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Recent Decision: Conviction Under Discriminatory City Ordinance Held "State Action"

The recent attempts by southern Negroes to enforce through sit-in demonstrations the rights granted them by the Civil War amendments have resulted in a number of arrests for criminal trespass. On May 27, 1963 the United States Supreme Court rendered its first decision on the constitutionality of such arrests.

In the principal case, ten Negro boys and girls entered an S. H. Kress "dime" store in South Carolina and seated themselves at the lunch counter. The store manager promptly called the police and closed the counter. When the police arrived the manager asked the defendants to leave because integrated service was in violation of a Greenville City ordinance requiring segregated eating facilities.[1] Upon their refusal, they were arrested for trespassing and subsequently convicted. The Supreme Court of South Carolina affirmed the convictions.[2] The United States Supreme Court, in reversing the convictions, *held* that when a state agency, here the City of Greenville, enacts an ordinance requiring discrimination because of race, and the state permits its criminal processes to be used in a way which facilitates the bigotry of that law, such court action is in violation of the fourteenth amendment's "equal protection clause" and the convictions are consequently unconstitutional. *Peterson v. City of Greenville,* 83 Sup. Ct. 1119 (1963).

In *Lombard v. Louisiana,*[3] decided by the Court on the same day, the facts were similar to those in *Peterson* except that rather than an ordinance requiring segregated facilities in restaurants, the Mayor and the Superintendent of Police of New Orleans had issued orders requiring the continuance of segregated service. The Court, alluding to its reasoning in *Peterson,* likewise reversed the trespass convictions involved and declared that a state cannot do by official command what it cannot do by ordinance or statute.

In 1875 pursuant to the authority granted by the fourteenth amendment, Congress passed the Civil Rights Act[4] which declared that all persons shall be entitled to equal accommodations and privileges in inns, public conveyances and places of public amusement. A penalty was imposed upon any individual denying a citizen such equal accommodations. The statute was declared unconstitutional in the *Civil Rights Cases*[5] because it was not the corrective legislation that the Supreme Court believed to be required in this area.[6] The Court stated that such legislation was of a direct and primary nature in that it established rights rather than protected them from state action. The Court felt, moreover, that the Civil Rights

[1] "It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean: (a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise; (b) Separate tables, counters or booths; (c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served. . . ." GREENVILLE, S. C. CODE § 31-8 (1958).

[2] 239 S.C. 298, 122 S.E.2d 826 (1961).

[3] 83 Sup. Ct. 1122 (1963).

[4] 18 Stat. 335 (1875).

[5] 109 U.S. 3 (1883).

[6] *Id.* at 13-14.

Act took immediate and absolute possession of the subject of equal rights and displaced state legislation in the area, thus giving the states no opportunity to effectuate the mandates of the fourteenth amendment.[7] The Court, in addition, declared that the "equal protection clause" of the fourteenth amendment inhibits "state action" only.[8] Merely private conduct, however discriminatory or wrongful, is not proscribed by the fourteenth amendment. A significant problem in the civil rights area, therefore, has often centered around the question: what is state action?

The Supreme Court, in an early opinion, established that a state can only act by its legislative, executive or its judicial authorities.[9] If the activity originates in a person or agency identifiable as an instrumentality of the state, such action will be deemed "state action." It is the power reposed in a person by virtue of his position that declares his acts to be those of the state, not simply the specific authority that the state grants to him.[10] The actions of the police, therefore, are the actions of the state for the purposes of the fourteenth amendment even when the police act contrary to state law.[11]

A state may not command discrimination by legislative or judicial action. It would seem, then, that it cannot judicially enforce private discriminatory practices.[12] One commentator offered the following analysis:

> State effectuation of private discrimination, state encouragement of private discrimination, *perhaps even state toleration of private discrimination,* are possible grounds for holding the State responsible for discrimination enforced by its courts. If the State is responsible for the discrimination, it is, generally, violating the equal protection clause.[13]

In the principal case, the petitioners' main contention was that the state had denied them the equal protection of the laws. The Supreme Court, agreeing with this contention, found that the decision to exclude petitioners from the lunch counter was made solely because they were Negroes. Since the exclusion of Negroes

[7] *Ibid.* In a vigorous dissent, the first Mr. Justice John Marshall Harlan stated: "If the grant to colored citizens of the United States of citizenship in their respective States, imports exemption from race discrimination, in their States, in respect of such civil rights as belong to citizenship, then, to hold that the amendment remits that right to the States for their protection, primarily, and stays the hands of the nation, until it is assailed by State laws or State proceedings, is to adjudge that the amendment, so far from enlarging the powers of Congress . . . not only curtails them, but reverses the policy which the general government has pursued from its very organization. Such an interpretation of the amendment is a denial to Congress of the power, by appropriate legislation, to enforce one of its provisions." *Id.* at 52 (dissenting opinion).

[8] *Id.* at 17. "If there is any one purpose of the Fourteenth Amendment that is wholly outside the realm of doubt, it is that the Amendment was designed to bar States from denying to some groups, on account of their race or color, any rights, privileges, and opportunities accorded to other groups." Oyama v. California, 332 U.S. 633, 649 (1948) (Black, J., concurring).

[9] *Ex parte* Virginia, 100 U.S. 339, 347 (1879).

[10] Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083, 1086 (1960).

"The constitutional provision . . . must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. . . . This must be so or the constitutional prohibition has no meaning." *Ex parte* Virginia, *supra* note 9, at 347. *Accord,* Shelley v. Kraemer, 334 U.S. 1 (1948).

[11] Screws v. United States, 325 U.S. 91 (1945).

[12] Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days,* 1960 DUKE L.J. 315, 364; see Shelley v. Kraemer, *supra* note 10.

[13] Henkin, *Shelley v. Kraemer: Notes For A Revised Opinion,* 110 U. PA. L. REV. 473, 486-87 (1962). (Emphasis added.)

was based upon an ordinance of the City of Greenville which is an agency of the State of South Carolina, the Court declared that the state "has thus effectively determined that a person owning, managing or controlling an eating place is left with no choice of his own but must segregate his white and Negro patrons."[14] The respondents contended that Kress would have excluded Negroes even if the ordinance had not been enacted. The Court found this an immaterial factor and concluded that the convictions, nevertheless, effectively enforced the city ordinance.

Mr. Justice Harlan, concurring, did not agree with the majority that the mere existence of an ordinance required a reversal of the convictions. He analyzed the question to be whether the ordinance influenced the store owner in his decision to discriminate. Recognizing the common-law right of a private restauranteur to conduct segregated facilities, he felt the majority opinion violated that right.[15] But he agreed that the convictions should be reversed because the store manager testified that he was influenced by the ordinance.

Mr. Justice Douglas, concurring in the *Lombard* opinion, discussed property concepts and drew a distinction between purely private property and property which, while privately owned, is maintained to serve the public.[16] He stated that property coming within the latter category, *e.g.*, a restaurant, if licensed by a state would become a state instrumentality.[17] Segregation practiced in such an establishment, he maintained, would involve such "state action" as is prohibited by the fourteenth amendment.[18]

Where the executive or legislative branch of any state or local government announces that segregation must be practiced in quasi-public facilities, there now seems to be no doubt that criminal trespass convictions for sit-in demonstrations are in violation of the fourteenth amendment. The question which then arises is whether, absent a statute, a judgment for civil treapass is constitutional if the demonstrator is refused service solely because of the store owner's personal prejudice. Following the reasoning of Mr. Justice Douglas in *Lombard*, the bringing of such an action in the state courts would invalidate the judgment on the grounds that the state has acted through its judiciary.[19] Furthermore, if the establishment is licensed by the state, Justice Douglas would declare the refusal of service to be state action since he regards the act of licensing sufficient to support a type of agency relationship between the state and the licensee.

It can be argued, then, that a court

[14] Peterson v. City of Greenville, 83 Sup. Ct. 1119, 1121 (1963).

[15] *Id.* at 1134-35.

[16] *Accord,* Marsh v. Alabama, 326 U.S. 501 (1946), wherein the Court stated: "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 . . . constitutional rights of those who use it." *Id.* at 506 (dictum).

[17] Lombard v. Louisiana, 83 Sup. Ct. 1122, 1130 (1963) (concurring opinion).

[18] Contrary to Justice Douglas' remarks, some courts have held that the mere licensing of businesses or issuance of permits by the state does not establish such a relationship with the state which would render the licensee's action state action. To that effect, see Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959); Madden v. Queens County Jockey Club, Inc., 296 N.Y. 249, 72 N.E.2d 697, *cert. denied,* 332 U.S. 761 (1947); State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

[19] Lombard v. Louisiana, *supra* note 17, at 1127-28.

cannot constitutionally award a judgment to a store owner in a civil trespass action against a sit-in demonstrator. As has been illustrated, a determination in favor of the plaintiff may be construed as a state acting through its courts. There exists authority for such a view, for in *Shelley v. Kraemer*[20] the Supreme Court held that judicial enforcement of private discriminatory practices, in the form of a racially restrictive covenant in a real estate contract, was state action resulting in a denial of the equal protection of the laws. The Court has also held that a state court could not constitutionally award money damages for the violation of such a covenant since it would be state action to enforce compliance with the covenant.[21] It appears, therefore, that the fourteenth amendment prevents a state from *enforcing* private discrimination where the state itself could not legislate or require such discrimination.

There are a number of complex legal questions which arise from the principal case. Heavy reliance on the Court's broad concept of "state action" may logically lead to a result whereby a state court's dismissal of a complaint brought by a Negro constitutes state discrimination since the state may thus be acting.[22] The most disturbing question unanswered by the decision is whether a court's inaction may be construed as "state action."[23]

Another major area of concern is reflected in Mr. Justice Douglas' concurring opinion in *Lombard* wherein he examined the distinction betwen private and quasi-public property. It is difficult to draw a line between these two areas. Furthermore, if the protection of private property rights is at issue, strong legal arguments and traditions must be considered. These arguments may be difficult to answer, even by the most ardent integrationist.

[20] 334 U.S. 1 (1948).

[21] Barrows v. Jackson, 346 U.S. 249 (1953).

[22] The possibility that state inaction may be deemed a violation of the fourteenth amendment's "equal protection clause" is discussed in Lynch v. United States, 189 F.2d 476, 479 (5th Cir.), *cert. denied*, 342 U.S. 831 (1951); Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 161 A.2d 705 (1960).

[23] For a profitable treatment of the interplay between state inaction and the fourteenth amendment, see Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303, 314-20 (1959); Note, *Lunch Counter Demonstrations: State Action and the Fourteenth Amendment*, 47 VA. L. REV. 105 (1961).