a license which is used as a means of regulating business and a mere license for tax purposes such as is practically universal for all business, trades and professions . . . ."); McKibbin v. Michigan Corporation and Securities Commission, Mich. , 119 N.W. 2d 557, 566 (discrimination by licensed real estate broker not "state action" "absent a showing of affirmative state action requirement or permitting such conduct or of a relationship of such interdependence between the state and its licensees that the licensees' conduct can be said to be that of the state."); Madden v. Queens County Jockey Club, 296 N.Y. 249, 255, 72 NE 2d 697, certiorari denied, 332 U.S. 761 (license to operate a race track; court distinguishes "between a 'license,' imposed for the purpose of regulation or revenue, and a 'franchise.'").

Cases revolving interaction of State and private conduct resulting in unconstitutionality

Cases where lessees of or buyers from the state have discriminated:

1. Burton v. Wilmington Parking Authority, 365 U.S. 715 (refusal to serve Negro in private restaurant located in public building and leased from the State)

2. Department of Conservation & Development v. Tate, 231 F. 2d 615 (C.A. 4) (threatened lease of state park to private persons who would discriminate)

3. Smith v. Holiday Inns of America, Inc., F. Supp. (M.D. Tenn.) (private motel located urban renewal land sold to proprietor refused to accommodate Negroes)

4. Derrington v. Plummer, 240 F. 2d 922 (C.A. 5) (refusal to serve Negroes in cafeteria leased from state and located in courthouse)

Cases where the state required or encouraged segregation by statute or official conduct:

5. Lombard v. Louisiana, 373 U.S. 267 (refusal to serve Negro in private restaurant in city where public officials encouraged and recommended restaurant segregation)

6. Peterson v. City of Greenville, 373 U.S. 244 (refusal to serve Negro in private restaurant in city where ordinance required restaurant segregation)

7. Gayle v. Browder, 352 U.S. 903, affirming 142 F. Supp. 707 (M.D. Ala.) (State law requiring private common carrier to segregate passengers)

8. McCabe v. A.T. & S.F.R.Co., 235 U.S. 151 (racial discrimination by railroad permitted by state law)

9. Turner v. City of Memphis, 369 U.S. 350 (state law requiring segregation in private restaurant located in public airport)

Cases where private groups whose power to act derives from state or federal law discriminated:

10. Steele v. Louisville & Nashville R. Co. 323 U.S. 192 (federal law conferred exclusive bargaining rights on union which discriminated against Negroes)

Cases where the state delegated a governmental function to a private entity:

11. Terry v. Adams, 345 U.S. 461 (delegation of election function by state to private group which excluded Negroes)

12. Smith v. Allwright, 321 U.S. 149 (same)

13. Marsh v. Alabama, 326 U.S. 531 (delegation by State of power to exclude religious solicitors from "company town" and conviction for trespass for refusal to leave)

Cases where private persons conspired with state officials to discriminate:

14. United States v. United States Klans, 194 F. Supp. 197 (M.D. Ala.) (private violence aided and abetted by misfeasance of local police)

15. United States v. Association of Citizens Councils of Louisiana, 196 F. Supp. 908 (W.D. La.) (discriminatory purging of Negroes from registration rolls by joint action of state Registrar and White Citizens Councils)

16. United States v. Thomas, 362 U.S. 58 affirming United States v. McElveen, 180 F. Supp. 10 (E.D. La.) (Same)

Cases where the state was involved financially or otherwise in creating or maintaining the private entity:

17. Simkins v. Moses H. Cohen Hospital, No. 8908 (C.A. 4, 11/1/63) (private hospital refusing Negro patients pursuant to statutory authorization although hospital constructed under federal and state plan)

3. Smith v. Holiday Inns of America, Inc., F. Supp. (M.D. Tenn.) (private motel located on urban renewal land sold to proprietor refused to accommodate Negroes)

18. Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (C.A. 4) (large-scale public financial support of library which excluded Negroes)

Cases in which the state has carried out administratively a private decision to discriminate:

19. Pennsylvania v. Board of Trusts, 353 U.S. 230 (administration by city of private trust containing racially discriminatory provision)

Cases in which a private common carrier has been empowered to make rules which the State will enforce criminally

Bowman v. Birmingham Transit Co., 280 F. 2d 531 (C.A. 5) (segregated seating rule of private common carrier authorized by state law and enforced by state)

Boynton v. Virginia, 364 U.S. 454 (trespass conviction of Negro for refusing to leave private restaurant in interstate bus terminal)

Cases where the State has commanded conduct by some private persons which inevitably injures others

Pierce v. Society of Sisters, 268 U.S. 510 (State law operating upon private citizens who necessarily responded so as to injure the complainant

Cases where state law seemed to be designed to reinforce private conduct which was itself illegal

Pollock v. Williams, 322 U.S. 4 (State law so construed so as to perpetuate private peonage)

Bailey v. Alabama, 219 U.S. 219 (State law so construed so as to perpetuate private peonage)

Cases where the state courts were involved only to the extent that they enforced private discrimination

Shelley v. Kraemer, 334 U.S. 1 (State court enforcement of restrictive housing covenant)

Barrows v. Jackson, 346 U.S. 249 (State court enforcement of restrictive housing covenant)

Facilitation or encouragement of discrimination by the State (actual decision private)

Baldwin v. Morgan, 287 F. 2d 750 (C.A. 5) (signs designating "white" and "colored" terminal waiting rooms unlawful despite lack of enforcement since signs encourage segregation); Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (C.A. 4) (library supported mainly with public funds); Simkins v. Moses Cone Hospital, C.A. 8909 (C.A. 4, 11/1/63) (private hospital constructed with federal funds according to state plan and authorized by law to discriminate); Derrington v. Plummer, 240 F. 2d 922 (C.A. 5) (leased restaurant in courthouse building); Department of Conservation & Development v. Tate, 231 F. 2d 615 (C.A. 4) (lease of state park to private persons); Smith v. Holiday Inns of America, Inc., ___ F. Supp. ___ (M.D. Tenn.) (sale of urban renewal land to private motel corporation).

Commentators who have espoused Lou Henkin's view

See Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 30 So. Cal. L. Rev. 208 (1957); Van Alstyne and Karst, State Action, 14 Stan. L. Rev. 3 (1961); Williams, The Twilight of State Action, 41 Texas Law Review 347 (1963).

An additional case like Shelly v. Kraemer

Abstract Investment Co. v. William D. Hutchinson, 22 Cal. Rptr. 309 (D.C. App., 2d Dist., 1962)

And, of course, you are aware of State v. Brown, A. 2d (Del. 1963).

Cases in support of common law duty of innkeepers, carriers, ferries and farriers to serve all members of the public equally to the extent of their facilities.

At common law certain private businessmen were regarded, in a certain sense, as affected with the public interest, exercising their employment not merely for their own emolument and advantage, but for the convenience and accommodation of the community. Such was the innkeeper who could not, if he had available room, refuse to receive a guest who was ready and able to pay him a reasonable compensation. White's Case (1558) 2 Dyer 158.b.; Warbrooke v. Griffin (1609), 2 Brownl. 254; Lane v. Cotton (1701) 12 Mod. 472; Bennett v. Mellor (1793), 5 Term R. 274; Thompson v. Lacy (1820), 3 Barn. & Ald. 283; see generally Storey, Bailments sections 475, 476 (7th ed. 1863); 5 Bacon, Inns and Innkeepers 230, 232 (1952); 3 Black, Commentaries 166 (Lewis 1897).[1/]

1/ According to Bacon, supra at 230, the duty of the innkeeper includes that of providing his guests with food. It has also been said that the purchase of food or liquor is sufficient to constitute one a guest of an innkeeper. Wright v. Anderton (1907) 1 K.B. 209; Bennett v. Mellor (1793) 5 Term. R. 273; Bowell v. DeWald, 2 Ind. App. 303, 28 N.E. 430.

However, according to early English decisions the innkeeper rule was restricted to travelers in the limited sense of the term, and the innkeeper was not bound to receive one who was not a traveler or wayfarer. See Lamonde v. Richard, (1897) 1 Q.B. 541; Rex v. Luellin, 12 Mod. 445. This requirement has been gradually eroded, and under the modern rule one may be a guest even though a fellow townsman with the innkeeper. See State v. Steele, 106 N.C. 766; Hill v. Memphis Hotel Co., 124 Tenn. 376, 136 S.W. 997.

This rule is usually held to be a part of the common law of the several states of this country, so far as applicable and not inconsistent with local law. It should be noted however that the law affecting innkeepers has been altered and modified by statute in most states. See e.g., Thomas v. Pick Hotels Corp., 224 F. 2d 664, 666 (C.A. 10); Perrine v. Paulos, 100 Cal. App. 2d 655, 224 p. 2d 41; Kisten v. Hildebrand, 48 Ky. (9 B. Mon) 72; Dewolf v. Ford, 193 N.Y. 397, 86 N.E. 527.

Similarly common carriers were obliged of common law accept all goods on the tender of reasonable payment. 146 N.C. 412, 53 S.E. 224; Atwater v. Delaware L.W. Ry. Co., 48 N.J. Law, 55, 2 Atl. 803, 805-806; Indianapolis, P. and C. Ry. Co. v. Rinard, 46 Ind. 293, 395; Cf. Railroad Co. v. Lockwood, 17 Wall (U.S.)357; Patterson v. Old Dominion S.S. Co., see Story, Bailments section 495 (7th ed. 1893). A common carrier, defined as one who undertakes to carry goods for persons generally, and who holds himself out as ready to engage in the transportation of goods for hire as a business and not as a casual occupation, has been held to include a ferry (Futch v. Bohannon, 134 Ga. 313, 67 S.E. 814) and even a ski lift (Fisher v.

Mt. Mansfield Co., 283 F. 2d 555 (C.A. 2).

Farriers (blacksmiths or more commonly those who shoed horses) were also at common law required to serve all the public. Lane v. Cotton, supra at 484; see Wilson v. Martin, 40 N.H. 88, 90.

Effect of regulatory, taxing, and similar licenses

Williams v. Howard Johnson's Restaurant, 268 F. 2d 845, 847 (C.A. 4) (restaurant license is "designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served"); Simkins v. Moses H. Cone Memorial Hospital, 211 F. Supp. 628, 636 (M.D. N.C.) (hospital license "designed to protect the health of persons served by the facility, and do not authorize any public officials to exert any control whatever over management of the business of the hospital, or to dictate what persons shall be served by the facility."); Wood v. Hogan, 215 F. Supp. 53, 58 (W.D. Va) (hospital license; must distinguish between "a license which is used as a means of regulating business and a mere license for tax purposes such as is practically universal for all business, trades and professions . . . ."); McKibbin v. Michigan Corporation and Securities Commission, Mich. , 119 N.W. 2d 557, 566 (discrimination by licensed real estate broker not "state action" "absent a showing of affirmative state action requirement or permitting such conduct or of a relationship of such interdependence between the state and its licensees that the licensees' conduct can be said to be that of the state."); Madden v. Queens County Jockey Club, 296 N.Y. 249, 255, 72 NE 2d 697, certiorari denied, 332 U.S. 761 (license to operate a race track; court distinguishes "between a 'license,' imposed for the purpose of regulation or revenue, and a 'franchise.'").

Effect of monopoly-type licenses

See Steele v. Louisville, N. R.R. Co., 323 U.S. 192 (exclusive bargaining agent under Railway Labor Act must represent all equally); Boman v. Birmingham Transit Company, 280 F. 2d 531, 535 (C.A. 5) (franchise to bus company; court distinguishes between "the public utility which holds what may be called a 'special franchise'" and the "ordinary business corporation which in common with all others is granted the privilege of operating in corporate form but does not have the special franchise of using state property for private gain to perform a public function.")

MARYLAND

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. The licenses are granted by the clerks of the circuit courts for the counties and the clerk of the Court of Common Pleas in Baltimore. A person doing business without a license 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)).

Permits are required for the operation of amusement parks. They are granted by the county commissioners (Md. Code, Article 25, §14. Article 27, §506 authorizes the amusement parks in Montgomery County to operate on Sunday.

MONTGOMERY COUNTY

Under Section 15-7 of the Montgomery County Code (1960), it is made "unlawful for any person to hold in the county any picnic, dance, soiree or other entertainment for gain or profit to which the general public are admitted," without first having obtained a permit or license. By Section 15-8, the County Council is empowered to issue such permit or license upon payment of a reasonable fee, and to adopt "such rules and regulations in connection with such permit, license and fee as are necessary to protect the public health, safety and welfare." By Section 15-11, the Council is empowered to "inspect, license, regulate or limit as to location within the limits of the county any place of public amusement or recreation. . . and in order to safeguard the public health, safety, morals and welfare, to pass rules, regulations or ordinances. . ."

In Chapter 75 of the Montgomery County Code the Council has promulgated specific regulations (in addition to general rules applicable to matters such as health, fire and saitation) relative to the licensing and operation of amusement parks, theatres, dance halls, restaurants, cafes, inns, taverns, public swimming pools, etc. These rules prescribe the hours of operation (Section 75-1, 75-2) and other detailed matters. Operation without a license of "amusement parks operated for profit" (Section 75-9) is forbidden (Section 75-5, 75-16). Licenses are issuable by the Director of the Department of Inspection and Licenses (Section 75-6) two weeks after a copy of the application has been published in a newspaper of general circulation (Section 75-7). But no amusement park license may be granted until the park submits proof "of sufficient financial responsibility, or adequate liability insurance coverage, to protect the public using the park" (Section 75-9). Payment of the license fee "entitles the operator of the amusement park" to operate all amusement devices not prohibited by law (Section 75-9). In these licensing and inspection requirements for the protection of the public interest and welfare, the State has manifested its high concern regarding the operation of the amusement accommodations involved. But even after the issuance of the State's approval for the operation of the establishment, continuing State concern is reflected in the system of regulation in the public interest.

Licenses issued expire within one year (Section 75-10). They may be denied, revoked or suspended if the enterprise "constitutes a detriment, is injurious to, or is against the interests of, the public health, safety, morals or welfare" (Section 75-11). Such grounds of disqualification encompass among others (a) defects in the character of the owner or operator, (b) noncompliance with applicable laws and regulations, (c) excessive noise, traffic congestion or other nuisance on the premises, and (d) occurrence or repeated occurrence on the premises of crimes or misdemeanors such as drunkenness or immorality. While hearings are provided in cases of revocation and suspension, there is specific authority for the summary closing of the premises to prevent manifest nuisance or danger (Section 75-13). The County reserves its rights of visitation and inspection at the premises (Section 75-15). In these ways, by continual vigilance and inspection, the State further demonstrates its concern for the public interest in the operation of the public accommodation involved.

FLORIDA

The Florida legislature has declared that the restaurant business is intimately affected with the public interest. Chapter 509 describes in great detail the public duties and responsibilities of the restaurants. The Florida Hotel and Restaurant Commission (Florida Statutes §509.012) has continuing regulatory supervision over "public food establishments," and the legislature requires that the Commissioner shall execute the laws governing their inspection and regulation "for the purpose of safeguarding the public health, safety, and welfare." (Florida Statutes §509.032(1)). The law requires approval by the Commissioner of the architect's plans for the erection or remodeling of any restaurant (Florida Statutes §509.211(4)). It regulates plumbing, lighting, heating, cooling, sanitation and ventilation facilities (Florida Statutes §509.221(1)). It requires every restaurant to obtain a license as a "public food service establishment" (Florida Statutes §509.241), makes it a misdemeanor for such an establishment to operate without a license, and sets forth the procedure for revocation of such licenses (Florida Statutes §509.261). It forbids a municipality or county from issuing any occupational license unless the Commissioner has first licensed the restaurant (Florida Statutes §509.271). It regulates the use of butter substitutes (Florida Statutes §509.231). And it establishes an advisory council of private restaurants and hotels for the purpose of and "to suggest means of better protecting the health, welfare and safety of persons utilizing the services offered by the industries represented on the council" (Florida Statutes §509.291).

The statute pursuant to which Appellants were arrested, §509.141, is an integral part of the above Chapter and an integral part of this elaborate legislative schema and program encompassing "public food establishments."

In addition, extensive regulations have been promulgated by the Commissioner, prescribing in minute detail the health and safety measures by which every restaurant must abide. Florida Administrative Code, Chapters 175-1, 175-2 and 175-4. And it is especially important to note that the regulations are not concerned solely with health and safety measures, but in order to promote and safeguard the public welfare, also, inter alia, (1) provide that licenses may be issued only "to establishments operated, managed or controlled by persons of good moral character" (Florida Administrative Code, §175-1.02): (2) prohibit publication or advertisement of false or misleading statements relating to food or beverages offered to the public on the premises (Florida Administrative Code §175-4.02); and (3) provide that "achievement rating cards be conspicuously displayed" (Florida Administrative Code §175-1.03).

Moreover, Chapter 509 is obviously not designed merely to raise revenue or merely compel compliance with zoning ordinances, as in the case of the typical occupational licensing statute. And even though the grant of an occupational license as such may be a condition precedent to engaging in the restaurant business, nevertheless, unlike the usual licensing requirements for merchants and tradesmen, Chapter 509 provides for the exercise of continuing administrative supervisory oversight and control, comparable to the supervision of businesses normally described as public utilities.

In addition, Shell City, Inc., qua corporation, exists only by virtue of state law, and is subject to the general Florida laws governing the creation, regulation, and dissolution of corporate entities. Florida Statutes, Chapter 608.

Miami

Chapter 35, Article I, of the 1957 Code of the City of Miami requires yearly licensing of a long list of businesses, including restaurants (as listed in Article III). Section 35-10 provides for revocation of the license for violations of any ordinance of the city or law of the State, or any other good and sufficient reason.

Chapter 25 of the Code, Food and Food Establishments, sets forth numerous regulations which control the management of food establishments. These include quality of food and misrepresentation as to its wholesomeness, ventilation, sanitary facilities, structure and painting of walls and floors in rooms used for preparation of food, garbage disposal, refrigeration, cleanliness of workers, dishes, towels, display of food, etc.

SOUTH CAROLINA

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).

South Carolina law requires a license tax (S.C. Code, §65-1382). Retail stores collect a sales tax (Chain Store Tax) (S.C. Code §65-1401) and are required to keep and preserve records of gross receipts (S.C. Code §65-1449. In addition, South Carolina has a use tax which applies to retailers (S.C. Code §§65-1421-1433).

Form No. DJ-96a
(Rev. 7-17-63)

DEPARTMENT OF JUSTICE

ROUTIN LIP

TO: NAME	DIVISION	BUILDING	ROOM
1. The Solicitor General			
2.			
3.			
4.			

☐ SIGNATURE ☐ COMMENT ☐ PER CONVERSATION
☐ APPROVAL ☐ NECESSARY ACTION ☐ AS REQUESTED
☐ SEE ME ☐ NOTE AND RETURN ☐ NOTE AND FILE
☐ RECOMMENDATION ☐ CALL ME ☐ YOUR INFORMATION
☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

These are answers to your most recent set of inquiries re: sit-in brief.

Harold H. Greene

FROM: NAME	BUILDING, ROOM, EXT.	DATE

Invitation to all members of
the public under tort law

Tort liability of establishments open to the general public has been held not to depend upon the status or purpose of the particular person injured. All members of the public are owed the same duties. See, e.g.:

1. Campbell v. Weathers, 153 Kan. 316, 111 P.2d 72

Person who enters a cigar and lunch store does not lose status as an invitee merely because he does not make purchase; the public as a class constitutes "invitees." Court said (111 P.2d at 76):

> It is common knowledge that an open door of a business place, without special invitation by advertisement or otherwise, constitutes an invitation to the public generally, to enter. Shall courts say, as a matter of law, that such guests are not invitees until they actually make a purchase? We think the mere statement of the question compels a negative answer.

2. Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 152 S.W. 2d. 1073

Lower court held that retail store not liable for injury to minor since minor had not entered with intention of purchasing. Supreme Court reversed and said (152 S.W. 2d at 1075):

> We think, however, that it is too strict a construction to say that the status of such a child depends entirely on whether it entered the premises with the intention of purchasing some of defendant's merchandise. Whether it intended to make a purchase is not the essential fact to be considered in determining whether

it was an invitee or a mere licensee. The most essential factor to be considered in determining this issue is whether the premises were public or private. If one uses his premises for private purposes, he has no reason to expect visitors other than those especially invited by him; and hence is under no obligation to keep his premises in a safe condition for the protection of those who may enter thereon without his invitation. . . . On the other hand, one who maintains a merchandise establishment, or other public place, to which, by reason of the business so conducted thereon, the public is impliedly invited to enter, necessarily expects visitors at all times. He knows that strangers may enter his place of business at any time, under the belief that, as members of the public, they have an implied invitation to so enter and inspect his merchandise, even though they do not then have a present intention to make a purchase. Since he knows that strangers may so enter his premises, he owes those who may enter the duty to exercise ordinary care to see that the premises are in a reasonably safe condition for their protection. It would not be a very humanitarian doctrine to say that a merchant could thus impliedly invite the public to his store, but that he was under the duty of exercising ordinary care for the safety only of

> those who had an intention of buying his merchandise; and that as to others who accompanied their friends thereon, and espceially children of tender years, he could with impunity allow the existence of hidden and concealed defects that might bring about their injury, so long as it could not be said that he had wilfully injured them or was guilty of gross negligence. (Emphasis added.)

Followed in Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W. 2d 609 (Person injured while using the drugstore as a shortcut; store held liable).

3. See also Restatement, Torts § 330(d): ". . . One who opens a shop thereby expresses his willingness to receive not only those who come to buy but also those who come to inspect goods with no present intention of buying;" § 332(b) ". . .the fact that a building is used as a shop gives the public reason to believe that the shopkeeper desires them to enter or is willing to permit their entrance not only for the purpose of buying but also for the purpose of looking at the goods displayed therein or even for the purpose of passing through the shop."

Question whether state should be held to regulation in "chunks" where it undertakes some regulation.

We were unable to find authority directly supporting this principle as a matter of agency law or under other principles of general applicability. The doctrine of apparent authority in agency law, which comes closest, would not help too much here since the claim could not very well be made that the public was misled by the amount of state regulation into believing that with respect to segregation and discrimination, too, state action was involved. Such an argument would be circular in any event, and would get us back to the main issue.

The following cases dealing with state involvement do offer some support, however, particularly the first.

1. Public Utilities Comm. v. Pollak, 343 U.S. 451, bears upon this question. The District of Columbia Public Utilities Commission had conducted an investigation of the bus company's installation of radio receivers and amplifiers on its busses. The Commission found the practice unobjectionable, but the Court of Appeals for the District of Columbia Circuit held it unconstitutional. As described by the Supreme Court (343 U.S. at 461):

> It was held by the court below that the action of Capital Transit in installing and operating the radio receivers, coupled with the action of the Public Utilities Commission in dismissing its own investigation of the practice, sufficiently involved the Federal Government in responsibility for the radio programs to make the First and Fifth Amendments to the Constitution of the United States applicable to this radio service. These Amendments concededly apply to and restrict only the Federal Government and not private persons
> . . . .

Continuing, the Court said (Id. at 462):

> We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments. In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. 1/ We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby.

1/ At this point in the opinion the court, in footnote 8, said:

> 'When authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by government itself.' American Communications Assn. v. Douds, 339 U.S. 382, 401. Cf. Smith v. Allwright, 321 U.S. 649; and see Olcott v. The Supervisors, 16 Wall. 678, 695-696.

* * * * *

> We, therefore, find it appropriate to examine into what restriction, if any, the First and Fifth Amendments place upon the Federal Government under the facts of this case, answering that the action of Capital Transit in operating the radio service, together with the action of the Commission in permitting such operation, amounts to sufficient Federal Government action to make the First and Fifth Amendments applicable thereto (emphasis added).

2. In the footnote mentioned supra appearing in the Pollak opinion the Court, as noted, cited Olcott v. The Supervisors, 83 U.S. (16 Wall.) 678, 695-696. In that case, the Court decided that taxation to aid in the building of a privately-owned railroad was taxation for a "public purpose." At the pages cited by the Court in Pollak the Olcott Court said this:

> Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the state. Though the ownership is private the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals under public grants, or by companies, are regarded as publici juris. The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, but they are compellable to permit the public to use their works in

> the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own creative power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the judge.

3. In Burton v. Wilmington Parking Authority, 365 U.S. 715, a public corporation leased space to a private entrepreneur in which to operate a restaurant within the public facility. The court held that the lease carried with it, by necessary implication, a requirement of non-discrimination. It might be said that the Court in effect ruled that when the public facility delegated to the private corporation the authority to operate a restaurant, and regulated that operation in other respects, it could not lawfully fail to regulate the restaurant viz a vis discrimination as well. See also Derrington v. Plummer, 240 F.2d 922 (C.A. 5); Boman v. Birmingham Transit Co., 280 F.2d 531 (C.A. 5) (segregated seating rule of common carrier authorized by State law and enforced by State).

From Mr. Ettlinger

Discrimination against Negroes in Maryland

The importation of Negro slaves into Maryland was forbidden by law in 1783.[1] Under the State Constitution of 1776, free negroes were not denied the right to vote. Discriminatory legislation against free negroes began early in the 19th century. In 1809, freed slaves were denied the right to vote,[2] and in 1831 freed negroes leaving the State without a written declaration of intention to return were not permitted to resume residence in Maryland.[3] The legislative attempts to keep the free negro population of Maryland to a minimum took two distinctive forms. The freeing of slaves by manumission was made difficult, and at the same time, laws were passed empowering the courts to deport and sell for slavery outside the State free negroes convicted of crime or

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1/ Maryland laws 1783 ch. 23.

2/ Maryland laws 1809 ch. 83

3/ Maryland laws 1831 ch. 323

or found without visible means of support.[4] Concurrent with this effort to rid the State of free negroes, the legislature went to great length to establish a negro colony in Liberia, Africa, to which the freed negroes in Maryland were encouraged to emmigrate.[5] Considerable amounts were voted by the legislature for the establishment of "Maryland in Liberia,"[6] and ingenious attempts were made to persuade the more sophisticated element in the negro population to encourage the masses to "return" to Africa.

In spite of the above efforts by the white settlers in Maryland, fifty per cent of the entire negro population of the State, shortly

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4/ Md. laws 1831 ch. 281

5/ Between 1833 and 1859 about 1,450 negroes were carried from Maryland to "Maryland in Liberia". J. M. Wright, The Free Negro in Maryland p. 337, Col. Univ. Studies 1921.

6/ Md. laws 1826 ch. 172

before the Civil War, were freed negroes who had remained in Maryland.[1] The assimilation of these negroes into the economic structure of the State was complicated by the great influx of German and Irish immigrants into Maryland about 1850. These immigrants displaced the negro craftsmen and laborers and succeeded in relegating the free negro in Maryland to menial labor. The ex slaves in Maryland were thus unable to find ready employment, and constituted a segment of the society which the white population considered as both undesirable and dangerous.[2] Laws were passed forbidding negroes to carry firearms, and attempts were made to secure legislation to have all unemployed negroes declared to be slaves. In 1851, the Maryland legislature was given blanket authorization

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1/ In 1860 there were 87,000 slaves in Maryland and almost as many free negroes. J. R. Brackett notes on the progress of the colored people of Maryland since the war p. 6; John Hopkins Univ. 1890.

2/ Wright, supra, p. 172; e.g. Md. Laws 1858 ch. 288 prohibiting business partnership with a negro and forbidding white merchant to employ negro clerks or salesmen in a retail store.

to deal with the free negro population as they saw fit.[9]

As far as can be ascertained, the position of the free negro in Maryland did not change substantially during or immediately following the Civil War. The Emancipation Declaration did not apply to Maryland. However, in 1867, the laws relating to slavery were repealed;[10] significatnly, at the same session of the legislatum, funds were voted to send emissaries to New York, New Jersey, and Pennsylvania to encourage people from those States to settle in Maryland where "recent" developments had created great opportunities.[11]

The negro leadership appears to have felt that Maryland's position as a Northern State during the Civil War, was detrimental to the negro

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9/ See Declaration of Rights, Maryland Constitution 1850-51.

10/ E.g. Md. Laws 1867, ch. 54.

11/ Md. Laws 1867 ch. 172

population.[12] There was no reconstructionist government in the State and no broad statutes were enacted to declare the negro equal to the white man in all respects. The abolition of the status of slavery does not appear to have changed substantially the second class citizen position to which the free negro in Maryland had been relegated before the Civil War. Efforts by the negro leaders to secure recognition of the rights of negroes subsequent to the Civil War were confined to two areas in the law where the negro was still stigmatized by law in Maryland. One, the exclusion of negroes from jury duty, and secondly, the disability imposed on negro women in bastardy proceedings.[13] Under the existing law, only white women could bring action for support against the putative father and the negro women had no way to get the courts to

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12/ Brackett, SUPRA. p. 6.

13/ W.T. McGivan "The Brotherhood of Liberty; The Courts and Negroes in Maryland. 18 Social Force No. 2.

order the father of the child to furnish support. Ultimately, the word "white" was struck from the bastardy statute, and the matter was laid to rest.

No laws, local or statewide, could be found requiring segregation in places such as inns, hotels or restaurants. Apparently such laws did exist in at least one northern State, as is evident from a Pennsylvania decision rendered in an action brought by a negro traveler who was refused accomodation at an inn. Pennsylvania law, apparently entitled an innkeeper to refuse accomodation to a negro. However, the Pennsylvania District Court, in U.S. v. Newcomer (27 Fed. Cas. 127, E.D. Pa. Feb. 29, 1876), held a negro traveler entitled to accomodation under the 14th amendment, regardless of the local law. The decision is however of doubtful value since the action was brought under the civil rights act of 1875.

No Maryland cases involving public accomodation could be found prior to the instant sit-in cases. However, it is submitted that the development in Maryland regarding segregation in public transportation afford an an excellent example of the interplay of custom and discriminatory legislation.

Prior to 1870 the street cars in Baltimore city, by regulations of the Railway Company, had required negroes to use the front end of the cars exclusively. There, negroes, who paid the same fare as white passengers, were exposed to the elements, and not provided seating facilities. Negro women were allowed inside the carriages when accompanying their white mistresses, or carrying a white child. The custom developed for negro women to borrow a white child when embarking on a long trip, so as to be assurred of the right to a seat in the carriage. In 1870, a New York negro took a seat inside the carriage in Baltimore, and was promptly ejected. He brought suit for damages for

ejection in Federal Court. Judge Giles in his decision in Thompson v. The Baltimore City Passenger Railway Co. (see Baltimore American, April 30, 1870), held that the railroad was required to furnish their negro passengers accomodations comparable to that furnished other passengers, and Thompson was held entitled to damages totaling 10 dollars. Following the Court's decision in Thompson, the Baltimore Railway designated certain of its cars available to Negroes.

In 1871, H.C. Fields, a negro from Virginia, took a seat in a Baltimore railroad car not designated as available to colored. He was ejected by the conductor and filed suit in Federal Court. From the contemporary reports of the trial, and from the evidence introduced it appears unequivocally that the earlier decision of Judge Giles, had not resulted in a permanent separation of the races in public transportation.[14/] Apparently, white people frequented those street cars set aside for

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14/ See attached photostats of the year 1871.

colored passengers, and as is fully stated in the editorial comments in the Baltimore American and in the Baltimore Sun, voluntary desegragation on the Railroad had taken place at the initiative of the white patrons. The court, in Fields, charged the jury that ~~under the 14th amendment~~, the negro passenger was entitled not be ejected on the basis of his color and he was held entitled to damages in the amount of 40 dollars. The newspaper accounts indicate that other Railroads had not provided separate cars for their passengers and apparently no segregation was practiced on trains except theose of the line involved in the Baltimore litigation.

In 1904, the Maryland State legislature, enacted state-wide Jim Crow laws so designated in the official compilation of laws. Separate compartments for colored and white passengers became mandatory in railroad

cars and on ferry boats.[15] Violation of the separate coach law by either the carrier or passengers was a misdemeanor and the Jim Crow laws appeared as part of the criminal law of the State.[16] By a subsequent enactment, street cars running 20 miles beyond city limits had also to be segregated.[17] The constitutionality of these statutes was challenged repeatedly, see State v. Jenkins, 127 Md. 278 (1914). The court decided that the separate seating provisions were not enforcable as far as interstate colored travelers were concerned. Nevertheless the statutes were not repealed, and negroes traveling within the State of Maryland had to travel in segregated compartments.

The Maryland Inter-Racial commission in its report to the governor and General Assembly in 1927 notes "if the legislature of 1904 was moved to

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15/ Md. Laws 1904 ch. 109

16/ Bagby, Maryland Code Annotated 1904 Art. 27, Sec. 346 et seq.

17/ Md. Laws 1908 ch. 248

enact a separated coach law for reasons that seemed to justify the act, it is clear . . . . that the general progress of the colored people have removed any causes that could be advanced for retaining this law."[18/] The Inter-Racial commission in its report of 1927, and again in 1939 strongly recommended that segregation in the railroad was unjustifiable in Maryland and urged the repeal of the Jim Crow statutes. The 1939 Maryland Statute Annotated retained the Jim Crow laws as originally enacted in 1904, but these laws no longer appeared in the 1951 Maryland States Annotated since they were repealed by ch. 22 of the 1951 Laws of Maryland. It is evident from the reports of the Inter-Racial commission that the Jim Crow laws while in force were not enforced by all public carriers in the State. (Research thus far has not led to any incident around 1904 that could have served as the impetus for the enactment of the

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18/ Report of the Maryland Inter-Racial Commission to the governor and General Assembly, 1927, p. 14. See also 1939 Report which recommended repeal of the discriminatory law.

Jim Crow laws in that year).

Other legislation affecting the colored population of Maryland, dealt primarily with educational facilities and reform schools as set forth in the Barr brief p. 31. None of these laws, a list of which is attached hereto, touch any area of public accomodation such as is involved in the sit-in cases.

Maryland statutes regarding the duties and obligations of innkeepers (designated "ordinary keepers" in the early laws) are primarily concerned with the minimum standards required for licensing under the State laws. None of these requirements have any relevance as far as racial discrimination is concerned.[19/] As far as can be ascertained, no legislation or ordinance, one way or the other, was enacted in Maryland before January 8, 1962, when the Baltimore City Council passed an ordinance providing for equal treatment. (The constitutionality of this

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19/ Maryland Code 1860, Art. 70 et. seq.; Poe, Public General Laws of Maryland 1904, Art. 56; 1939 Annotated Code of Maryland, Art. 56.

ordinance was challenged in Carson's Inn v. Mayor and City Council of Baltimore, Sup. Ct. No. 1962, 990, 74578, a Maryland case pending appeal in the State Courts.) At the request of Baltimore City, the trespass law under which the defendants in the Maryland sit-in cases were indicted, was amended to preclude its application to situations arising under the Baltimore City public accomodation law. Maryland state law contains diverse general provisions regulating the operation of places of public accomodation and an enumeration of some of these regulations is found in footnote 28, p. 53 of petitioner's brief in the Barr case.

The instant two Maryland sit-in cases arose in Baltimore City and in the incorporated township of Glen Echo, Montgomery County. The state law of Maryland provides autonomous status for both the county and the city and accordingly Baltimore City and Montgomery County, have enacted regulatory legislation supplementary

to the state-wide law for places of public accomodation. As far as can be ascertained none of these local regulations have any bearing on the question of separation of the races. A direct contact with the Mayor of the township of Glen Echo failed to turn up any ordinance or regulation of the City Council requiring segregation in the Glen Echo Amusement Park. (The Mayor stated that the facilities at the Amusement Park, including the swimming pool, have been integrated for the past two years and that trouble at the amusement park was confined to fights among white patrons).

The presently available source material shows that the inferior position of the free negro in Maryland, was apparently not substantially affected by the Civil War. The editorial comment and report of the Thompson and Fields cases in the Baltimore press show that there was considerable flexibility in race relations around 1870 and that an erosion of the established customs of segregation in places

of public contact had set in. In the absence of legally imposed separation, white patrons of the railway seemed to have felt no compulsion to refrain from being seated next to a negro once the latter's right to a seat had been established. Certainly the Jim Crow law of 1904 did not perpetuate an existing custom. Conversely, the enactment of the Jim Crow statutes appears to have met with some measure of disregard by the railways and public as appears from the above-cited reports of the Inter-Racial Commission of the governor.

Maryland statutes concerning segregation in the state school system have not yet been repealed. There must be separate state 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 EducationCompact, 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.

The question is whether the decisions of the ~~the~~ Supreme Court in Shelley v. Kraemer, 334 U.S. 1 (1948) and Barrows v. Jackson, 346 U.S. 249, holding that a covenantor may not either sue to enforce a racially restrictive covenant or sue to collect damages for breach of one, also ~~prohibit~~ prohibit an unwilling vendor from raising a racial covenant as a defense to an action by a vendee (who is of the excluded race) to enforce a contract of sale. In a case decided shortly after Shelley, a state court had no trouble holding that under Shelley a restrictive covenant (prohibiting sale to persons of Mexican descent), may not be used as

a defense ~~to a title action~~ to a cross-action on a trespass to try title. Clifton v. Puente, 218 S.W. 2d 272 (Tex. Civ. App.). In another state case, ~~Clark~~ involving an action by Negro lot owners in a white-only restricted area to declare null the restrictive covenants on all of the lots, the court held the Negroes' lots to be free of the covenant, thus quieting their title, and stated that "no rights, duties or obligations can be based" on ~~xx~~ racially restrictive covenants. Capitol Federal Savings & Loan Assn. v. Smith, 316 P.2d 252 (S. Ct. Colo.)

The only case in Supreme Court on this point is ~~which touched on the point~~ ~~research uncovered was~~ that of Rice v Sioux City Cemetery, 245 Iowa 147, 60 N.W 2d 110 affirmed by an equally divided court, 348 U.S. 880 (1954) and certiorari denied as improvidently granted, 349 U.S. 70 (1955). There a widow sued a cemetery for damages based on mental suffering caused by the cemetery's breach of contract in refusing to bury her husband, a Winnebago Indian, because the contract also provided that "burial privileges accrue only to members of the Caucasian race." The Supreme Court of Iowa held that Shelley v. Kramer, supra ~~334 U.S. 1~~, did not require a state

court to ignore such a provision in a contract when raised as a defense and in effect to ~~ignore~~ reform the contract by enforcing it without regard to the clause. The Supreme Court of the United States granted certiorari (347 U.S. 942) but split 4-4 on whether to affirm or reverse, thus affirming the Iowa Court. The next year the U.S. Supreme Court reheard the case and this time denied certiorari as improvidently granted, on the grounds that a newly enacted Iowa statute prohibiting discrimination in cemeteries solved the problem for the future and thus robbed the case of the "special and important reasons" for granting certiorari.

Thus, as far the Supreme Court is concerned,
the question remains open, it would seem.

1/ As noted , for the purpose of tort liability the responsibilities of an establishment open to the public does not depend upon the status or purpose of the particular person injured.

_/ ". . . Congress has a right, by appropriate legislation, to enforce and protect such fundamental rights against unfriendly or insufficient State legislation. I (?) say unfriendly or insufficient; for the XIV Amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen; and prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection." From an unpublished draft of a letter by Justice Bradley to Circuit Judge William B. Woods, March 12, 1871, on file, The New Jersey Historical Society, Newark, New Jersey.

_/ Attached to the drafts of two letters, including the one to Justice Woods, was a note by Justice Bradley stating: "The views expressed in the foregoing letters were much modified by subsequent reflection, so far as relates to the power of Congress to pass laws for enforcing equality between the races."

Cases in support of common law duty of innkeepers, carriers, ferries and farriers to serve all members of the public equally to the extent of their facilities.

At common law certain private businessmen were regarded, in a certain sense, as affected with the public interest, exercising their employment not merely for their own emolument and advantage, but for the convenience and accommodation of the community. Such was the innkeeper who could not, if he had available room, refuse to receive a guest who was ready and able to pay him a reasonable compensation. White's Case (1558) 2 Dyer 158.b.; Warbrooke v. Griffin (1609), 2 Brownl. 254; Lane v. Cotton (1701) 12 Mod. 472; Bennett v. Mellor (1793), 5 Term R. 274; Thompson v. Lacy (1820), 3 Barn. & Ald. 283; see generally Storey, Bailments sections 475, 476 (7th ed. 1863); 5 Bacon, Inns and Innkeepers 230, 232 (1952); 3 Black, Commentaries 166 (Lewis 1897).[1/]

1/ According to Bacon, supra at 230, the duty of the innkeeper includes that of providing his guests with food. It has also been said that the purchase of food or liquor is sufficient to constitute one a guest of an innkeeper. Wright v. Anderton (1907) 1 K.B. 209; Bennett v. Mellor (1793) 5 Term. R. 273; Bowell v. DeWald, 2 Ind. App. 303, 28 N.E. 430.

However, according to early English decisions the innkeeper rule was restricted to travelers in the limited sense of the term, and the innkeeper was not bound to receive one who was not a traveler or wayfarer. See Lamonde v. Richard, (1897) 1 Q.B. 541; Rex v. Luellin, 12 Mod. 445. This requirement has been gradually eroded, and under the modern rule one may be a guest even though a fellow townsman with the innkeeper. See State v. Steele, 106 N.C. 766; Hill v. Memphis Hotel Co., 124 Tenn. 376, 136 S.W. 997.

This rule is usually held to be a part of the common law of the several states of this country, so far as applicable and not inconsistent with local law. It should be noted however that the law affecting innkeepers has been altered and modified by statute in most states. See e.g., Thomas v. Pick Hotels Corp., 224 F. 2d 664, 666 (C.A. 10); Perrine v. Paulos, 100 Cal. App. 2d 655, 224 p. 2d 41; Kisten v. Hildebrand, 48 Ky. (9 B. Mon) 72; Dewolf v. Ford, 193 N.Y. 397, 86 N.E. 527.

Similarly common carriers were obliged of common law accept all goods on the tender of reasonable payment. 146 N.C. 412, 53 S.E. 224; Atwater v. Delaware L.W. Ry. Co., 48 N.J. Law, 55, 2 Atl. 803, 805-806; Indianapolis, P. and C. Ry. Co. v. Rinard, 46 Ind. 293, 395; Cf. Railroad Co. v. Lockwood, 17 Wall (U.S.)357; Patterson v. Old Dominion S.S. Co., see Story, Bailments section 495 (7th ed. 1893). A common carrier, defined as one who undertakes to carry goods for persons generally, and who holds himself out as ready to engage in the transportation of goods for hire as a business and not as a casual occupation, has been held to include a ferry (Futch v. Bohannon, 134 Ga. 313, 67 S.E. 814) and even a ski lift (Fisher v.

Mt. Mansfield Co., 283 F. 2d 555 (C.A. 2).

Farriers (blacksmiths or more commonly those who shoed horses) were also at common law required to serve all the public. Lane v. Cotton, supra at 484; see Wilson v. Martin, 40 N.H. 88, 90.

__/ Alaska Statutes, Title 11, Section 11.60.230; Annotated California Codes, Penal - Title 9, Section 365; Colorado Revised Statutes Annotated, 25-1-1 through 25-2-5; Connecticut General Statutes Annotated, 53-35 (1962 Supp.); North Dakota Century Code, Section 12-22-30 (1961 Supp.); Legislature of State of South Dakota, 1963 Session, Senate Bill Number 1, Acts of the South Dakota Legislature; Idaho Code, 18-7201 through 18-7203 (1961 Supp.); Illinois Annotated Statutes, Title 14, Section 9; Burns Indiana Statutes Annotated, Section 10-901 through 10-914 (1962 Supp.); Code of Iowa (1962), Chapter 735; General Statutes of Kansas, 1961 Supplement, Chapter 21-2424; Revised Statutes of Maine (1954), Chapter 137, Section 50; General Assembly of Maryland, 1963 Session, Chapter 227; Annotated Laws of Massachusetts, Chapter 140, Sections 5 and 8; Michigan Statutes Annotated, Sections 28.343 and 28.344; Minnesota Statutes Annotated, Section 327.09; Revised Codes of Montana, Title 64, Section 211; Revised Statutes of Nebraska (1943), Chapter 20, Sections 101 and 102; New Hampshire Revised Statutes Annotated, Chapter 354, Sections 1, 2, 4 and 5 (1961 Supp.); New Jersey Statutes Annotated, Title 2A, 169-4 and 170-11; New Mexico Statutes Annotated (1953), Chapter 49, Section 8-1 through 8-6; McKinney's Consolidated Laws of New York Annotated, Civil Rights - Article 4, Sections 40 through 41 (1962 Supp.); Page's Ohio Revised Code Annotated, Sections 2901-35 and 2901-36; Oregon Revised Statutes, Sections 30.670, 30.675 and 30.680; Purdon's Pennsylvania Statutes Annotated, Title 18, Section 4654; General Laws of Rhode Island, Section 11-24-1 through 11-24-6; Vermont Statutes Annotated, Chapter 29, Section 1451 through 1452; Revised Code of Washington Annotation, Title 49.60.010 through 49.60.170; West's Wisconsin Statutes Annotated, Section 942.04 (1963 Supp.); Wyoming Statutes (1957), Section 6-83.1 and 6-83.2 (1961 Supp.); District of Columbia Code (1961), Title 47, Sections 2907, 2910 and 2911.

Facilitation or encouragement of discrimination by the State (actual decision private)

See also, Baldwin v. Morgan, 287 F. 2d 750 (C.A. 5) (signs designating "white" and "colored" terminal waiting rooms unlawful despite lack of enforcement since signs encourage segregation); Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (C.A. 4) (library supported mainly with public funds); Simkins v. Moses Cone Hospital, C.A. 8909 (C.A. 4, 11/1/63) (private hospital constructed with federal funds according to state plan and authorized by law to discriminate); Derrington v. Plummer, 240 F. 2d 922 (C.A. 5) (leased restaurant in courthouse building); Department of Conservation & Development v. Tate, 231 F. 2d 615 (C.A. 4) (lease of state park to private persons); Smith v. Holiday Inns of America, Inc., ___ F. Supp. ___ (M.D. Tenn.) (sale of urban renewal land to private motel corporation).