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Reflections on the Sit-Ins

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REFLECTIONS ON THE "SIT-INS"

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On February 1, 1960, in the city of Greensboro, North Carolina, four Negro students attending North Carolina A & T College of that city walked into a local dime store, made several purchases, and proceeded to the lunch counter where they sat and ordered coffee. The waitress refused the order and the students refused to leave upon being requested to do so. They remained in their places until the store closed. This was the spark which ignited the so-called "sit-in" movement which has spread throughout the deep South and has led to an extensive campaign of boycotting and picketing of Northern dime stores.[1]

The Southern reaction to the movement has been quick and unrestrained. Hundreds of students have been arrested and convicted under the trespass statutes of several states.[2] The National Association for the Advancement of Colored People, through its Chief Counsel, Thurgood Marshall, has declared its intention to appeal many of the convictions.[3] It is not improbable that some of the cases will reach the Supreme Court of the United States. The several possible reactions of that tribunal to a problem of such profound social implications comprise the subject matter of this effort.

The precise posture of the cases which finally reach the Supreme Court is, of course, impossible to predict. That they will involve essentially the same facts as were involved in the Greensboro incident with a subsequent arrest and conviction under a state trespass statute appears, however, to be a reasonable prognosis.

Rights and Duties of the Parties in the Absence of State Intervention

An analysis of the rights and duties of the sit-ins and the dime store proprietor before the occurrence of overt intervention by state officials

† See contributors' section, masthead p. 458, for biographical data.

1 Washington Post and Times Herald, April 10, 1960, p. E1, col. 1. To date no injunctions have issued against the picketing in Northern states. Whether the activities of the persons actually sitting at the lunch counters could be legitimately termed "picketing" is an interesting question. Certainly, their activities do not constitute picketing as the term is generally understood. Rather than attempting to influence through moral suasion the public or the store managers of the rightness of their position, they are asserting that they have a legal right to be served and are simply waiting for that right to be honored. In a sense public opinion is irrelevant. On the other hand, it is not inconceivable that the dime store managers could bring an action in tort against the participants on the theory that the participants are in fact pickets and as such are substantially interfering with their business expectations. Heretofore such actions have been sustained only when the defendant has attempted to divert business to himself. Whether a court could constitutionally provide for an action for damages or provide injunctive relief against the continuation of the sit-ins involves many of the questions to be considered herein. To date no proprietor has brought such an action, probably because of the states' enforcement of their trespass statutes.

2 N.Y. Times, Mar. 19, 1960, p. 8E, col. 1.

3 Ibid.

will serve, perhaps, to clarify the fundamental issues as well as to place the problem in its proper perspective. For example, a North Carolina statute provides as follows:

> Inns, Hotels, and Restaurants:
>
> Must furnish accommodations
> Every innkeeper shall at all times provide suitable food, rooms, beds, and bedding for strangers and travelers whom he may accept as guests in his inn or hotel.[4]

While the title of the section indicates that its provisions extend to restaurants, restaurants are not specifically mentioned as separate entities in the body of the statute. Furthermore, it cannot be assumed that a lunch counter operated as a department of a dime store would come within the definition of "restaurant." Finally, it is important to note that, according to the statute, the proprietor must furnish accommodations to those whom he *may* accept as guests. That an attempt to invoke the aid of this statute in the North Carolina courts would prove unsuccessful is strongly suggested by the language of the North Carolina Supreme Court in the case of *State v. Clyburn*.[5] In that case, several Negroes who refused to leave a section of a restaurant reserved for whites were arrested and convicted pursuant to the state's trespass statutes.[6] The constitutional validity of the arrests and convictions was not discussed in the opinion. Nor did the court consent to take judicial notice of a municipal ordinance of the city of Durham requiring racial discrimination in restaurants. Consequently, the sole question discussed by the court was whether or not a refusal of a restaurant owner to serve Negroes constituted a denial of equal protection of the laws. The opinion leaves no doubt as to the view of the North Carolina Supreme Court:

> Our Statutes, G.S. Sectious 14-126 and 134 impose criminal penalties for interference with the possession or right of possession of real estate privately held. . . . The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. . . . Race confers no prerogatives on the intruder. . . .[7]

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[4] N.C. Gen. Stat. § 72-1 (1950). North Carolina is typical of Southern States in its statutory treatment of criminal trespass and of the rights and duties of restaurant owners. For purposes of illustration, only the North Carolina statutes will be considered in this analysis.

[5] 247 N.C. 455, 101 S.E.2d 295 (1958).

[6] N.C. Gen. Stat. § 14-126 (1953).

Forcible entry and detainer—No one shall make entry into any lands and tenements, or terms for years, but in case where entry is given by law . . . and if any man do the contrary, he shall be guilty of a misdemeanor.

N.C. Gen. Stat. § 14-134 (1953).

Trespass on land after being forbidden; . . . If any person after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding Fifty Dollars, or imprisoned not more than thirty days. . . .

[7] State v. Clyburn, 247 N.C. 455, 458, 101 S.E.2d 295 (1958).

This view finds support in the opinion of the Court of Appeals of the Fourth Circuit in the case of *Williams v. Howard Johnson's Restaurant.*[8] The case involved a Negro lawyer traveling by auto from Washington, D. C., to Lexington, Virginia, who stopped en route at a Howard Johnson's Restaurant in Alexandria, Virginia. Upon being refused service, he sought a declaratory judgment, an injunction, and damages against the proprietor on the grounds that such discrimination constituted (1) interference with the free flow of interstate commerce, (2) a violation of the Civil Rights Acts of 1875, and (3) a violation of the equal protection clause of the fourteenth amendment. The latter argument was based on the state's acquiescence in racial discrimination. The court rejected the contention that interstate commerce was involved. It also rejected the argument under the Civil Rights Acts on the ground that the provisions relied on by plaintiff were held unconstitutional in the *Civil Rights Cases.*[9]

In addressing itself to plaintiff's argument under the fourteenth amendment, the court states:

> [N]o statute of Virginia requires the exclusion of Negroes from public restaurants. . . . Unless these actions are performed in obedience to some positive provision of State law they do not furnish a basis for the pending complaint.[10]

The court, quoting from *Shelley v. Kraemer,*[11] continued:

> [T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shields against merely private conduct, however discriminatory or wrongful.[12]

The reasoning of these cases suggests that the dime store proprietors, in the absence of affirmative state action, are within their constitutional rights in refusing to serve Negroes. To state that they are within their rights is to state no more, perhaps, than that they cannot be compelled to serve Negroes. The proprietor is under no constitutional obligation to serve Negroes and conversely, Negroes have no constitutional right to be served. In its simplest formulation the syllogism may be stated as follows:

The fourteenth amendment does not reach private conduct. The activities of a lunch counter operator are in this context private. Therefore, the fourteenth amendment does not apply to them. Needless to say, it is the critical middle premise which is the subject of most debate.

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8 268 F.2d 845 (4th Cir. 1959).
9 109 U.S. 3 (1883).
10 268 F.2d 845, 847.
11 334 U.S. 1, 13 (1948).
12 268 F.2d at 848.

State Action—Licensing and Other Regulation

In none of the foregoing cases was the argument made that by virtue of the public function of the restaurant, its receipt of a license from the state, and its amenability to state regulation and inspection, its activities came within the purview of the fourteenth amendment. The refusal of the Supreme Court to grant certiorari in the case of *Dorsey v. Stuyvesant Town Corp.*[13] may have convinced the plaintiffs in these cases of the futility of such an argument. That case involved racial discrimination in the selection of tenants by a private New York housing corporation. Acting pursuant to certain statutory provisions, the city had condemned a large tract of land necessary for the construction of the project and had granted a tax exemption to the corporation on the project. The New York Court of Appeals found that the action of the state was insufficient to bring the discriminatory practices of the corporation within the ambit of the fourteenth amendment. Of course, it has been stated more than once that a refusal to grant certiorari implies no more than that less than four members of the Supreme Court were concerned to hear the case. On the assumption that no further inferences may be drawn, it is not beyond reason to argue that the regulatory activities of the state relating to dime stores are sufficiently pervasive to subject the store's activities to the prohibitions of the equal protection clause of the fourteenth amendment. Indeed, such a view was propounded by no less eminent a jurist than Mr. Justice John Marshall Harlan in the *Civil Rights Cases,* where he argued in solitary dissent that railroads, inns, theatres, and other public facilities were agents or instrumentalities of the state charged with a duty to the public at large. History has not yet vindicated Harlan's position on this question.[14]

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[13] 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950).

[14] Some commentators have expressed the opinion that Harlan's dissent would permit Congress to legislate against purely private discrimination. Such appears to be the view of Alan Westin. In his article, "John Marshall Harlan and the Constitutional Rights of Negroes," 66 Yale L.J. 637 (1957), he argues in great detail that such a position runs counter to the legislative history of § 1 of the fourteenth amendment. Westin is not specific as to what constitutes "private" discrimination. If he is referring to racial discrimination by privately owned public facilities, his argument is, at least, legitimate. There is, however, a possibility that he is referring to discrimination of a purely private or social nature. An analysis of the opinion in the Civil Rights Cases indicates only one passage which might be construed in such a manner. At page 53-54 of the dissent, Harlan states, "It does not seem to me that the fact that [by] the second clause of the First Section of the Fourteenth Amendment, the States are expressly prohibited from making or enforcing laws abridging the privileges and immunities of citizens of the United States furnishes any sufficient intent to deny Congress the power by general, primary, and direct legislation of protecting citizens of the several states being also citizens of the United States against all discrimination in respect of their rights as citizens which is founded on race, color, or previous condition of servitude." It will be noted that the reference to "all discrimination" is modified by the phrase, "in respect of their rights as citizens." A clearer exposition of Harlan's views on purely private discrimination is found on page 59 of his dissent where he states that,

Whether one person will permit or maintain social relations with another is a matter

At this writing, the majority view in the *Civil Rights Cases* remains the definitive statement as to the constitutional status of privately owned public facilities. For purposes of the application of the prohibitions of the fourteenth amendment, they are private. Nevertheless, because of the necessarily speculative character of this paper, it is not improper to explore some of the ramifications of an overruling of the decision in the *Civil Rights Cases.*

Should the Supreme Court overrule that much-quoted opinion, it seems probable that racial segregation at the lunch counters would be held to contravene the equal protection clause and that the widely practiced device of maintaining a separate counter for Negro customers would be invalidated on the rationale of *Brown v. Board of Education,*[15] *i.e.,* separate facilities operated by an agency of the state are inherently unequal. But the obvious difficulty with this approach involves the question of the degree of state regulation required for the application of the fourteenth amendment. For example, the degree of regulation of a shoe shine establishment or of a one-chair barber shop may well be substantially the same as that of a large-volume dime store. Would, then, the business volume and the number of persons actually served by the establishment be relevant considerations? It is submitted that these are questions to which today's Supreme Court is not likely to address itself, for there are approaches more subtle and less attenuated than that involving the "state agency" concept.

Police Intervention

The foregoing indicates that, in the absence of affirmative state action in the implementation of racial discrimination by a dime store proprietor, the equal protection clause has no present application. At the point of arrest, however, the state has "put its thumb on the scales." The weight of that thumb is crucial to the question of whether or not the fourteenth amendment may be invoked to perform its balancing function. The United States Court of Appeals of the Third Circuit was confronted with this question in the case of *Valle v. Stengel.*[16] The

with which government has no concern. I agree that if one citizen chooses not to hold social intercourse with another, he is not and cannot be made amenable to the law in that regard; for even upon grounds of race, no legal right of a citizen is violated by the refusal of others to maintain social relations with him. What I affirm is that no State nor the officers of any State nor any individual wielding power under State authority for the public benefit or the public convenience can, consistently either with freedom established by the fundamental law, or with that equality of civil rights which now belongs to every citizen, discriminate against freemen or citizens in those rights because of their race, or because they once labored under the disabilities of slavery imposed upon them as a race.

[15] 347 U.S. 483 (1954).

[16] 176 F.2d 697 (3d Cir. 1949).

case involved several plaintiffs, both white and Negro, who were admitted, upon payment of an entrance fee, to the Palisade Amusement Park in New Jersey. The park was privately owned and operated. After purchasing tickets for admission to the swimming pool, they were informed that the pool was unavailable for use by citizens of African descent. Although not mentioned in the report of the case, several additional facts might be mentioned at this point for the purpose of placing the action of the police chief, Stengel, in proper perspective. According to James Robinson, Executive Secretary of the Congress on Racial Equality and one of the participants in the Palisade affair, the group, after being refused admission, remained in line in front of the pool's ticket booth. Shortly, several employees of the park physically attacked them. In conformance with the non-violent principles of CORE, they refused to retaliate but remained more or less in their places[17] until their arrest at the hands of Police Chief Stengel. The report of the case is unclear as to the precise charge filed against the plaintiffs.

In addition to a demand for damages, plaintiffs sought an injunction restraining defendants from denying rights guaranteed to them by the Constitution on grounds of race or color. The court held that Stengel's action was violative of the equal protection clause, of the Civil Rights Acts of 1875, and of the New Jersey Civil Rights Statute.[18]

Considering the relation of the police officer's action to the equal protection clause, the court said,

> The fact that Stengel, a law enforcement officer, was acting in defiance of the law of New Jersey . . . will not serve as a defense and, since the complaint alleges in effect that he aided and abetted the corporate defendant and the managing defendants, his actions may be attributed to them and treated as their own.
>
> It follows, therefore, that the plaintiffs were denied equal protection of the laws. . . .[19]

The inescapable implication is that the action of the police officer in aid of the private discrimination of the park's management furnished the requisite state action for the invocation of the fourteenth amendment. It is important to note that the facts of his case are quie similar to those of the typical sit-in situation. In both cases, Negroes are admitted to one area of the premises but excluded from another. In both cases the aid of law enforcement officials is required to enforce the discriminatory practices. The facts differ significantly only insofar as

[17] This information was obtained through a conversation with Mr. Robinson at Lexington, Kentucky, in August of 1959.

[18] N.J. Stat. Ann. §§ 10.1-1-10.1-6 (1960).

[19] 176 F.2d 697, 702 (1949). But cf. Drews v. State, — Md. —, — A.2d —, 29 U.S.L. Week 2325 (1961).

the authority to make the arrests is concerned. Thus, in the typical sit-in case, a state trespass statute will be involved and, thereby, an additional arm of the state invoked in aid of private discrimination. The Court of Appeals of the Third Circuit was convinced that the action of a law enforcement official in defiance of state law supplied the fourteenth amendment's requirement of state action. It is clear, then, that the opinion would not have differed had the officer acted pursuant to state law in making the arrest.

The *Valle v. Stengel* court held further that the action of the police officer violated the Civil Rights Acts,[20] in as much as the plaintiffs "were denied the right to make or enforce contracts, all within the purview of and prohibited by the provision of R. S. 1977. But any narrow interpretation of the Civil Rights Acts has been obliterated by the *Screws* decision." The court then proceeds to find that in addition to the right to make and enforce contracts the privileges and immunities of citizenship include the right to the pursuit of happiness:

> The "privileges or immunities" referred to in R. S. 1979 are the "Privileges and Immunities" of Article IV, Section 2 of the Constitution and the "privileges or immunities" of the Fourteenth Amendment. . . .
>
> The Privileges and Immunities clause . . . guarantees the right of the individual citizen to engage in the pursuit of happiness. The field of human rights covered by the privileges and immunities clause is indeed a broad one. The individual defendants, acting in concert . . . have denied to the plaintiffs the privileges and immunities of citizenship.[21]

This interpretation of the provisions of the Civil Rights Acts is suggestive of a means by which a state's enforcement of private discrimination by way of arrests could be invalidated by the Supreme Court. At the same time, the often repeated charge of judicial legislation could be avoided. The view that the right to the pursuit of happiness is included within the privileges and immunities of citizenship is not a novel one. It is supported, in fact, by a dictum contained in the majority opinion in the *Civil Rights Cases*.[22] Any reasonable application of the phrase

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[20] Rev. Stat. §§ 1977, 1979 (1875), 42 U.S.C. §§ 1981, 1983 (1958).

> Equal rights under the law.
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts. . . .
>
> * * *
>
> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an Action at law, suit in equity, or other proper proceeding for redress.

[21] 176 F.2d 697, 702 (1949). Screws v. United States, 325 U.S. 91 (1945). The Screws case stands for the proposition, inter alia, that § 20 of the Criminal Code (Civil Rights Acts of 1875) applies to persons acting under both state and federal law.

[22] 109 U.S. 3, 24 (1883).

"pursuit of happiness" to cases involving racial discrimination is not, however, without difficulty. One man's happiness is often another's anathema. The reliance of the Supreme Court on language of such ambiguous intendment in the invalidation of state enforcement of private discrimination could open a Pandora's box of litigation.

On the other hand, a reasonable argument could be made in applying the court's more narrow holding to the facts of the sit-in situation. Section 1979 of the Civil Rights Acts subjects "every person who under color of any statute" deprives a citizen of his privileges or immunities secured by the Constitution, to an action at law, suit in equity, or other proper proceeding for redress. Should section 1979 be held applicable to the police enforcement of private discrimination, the arresting officers would be held liable in tort and could be enjoined from further enforcement of a statute the effect of which is to promote private discrimination. In making an argument under section 1979 it is important to note that Negro customers are not excluded from all areas of the dime store but only from the lunch counters. There is no discrimination in the "integrated" sections and, in fact, nothing to overtly indicate that access to any section of the store is denied except, perhaps, a conspicuous absence of brown faces at the lunch counters. Indeed, in many of these stores Negroes are permitted to order from the lunch counters while standing and are expected to leave immediately after delivery of the food. It is not inconceivable that the argument could be made that the store, through its invitation to all the world to enter and to purchase its goods, has made a promise implied in fact that all the facilities of the store, including the lunch counter stools are available to every business guest. The acceptance of such an argument, in addition to subjecting the arresting officer to an action in tort for denying the Negroes' right to enforce a contract, would also entitle plaintiffs to a decree of specific performance or to damages for breach of contract under general common-law contract doctrine.

The Circuit Court in *Valle v. Stengel* was careful to emphasize the role of the police chief in distinguishing that case from the *Civil Rights Cases* where the criminal provisions of the Civil Rights Acts forbidding discrimination in inns, public conveyances, and theatres were held unconstitutional. The court states:

> In the instant case we are concerned with the actions of a chief of police holding his office by virtue of State law and acting under color of law within the purview of the *Screws* decision. . . . Mr. Justice Bradley emphasized the fact that the interference with the individuals referred to in the *Civil Rights Cases* was not the action of the State. Cf. the circum-

stances at bar. It is apparent that the decision in the *Civil Rights Cases* does not control the instant litigation.[23]

The same considerations are relevant in distinguishing *Valle v. Stengel* from *Williams v. Howard Johnson's Restaurant*.[24] Nevertheless, the language of the court in the latter case suggests that its decision would have differed from that of the Third Circuit in *Valle v. Stengel* on the question of the applicability of the fourteenth amendment and the Civil Rights Acts.[25] The Court of Appeals of the Fourth Circuit was of the opinion that the fourteenth amendment reached only statutes requiring the exclusion of Negroes from public restaurants. That such an interpretation is unduly simplistic seems clear from the Supreme Court's discussion in *Shelley v. Kraemer*.[26]

Judicial Intervention

In view of the large number of convictions for trespass occurring in the Southern states, the question of the judicial enforcement of private racial discrimination assumes a certain importance. The landmark decision on this question was, of course, *Shelley v. Kraemer*. That case involved the judicial enforcement of private agreements having as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. In his discussion of the validity of such agreements, Chief Justice Vinson carefully stated that the agreements between private parties to refrain from conveying property to certain classes of persons violated no constitutional provisions. The fourteenth amendment "erects no shield against merely private conduct, however discriminatory or wrongful." In language no less explicit the Court discussed the constitutional aspects of the judicial enforcement of privately executed racially restrictive covenants:

> These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements.
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> * * *
>
> The judicial action in each case bears the clear and unmistakable imprimatur of the State . . . . State action, as that phrase is understood for purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.
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> * * *
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> Having so decided, we find it unnecessary to consider whether petitioners

[23] 176 F.2d 697, 703 (1949).

[24] Supra note 10.

[25] The question in Valle v. Stengel could have been decided on the narrow ground that the discriminatory activities of defendants violated the provisions of the New Jersey Civil Rights Acts. In subsequent cases, much of the court's opinion could be dismissed as dicta.

[26] 334 U.S. 1 (1948).

> have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.[27]

The practical effect of the decision is that private persons cannot be enjoined from making racially restrictive covenants, but, at the same time, the agreements cannot be judicially enforced. It can be confidently asserted that any attempt to apply the rationale of *Shelley v. Kraemer* to the facts of the sit-in situation will encounter the inevitable objection that the two cases must be distinguished in terms of the respective rights involved. Clearly, in *Shelley* the petitioners were denied the right to own property. The sit-in on the other hand has not been denied a right of like specificity. Support for such a distinction can be found in the words of Chief Justice Vinson when he states that "it cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."[28]

At the bottom of the attempt to distinguish the rights involved in the respective cases is the view that the equal protection clause and the rights thereunder extend no further than the rights set out under the due process clause.[29] Under this view, the sit-in is prevented from asserting that he has been denied the equal protection of the laws since he is without an argument under the due process clause. On the other hand, such a view loses some of its persuasiveness when it is recalled that Chief Justice Vinson in the final paragraph of the *Shelley* opinion, quoted above, found it unnecessary to consider plaintiff's argument under the due process clause. Apparently the Chief Justice found some distinction between the two clauses. Chief Justice Warren, in *Brown v. Board of Education,* was equally unconcerned with the due process clause. In that case, as in the sit-in cases, isolation of the rights under the due process clause becomes difficult. That equal protection of the laws was denied is, however, quite clear. The refusal of the North Carolina Supreme Court to take judicial notice of a municipal ordinance

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27 Id. at 13-14, 20, 23.

28 Id. at 10. That the law, including constitutional law, should treat rights to real property differently than rights to personalty is not surprising in the light of our legal and intellectual history. On this subject, a reading of Locke on Civil Government, bk. II, ch. V, "Of Property," may still serve to illuminate legal calculations: "[T]he chief matter of property being now not the fruits of the earth and the beasts that subsist on it, but the earth itself, as that which takes in and carries with it all the rest; . . ." Id. at ¶ 32.

29 See Abernathy, "Expansion of the State Action Concept Under the Fourteenth Amendment," 43 Cornell L.Q. 375, 410 (1958).

requiring segregation in restaurants in *State v. Clyburn*[30] seems to suggest that even that court might find some difficulty in disposing of an attack on the statute. Finally, the Court of Appeals of the Fourth Circuit in *Williams v. Howard Johnson's Restaurant* was emphatic in its assertion that no statute of Virginia required segregation in restaurants, the implication being that such a statute would be invalidated. Yet, no rights under the due process clause appear to be involved. If any right is indeed involved it must fairly be said to be the right to equal protection of the laws. It would appear then that whether or not a legitimate distinction may be made between the due process and equal protection clauses of the fourteenth amendment, the courts, in fact, make a distinction. It is suggested that the better view as to the relation between these two clauses would be that the right to the equal protection of the laws is implicit in the notion of due process. Under this view, the right of equal protection exists in addition to rights of life, liberty, and property as a separate and distinct right under the due process clause.

On the basis of the foregoing discussion, it seems rather clear that a state could not enact a constitutional statute requiring discrimination in privately owned restaurants. To do so would result in the denial of the equal protection of the laws to the excluded classes. The attempt to distinguish the sit-in cases from the restrictive covenant cases in terms of specific rights under the due process clause becomes specious at this point. To hold that discrimination at the lunch counters may be enforced by the judiciary requires that a distinction be made between the effect of legislative and judicial action. Chief Justice Vinson has stated in *Shelley v. Kraemer,* however, that "state action, as that phrase is understood for purposes of the Fourteenth Amendment, refers to exertions of state power in all forms." Such a broad statement raises the question whether a legitimate distinction may be made between the right of the proprietor to select his clientele and that of the private person to select the guests he may receive in his home. If the doctrine of *Shelley v. Kraemer* is held to apply to the former situation, why not the latter? It is submitted that the distinction is to be found in the public character of a dime store's functions as opposed to the purely private nature of the home owner's activities. That a distinction is made can be seen from an analysis of the two situations in terms of an attempt to regulate the respective relationships by statute. A state statute requiring integration in all public facilities is undoubtedly constitutional.[31] On the other

[30] Supra note 5.

[31] See 2 Emerson & Haber, Political and Civil Rights in the United States 1413 (2d ed. 1958).

hand, a statute requiring private individuals to accept as guests all persons who present themselves at their doors would probably be held to constitute such interference with the right to the private enjoyment of one's property as to deprive the occupant of property without due process of law. In like manner, a refusal by a court to enforce a trespass statute against an intrusion of such a nature could be attacked on similar grounds. The largely inarticulate assumption behind this distinction is that a person who operates a business for the service of the public at large relinquishes his right to undisturbed privacy. Cases involving discrimination by individual shopkeepers might present a more difficult question.

It has been suggested that in cases less extreme than *Shelley*, "where the necessity of protecting the property right outweighs the need for safeguarding the civil right, judicial action resulting in some discrimination might still be permitted."[32] Opinions as to the extremity of dime store lunch counter discrimination may vary. From the viewpoint of the Negro, it is, perhaps, more extreme than the discrimination in *Shelley*. There the discrimination was private and subtle. Lunch counter discrimination, on the other hand, is a continuing public insult to the dignity of millions of urban Negroes. Against these considerations stands the proprietor's interest in selecting his clientele on whatever basis he deems desirable. The balancing of these conflicting interests is within the special competence of the Supreme Court. Should *Shelley* be held to apply, the proprietor would retain his right to exclude Negroes. Yet, this right would be unenforceable by a court. Naturally, the question arises as to whether it is proper to speak of unenforceable rights. The same consideration applies in *Shelley* as to the question of the unenforceable contract. Perhaps it is productive of less confusion to conceive of the judiciary as a neutral body where private discrimination in housing and, perhaps, in public facilities is involved. It lends its powers to enforce neither integration nor segregation.

A failure by the Supreme Court to apply the *Shelley* doctrine or any of the previously suggested theories or combination of such theories will, of necessity, require an exploration of alternative remedies.

Alternative Remedies

The possibility of national legislation to enforce lunch counter integration is so remote that a discussion of it is largely academic. There are two major reasons why such legislation cannot be expected. First,

32 Note, "State Action Reconsidered in Light of Shelley v. Kraemer," 48 Colum. L. Rev. 1241, 1245 (1948).

a Congress which refuses to endorse a decision of the Supreme Court invalidating discrimination in public schools could not reasonably be expected to invalidate lunch counter discrimination through affirmative legislation. The second and more pertinent reason is that a similar statute was declared unconstitutional in the *Civil Rights Cases* on the ground that the enabling clause of the fourteenth amendment allows Congress to enact only corrective and not primary legislation in the area of private discrimination. Mr. Justice Bradley, speaking for the majority, interpreted the provisions of the fourteenth amendment as applying only to the invasion of individual rights by the state and not to the private invasion of such rights. It seems unlikely that the Supreme Court of 1961 is ready to overrule the decision in the *Civil Rights Cases* and uphold such a statute even if it could be passed. History has yet to come abreast of the views of John Marshall Harlan.

In view of the speculative character of this paper, it is not improper to suggest a means by which Congress could reach the discrimination in these cases. It is important to understand that the discrimination involved here is not that of the individual bigot operating a corner cigar store. Here the discrimination is practiced by the agents of nation-wide chain stores. Further, it can be shown that the practices of these giant corporations tend to breed racial tensions in the states of the South. The industrial development of the Southern states is vital to an expanding economy. Yet, it is evident that private investors are reluctant to establish industrial complexes in areas distinguished by extreme racial tensions. Therefore, Congress could legitimately find that the elimination of discriminatory practices at dime store lunch counters will tend to decrease racial tensions in the area and thereby facilitate the free flow of interstate commerce.[33]

Several state legislatures have responded to the question of discrimination in access to public facilities through the passage of civil rights statutes.[34] There is nothing to prevent the passage of such statutes in the South except, perhaps, more than a century of the acceptance by the majority of the ideology of racism. The constitutionality of such statutes is undisputed, but, to those naive enough to expect such legislation, the observation of Mr. Justice Jackson in *Kunz v. New York*[35] is apposite. "Life teaches one to distinguish between faith and hope."

Perhaps the most desirable means of resolving this very difficult

[33] Cf. Wickard v. Filburn, 317 U.S. 111 (1942); Civil Rights Act of 1960, § 203, 74 Stat. 87.

[34] See supra note 31 at 1413.

[35] 340 U.S. 290, 314 (1951).

problem is suggested by the following statement from the April issue of the CORE-lator.

> Buried in the reams of copy about the southern sit-ins is the fact that since the protest movement started, over 100 lunch counters and eating places in various parts of the south have started to serve everybody regardless of color.[36]

[36] April, 1960, p. 1.