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Constitutional Law - State Action - Imposing Criminal Penalties to Enforce Private Discrimination

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CONSTITUTIONAL LAW—STATE ACTION—IMPOSING CRIMINAL PENALTIES TO ENFORCE PRIVATE DISCRIMINATION—Defendants, Negroes, entered a section of a private restaurant designated to be for "White" patrons only. Although they were denied service, they refused to comply with the proprietor's request to leave. Defendants were subsequently arrested by a police officer after declining his offer not to arrest if they would depart, and were tried for violation of the state's criminal trespass statutes.[1] They were found guilty of a misdemeanor. On appeal, *held,* sustained. Defendants have no constitutionally protected right not to be discriminated against by an operator of a private enterprise. *State v. Clyburn,* 247 N.C. 455, 101 S.E. (2d) 295 (1958).

[1] N.C. Gen. Stat. (1953) §§14-126 and 14-134.

The Supreme Court has consistently interpreted the constitutional prohibitions of the Fourteenth Amendment[2] to limit invasions of civil liberties by state agencies only and not to restrain private individuals.[3] A person seeking protection under the Constitution must establish an infringement of his rights by the state itself, and the protection to be afforded is thus dependent to a large extent upon the bounds of the concept of "state action."[4] Before prohibitions of the Fourteenth Amendment are invoked a court must determine (1) that there exists governmental action in fact, (2) that this action directly results in the denial of some recognized right of an individual, and (3) that the necessity of protecting such right outweighs a curtailment of the state agency's freedom of action.[5] In the principal case alternative grounds might be asserted to justify constitutional protection for defendants. The state's issuance of an operating license to the restaurant constitutes state action in fact. While the recipient of the license will not necessarily employ discriminatory practices, the inevitability that this will result in certain sections of the country might suffice to provide the necessary causal relation between the state action and any subsequent infringement of individual liberties. The courts have not, however, adopted such a piercing analysis. Generally, a causal relation will be found only in cases where the state agency has expressly authorized discriminatory results.[6] Nevertheless, in some instances the courts have succeeded in affording protection from discrimination by holding ostensibly private agencies to be instrumentalities of the state where they have received substantial state assistance[7] or have performed functions of great public interest.[8] In certain cases involving grave social or political implications extension of the instrumentality concept has been applied.[9] When less fundamental rights are involved the periphery of this approach has remained uncertain,[10] and has never been

2 "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws." U.S. CONST., Amend. XIV.

3 Civil Rights Cases, 109 U.S. 3 (1883).

4 See 1 RACE REL. L. REP. 613 (1956).

5 See Clark, "Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard," 66 YALE L. J. 979 (1957). See also 48 COL. L. REV. 1241 (1948).

6 Hall v. Commonwealth, 188 Va. 72, 49 S.E. (2d) 369 (1948), app. dismissed 335 U.S. 875 (1948); Breard v. Alexandria, 341 U.S. 622 (1951).

7 Kerr v. Enoch Pratt Free Library, (4th Cir. 1945) 149 F. (2d) 212, cert. den. 326 U.S. 721 (1945); Derrington v. Plummer, (5th Cir. 1956) 240 F. (2d) 922, cert. den. 353 U.S. 924 (1957). But see Norris v. Mayor & City Council of Baltimore, (D.C. Md. 1948) 78 F. Supp. 451; Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E. (2d) 541 (1949), cert. den. 339 U.S. 981 (1950).

8 Terry v. Adams, 345 U.S. 461 (1953).

9 E.g., Terry v. Adams, note 8 supra. But see Dorsey v. Stuyvesant Town Corp., note 7 supra.

10 HALE, FREEDOM THROUGH LAW 244 et seq. (1952); 57 YALE L. J. 426 (1948). See also Horowitz, "The Misleading Search for 'State Action' Under the Fourteenth Amendment," 30 SO. CAL. L. REV. 208 (1957).

extended to include private businesses merely because they receive an operating license from the state.[11] The reasons for refusing to make this extension are that the merchant's privilege to deal with whom he pleases is deemed more important than safeguarding civil rights which may be infringed, and that the Supreme Court has no intent to make the Fourteenth Amendment such an omnipotent over-law.[12] Thus it cannot be established that the state's issuance of an operating license directly resulted in the infringement of defendant's constitutional right to be free from state discrimination. The state did not expressly authorize discrimination and the private restaurant which practiced discrimination will not be considered a state instrumentality.

Still it is clear that a state's power to protect property interests must be exercised within the boundaries defined by the Fourteenth Amendment.[13] While a criminal trespass statute generally does not on its face disclose an arbitrary classification, conviction for the offense of trespass on private property after notice may result in a constitutional violation. This would depend upon whether an individual has the constitutionally protected right to be free from criminal penalties imposed by a state in recognition of a property owner's privilege to exclude persons because of their race. Policy considerations favor protecting the landowner's possessory rights, and since a landowner may desire to exclude individuals from entering for innumerable reasons other than racial discrimination, convictions under trespass statutes are generally considered valid police power measures.[14] When a person is labeled a trespasser solely because of his color, is ejected by a police officer and has criminal proceedings initiated against him, latent arbitrary discriminations included within the statute become operative. Moreover, enforcement of criminal sanctions does constitute state action in fact. That this enforcement results in a denial of the defendants' right to be free from state discrimination can be argued by reference to the intervention doctrine of *Shelley v. Kraemer*:[15] a state court may not sanction proceedings which aid the enforcement of private discrimination when, but for the judicial intervention, the private discrimination would not be as successfully effectuated.[16] It is true, however, that the defendants had no right

[11] Civil Rights Cases, note 3 supra. *Accord,* Terrel Wells Swimming Pool v. Rodriguez, (Tex. App. 1944) 182 S.W. (2d) 824. See Justice Harlan's dissent in Civil Rights Cases, note 3 supra, at 41.

[12] See 44 CALIF. L. REV. 718 (1956).

[13] Shelley v. Kraemer, 334 U.S. 1 at 22 (1948). Cf. American Fed. of Labor v. Swing, 312 U.S. 321 (1941).

[14] Hall v. Commonwealth, note 6 supra; HALE, FREEDOM THROUGH LAW 370 et seq. (1952).

[15] Note 13 supra, holding unconstitutional judicial enforcement of a restrictive covenant which deprived a covenantor's purchaser of property rights. See also Barrows v. Jackson, 346 U.S. 249 (1953).

[16] *Accord:* Rice v. Sioux City Park Cemetery, 245 Iowa 147, 60 N.W. (2d) 110 (1953), cert. dismissed 349 U.S. 70 (1955) (dictum); Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.

to be on another's land without consent,[17] and it seems unlikely that the Supreme Court would be ready to find imposition by the state court of a moderate statutory fine or jail sentence a sufficient impairment of rights to require reversal of the conviction in the principal case.[18] The state's freedom of action in protecting peaceful possession of private property would probably be said to outweigh a trespasser's right not to have the state enforce private discriminations. Only when this means of protecting property interests impairs a preferred fundamental right such as freedom of speech, press or religion in a context of great public interest does the Court seem inclined to declare the conviction unconstitutional.[19] The present state of the law not only recognizes that "a man's home is his castle," but allows the state to police his gate and coercively enforce his racial discriminations.

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(2d) 491 (1956) (dictum); Gordon v. Gordon, 332 Mass. 197, 124 N.E. (2d) 228 (1955), cert. den. 349 U.S. 947 (1955) (gift over if legatee married outside Hebrew faith); Black v. Cutter Laboratories, 351 U.S. 292 (1956), note, 55 MICH. L. REV. 871 (1957). See also 44 CALIF. L. REV. 718 (1956).

[17] The principal case is in this respect distinguishable from Shelley v. Kraemer, note 13 supra, as the Negroes in that case had purchased the property rights they asserted.

[18] That the discrimination was defined initially by a private person will also be significant, though not conclusive, in upholding the constitutionality of the conviction. See Shelley v. Kraemer, note 13 supra, at 20; Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, 353 U.S. 230 (1957). A statute which expressly authorized this discrimination would be invalid. Cf. Buchanan v. Warley, 245 U.S. 60 (1917); Martin v. Struthers, 319 U.S. 141 (1943). If this discrimination was the result of a state agent's discretion it would be unconstitutional. Cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[19] Marsh v. Alabama, 326 U.S. 501 (1946), note, 44 MICH. L. REV. 848 (1946), comment, 45 MICH. L. REV. 733 (1947), holding unconstitutional the state's attempt to impose criminal punishment on a Jehovah's Witness for distributing religious literature in a company town.