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Constitutional Law -- First Amendment Protection of the Right to Demonstrate -- the "New" Limitations

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to exercise discretion beyond that specified by statute in the disposition of actions brought before an inappropriate forum. The court should be free to relieve a harassed defendant and to encourage litigation in a forum better suited to a just result.

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Constitutional Law—First Amendment Protection of the Right to Demonstrate—the "New" Limitations

Petitioners in *Adderley v. Florida*[1] were among a group of students engaged in integration efforts in Leon County, Florida. On the day following the arrest of some of their fellows, approximately two hundred students including the thirty-two petitioners marched to the Leon County jail. There they stood and sat upon the jail premises, dancing, singing and clapping. In so doing they partially obstructed a jail entrance and a jail driveway used by the sheriff and his officers to transport prisoners, and by tradesmen servicing the jail but not generally by the public. The sheriff, after notifying the demonstrators that he was the legal custodian of the jail, ordered them to leave or be arrested for trespass. Many left, but 107 remained and were arrested. This included petitioners, who were convicted of a violation of a Florida trespass statute.[2] After the Florida appellate court denied rehearing,[3] the Supreme Court granted certiorari.[4] Upon hearing, a five justice majority determined that the convictions should be affirmed. The opinion, written by Justice Black, made it clear that otherwise valid state trespass convictions under properly worded statutes, nondiscriminatorily applied, will not be invalidated because the purpose of the trespass was the assertion of civil rights, and that in the case of trespass on public lands, the court will test the propriety of regulation, not by the purpose[5] of the trespass, but by the *use* to which the property is dedicated.

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[1] 385 U.S. 39 (1966).

[2] FLA. STAT. ANN. § 821.18 (1965). "Every trespass upon the property of another, committed with a malicious and mischievous intent, the punishment of which is not specifically provided for, shall be punished by imprisonment not exceeding three months, or by fine not exceeding one hundred dollars."

[3] Adderley v. State, 175 So. 2d 249 (Fla. 1965) (per curiam).

[4] Adderley v. Florida, 382 U.S. 1023 (1966).

[5] *I.e.* "To petition . . . for redress of grievances," U.S. CONST. amend. I.

The affirmance of this conviction no doubt came as a surprise to many, as it is the first Supreme Court decision upholding such a conviction in the short but turbulent history of sit-in cases.[6] This absence of affirmances seems to have given rise to a largely unarticulated belief[7] that essentially all demonstrations against governmental policy on state property are protected against state prosecution by the first amendment as made applicable to states by the due process clause of the fourteenth amendment.[8] A similar belief has arisen that in cases involving demonstrations against racial segregation, any prosecution is invalid as state action enforcing unequal treatment of the races,[9] and therefore a violation of the equal protection clause of the fourteenth amendment.[10] But no holding by the Court fully supported either of these beliefs or squarely refuted them. Indeed these questions had seldom been reached. In no case prior to *Adderley* had the majority of the Court found that the record made out an otherwise valid conviction under an otherwise constitutional statute properly applied, as may be seen by a brief review of the leading sit-in cases.

In *Garner v. Louisiana*,[11] the first sit-in case to reach the Supreme Court, petitioners, peaceful participants in sit-ins at the "white" lunch counters of privately owned businesses, were charged with a breach of the peace. Petitioners presented to the court, among other contentions, the equal protection argument, based on the aid of the criminal law in the maintenance of segregation.[12] The Chief

[6] While in Drews v. Maryland, 381 U.S. 421 (1965), the Court did not overturn the disorderly conduct convictions of four sit-in demonstrators tried before passage of the Public Accommodations Law, 78 Stat. 243, 42 U.S.C.A. §§ 2000(a)-2000(a)(6) (1964), but who appealed after its passage, the Court refused review in a memorandum which gave neither indication of its grounds nor holding as to the validity of such convictions.

[7] This belief is evidenced by the contention of petitioners in the principal case, "that they had a constitutional right to stay on the property over the jail custodian's objections," 385 U.S. at 47; and by the premise of Justice Douglas's dissenting opinion that the jailhouse, as "one of the seats of government . . . is an obvious center of protest." *Id.* at 49 (dissenting opinion of Douglas, J.).

[8] Edwards v. South Carolina, 372 U.S. 229 (1963); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925).

[9] See, Bell v. Maryland, 378 U.S. 226, 242-60, 286-318 (1964) (concurring opinions of Douglas, J., and Goldberg, J.). While this question was not squarely before the Court in the principal case, its relevance to the decision will be discussed below.

[10] See, Civil Rights Cases, 109 U.S. 3 (1883).

[11] 368 U.S. 157 (1961).

[12] *Id.* at 163.

Justice, for the majority, found it "unnecessary to reach the broader constitutional questions presented,"[13] and reversed the case on the ground that the record did not disclose "any evidence which would support a finding that the petitioners' acts caused a disturbance of the peace."[14] Therefore, the Court held the convictions were without due process of law.[15]

A 1963 case, *Edwards v. South Carolina*,[16] presented an appropriate fact situation for testing the applicability of first amendment protection to demonstrations. These defendants were arrested for breach of the peace while holding a non-violent demonstration on the state capitol grounds as an expression of their grievances regarding state policies. Here the Court came closer to reaching the broad issues. It found that the first amendment rights to peacefully assemble and petition government were indeed infringed, but made it clear that: "We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that a certain specific conduct will be limited or proscribed."[17] The Court reversed four other 1963 convictions on a finding of forbidden state action without reading the broader issues.[18]

In early 1964 five more sit-in cases were decided by the Court, and in four of them the Court found clear grounds for voiding the judgments without reaching the broad issues.[19] In the other case,

[13] *Id.* at 163.

[14] *Id.* at 163-64.

[15] Thompson v. Louisville, 362 U.S. 199 (1960). The following year, in Taylor v. Louisiana, 370 U.S. 154 (1962), the Court reversed a breach-of-peace conviction arising out of a bus station sit-in by following *Garner*.

[16] 372 U.S. 229 (1963).

[17] *Id.* at 236.

[18] In Avent v. North Carolina, 373 U.S. 375 (1963); Gober v. City of Birmingham, 373 U.S. 374 (1963); and Peterson v. City of Greenville, 373 U.S. 244 (1963), the convictions were in cities having segregation ordinances. In Lombard v. Louisiana, 373 U.S. 267 (1963), an announcement by city officials that sit-ins would not be permitted was held to be sufficient state action to invalidate the conviction, even though the city had no segregation ordinance.

[19] In Bouie v. City of Columbia, 378 U.S. 347 (1964), the Court found a violation of due process in that the statute under which petitioners were convicted did not give them fair warning of the prohibition of their acts. In Robinson v. Florida, 378 U.S. 153 (1964), the Court reversed a conviction arising out of a sit-in in a segregated restaurant on a finding of state action in that a health regulation required separate toilet and lavoratory facilities for the races. In Barr v. City of Columbia, 378 U.S. 146 (1964), violation of due process was found on grounds of a want of evidence to support the charge. The conviction in Griffin v. Maryland, 378 U.S. 130

Bell v. Maryland,[20] a majority of the Court (six justices) actually reached the broad equal protection issue, but divided evenly with three holding that enforcement of a state trespass statute against demonstrators who were ordered to leave because of their race was a discriminatory state action[21] and three that it was not.[22] The other justices favored reversal on other grounds.[23]

Ten days after the decision in *Bell v. Maryland,* the relative importance of the broad unconstitutional state action theory for voiding sit-in convictions lost much of its importance when the Public Accommodations Act[24] became law. The segregation of most potential sit-in sites became illegal, so that police protection of the right to segregate property became largely irrelevant.[25] Therefore, most of the controversy after the enactment of the statute is primarily concerned with the first amendment doctrine that was to become the principal issue in *Adderley.*

This issue was raised twice more in important decisions before *Adderley.* In the *Cox v. Louisiana*[26] decisions, as had been the case in *Edwards,* the facts were ideal for testing the extent to which the first amendment protects the activities of demonstrators. These cases arose out of street demonstrations protesting segregation and the arrest of other demonstrators then held in a jail located in a courthouse across the street from the site of the demonstrations. The leader of these demonstrations was convicted under state statutes prohibiting disturbance of the peace,[27] obstructing public passage-

(1964), was reversed on grounds of unconstitutional state action in that the order excluding Negroes came from a uniformed deputy sheriff.

[20] 378 U.S. 226 (1964).

[21] *Id.* at 242 (opinion of Douglas, J.); *Id.* at 286 (opinion of Goldberg, J.).

[22] *Id.* at 318 (dissenting opinion of Black, J.).

[23] The Maryland legislature had enacted a public accommodations statute, MD. ANN. CODE art. 49B § 11 (Supp. 1963), after the conviction of petitioner but before the decision of the Supreme Court. It was the sense of the three justices that the Court should remand for reconsideration in light of the change in state law.

[24] 78 Stat. 243, 42 U.S.C.A. §§ 2000(a)-(a)(6) (1964), held constitutional in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964).

[25] This is true even as to sit-ins occurring prior to passage of the act, since the Court held on the same day the act was declared constitutional that it brought abatement. Hamm v. City of Rock Hill, 379 U.S. 306 (1964) (5- to -4 decision).

[26] 379 U.S. 536 (1964); 379 U.S. 559 (1965).

[27] LA. REV. STAT. § 14:103.1 (Supp. 1962).

ways[28] and picketing in or near a courthouse.[29] In the first of the *Cox* decisions, the Court reversed the first two of these convictions. But, as in *Edwards,* the basis of reversal was narrow enough to leave questions as to the view of the majority regarding the broad proposition. The Court did hold that by the breach-of-peace conviction Louisiana "infringed appellant's rights of free assembly by convicting him under this statute."[30] In so doing, the Court indicated that the elements of demonstration, including singing, cheering, foot-stamping, and clapping, are protected forms of expression, but tied this determination to a holding that the conviction could not be sustained because:

> The statute . . . as authoritatively interpreted by the Louisiana Supreme Court, is unconstitutionally vague in its overly broad scope . . . [as one element of the crime was] . . . congregating . . . with intent to provoke a breach of the peace, or under circumstances such that a brecah of the peace may be occasioned.[31]

As the Louisiana court in applying this element defined "breach of the peace" as including agitation or arousal from a state of repose, the Supreme Court held that a person might be punished for the peaceful expression of unpopular views, so that his first amendment rights would be infringed.[32] This finding of unconstitutionality for overbreadth prevented the opinion from being of much probative value in seeking a test for the propriety of governmental regulation of demonstrations.

The Court's treatment of the other two charges gave little aid in defining the scope of first amendment coverage of demonstrations. In reversing the conviction for obstructing passageways, the Court stated:

> We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who would communicate ideas by pure speech.[33]

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[28] LA. REV. STAT. § 14:100.1 (Supp. 1962).
[29] LA. REV. STAT. § 14:401 (Supp. 1962).
[30] Cox v. Louisiana, 379 U.S. 536, 545 (1965).
[31] *Id.* at 551, quoting State v. Cox, 244 La. 1087, 1105, 156 So. 2d 448, 455 (1963).
[32] *Cf.* Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).
[33] Cox v. Louisiana, 379 U.S. 545, 555 (1965).

But as the application of the statute by city officials was held to be discriminatory, the Court did not reach the broad question. Then, in reversing the conviction for picketing near a courthouse in the second of the *Cox* opinions,[34] the Court made clearer the import of the first opinion that the same standards will not apply in testing the propriety of regulating picketing as in the case of ordinary speech.[35] The Court found that the Louisiana statute was constitutional on its face.[36] However, it found that the application of the statute was a violation of due process, but on grounds so narrow that they have little precedential value beyond the particular facts of the case.[37]

The last of the cases requiring close examination before *Adderley* was *Brown v. Louisiana*,[38] another case presenting an appropriate situation for examination of the application of the first amendment through the fourteenth, and the case in which the prevailing opinion[39] reached the issue most broadly. Petitioners had entered a public library, which some of the evidence indicated practiced segregation. One of them handed the librarian a card bearing the name of a book. The librarian had searched for the book and finding it not to be on her shelves told petitioners that she would order it for them. At this point, the librarian testified, she expected them to leave. Instead, one of petitioners sat down in the only chair in the room, and the others stood around him. After they had refused to leave at the request of the librarian and her superior, the two ladies called the sheriff. He repeated the request, and when petitioners still did not leave arrested them under another clause

[34] Cox v. Louisiana, 379 U.S. 545, 559 (1965).

[35] The Court held that "the fact that free speech is intermingled with . . . conduct does not bring with it constitutional protection," and that the "clear and present danger" test is not necessarily applicable when speech is not in its "pristine form." *Id.* at 564, 566.

[36] The state legislation described by Justice Goldberg as "a valid law, dealing with conduct subject to regulation so as to vindicate important interests of society," *id.* at 564, was modeled on a federal statute, 18 U.S.C. § 1507 (1964), drafted by members of the Supreme Court.

[37] The reversal turned on an entrapment theory based on an "administrative determination" of the meaning of the word "near" by police officials present at the demonstration.

[38] 383 U.S. 131 (1966).

[39] There was no true majority opinion as the five justices supporting reversal spoke in three separate opinions in a 3-1-1 split. The decision of the Court was announced in the opinion of Mr. Justice Fortas joined by the Chief Justice and Justice Douglas. It is to this opinion that the term "prevailing opinion" is applied herein.

of the same breach of the peace statute tested in the first *Cox* opinion. After noting that the conviction was reversible on the same basis of statutory construction as in *Cox,* the opinion went on to express more explicitly than in any other case the view that the first amendment offers a broad protection of expression by physical presence:

> We are dealing here with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances . . . [T]hese rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence . . . the unconstitutional segregation of public facilities.[40]

Thus the prevailing opinion indicated that the first amendment guarantees the right to use the property of others, or at least that of the government, as a platform for the expression by physical demonstration of dissident opinions. This holding, taken in the light of similar but narrower holdings in the *Edwards* and *Cox* decisions, presented the best evidence of the law as to first amendment protection of the right to demonstrate. Protection was to be complete, so long as the demonstrators met two tests: the presence must be for the purpose of expression; and the demonstration must be orderly.

Nine months later came *Adderley v. Florida.* The Court rendered its surprising opinion applying Black's new use test. However, the opinion in *Adderley,* despite the growing definiteness of statement and breadth of protection from *Edwards* to *Cox* to *Brown,* was not actually novel and need not have been surprising, for a line of separate opinions at least two years long had foreshadowed the shape of constitutional doctrines to come. As the pronouncements of the Court became stronger, as the protection of demonstration proved broader, the number of adherents became correspondingly smaller. The clear indications that the Court would one day greatly restrict the constitutional protection of expression by trespass began with the dissenting opinion in *Bell v. Maryland,*[41] over two years before *Adderley.*

[40] Brown v. Louisiana, 383 U.S. 131, 141-42 (1966).

[41] The contention that petitioners had a constitutional right to enter

It is true that the major issue in *Bell* was the applicability of the equal protection clause of the fourteenth amendment to use of state criminal laws in cases of sit-ins in segregated establishments. But it is equally true that petitioners raised the due process-First amendment aspect of the fourteenth, and that the dissent dealt specifically with the issue. Justice Black, speaking for himself and Justices White and Harlan, described the argument as coming down to this:

> That since petitioners did not shout, obstruct Hooper's business . . . , make speeches, or display picket signs, handbills, or other means of communication, they had a perfect constitutional right to assemble and remain . . . over the owner's continuing objections, for the purpose of expressing themselves by language and demonstrations. . . .[42]

Significantly Justice Black's rewording of petitioners' argument bears striking resemblance to the test prescribed in *Brown,* and significantly he resoundingly rejected it.[43] Though this case is not directly parallel to *Adderley* since the demonstration in *Bell* occurred on private property, this dissent is a clear rejection of the liberal protection doctrine over two years before the *Adderley* decision.

Then in *Cox,* four justices rejected the broad first amendment view. Justice Black, while concurring in the reversal of the breach-of-peace and obstructing-public-passageways convictions, did so solely on the basis of constitutional impropriety of the particular statutes in the case. He felt that the first statute[44] was violative of due process as it was broad, vague and not so narrowly drawn as to assure nondiscriminatory application, and so was constitutionally invalid under the holding in *Edwards.* Black made it clear, though, that this narrow basis was his only ground for concurring, and that his joining in the opinion in *Edwards* had never indicated that he accepted the broad view of first amendment protection of demonstrations, as he wrote:

> or to stay on Hooper's premises against his will because, if there, they would have had a constitutional right to express their desire . . . is a bootstrap argument. The right to freedom of expression is a right to express views—not a right to force other people to supply a platform or a pulpit.

Bell v. Maryland, 378 U.S. 226, 345 (1964) (dissenting opinion of Black, J.).

[42] *Id.* at 344.

[43] *Id.* at 345.

[44] LA. REV. STAT. § 14:103.1 (Supp. 1962).

> *Edwards* . . . as I understand it, did not hold that either private property owners or the States are constitutionally required to supply a place for people to exercise freedom of speech or assembly. . . . What *Edwards* as I read it did hold, and correctly I think, was not that the Federal Constitution prohibited South Carolina from making it unlawful for people to congregate, picket, and parade on or near that State's capitol grounds, but rather that in the absence of a clear, narrowly drawn, nondiscriminatory statute prohibiting such gatherings and picketing, South Carolina could not punish people for assembling at the capitol to petition for redress of grievances.[45]

Also, while Black concurred in reversing the conviction under the obstructing-public-passageways statute,[46] he did so on grounds that the statute, because of exclusions therein, was discriminatory,[47] and he made it clear that this did not indicate any weakening of his views as to the broad proposition.[48]

The other two dissenters from *Bell,* White and Harlan, reiterated their belief that conduct is not so protected by the first amendment as is speech. In a joint opinion written by White, they concurred in reversal of the breach-of-peace conviction, but did so saying: "I do not agree with everything the Court says concerning the . . . conviction, particularly its statement concerning the unqualified protection to be extended to Cox's exhortations to engage in sit-ins. . . ."[49] These two justices dissented in the reversal of the obstructing-passageways conviction, agreeing with Black that a properly drawn statute can be used to regulate picketing and marching, and finding that the Louisiana statute was not discriminatory or improperly drawn.

In addition to the reiteration of position by the dissenters from *Bell, Cox* brought an increase in their number as Justice Clark,[50]

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[45] Cox v. Louisiana, 379 U.S. 536, 578-79 (1965) (separate opinion of Black, J.).

[46] LA. REV. STAT. 14:100.1 (Supp. 1962).

[47] *Cf.,* New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 561 (1938).

[48] "I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways. Standing, patrolling, or marching back and forth is conduct, not speech, and as conduct can be regulated and prohibited." Cox v. Louisiana, 379 U.S. 536, 581 (1965) (separate opinion of Black, J.).

[49] *Id.* at 591. (Separate opinion of White, J.)

[50] Clark had earlier indicated his inclination as he was the lone dissenter in Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (dissenting opinion of Clark, J.).

one of the three not reaching broad issues in *Bell,* filed his separate opinion. He concurred in reversal of the breach-of-peace and obstructing-passageways convictions, but, like Black, did so on narrow grounds, as he stated his agreement with Black on the broader first amendment question.[51]

Finally, in the *Brown* case, the coming of *Adderley* was shown to be not only probable but reasonably certain. Black, in a dissenting opinion for four justices,[52] laid down the interpretation of the first amendment's scope that was to prevail in *Adderley:*

> The First Amendment . . . protects speech, writings, and expression of views in any manner in which they can be legitimately and validly communicated. But I have never believed that it gives any person or group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of public or private property or to state law.[53]

After repudiating the broad view of the first amendment, Black set out the "use" test that he would later apply for the majority in *Adderley,* as he distinguished *Brown* from *Cox* on the basis of the sites of the two demonstrations.[54]

While it is true that this foreshadowing of the *Adderley* opinion is still the voice of a four-justice minority, these are not exactly the same four justices who had expressed similar views previously. Justice Stewart, who had not reached the issue in *Bell* and had been with the majority in *Cox,* joined in Black's dissent in *Brown,* placing himself on the side of those who find demonstrations to be outside the scope of general application of the First Amendment. Justice White, who had sided with Black in the earlier decisions, voted with the majority favoring reversal of the *Brown* conviction, but did so in a separate opinion, on narrow factual grounds, making

[51] "I . . . agree with him [Black] that the statute prohibiting obstruction of public passageways is invalid under the Equal Protection Clause. And . . . I arrive at the same conclusion for the same reason on the question regarding the breach of the peace statute." Cox v. Louisiana, 379 U.S. 536, 589 (1965) (separate opinion of Clark, J.).

[52] Brown v. Louisiana, 383 U.S. 131, 151 (1966) (dissenting opinion of Black, J.).

[53] *Id.* at 166.

[54] "Public buildings such as libraries, schoolhouses, fire departments, courthouses, and executive mansions are maintained to perform certain specific and vital functions. Order and tranquility of a sort entirely unknown to the public streets are essential to the normal operation." *Id.* at 157 (dissenting opinion of Black, J.).

clear that he had not changed his view as to the broad proposition.[55]

If Justice White had considered the statute in this case to be properly drawn, and its application properly made, the opinion of Justice Black would have been not the dissent but by the majority. So in *Brown,* nine months before *Adderley,* it became clear that if a case came before the Supreme Court involving conviction of demonstrators under a statute that was clear, narrowly drawn, and nondiscriminatory, a majority of the court[56] was not going to find a violation of the first amendment simply because expression by demonstration was limited. The conviction in *Adderley* was made under such a statute,[57] and the Court reached not a surprising conclusion but the exact result foreshadowed in *Brown.* The five-justice majority voted to uphold the conviction.

Black, now writing for a majority, rejected with great clarity the view that the first amendment offers full protection to expression by physical entry:

> [P]etitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections . . . has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law [is] vigorously and forthrightly rejected. . . .[58]

Black then announced with equal force the view adopted by the majority. So long as the regulation of the use of state owned property is evenhanded and not directed at the particular views being expressed,[59] the power of the state to bar citizens from its property or restrict them from protest activities while thereon does not con-

[55] Were it clear . . . that lingering in a public library for 10 minutes . . . contravened some explicit statute, ordinance, or library regulation of general application, or even if it were reasonably clear that a 10-minute interlude . . . exceeded what is generally contemplated as a normal use of a public library, I would have difficulty joining in a reversal of this case . . . Nor would I deem the First Amendment to forbid a municipal regulation limiting loafing in library reading rooms. *Id.* at 150 (separate opinion of White, J.).

[56] Justices Black, White, Clark, Stewart, and Harlan.

[57] FLA. STAT. ANN. § 821.18 (1965).

[58] Adderley v. Florida, 385 U.S. 39, 47-48 (1966).

[59] There is not a shred of evidence that this power [of the sheriff to exclude from the jail premises] was exercised . . . because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protests. . . . There is no evidence that on any other occasion had similarly large groups

flict with the first amendment, so long as such regulation is consistent with the nature of the property.[60]

The wisdom of Black's opinion may perhaps be best assessed by subjecting it to the examination of dissent, *i.e.* the dissent of Justice Douglas for himself and three other justices.[61] The dissenters insist that the conviction of petitioners infringes their right "to assemble, and to petition the government for a redress of grievances."[62] To support this proposition, Douglas makes much of the fact that the purpose of petitioners' presence was one of expression, asserting that this fact brings it within the scope of first amendment protection.[63] The dissent also deems it important that the sheriff, "well understood the purpose of the rally,"[64] and that the testimony as to the purpose "was not contradicted or even questioned."[65] Yet such language in the dissent does nothing to weaken Black's thesis, nor, in real sense, to even criticize it. Black well knew that the purpose of the trespassers was to express their views. His whole opinion makes that clear, but he and the majority simply found this purpose to be irrelevant. A crime had been committed. A conviction had been obtained that the majority found to be constitutional.[66] That the guiding principles which led the trespassers to violate the statute were believed by them to be of greater virtue than the principles of those who governed the state did not, in the eyes of the majority, take the act out of the scope of the criminal statute or bring it within the scope of the first amendment. Black was even able to cite authority concurred in by three of the dissenters

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. . . been permitted to gather on this portion of the jail grounds for any purpose.

Id. at 47.

[60] Black stated for the majority: "The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 47. "The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." *Id.* at 48.

[61] *Id.* at 48 (dissenting opinion of Douglas, J., with whom the Chief Justice and Brennan and Fortas, Jj., concur).

[62] U.S. CONST. amend. I.

[63] "There is no question that petitioners had as their purpose a protest against the arrest of Florida A. & M. students for trying to integrate public theatres . . . and state and local policies of segregation. . . ." 385 U.S. at 51 (dissenting opinion of Douglas, J.).

[64] *Id.* at 51 (dissenting opinion of Douglas, J.).

[65] *Id.* at 51.

[66] Even the dissent did not find the statute invalid in its general application.

supporting this proposition.[67] Thus the dissent and the opinion of the majority do not each criticize the reasoning of the other, rather they present two squarely opposed premises. Of the two, Black's thesis seems preferable. The theory of the dissent implies that no entry can be regulated where the trespasser holds dissident views and the person in charge of the premises knows that the trespasser entered to express those views. Justice Douglas's thesis invites a situation in which nurses would have to pick their way among supine demonstrators to attend their patients; in which teachers would have to peer over the signs of pickets to inspect the decorum of their classes; in which jail administrators would be hampered in the transportation of their prisoners by the presence of singing, dancing, shouting crowds. The view of the dissent would find all these and innumerable equally unpalatable eventualities justified by the simple fact that the demonstrators had first notified the custodian of the premises of an intent to express opinion by their presence. The five justices of the majority seem justified in finding this prospect undesirable.

The dissent goes on to complain, in support of the theory that the conviction is violative of the first amendment, that: "[T]he jail-house grounds were not marked with 'NO TRESPASSING!' signs, nor does respondent claim that the public was generally excluded from the grounds. Only the sheriff's fiat transformed lawful conduct into unlawful trespass."[68] Yet as Black pointed out, "the sheriff, as jail custodian, had power . . . to direct that this large crowd of people get off the grounds,"[69] and petitioners were not arrested until the sheriff had twice ordered them to leave and apprised them of his position as custodian of the jail. What greater strength the erection of "no trespassing" signs could have added to this order can go only to the exclusion of the public generally. While it is true that there is no evidence that the public generally was excluded, it is equally true, as Black pointed out, that there was no evidence that any other part of the public had ever held a mass

[67] "The conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association." Cox v. Louisiana, 379 U.S. 559, 563 (1964). This opinion was joined by Douglas, Warren, and Brennan. Fortas was not yet on the Court. See, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949). But *cf.*, Thornhill v. Alabama, 310 U.S. 88 (1940).

[68] 385 U.S. at 52.

[69] *Id.* at 46-47.

meeting on the premises or remained there after an order to leave.

Finally, the dissent admits that Black's "use" test for defining the outer limits of the state's power to exclude demonstrators from its premises has validity.[70] But then Douglas goes on to say, "[T]his is quite different from saying that all public places are off limits to people with grievances."[71] Indeed it is quite different, but Douglas has set us a straw man. Black at no point suggests that all public places are or should be off limits. In fact, in distinguishing the principal case from *Edwards,* Black makes clear that this is not his position as he points out that, "Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not."[72]

In further attacking the majority opinion, the dissent suggests that the Court's holding would place in the discretion of the custodian of public property the power to determine when the property shall be used to express ideas. This power, Douglas argues, would give the custodian, "the awesome power to decide whose ideas may be expressed, and who shall be denied a place to air their claims and petition their government."[73] However, the power which the majority recognizes as being vested in the custodian is not an unbridled one, nor is it awesome. A custodian may not decide who may express views and who may not. The custodian may only perform his function of administering the property evenhandedly according to its dedicated use.

In short, the majority in the principal case is not announcing a novel doctrine granting a new and frightful power to state employees. Instead, it is rendering a predictable opinion recognizing that the administration of property is impossible if its use by the public is not confined to purposes at least akin to its normal function.

An examination of Black's opinion is not completed by a contrast of constitutional theories. It must be noted that other considerations were in the minds of the majority. These considerations are more fully reflected in Black's dissent in *Brown*[74] than in

[70] "There may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. There may be some instances in which assemblies and petition for redress of grievances are not consistent with other necessary purposes of public property." *Id.* at 54.

[71] *Id.* at 54.

[72] *Id.* at 41.

[73] *Id.* at 54.

[74] Brown v. Louisiana, 383 U.S. 131, 151 (1966) (dissenting opinion of Black, J.).

his opinion in *Adderley*. Black and those who joined with him were concerned that a failure to enforce laws against demonstrators was part of a dangerous trend. Their concern is displayed in two statements of the *Brown* dissent. First:

> It is high time to challenge the assumption in which too many people have too long acquiesced, that groups that think they have been mistreated or that have actually been mistreated have a constitutional right to use the public's streets, buildings, and property to protest whatever, wherever, whenever they want, without regard to whom such conduct may disturb.[75]

And the closing statement of the dissent:

> But I say once more that the crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow. If we ever doubted that, we know it now. The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in. The holding in this case today makes it more necessary than ever that we stop and look more closely at where we are going.[76]

The weight of this concern in the formation of the views expressed in this dissent and in the principal case is subject to deep inquiry. Black, the great exponent of first amendment liberties,[77] is apparently reading history and finding the forerunner of the protest demonstration, not in pamphleteering of Thomas Payne or the dissident speaking of Edmond Burke, but in the violent revolutionaries of nineteenth century France. He who long has advocated the first amendment protection of ideas,[78] now fears that this departure from traditional Anglo-American forms of protest will end in mobs unwilling to rest on the merits of their ideas, but bent upon prevailing through the physical strength of their adherents. While the degree to which these fears influenced Black's decision is not subject to exact measurement, they must necessarily be considered by all who would study this opinion and reflect on future decisions.

The effect of this case will certainly be great. Protest demonstra-

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[75] *Id.* at 162.

[76] *Id.* at 168.

[77] See Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962).

[78] See, *e.g.*, Feldman v. United States, 322 U.S. 487, 501 (1944) (dissenting opinion of Black, J.).

tion is certainly not dead. But state governments may now be assured that so long as their regulations are clear and narrowly drawn, and so long as their administration is nondiscriminatory, they may protect public property from invasion by demonstrators unless the nature of such property is such that its use for mass assembly is appropriate.[79] Conversely, those who would demonstrate should be warned that in planning their protests they should incline toward the selection of sites in which public assemblies are normal or have previously or traditionally occurred, and where they will not unduly interrupt some administrative or judicial function of government.

It is unclear what effect this opinion will have on cases arising out of civil rights demonstrations in the segregated accommodations of private persons. As indicated above, the view that the first amendment prevented prosecution of demonstrators generally has been held in conjunction with a view that the equal protection clause of the fourteenth protected from prosecution for trespass those who were ordered from the property of others because of their race. This question was not, of course, before the Court in *Adderley*.[80] However, the opinion may be of some aid in predicting the probable result when the question does arise.[81] Since three of the six justices who reached the equal protection issue in *Bell v. Maryland*[82] rejected the demonstrators' arguments, and since these same three, joined by two others, have now found that demonstrators, even on public property, are not insulated from convictions for trespass by the motives behind their entry, it seems likely that future protestors holding sit-ins in establishments not covered by the Public Accommodations Act would certainly not be protected by the first amendment and probably not by the equal protection clause of the

[79] Various parts of Black's opinion suggest that capital grounds, public parks, and to a limited extent the streets are among those places appropriate for demonstration.

[80] Petitioners did raise this issue by claiming that they were entitled to abatement under the doctrine of Hamm v. City of Rock Hill, 379 U.S. 229 (1964), as their protests had been directed toward segregated facilities. The Court found this contention untenable.

[81] There is a greater likelihood of the issue's arising than might at first appear. True, the Public Accommodations Act, 78 Stat. 743, 42 U.S.C.A. §§ 2000(a)-(a)(6) (1964), made segregation of most establishments unlawful. But the act did leave certain exceptions. (*E.g.* sellers of food for off-premises consumption, providers of lodging for transients with accommodations for fewer than six in the residence of the proprietor, possibly operators of participant sports centers).

[82] 378 U.S. 226, 318 (1964) (dissenting opinion of Black, J.).

fourteenth. Therefore those who would urge integration of the remaining lawfully segregated establishments would be well advised to do so by boycott, lawful picketing, or other means not involving the invasion of the segregated property. Otherwise, they run the risk of sustained convictions under clear, narrowly-drawn statutes.

DAVID B. SENTELLE

Constitutional Law—State Cannot Award Damages for Invasion of Privacy Without Proof of Actual Malice

The United States Supreme Court, in *New York Times Co. v. Sullivan*,[1] held that a state court could not constitutionally award damages in a libel suit by a public official against a critic of his official conduct without a showing of actual malice—that defendant knew the statement was false or that there was a reckless disregard for its truth. The malice requirement has since been extended to a prosecution under a state criminal libel statute.[2] In the recent case of *Time, Inc. v. Hill*,[3] the Court extended the malice requirement to a civil action for damages brought under a state invasion of privacy statute.[4]

In September of 1952 plaintiff Hill and his family were held hostage for nineteen hours in their home outside Philadelphia. The captors—three escaped convicts—then released the family unharmed. The following spring, a novel[5] was published describing "the experience of a family of four held hostage by three escaped convicts in the family's suburban home."[6] The family in the novel suffered violence and verbal abuse at the hands of the convicts, while the Hill family had not. When a play made from the book opened for

[1] 376 U.S. 254 (1964).

[2] Garrison v. Louisiana, 379 U.S. 64 (1964). *New York Times* and *Garrison* involved respectively a city commissioner and state criminal court judges—all clearly "public officials." In Rosenblatt v. Baer, 383 U.S. 75 (1966) the public official concept was extended to include a commissioner of a county ski recreation area.

[3] 385 U.S. 374 (1967).

[4] N.Y. CIVIL RIGHTS LAW §§ 50-51. Section 50 makes the use "for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person" without that person's consent, a misdemeanor. Section 51 gives any person whose name is so used, remedies in the form of actions for an injunction and for damages.

[5] HAYES, THE DESPERATE HOURS (1953).

[6] 385 U.S. at 378.