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TOWARD FREEDOM OF CHOICE IN PLACES OF PUBLIC AND PRIVATE ACCOMMODATION

Alfred Avins*

I. CURRENT INFRINGEMENTS ON FREEDOM OF CHOICE

The last decade has witnessed an acceleration of the Negro drive to eliminate racial distinctions in both public and private places, accompanied by ever more serious incursions into individual freedom of choice of association, made by such drive. The facts are common knowledge to all who read the newspapers. However, a review of several of the more striking incidents will serve to place the law in a more intelligible context.

The earliest object of widespread pressure during the 1960's has been restaurants and lunch counters. The new phenomenon of a "sit-in" was developed to put pressure on such businesses. This author has had occasion to deal with such tactics in prior articles.¹ Such tactics have led to the closing of the business, which Negroes hailed as a victory.² In another instance, 50 club-wielding Negro students invaded a drive-in restaurant at 3:45 A.M. and battered cars there, thus terrorizing the customers.³ On occasion, to counteract these demonstrations, white students staged counter-sit-ins⁴ and their own boycotts.⁵

Another form of retaliation against variety stores with segregated lunch counters was tried by Negro students in Virginia. They entered the stores, filled baskets with merchandise, and took them to the check out point. After the cashier had rung up

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¹ See Avins, *The Right Not to Listen*, 51 A.B.A.J. 656 (1965); Avins & Crutchfield, *Prima Facie Tort and Injunction—New Remedies Against Sitdowns*, 24 GA.B.J. 20 (1961), 23 ALA. LAW. 163 (1962).

² N.Y. Times, Feb. 7, 1960, at 35, col. 1.

³ N.Y. Times, March 6, 1960, at 43, col. 3.

⁴ N.Y. Times, Feb. 5, 1960, at 12, col. 3.

⁵ N.Y. Times, Feb. 14, 1960, at 44, col. 7 (city ed.).

the items, they refused to pay for the goods, forcing the clerks to return them to the shelves, and delaying service to other patrons.⁶ These sit-in and other demonstrations were praised by world socialist leaders⁷ and Governor Nelson Rockefeller of New York.⁸ A Negro judge from New York praised them as a second "Boston Tea Party."⁹

During the opening period of the Kennedy administration, several African diplomats driving from New York City to Washington were refused service in Maryland restaurants along U.S. Route 40. The total distance between these two cities is about 225 miles and it takes slightly more than four hours to drive. However, of this distance only about 88 miles are in Maryland, which would take about an hour and a half to drive. Bus passengers on non-stop busses have been known to survive this journey without food or drink and still arrive in excellent condition. Presumably African diplomats would not die of hunger either. Nevertheless the State Department publicly called on the Maryland legislature to enact a law forbidding racial discrimination in restaurants and "public accommodations" for the offended diplomats and, while they were at it, for American Negroes as well. Such a bill had been beaten three times. However, the department warned that unless African diplomats were served, the United Nations might leave New York City.¹⁰ President Kennedy added his support to such a bill.¹¹ So did other officials, but they refused to guide the rebuffed diplomats to restaurants on Route 40 that were willing to serve them.¹² In spite of the fact that some restaurants did serve Negroes, the State Department pressured the others.¹³ On the legislative front, the state legislature ignored local integrationist groups¹⁴ and refused once again to pass the bill.¹⁵ But two years later such a law was passed.¹⁶ Rep. Adam Clayton Powell's contribution to solving the problem of diplomats was to criticize the small number of Negroes invited to dinners and receptions held for them.¹⁷

Not all of Maryland favored anti-discrimination legislation.

⁶ N.Y. Times, April 25, 1961, at 30, col. 1 (city ed.).

⁷ N.Y. Times, May 1, 1960, at 78, col. 4 (city ed.).

⁸ N.Y. Times, April 13, 1960, at 32, col. 3.

⁹ N.Y. Times, April 13, 1960, at 61, col. 4 (city ed.).

¹⁰ N.Y. Times, Sept. 14, 1961, at 1, col. 8.

¹¹ N.Y. Times, Sept. 26, 1961, at 5, col. 3.

¹² N.Y. Times, Sept. 27, 1961, at 3, col. 6. See also N.Y. Times, Aug. 17, 1961, at 51, col. 1 (pressure on Howard Johnson chain).

¹³ N.Y. Times, Oct. 8, 1961, at 56, col. 4.

¹⁴ N.Y. Times, Feb. 12, 1960, at 15, col. 2.

¹⁵ N.Y. Times, March 11, 1962, at 70, col. 6 (city ed.).

¹⁶ N.Y. Times, June 16, 1963, at 59, col. 5.

¹⁷ N.Y. Times, April 29, 1961, at 4, col. 5.

A Washington suburb has been embroiled in controversy over whether such legislation should be retained.¹⁸ In Cambridge, Maryland, a referendum to open restaurants to Negroes lost by 1,720 for to 1,994 against, although the Negro vote was 587 for to 32 against.¹⁹

Restaurants have also been under attack in other sections. The problems of Lester Maddox, who closed his restaurant in Atlanta rather than serve Negroes, are well known. It was clear that many of Maddox's customers, who stood outside his restaurant and cheered him, did not want to eat with Negroes.²⁰ Federal Bureau of Investigation agents questioned so many customers about Maddox's practices that his business fell off by one-third.²¹

The New York City Commission on Intergroup Relations accused a number of restaurants of subtle discrimination against African delegates to the United Nations by serving them in undesirable locations or so slowly that they would walk out. However, this charge was denied.²² New York has had an anti-discrimination law for many years,²³ but apparently this law was being widely evaded.

Another favorite business which attracts integration drives is the hotel industry. It was alleged that a Houston hotel had refused to honor a reservation of a Negro federal official, although the hotel said that this was merely a clerical error.²⁴ Of course, hotels have refused to accommodate guests for other reasons also. One hotel in Selma, Alabama, declined to give a room to a Norwegian newspaper reporter because he came from the "nation which gave the Rev. Dr. Martin Luther King the Nobel Peace Prize." It was not alleged that the reporter had any hand in this; the hotel owner simply wanted him to stay in Norway.²⁵ However, economic arguments often proved persuasive; thus, some Atlanta hotels desegregated to obtain convention business.²⁶ An Anti-Defamation League report found a four-fifths drop in Florida hotels discriminating against Jews between 1953 and 1960.²⁷ Indeed, a Negro actress had

¹⁸ N.Y. Times, April 15, 1963, at 13, col. 1.

¹⁹ N.Y. Times, June 24, 1963, at 29, col. 1 (city ed.); *id.* Oct. 3, 1963, at 20, col. 1 (city ed.).

²⁰ N.Y. Times, Aug. 14, 1964, at 25, col. 1; *id.* Feb. 8, 1965, at 18, col. 3.

²¹ N.Y. Times, Nov. 13, 1964, at 19, col. 2.

²² N.Y. Times, June 6, 1960, at 1, col. 2; *id.* June 9, 1960, at 67, col. 3.

²³ N.Y. CIVIL RIGHTS LAW, § 40 (McKinney 1954).

²⁴ N.Y. Times, Jan. 20, 1962, at 11, col. 5.

²⁵ N.Y. Times, March 23, 1965, at 27, col. 8.

²⁶ N.Y. Times, March 11, 1962, at 63, col. 5.

²⁷ N.Y. Times, April 25, 1960, at 2, col. 3 (city ed.).

occasion in 1962 to label a charge of hotel discrimination against her in a Maine community where she played to be completely false.²⁸

Nevertheless, government action to prohibit hotel discrimination has been widespread. The New York State Commission Against Discrimination acted to prevent a resort from issuing a brochure saying: "Serving Christian clientele since 1911."²⁹ However, after much agonizing, including 56 staff study days of examining hotel registers for 20 years and measuring distances between 37 resort hotels and nearby churches and synagogues, the commission concluded that it was lawful for resorts to issue brochures stating "churches near by."³⁰ The Anti-Defamation League and the Commission forced a private religious club not to accept conventions on their premises as the price of being let alone by the Commission.³¹

It is difficult to think of a business whose policies have been immune from integration drives. Camps are a good example of facilities where integration has been used primarily for social purposes.³² Of course, interracial camps have long been advertised,³³ but government has now stepped in to force all camps to integrate. For example, it was ruled in New Jersey that day camps could not discriminate.³⁴ The New Jersey State Division on Civil Rights also ordered a private, nonprofit camp for the blind, run by blind men for the purpose of giving other blind persons free vacations, to give a Negro a free two-week vacation, on the ground that it had discriminated against him based on color. The division did not explain how the camp's blind directors could see his color, especially since he had only applied by letter.³⁵

Probably the most hilarious use of the New Jersey Civil Rights Law occurred recently when a Negro woman complained to state officials that she had been turned away from a nudist camp because of color. After an investigation, the Division on Civil Rights held that a nudist camp was a place of public accommodation and would have to admit the woman.³⁶ Perhaps the camp felt that the color contrast would be inharmonious. At any rate, it is difficult to believe that the need of Negroes for nudist camps is so pressing as to require the expenditure of state funds for the purpose.

²⁸ N.Y. Times, Aug. 1, 1962, at 23, col. 1.

²⁹ N.Y. Times, Feb. 1, 1960, at 42, col. 5; *id.* Aug. 2, 1960, p. 8, col. 2.

³⁰ N.Y. Times, Jan. 8, 1960, at 29, col. 4 (city ed.).

³¹ N.Y. Times, Dec. 19, 1959, at 27, col. 1.

³² See N.Y. Times, March 20, 1958, at 31, col. 5.

³³ See e.g., N.Y. Times, April 23, 1961, § 6 (Magazine) at 105.

³⁴ N.Y. Times, March 17, 1965, at 52, col. 3; *id.* May 18, 1965, at 41, col. 4.

³⁵ N.Y. Times, Nov. 5, 1966, at 33, col. 1; *id.* Feb. 25, 1967, at 29, col. 8.

³⁶ N.Y. Times, June 16, 1966, at 49, col. 8; *id.* June 22, 1966, at 14, col. 5.

Amusement parks have also been the subject of demonstrations for integration. One well-publicized demonstration occurred in Maryland, where hundreds of patrons cheered the owner's attempt to keep some demonstrating clergymen out of the park.³⁷ An integrated amusement park in Oklahoma lost so much money that it had to resegregate to avoid bankruptcy.³⁸ Suburbs enacted residence restrictions to keep Negroes out of their local parks.³⁹ Nevertheless in spite of this sentiment, the federal government has barred all segregated groups from federal recreational facilities.⁴⁰

The same drive has been made against swimming pools. One manager of a privately-owned pool was sentenced to five days in jail and a \$200 fine for discrimination.⁴¹ But pool desegregation has not noticeably improved race relations. In Baltimore two Negro orphans were jeered out of a formerly all-white municipal pool,⁴² while in Chicago pool desegregation caused a race riot.⁴³

Negro groups have boycotted segregated football games,⁴⁴ and one congressman introduced a bill to bar segregated teams from using any federal stadium.⁴⁵ The Museum of Modern Art has refused to lend pictures to segregated groups; the Metropolitan Opera has likewise refused to play before segregated audiences.⁴⁶ A discotheque has been the subject of investigation for discrimination on the complaint of an interracial couple.⁴⁷ In North Dakota, one bartender was sentenced to 30 days in jail and a fine of \$100 for discrimination against Negroes who wanted drinks.⁴⁸ In Baltimore, a tavern was picketed by Negro groups for serving only whites. It then changed its policy to serve only Negroes, but these Negro groups continued to demonstrate. Finally, the tavern agreed to integrate.⁴⁹

Transportation is another industry where the integration drive has been widely publicized. Bus boycotts⁵⁰ and federal orders to

³⁷ N.Y. Times, July 5, 1963, at 1, col. 2 (city ed.).

³⁸ N.Y. Times, July 25, 1963, at 11, col. 7.

³⁹ N.Y. Times, July 20, 1960, at 31, col. 1.

⁴⁰ N.Y. Times, April 22, 1961, at 10, col. 3 (city ed.).

⁴¹ N.Y. Times, May 13, 1959, at 7, col. 5 (city ed.).

⁴² N.Y. Times, June 25, 1963, at 13, col. 1.

⁴³ N.Y. Times, July 31, 1960, at 15, col. 8.

⁴⁴ N.Y. Times, Aug. 15, 1961, at 36, col. 1.

⁴⁵ N.Y. Times, March 6, 1962, at 39, col. 1 (city ed.).

⁴⁶ N.Y. Times, Aug. 22, 1962, at 28, col. 1.

⁴⁷ N.Y. Times, April 9, at 3, col. 6 (city ed.).

⁴⁸ N.Y. Times, Dec. 3, 1961, at 58, col. 4; *id.* Dec. 7, 1961, at 36, col. 6 (city ed.).

⁴⁹ N.Y. Times, July 6, 1966, at 15, col. 1.

⁵⁰ See e.g., N.Y. Times, March 5, 1962, at 20, col. 6 (city ed.).

integrate buses⁵¹ have been widely publicized. But the ingenuity of businessmen in evading unpalatable regulations is unbounded. The Chairman of the New York City Commission on Human Rights complained that taxicab drivers were passing Negroes by and were driving with "off-duty" signs in Negro neighborhoods.⁵² The drivers alleged that they were afraid of being robbed if they stopped in Negro areas. But the mayor ordered cabs to have a device which kept the "off-duty" sign on for half an hour, during which no passengers could be picked up, to discourage use of this sign in Negro neighborhoods.⁵³

Integration has reached the very young. The New York City Welfare Commissioner threatened to cut off funds from adoption agencies which refused to accept Negro children.⁵⁴ Yet the one agency handling colored children found great difficulty in placing them.⁵⁵ The sick have not been spared. As early as 1961 hospitals in Chicago were sued in federal court to force them to integrate.⁵⁶ The following year both the N.A.A.C.P. and the Department of Justice sued to prevent private hospitals which had received federal, state, or local grants from segregating or discriminating against Negroes in any way.⁵⁷ With the advent of the Civil Rights Act of 1964, the Department of Health, Education, and Welfare threatened to cut off hospitals from federal funds unless they integrated staff and patients. Inspectors were dispatched around the country to insure compliance.⁵⁸ The Department also threatened to cut off Medicare funds, estimated to amount to 20 percent of hospital budgets, unless full integration was achieved. The Department guidelines forbade giving patients a choice as to whether they want to share a room with a person of another race, and required abolition of dual facilities unless actually used bi-racially.⁵⁹

An aggravated instance of pressure for compulsory integration occurred in respect to St. John's Episcopal Hospital in Brooklyn, New York. Bishop De Wolfe originally decided to allow patients in semi-private rooms to be placed in rooms with patients of the

⁵¹ See N.Y. Times, Aug. 12, 1961, at 41, col. 1.

⁵² N.Y. Times, March 6, 1966, at 95, col. 2; *id.* Dec. 10, 1966, at 28, col. 5. See also *id.*, Dec. 9, 1967, at 26, col. 3.

⁵³ N.Y. Times, May 24, 1967, at 49, col. 8.

⁵⁴ N.Y. Times, Dec. 1, 1960, at 63, col. 2 (city ed.).

⁵⁵ N.Y. Times, Nov. 14, 1964, at 13, col. 5 (city ed.).

⁵⁶ N.Y. Times, Feb. 11, 1961, at 24, col. 3 (city ed.).

⁵⁷ N.Y. Times, May 9, 1952, at 1, col. 6; *id.* June 20, 1962, at 16, col. 3.

⁵⁸ N.Y. Times, Sept. 2, 1965, at 21, col. 2; *id.* April 11, 1966, at 38, col. 3. See also *id.* Jan. 20, 1968, at 60, col. 4 (HEW requires Alabama to force private clinics treating welfare patients to eliminate separate waiting rooms).

⁵⁹ N.Y. Times, March 9, 1966, at 26, col. 1.

same race if they so desired to "enjoy greater peace of mind." The Urban League denounced this "particularly horrifying disclosure", while an unofficial church group called the decision "illegal, immoral, and inefficient."⁶⁰ The New York City Commission on Human Rights started an immediate inquiry.⁶¹ When the bishop declared that "the principle of consent" had to be regarded in assigning a white or Negro patient to a room with a person of another race, the executive director of the commission declared that "in this day and age it is just a little ridiculous" to adhere to such a principle.⁶²

The bishop reaffirmed the hospital's practice that the general wards of the hospital are integrated but that if a person objects to being placed in a semi-private room with someone of another race, he is only placed in an integrated room if no other beds are available, and he is then moved to a room with someone of the same race when a bed becomes available there. Because of this 150 pickets from the N.A.A.C.P., C.O.R.E., the Drug and Hospital Employees Union, and Negro churches, demonstrated in front of the hospital.⁶³ A vigil was also maintained by clergy and laity of the church belonging to an unofficial church integrationist group outside of the hospital.⁶⁴ After pressure from these groups and from the City Commission on Human Rights, the bishop capitulated, revoked the "principle of consent," and ordered that semi-private rooms be integrated regardless of the objections of patients.⁶⁵

The dead and their bereaved have been subjected to integrationist pressures. The Massachusetts State Commission Against Discrimination and Attorney General took action against a cemetery for discriminating against non-whites although 5,000 persons who had purchased burial plots contracted for such exclusivity.⁶⁶ In Michigan, a court held that a cemetery had violated the civil rights of a Negro when it refused to let him bury his mother in an all-white burial ground.⁶⁷ The Veterans Administration has refused to contract with white undertakers unless they handle Negro clients.⁶⁸ The directive from the Defense Department not to deal with funeral homes unless they handled persons of all races put Turner Air Force Base in Georgia in a quandry. The two

⁶⁰ N.Y. Times, July 3, 1962, at 7, col. 6.

⁶¹ N.Y. Times, July 4, 1962, at 21, col. 1.

⁶² N.Y. Times, July 5, 1962, at 14, col. 6.

⁶³ N.Y. Times, July 9, 1962, at 16, col. 7.

⁶⁴ N.Y. Times, July 11, 1962, at 27, col. 1; *id.* July 12, 1962, at 18, col. 1.

⁶⁵ N.Y. Times, July 13, 1962, at 10, col. 2; *id.* July 19, 1962, at 24, col. 3.

⁶⁶ N.Y. Times, Feb. 1, 1960, at 21, col. 6 (city ed.).

⁶⁷ N.Y. Times, Sept. 14, 1966, at 23, col. 7; *id.* Dec. 7, 1966, at 38, col. 3.

⁶⁸ N.Y. Times, June 23, 1962, at 21, col. 3.

white establishments said that they would not handle Negro dead, and two Negro homes said that they would not handle the white dead. The base therefore cancelled all burial contracts and announced that cases would be handled on "an individual purchase order basis with specific approval at the secretarial level of the service."⁶⁹ This means that the Secretary of the Air Force would have to take time out from reviewing contracts for billions of dollars worth of supersonic jets to approve the burial of Airman Basic John Doe at Turner Air Force Base. This would constitute a dubious use of a busy official's time, to say the least.

The federal government has entered the compulsory integration field in a variety of other ways. For example, when federal agencies rent space from private landlords, these agencies require the landlords to sign a lease which contains a condition that he will insert a clause in his leases with other tenants requiring them not to discriminate or segregate on the grounds of race. In other words, the landlord must coerce tenants who have nothing to do with the federal government into changing their operations. The landlord is required to "take such action... as the contracting agency may direct" in enforcing this clause; this may include cancellation of the other private tenant's lease, with the landlord left with vacant space.⁷⁰ In one instance, a drug store gave up its postal sub-station contract rather than integrate a lunch counter.⁷¹

Probably the most widely publicized government restriction in recent years occurred in connection with the carrier Franklin D. Roosevelt which, after more than three months in Vietnamese waters on war duty, stopped to refuel at Capetown, South Africa, on its way home. Originally, four days of shore leave had been scheduled for the 3800 officers and men of the carrier, which included about 200 Negroes. The city residents had spent weeks planning hospitality for the men, and the sizable colored community had planned to entertain the Negroes aboard the ship. The day before the ship docked, the Deputy Defense Secretary and Navy Secretary yielded to integrationist groups and congressmen and banned individual leave, requiring that sailors not be permitted ashore except on integrated bus tours or for integrated athletic events.⁷² Since South African apartheid legislation prevented this, the carrier had to cancel all leave.⁷³ This decision frustrated both

⁶⁹ N.Y. Times, Aug. 18, 1963, at 31, col. 1 (city ed.).

⁷⁰ Wall St. Journal, Feb. 4, 1963, at 1, col. 6.

⁷¹ N.Y. Times, Nov. 14, 1963, at 8, col. 6.

⁷² N.Y. Times, Feb. 4, 1967, at 11, col. 1.

⁷³ N.Y. Times, Feb. 5, 1967, at 1, col. 5. A Defense Department spokesman said: "The Department of Defense has authorized liberty only for participation in organized integrated activities during the visit of the

white and Negro sailors, who had had no liberty in many months, and angered both white and colored residents of Capetown, who had prepared the biggest welcome ever given a ship in South Africa.⁷⁴ When the ship announced that it would receive visitors, over 100,000 townspeople of all races visited it for two days. Not only were pro-government newspapers critical of the Defense Department, but opposition liberal newspapers condemned the cancellation as unrivaled in pettiness. Sixty crewmen were allowed ashore—but only to donate blood, so that those who were prepared to shed their blood had to donate it to get leave.⁷⁵ Notwithstanding this blunder, a few days later the missile-tracking ship *Sword Knot*, with a crew of 56 whites and 11 Negroes, was kept standing off Durban for eight days by the Defense Department and finally ordered to Mombasa, Kenya, rather than being allowed to enter South Africa, because the Department did not wish to allow the crew shore liberty in Durban. The crew did not appreciate this gesture at all.⁷⁶

In addition to integrating facilities, great pressure has been brought to bear to compel personal services for Negroes. Barbers have borne the weight of this drive. For example, the New York State Commission Against Discrimination threatened a barber who sought to discourage Negro patronage with a \$500 fine and six months in jail.⁷⁷ An Ohio barber who did not want to serve Negroes had to close his shop to avoid the effect of a state Civil Rights Commission order. Hundreds of Negro students picketed his shop to force him to comply.⁷⁸ In New York, a group of clergymen pressured five local barbers because Negroes had to drive to a city fifteen miles away for a haircut.⁷⁹ In spite of the fact that the District of Columbia had a law against barber discrimination, twenty African diplomats complained that they had been refused service.⁸⁰

U.S.S. Franklin D. Roosevelt to Capetown. If no organized integrated activities can be provided, there will be no liberty." *Id.* at 26, col. 1.

⁷⁴ N.Y. Times, Feb. 6, 1967, at 10, col. 2.

⁷⁵ N.Y. Times, Feb. 7, 1967, at 15, col. 1.

⁷⁶ N.Y. Times, Feb. 6, 1967, at 4, col. 6 (city ed.). The following telegram was sent from the ship to the Mayor of Durban: "We wish to express our extreme displeasure over action taken by our Government in not permitting our vessel to re-enter Durban as planned. Please convey our gratitude to the people of Durban for their friendliness and hospitality during our previous visit. Request publication. From every officer and an overwhelming majority of the crew."

⁷⁷ N.Y. Times, Oct. 7, 1960, at 26, col. 4 (city ed.).

⁷⁸ N.Y. Times, Feb. 24, 1962, at 22, col. 8; *id.* Jan. 5, 1963, at 13, col. 1; *id.*, March 16, 1964, at 27, col. 3.

⁷⁹ N.Y. Times, Oct. 3, 1963, at 28, col. 2 (city ed.).

⁸⁰ N.Y. Times, June 9, 1963, at 51, col. 1.

A New Hampshire barber was fined for refusing to serve a Negro in that state.⁸¹

The fight against barbers has been particularly active in New Jersey. Violence flared in the college town of Madison because of a boycott and picketing by college students and faculty of five barbershops which refused to serve Negroes. The barbers contended that they were unqualified to cut Negro hair and that they would lose business from white patrons by serving Negroes. They rejected the proposal to hire a Negro barber because only two percent of the potential clientele was Negro.⁸² The New Jersey Board of Barber Examiners then issued a directive that a barber who could not cut Negro hair was incompetent and would have his license revoked. A barber association president replied that strict enforcement of this directive would require revocation of ninety percent of the licenses in New Jersey.⁸³ When the State Division on Civil Rights ordered a local barber to give Negroes a haircut,⁸⁴ the barber refused on the ground that this was a personal service which could not be coerced, and he appealed to the courts.⁸⁵ The protesting barbers, who originally only numbered five, grew to an organization of 2,500 throughout the state by this time.⁸⁶ Eventually, the State Supreme Court ruled that barbers had to serve Negroes, and the barbers reluctantly submitted.⁸⁷ Indeed, the State Division on Civil Rights even took action against a Negro barber who would not serve Negroes for fear of losing white customers.⁸⁸

An Illinois barber was acquitted in criminal court of racial discrimination under a statute which provided penalties of six months in jail and \$1,000 fine.⁸⁹ Nevertheless, the state suspended his license for the alleged discrimination of which a jury acquitted him.⁹⁰

Other services have also been covered by anti-discrimination drives. The New York State Board of Regents passed a rule making it cause to revoke the license of a professional person under its jurisdiction for discrimination based on race, creed, color or national origin. The Regents supervise 20 professions, including medicine,

⁸¹ N.Y. Times, June 12, 1964, at 42, col. 1.

⁸² N.Y. Times, May 16, 1963, at 52, col. 4; N.Y. Journal-American, May 6, 1964, at 47, col. 7.

⁸³ N.Y. Times, Aug. 6, 1964, at 8, col. 6 (city ed.).

⁸⁴ N.Y. Times, Dec. 13, 1964, at 46, col. 1 (city ed.).

⁸⁵ N.Y. Times, Dec. 22, 1964, at 21, col. 1.

⁸⁶ N.Y. Times, Feb. 26, 1966, at 26, col. 5 (city ed.).

⁸⁷ N.Y. Times, Feb. 22, 1966, at 1, col. 3; *id.* Feb. 27, 1966, at 71, col. 6.

⁸⁸ N.Y. Times, July 16, 1966, at 27, col. 1.

⁸⁹ N.Y. Times, Oct. 16, 1964, at 4, col. 5 (city ed.).

⁹⁰ N.Y. Times, Dec. 2, 1964, at 43, col. 4; *id.* Jan. 5, 1965, at 20, col. 6.

dentistry, nursing, pharmacy, engineering, public accounting, architecture, land surveying, psychology, optometry, veterinary medicine, and shorthand reporting.⁹¹ Much of this drive has hurt, rather than helped, Negroes. It has been found that Negro businessmen and professionals who depended on an almost exclusively Negro trade have lost substantial business as a result of desegregation.⁹² When Kentucky by executive order banned racial discrimination in businesses and professions licensed by the state, the Negro funeral association opposed it.⁹³

It is also difficult to see what practical benefit will result from the orders to desegregate jails⁹⁴ and private clubs.⁹⁵ Moreover, federal court orders such as one forbidding a state judge from making special seating arrangements for white persons who did not want to sit next to Negroes in the courtroom⁹⁶ can hardly benefit Negroes either.

It is interesting to note that racial discrimination exists abroad also. In Belgium, even though there is a law against discrimination in public places, the law is often ignored, and African students and employees of international organizations are frequently refused service in hotels, movie theaters, restaurants, cafes, and bars.⁹⁷ In Japan, in one town adjacent to an American air base, 38 out of the 44 bars maintained a policy of serving only white airmen because they would not patronize an establishment that served Negroes. When Negro airmen conducted a sit-in at this base, police narrowly averted a fight.⁹⁸ When hotels in Southern Rhodesia established a non-racial policy, Africans flocked to hotel lounges and bars, resulting in a sharp drop in the number of white customers. Managers complained that the Africans behaved poorly and that the women were not properly dressed. After a few weeks several of the hotels reverted to their prior practice of serving only white persons.⁹⁹

⁹¹ N.Y. Times, Oct. 27, 1962, at 27, col. 1.

⁹² N.Y. Times, Jan. 26, 1965, at 19, col. 4.

⁹³ N.Y. Times, June 28, 1963, at 11, col. 5. By a vote of 11 to 1 the Louisville Board of Aldermen had resolved: "We, the Board of Alderman of the City of Louisville, are opposed to any ordinance which takes away the right of an owner of a private business to select his or its customers or clientele." N.Y. Times, June 15, 1961, at 32, col. 7.

⁹⁴ N.Y. Times, Dec. 13, 1966, at 26, col. 3.

⁹⁵ N.Y. Times, Dec. 5, 1967, at 43, col. 4 (holding that a private club was a place of public accommodation in Kansas). *But see id.*, June 10, 1962, at 81, col. 1 (holding that a golf club was exempt from the Colorado law).

⁹⁶ N.Y. Times, April 28, 1966, at 39, col. 2 (city ed.).

⁹⁷ N.Y. Times, July 29, 1967, at 2, col. 8.

⁹⁸ N.Y. Times, Aug. 17, 1963, at 7, col. 4.

⁹⁹ N.Y. Times, Feb. 11, 1962, at 7, col. 1 (city ed.).

Because discrimination in England against Negroes and Indians in pubs and other places was widespread,¹⁰⁰ the Labor Party has recently passed a law forbidding discrimination in "places of public resort."¹⁰¹ The London pub owners' association urged a one-day shutdown to protest denial of the right to choose customers.¹⁰² But a similar order in Zambia has backfired. There a white barber had segregated his shop with a partition, with blacks paying 40 cents while white customers paid a dollar. When the government ordered him to remove the partition he complied; then he charged everyone a dollar.¹⁰³

II. THE ERA OF SEPARATE AND EQUAL

A. THE COMMON LAW BACKGROUND

A common misconception which currently pervades legal literature is that the doctrine of "separate-but-equal" originated full-blown from the celebrated case of *Plessy v. Ferguson*.¹⁰⁴ Nothing could be further from the truth. In fact, this doctrine has had a long common-law history.

In England, even those businesses which had to serve the public without discrimination always had the right to arrange their customers as they choose. For example, an innkeeper had the right to select the rooms for his guests; they could not choose their own rooms.¹⁰⁵ The rule was the same in Canada.¹⁰⁶ The Scottish Court of Session has held that a railway company has the right to assign seats to passengers, and the fact that a passenger has taken a seat before one is assigned to him does not prevent the company from moving him to the assigned seat.¹⁰⁷ The rule appears to be similar in Canada.¹⁰⁸

The South African law is of particular interest because it has proceeded in the exact opposite direction from American law. Originally, complete freedom of choice was the rule in South Africa. In 1910, it was held that a local authority had no legal

¹⁰⁰ N.Y. Times, Nov. 18, 1965, at 33, col. 1.

¹⁰¹ N.Y. Times, May 4, 1965, at 1, col. 6.

¹⁰² N.Y. Times, May 26, 1965, at 3, col. 4 (city ed.).

¹⁰³ N.Y. Times, March 2, 1967, at 4, col. 6; *id.* March 19, 1967, at 17, col. 3.

¹⁰⁴ 163 U.S. 537 (1896).

¹⁰⁵ *Fell v. Knight*, 8 M. & W. 269, 151 Eng. Rep. 1039 (1841); *Scrivenor v. Reed*, 6 W.R. 603 (1858).

¹⁰⁶ *Doyle v. Walker*, 26 U. Can. Q.B. 502 (C.A. 1867).

¹⁰⁷ *Scott v. Great North of Scotland Ry. Co.*, 22 R. 287, 32 Scot. L.R. 218 (Ct. of Sess. 1895).

¹⁰⁸ See *O'Connor v. Halifax Tramway Co.*, 38 N.S.R. 212, 225 (1905), *aff'd*, 37 S.C.R. 523 (1905).

right to segregate swimming areas by race.¹⁰⁹ It was also held that a municipality had no right to require taxicabs to carry only white or colored passengers, because the owner could choose his own customers.¹¹⁰ But as early as 1916, the Transvaal Provincial Division held that a municipality could run tram lines for white persons and exclude colored persons entirely if there was insufficient colored business. A dissenting justice argued that while a municipality could segregate trams and run fewer colored trams if demand was less, it could not refuse all service to colored passengers, who could take white trams if none other were being run.¹¹¹

The landmark case of *Rasool v. Minister of Posts & Telegraphs*¹¹² fixed the law on this point. Here, the Appellate Division of the Supreme Court of South Africa decided that it was lawful to segregate post office counters by race. One justice dissented on the ground that racial segregation denoted inferiority, impaired the dignity of the individual, and denied equality before the law.¹¹³ The same rule was immediately applied to railways.¹¹⁴

Shortly thereafter, the South African Supreme Court established its own version of the "separate but equal" doctrine. In one case, the Cape Provincial Division upheld segregated beaches if facilities had been equal, but also held that a segregation regulation was invalid where the European section had good roads and fine sand, while the non-European section had no roads and was rocky.¹¹⁵ Likewise, in 1950 the Appellate Division decided that absent express statutory authority, the right to segregate would not be deemed to include the right to assign substantially unequal facilities to different races. It therefore disapproved the majority opinion and agreed with the dissenting justice in the Transvaal Provincial Division case previously noted.¹¹⁶ The court concluded that a railway regulation reserving some coaches for Europeans but not reserving any for non-Europeans exclusively was unequal and invalid.¹¹⁷ Three years later the court held that a native could not be convicted for using a European railway waiting room when

¹⁰⁹ *Rex v. Plaatjes*, So. Afr. L. Rep. 1910 E.D.L. 63.

¹¹⁰ *Swarts v. Pretoria Municipality*, So. Afr. L. Rep. 1920 T.P.D. 187.

¹¹¹ *George v. Pretoria Municipality*, So. Afr. L. Rep. 1916 T.P.D. 501.

¹¹² So. Afr. L. Rep. 1934 A.D. 167.

¹¹³ *Id.* at 183.

¹¹⁴ *Rex v. Herman*, So. Afr. L. Rep. 1937 A.D. 168. See also *Rex v. Mozumba*, 1953 (1) S.A.L.R. 235 (T.P.D.) (railway staircase segregated).

¹¹⁵ *Rex v. Carelse*, So. Afr. L. Rep. 1943 C.P.D. 242.

¹¹⁶ *George v. Pretoria Municipality* So. Afr. L. Rep. 1916 T.P.D. 501.

¹¹⁷ *Rex v. Abdurahman*, 1950 (3) S.A.L.R. 136 (A.D.).

the native waiting room had inferior accommodations.¹¹⁸ It had also been held that apartheid in buses is lawful, but cannot be applied when it would cause large financial losses to the bus company.¹¹⁹

But the inequality had to be substantial. Accordingly, it was held that where Europeans on buses were allocated soft or padded seats and non-Europeans obtained only hard seats, such a difference did not invalidate the bus segregation.¹²⁰ Likewise, it was held that where the non-European waiting room has inferior facilities because it is being used temporarily while rebuilding goes on elsewhere, segregation cannot be voided for that reason alone.¹²¹

Since 1960, apartheid has been given a dominant position. Thus, the Appellate Division has held that the Group Areas Act authorizes separate and unequal accommodations for the purpose of shifting population.¹²² Of course, freedom of choice has given way to this policy. It has thus been held that a taxi limited to conveying non-white passengers may be convicted for taking a white passenger.¹²³ This policy has not spread to Rhodesia, which still does not permit municipal discrimination.¹²⁴

In the United States, as early as 1858 the Illinois Supreme Court held that a ferryman, who was a common carrier, had the absolute right to decide what position each person should take on the boat, without reference to priority of arrival at the ferry.¹²⁵ The common law, as it developed in the nineteenth century, gave common carriers and innkeepers, who had to accommodate all persons, the right to engage in racial or other segregation.¹²⁶ Thus it was held

¹¹⁸ *Rex v. Lusu*, 1953 (2) S.A.L.R. 484 (A.D.). See also *Rex v. Zihlangu*, 1953 (3) S.A.L.R. 871 (C.P.D.).

¹¹⁹ *Pietermaritzburg City Council v. Local Road Transportation Bd.*, 1959 (2) S.A.L.R. 758 (N.P.D.), *aff'd* 1960 (1) S.A.L.R. 254 (N.P.D.).

¹²⁰ *Tewari v. Durban Corp.*, 1953 (1) S.A.L.R. 85 (N.P.D.).

¹²¹ *Rex v. Lepile*, 1953 (1) S.A.L.R. 225 (T.P.D.). See also *Reddy v. Durban Corp.*, 1954 (4) S.A.L.R. 304 (N.P.D.).

¹²² *Minister of the Interior v. Lockhat*, 1961 (2) S.A.L.R. 587 (A.D.).

¹²³ *S. v. Engeldoe's Taxi Service (Pty.) Ltd.*, 1966 (1) S.A.L.R. 329 (A.D.); *S. v. Salama Taxis (Pty.) Ltd.*, 1964 (1) S.A.L.R. 371 (C.P.D.).

¹²⁴ *Chamboko v. Town Management Bd. of Mabelreign*, 1962 *Rhod. & Nya Rep.* 450; *Desai & Co. v. Bindura Town Management Bd.*, 1952 *S. Rhod.* 136, 1952 (3) S.A.L.R. 742, *aff'd* 1953 (1) S.A.L.R. 358 (A.D.).

¹²⁵ *Claypool v. McAllister*, 20 Ill. 504 (1858).

¹²⁶ See *Avins, Racial Segregation in Public Accommodations: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 18 *WEST. RES. L. REV.* 1251, 1255, n. 19 (1967), and the cases cited therein. See also *Houck v. Southern Pac. Ry. Co.*, 38 Fed. 226 (C.C.W.D. Tex. 1888). In *Henderson v. Trailway Bus. Co.*, 194 F. Supp. 423, 426 (E.D. Va. 1961), the court said: "Racial segregation on property in private demesne has never in law been condemnable."

that a rule of a streetcar company separating the races was valid.¹²⁷ Likewise, it has been held that a carrier may require a white deputy sheriff handcuffed to a Negro prisoner to sit with the prisoner in the colored car and not the white car.¹²⁸ Of course, the same rule was applied to businesses without franchises, such as theaters.¹²⁹ The authorities pointed out that the "difference between *discrimination* and *classification* is important, and there is no lack of decisions which emphasize it."¹³⁰

Even the southern courts recognized that the common law required carriers to offer equal facilities as the corollary of racial segregation. Thus, the Kentucky Court of Appeals declared:

No rule, regulation, custom, or usage may be relied upon by a carrier which will permit it to discriminate against or in favor of a passenger on account of his race or color. Such is intolerable and will not be countenanced by the courts. She was entitled at the hands of appellee, its agents and servants, to equal and like accommodation in any and all respects to those accorded or given to white persons. . . . In the discharge of its duty as a public carrier, a bus company must use their public conveyances and buses, owned and set apart by it for that purpose, for the transportation of passengers, without favor or discrimination, to all persons offering

Indeed, the occupant may lawfully forbid any and all persons, regardless of his reason or their race or religion, to enter or remain upon any part of his premises which are not devoted to a public use."

¹²⁷ *Bowie v. Birmingham Ry. & El. Co.*, 125 Ala. 397, 27 So. 1016 (1900).

¹²⁸ *Spenny v. Mobile & O. R. Co.*, 192 Ala. 483, 68 So. 870 (1915), *denying cert.* to 12 Ala. App. 375, 67 So. 740 (Ct. App. 1914). In *Huff v. Norfolk Southern R. Co.*, 171 N.C. 203, 207, 88 S.E. 344, 346 (1916), the court declared: "Under his contract of carriage he was entitled to be transported to his destination, and afforded sufficient and equal accommodation during his journey, but he had no right to roam at will over the train or to take his seat with his handcuffed colored prisoner in the car set apart for white persons, regardless of the comfort and convenience of the other passengers, and contrary to the directions of the conductor, given in the reasonable exercise of his authority."

¹²⁹ In *Younger v. Judah*, 111 Mo. 303, 312, 19 S.W. 1109, 1111 (1892), the court held: "Such separation does not necessarily assert or imply inferiority on the part of one or the other. . . . The colored man has, and is entitled to have, all of the rights of a citizen, but it cannot be said that equality of rights means identity in all respects."

¹³⁰ *Wister, Discrimination Not Between Sex But the Color of Citizens*, 32 AM. L. REG. (n.e.) 748, 754 (1893). See also *Chiles v. Chesapeake & O. Ry. Co.*, 125 Ky. 299, 306, 101 S.W. 386, 388 (1907), *aff'd* 218 U.S. 71 (1910), where the Kentucky Court of Appeals declared: "There is a wide difference between classification and regulation involving a separation of the races and a discrimination between them. When there are two cars in a train, or two compartments in a car, substantially alike in quality, convenience, and accommodation, neither white nor colored passengers have the legal right to complain that they have been discriminated against merely because the carrier required each race to occupy a car or compartment set aside for its accommodation."

themselves for transportation... It must receive, treat, and transport all persons, affording the same convenience, safety, and protection of health, without regard to race, creed, or color, or previous condition of servitude... A common carrier of passengers for hire has the right, in the absence of a statute, to prescribe regulations for the separation of white and colored passengers, giving equal and like protection and accommodation to both... We know of no rule that requires a common carrier of passengers for hire to yield to the disposition of passengers, arbitrarily to determine for themselves as to the coach or vehicle in which they may take passage. They are entitled to be transported within a reasonable time without discrimination and without favoritism or partiality, but are without right to select the coach or vehicle or the seat thereon which they will occupy.¹³¹

At the very beginning of its existence, some years before *Plessy*, the Interstate Commerce Commission considered and approved the "separate-but-equal" doctrine. In *Council v. Western & Atlantic R.R. Co.*,¹³² the Commission drew an analogy between the right of railroads to set aside cars for ladies, and its right to segregate the races. It pointed to school segregation and separate organizations to illustrate public sentiment in favor of segregation, and concluded that segregation was not per se an undue prejudice and an unjust preference. But it held that a railroad could not relegate a Negro to an inferior car if it charged him first-class fare.

Likewise, in *Heard v. Georgia R.R. Co.*,¹³³ the Commission justified segregation when accommodations were equal.¹³⁴ But it condemned segregation of Negroes who paid first-class fare into inferior cars. It ruled that where segregation was enforced "the cars for the two colors should be equal in their comforts and accommoda-

¹³¹ *Brumfield v. Consolidated Coach Corp.*, 240 Ky. 1, 18-20, 40 S.W.2d 356, 364-65 (1931).

¹³² 1 I.C.C. 339 (1887).

¹³³ 1 I.C.C. 428 (1888).

¹³⁴ *Id.* at 435, where it said: "It by no means follows that separation into cars of equal quality and where the same protection is accorded is undue preference to one class of passengers or undue prejudice to the other class. Circumstances and conditions may exist to justify such separation, and it may be in the interest of both that it should be done."

"The same section applies the same principles to the transportation of property as to persons, but no one would seriously insist that the statute requires all property of the same kind or all kinds of property to be carried in the same car. If like property receives like transportation and at like rates, the carrier's duty in that regard is performed. The number of cars used for the purpose is immaterial."

"Identity, then, in the sense that all must be admitted to the same car and that under no circumstances separation can be made, is not indispensable to give effect to the statute. Its fair meaning is complied with when transportation and accommodations equal in all respects and at like cost are furnished and the same protection enforced." *Accord*, *Chiles v. Chesapeake & Ohio R. Co.*, 218 U.S. 71 (1910).

tions, and that colored travelers should have no occasion for contrasting unfavorably their mode of transportation with that of white travelers in the same train, where both pay the same price for carriage."¹³⁵

The "separate-but-equal" doctrine was an attempt to balance the respective interests and desires of both Negroes and white persons. The Commission pointed out:

When it becomes an element in a judicial controversy, one color or race has no exclusive right to recognition nor ground for special favor over the other, but white and black alike are entitled to fair and impartial consideration, and the principle of equality of rights is to be applied with even-handed justice, but without unnecessary extension beyond its legitimate purview. It is not, therefore, with sole regard to the wishes or conceptions of ideal justice of colored persons, nor only with deference to the prejudices or abstract convictions of white persons, that a practical adjustment is to be reached, but with enlightened regard to the best interests and harmonious relations of both, constrained by long past events for which none now living are responsible to make their habitations and support themselves as best they can under the same government.¹³⁶

The Supreme Court placed an important limitation on the "separate-but-equal" doctrine in 1914. It held that a carrier could not refuse to provide equivalent facilities for Negroes merely because the amount of colored business did not justify equal facilities. To this extent, segregation had to give way to equal facilities. The Court reasoned that the right of each person to equivalent comfort in traveling outweighed whatever interest the carrier and its patrons had in segregating passengers.¹³⁷

B. THE SEGREGATION STATUTES

Segregation statutes, with rare exceptions, did not come into existence in respect to railroads and other businesses until the

¹³⁵ *Heard v. Georgia R. R. Co.*, 1 I.C.C. 428, 435 (1888).

¹³⁶ *Id.* at 432.

¹³⁷ *McCabe v. Atchison, Topeka & S.F. Ry. Co.*, 235 U.S. 151, 161-62 (1914), where the Court declared: "This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor; but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded."

populist movement in the Southern states during the early 1890's displaced the landed aristocracy which traditionally dominated state governments and brought into power representatives of the poorer whites, who were most likely to have to associate with Negroes.¹³⁸ The common-law rule that Negro passengers stand on the same footing as other passengers, and must be given the class of accommodations called for by their tickets,¹³⁹ but on the other hand are not entitled to any special privileges,¹⁴⁰ was adhered to by the southern courts in applying segregation laws. Thus, the Georgia Supreme Court awarded substantial damages to a colored passenger who was not protected from abuse by a railway on which he was riding.¹⁴¹ The Kentucky Court of Appeals declared that "the law requires a common carrier to receive and transport passengers without discrimination and with impartiality."¹⁴² The Mississippi Supreme Court has been emphatic on the need to supply equal facilities to both races.¹⁴³ And while it has been held that failure to accord Negroes equal train accommodations does not give rise to an action for damages absent special damages,¹⁴⁴ it has also been held that a railroad is indictable for providing inferior cars for Negroes.¹⁴⁵

The same rule applied to municipal recreational facilities. Because a state may only make reasonable classifications as to

¹³⁸ For a general discussion, see Stephenson, *Race Distinctions in American Law*, 43 AM. L. REV. 547, 552-78, 734-58 (1909); Stephenson, *Separation of the Races in Public Conveyances*, 3 AM. POL. SCI. REV. 180 (1909); Dixon, *Civil Rights in Transportation and the ICC*, 31 GEO. WASH. L. REV. 198 (1962); Quindry, *Airline Passenger Discrimination*, 3 J. AIR LAW 479, 499-514 (1932).

¹³⁹ *Billinger v. Clyde S.S. Co.*, 158 Fed. 511 (S.D.N.Y. 1908).

¹⁴⁰ *Miller v. New Jersey Steamboat Co.*, 58 Hun 424, 12 N.Y.S. 301 (1890).

¹⁴¹ *Richmond & D.R. Co. v. Jefferson*, 89 Ga. 554, 16 S.E. 69 (1892).

¹⁴² *Brumfield v. Consolidated Coach Corp.*, 240 Ky. 1, 14, 40 S.W.2d 356, 363 (1931).

¹⁴³ *Illinois Cent. R. Co. v. Redmond*, 119 Miss. 765, 782, 81 So. 115, 117 (1919), where the court said: "The separate coach laws here under consideration do not require that the accommodations furnished to passengers of the one race be identical with those furnished to passengers of the other, but they do require in plain and unambiguous language that the accommodations (which, of course, include not only those things which are necessary for, but also such as add to comfort and convenience) provided for passengers of the one race shall be equal to those provided for passengers of the other race, from which it necessarily follows that, if separate toilets are provided for the sexes of the one race, separate toilets must also be provided for the sexes of the other, and if a place in which to smoke is provided for the one race, such a place must also be provided for the other."

¹⁴⁴ *Norwood v. Galveston, H. & S. A.R. Co.*, 12 Tex. Civ. App. 560, 34 S.W. 180 (1896).

¹⁴⁵ *Louisville & N.R. Co. v. Commonwealth*, 117 Ky. 345, 78 S.W. 167 (1904).

who may use its recreational facilities,¹⁴⁶ it had been held that Negroes were entitled to the equal use of tax-supported activities.¹⁴⁷ Accordingly, although segregation was upheld in parks,¹⁴⁸ playgrounds,¹⁴⁹ and other recreational areas,¹⁵⁰ it was also held that Negroes could not be excluded entirely from publicly supported golf courses,¹⁵¹ libraries,¹⁵² or swimming pools.¹⁵³ Where facilities for Negroes were clearly inferior, the municipality could not confine them to using them.¹⁵⁴

The courts also held that substantially equal facilities satisfied the rule; they did not have to be identical.¹⁵⁵ One court noted: "The requirements of equality of treatment may be refined too far."¹⁵⁶ Thus, it was decided that a bus company rule seating Negro passengers from the rear forward and white passengers from the front back was not discriminatory in spite of minor seating differences if the seats were substantially equal. Moreover, reasonable shifting of Negro passengers at normal discharge places such as stop-overs was deemed valid, but a rule requiring repeated shifting of Negro

¹⁴⁶ D.D.B. Realty Corp. v. Merrill, 232 F. Supp. 629 (D. Vt. 1964).

¹⁴⁷ Easterly v. Dempster, 112 F. Supp. 214 (E.D. Tenn. 1953).

¹⁴⁸ Sweeney v. City of Louisville, 309 Ky. 465, 218 S.W.2d 30 (1949); Berry v. City of Durham, 186 N.C. 421, 119 S.E. 748 (1923).

¹⁴⁹ Camp v. Recreation Bd., 104 F. Supp. 10 (D.D.C. 1952).

¹⁵⁰ Hayes v. Crutcher, 108 F. Supp. 582 (M.D. Tenn. 1952).

¹⁵¹ Beal v. Holcombe, 193 F.2d 384 (5th Cir. 1951), *cert. denied*, 347 U.S. 974 (1954). *Accord*, City of Greensboro v. Simkins, 246 F.2d 425 (4th Cir. 1957).

¹⁵² Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945).

¹⁵³ Kern v. City Comm'rs, 151 Kan. 565, 100 P.2d 709 (1940).

¹⁵⁴ Williams v. Kansas City, 104 F. Supp. 848 (W.D. Mo. 1952), *aff'd*, 205 F.2d 47 (8th Cir. 1953), *cert. denied*, 346 U.S. 826 (1953).

¹⁵⁵ Rogers v. Atchison, T. & S. F. Ry. Co., 283 S.W. 2d 664 (Mo. App. 1955). In Louisville & N.R. Co. v. Commonwealth, 160 Ky. 769, 774, 170 S.W. 162, 164 (1914), the court observed: "Equality of accommodations does not mean identity of accommodations.... To hold that it does involves a considerable measure of refinement. If equality does mean identity, then if the upholstering of the seats in that part of the train set apart for white passengers is of plush, it cannot be leather in that part set apart for colored passengers. And if the plush be red in the one portion of the train, it must not be green in the other. If equality of accommodations means identity, then if there are seats for 200 white passengers, there must likewise be provided seats for 200 colored passengers. If equality means identity, then if there are 500 electric lights in that portion of the train reserved for white passengers there must be 500 electric lights in that part reserved for colored passengers."

¹⁵⁶ Durkee v. Murphy, 181 Md. 259, 29 A.2d 253, 255 (1942). In Choctaw, O. & G.R. Co. v. State, 75 Ark. 279, 282, 87 S.W. 426, 427 (1905), the court said: "The accommodations need not be the same; if as good, they would be equal, within the meaning and spirit of the statute; its object being to prevent discrimination.... The waiting rooms need not be of the same dimensions."

passengers was deemed discriminatory.¹⁵⁷ Likewise, it was held that where Negro passenger traffic constituted only ten to fifteen percent of the total, a pro rata facility was satisfactory.¹⁵⁸

Sometimes, however, separate and equal became mutually exclusive categories by force of circumstances. Cases occurred where colored passengers had to stand because empty seats in the white section were not allocated to them.¹⁵⁹ Even before 1954, the federal courts were able to alleviate this problem in respect to interstate carriers. Thus, the Seventh Circuit held that requiring a Negro bus passenger to stand when there were seats in the white portion of the bus, and refusing to move a partition forward when the Negro section was crowded and the white section had vacancies, constituted an undue discrimination in violation of the Interstate Commerce Act.¹⁶⁰ Likewise the Fourth Circuit decided that a railroad regulation forcing passengers to change cars at particular points to segregate interstate passengers, unduly burdened interstate commerce in violation of the Interstate Commerce Act.¹⁶¹

In intrastate commerce, the state courts made the final decision as to whether separate or equal was to be the dominant consideration. In one case where a Negro woman boarded a city bus and took the only vacant seat in the white section, the Supreme Court of Appeals of Virginia held that the act of the bus driver in directing her to go to the colored section in the rear, but not directing a white person to exchange seats with her, was an invalid attempt

¹⁵⁷ *Day v. Atlantic Greyhound Corp.*, 171 F.2d 59 (4th Cir. 1948). In *New v. Atlantic Greyhound Corp.*, 186 Va. 726, 744, 43 S.E.2d 872, 881 (1947), the court said: "Segregation statutes must be enforced equally and without discrimination in the quality and convenience of accommodations provided for white and colored passengers.... The colored passenger is entitled to every substantial accommodation offered a white passenger. There must be 'substantial equality of treatment' as well as 'substantial equality of facilities' furnished. There must be no discrimination in terms or enforcement...."

"It is impossible for the accommodations on a bus to be absolutely identical in all respects.... There must be some seats in the front of a vehicle and some in the rear, as well as in the middle. Some must be over the wheels, or, perhaps over the engine, if the engine is under the body. All window arrangements are not the same. A minor or trifling inconvenience or difference in seating is inevitable under the most favorable conditions, and minor disadvantages in travel do not necessarily indicate discrimination."

¹⁵⁸ *Louisville & N.R. Co. v. Commonwealth*, 160 Ky. 769, 774, 170 S.W. 162, 164 (1914).

¹⁵⁹ *See, e.g., Illinois Cent. R. Co. v. Redmond*, 119 Miss. 765, 81 So. 115 (1919).

¹⁶⁰ *Lyons v. Illinois Greyhound Lines*, 192 F.2d 533 (7th Cir. 1951).

¹⁶¹ *Chance v. Lambeth*, 186 F.2d 899 (4th Cir. 1951), *cert. denied sub nom. Atlantic Coast Line R. Co. v. Chance*, 341 U.S. 941 (1951).

to enforce the segregation statute in a discriminatory manner.¹⁶² But that same court also held that where the last remaining seat on a bus with sets of double seats is next to one occupied by a white person, and all of the seats in the Negro section are filled, a Negro must stand rather than sit down. The majority of the court held that when seats are fairly allotted to each race in accordance with their expected use of the facility, there is no discrimination even if more members of one race use it than expected. In such a case, "one has to stand and thus to undergo a minor inconvenience."¹⁶³

A dissenting justice argued that the Negro standee was discriminated against in the "quality or convenience of the accommodations" afforded to him, and that it was no excuse that Negroes as a whole were as well treated as white persons as a whole since the right to equal treatment was individual and not collective. This justice noted that if the standee had been white he could have sat down. He concluded:

The 'quality and convenience of accommodation' provided by the carrier bear no relation to the color or race of its passengers. Passengers on the same vehicle paying the same rate of fare are entitled to receive 'substantial equality of facilities.' Seats are provided because of the desirability for comfort, convenience and safety. A standing position in the aisle of a bus, subject to its starting, moving and stopping movements can hardly be said to be substantially equal in convenience and accommodation to the occupancy of a seat.¹⁶⁴

The justification for segregation in public carriers was long ac-

¹⁶² *Davis v. Commonwealth*, 182 Va. 760, 765, 30 S.E.2d 700, 703 (1944), where the court remarked: "A statute which permits inequality of treatment to the members of the two races would be plainly invalid."

¹⁶³ *Commonwealth v. Carolina Coach Co.*, 192 Va. 745, 754, 66 S.E. 2d 572, 578 (1951). The court also said: "There is not and cannot be any fundamental or legal difference in segregation by seats on a bus and segregation by coaches or compartments on a train. For we know that factually and in reality all seats in a coach or in a partitioned part of a coach assigned to one race must, in the nature of things, be at times occupied and no seat available to a passenger of that race when there are unoccupied seats in the other coach or partitioned space allotted the other race. The physical difference, such as it is, in the two methods or modes of segregation is that segregation by seats affords a more equitable allotment of space and conveniences than does separation by coaches or by partitions in coaches."

"By this legislation, no paramount rights or privileges are given to one race over the other or to one individual over another. It is not due to any discrimination, but to circumstances, applying alike to all—as well to a white citizen as to a colored one, that a member of one race or the other may under some conditions find no seating accommodation available."

¹⁶⁴ *Id.* at 759, 66 S.E.2d at 580.

cepted, not only by the courts,¹⁶⁵ but also by writers in legal periodicals.¹⁶⁶ One writer for the Yale Law Journal urged a federal segregation statute based on alleged scientific evidence of racial antipathy.¹⁶⁷ The generally accepted view was that segregation was an exercise of the police power to prevent collisions and disorder which integration might cause.¹⁶⁸ The Supreme Court of Mississippi even suggested that Negroes wanted railroad segregation as much as white people, in order to avoid race riots.¹⁶⁹

A more realistic view of the matter was taken by those cases which frankly ascribed segregation statutes to the desire of many white people not to sit next to Negroes.¹⁷⁰ In *Spenny v. Mobile &*

¹⁶⁵ *Corporation Commission v. Transportation Committee*, 198 N.C. 317, 151 S.E. 648 (1930). See also the lengthy opinion of Mr. Justice Clifford endorsing segregation in carriers in *Hall v. DeCuir*, 95 U.S. 485, 500-09 (1878).

¹⁶⁶ Doolan, *Validity of Separate Coach Laws When Applied to Interstate Passengers*, 1 VA. L. REV. 379 (1914).

¹⁶⁷ Baker, *Segregation of White and Colored Passengers on Interstate Trains*, 19 YALE L.J. 445 (1909). The author said: "A Federal statute is necessary to compel interstate carriers to separate colored and white passengers, and if such legislation could be accomplished the separation of the races in transportation would be a worthy regulation of commerce." *Id.* at 451-52.

¹⁶⁸ In *Smith v. State*, 100 Tenn. 494, 500, 46 S.W. 566, 568 (1898), the court declared: "A requirement that all persons who travel shall travel together is not in any sense a police regulation. It is easy to perceive how it might conduce to the comfort, health, or safety of persons traveling to be separated, but no reason of this kind can be found, nor any other of a police nature, for requiring that all should be crowded or mixed together...."

¹⁶⁹ In *Alabama & V. Ry. Co. v. Morris*, 103 Miss. 511, 518-19, 60 So. 11, 13-14 (1912), the court asserted: "The statute was not enacted with any idea of discriminating against the members of either race; nor was it prompted by prejudice or passion, but with the knowledge that the enforced intermingling of the races would be distasteful to both races, would inevitably result in discomfort to both, and provoke and encourage conflicts endangering the peace and quiet of the commonwealth...."

"The two races here accept the law as a wise and necessary exercise of the police power of the state for the protection of members of both races. No greater punishment could be inflicted upon the average negro traveler than being obliged to sit in the coach set apart for whites, and our colored fellow citizens would be the first to oppose a repeal of the statute.

"A riot upon an interstate train growing out of the refusal of common carriers to recognize a situation known to every Mississippian—black and white—would endanger the lives and disturb the peace of all persons passengers on the train,.... the law is... a reasonable and wise exercise of the police power of the state."

¹⁷⁰ See e.g., *Ohio Val. Ry.'s Receiver v. Lander*, 104 Ky. 431, 47 S.W. 344, (1898), *rehearing denied*, 104 Ky. 431, 48 S.W. 145 (1898).

O.R. Co.,¹⁷¹ Thomas, J., in a dissenting opinion, argued that if this purpose was ascribed to the legislature, the statute would have to be declared in violation of the equal protection clause of the fourteenth amendment. He asserted that the only legitimate purpose which the statute could have would be the preservation of the public peace.¹⁷² However, the majority took the position that as long as equal facilities were in fact afforded to Negro passengers, it was immaterial that the motive of the legislature was to protect white persons who did not want to associate with Negroes, and not to protect Negroes who were adverse to associating with white persons.¹⁷³

¹⁷¹ 12 Ala. App. 375, 67 So. 740 (Ct. App. 1914), *cert. denied*, 192 Ala. 483, 68 So. 870 (1915).

¹⁷² He declared: "While the statute, in terms, equally protects whites from the presence of negroes, and negroes from the presence of whites in their respective coaches, yet it is well known that the leading purpose of this statute was to protect the white race from the presence of negroes while traveling on trains." . . . if, as was done by the Texas court [in *Gulf, C. & S.F. Ry. Co. v. Sharman*, 158 S.W. 1045, 1047 (Tex. Civ. App. 1913)] we hold that the 'leading purpose of this statute was to protect the white race from the presence of negroes while riding on trains,' it will result in the condemnation of the statute in toto as being in the teeth of the Fourteenth amendment to the Federal Constitution, designed, as it was, to prevent discriminations between races in state laws and guaranteeing to each and all 'equal protection of the laws.'

"The only basis upon which statutes like the one here have been sustained by the United States Supreme Court as not being in conflict with the said Fourteenth amendment to the United States Constitution . . . is that such statutes afford equal accommodations for and like protection to each race and were designed as police regulations to prevent breaches of the peace. Whatever private or secret reasons may have actuated the Legislature in the passage of the statute, if any, are not to be considered in construing the statute. We are not permitted to ascribe to them, as did the Texas court, unconstitutional purposes not disclosed in the act; but, the act being consistent in its terms, with constitutional purposes, we shall presume that these and these only led to its passage, which was a desire, as we have before said, to promote the public peace by preventing clashes and conflicts between the two races, which would result if it was permitted that they be brought together as fellow travelers in the same railroad car or compartment, and with equal rights therein as such, both as to the matter of sitting and as to all other privileges of passengers." *Id.* at 386-88, 67 So. at 743-44.

¹⁷³ The court said: "It does not seem to me that enactments of the nature under consideration would be affected and held to be void as violating the provisions of the fourteenth amendment of the federal Constitution, guaranteeing to all persons equal protection of the laws, because we are aware of the history and cause for their enactment as a matter of common knowledge, and use this knowledge in applying them to concrete cases . . . so long as no discrimination is made in the enforcement of the statutes, and equal protection of the law is accorded to all. It has been held to be a reasonable regulation for a carrier to

C. CRITICISMS OF ENFORCED SEGREGATION

The enforcement of segregation laws in carriers led to a situation which many people considered a burdensome nuisance, causing more discomfort and inconvenience than the contrary. For example, under state segregation laws it was held that railroads had to provide a separate coach for each race even though there were no Negro passengers since Negroes could demand passage at any time.¹⁷⁴ It was decided that a Negro porter could be in a white Pullman car to perform duties but not to sleep there.¹⁷⁵ Another case ruled that even where separate toilets were not provided for the sexes, they would have to be provided for different races.¹⁷⁶ The Tennessee Supreme Court said that separate dining car accommodations might be made in compliance with the statute by calling white railroad passengers first and Negroes next, but it awarded damages for negligence to white passengers who were called when Negroes were also being served.¹⁷⁷

have on its train a coach to be occupied exclusively by ladies.... It was not to keep ladies out of other cars, but to prevent men from obtruding on ladies.... We also know as a matter of common knowledge that the object and purpose... in passing the statutes for the segregation of the races in jails and schools and on the trains and other places, was not to prevent an undesirable and unwelcome intrusion of the white people upon the colored people;... are we to be required to throw away common knowledge and common sense and blind ourselves to the universal knowledge that they were enacted by a dominant white race with a view to the preservation of peace and good order and the promotion of that race's quiet enjoyment of these places without the association of the negro race, and to prevent the evil and disturbances that are likely to result as the consequences of an undesired intrusion by negroes upon white persons in those places where a comingling of the races is provided against?... [We] historically know that the enactment of these laws grew out of no purpose to meet an objection of the negro race against association with the white race, nor to prevent the white people from attending Negro schools, or riding in cars, or compartments of cars, set apart for Negroes.... If it should be a fact that the Negro race claims no right as against the intrusion upon it of the white race, how can it then be said to be a denial of any right, equal or otherwise, of that race for a white person to occupy a compartment on a car set apart for the occupancy of the Negro race?" *Id.* at 399-401, 67 So. at 747-48.

¹⁷⁴ *Louisville, & N.R. Co. v. Commonwealth*, 171 Ky. 355, 188 S.W. 394 (1916). In *Southern Kansas Ry. Co. v. State*, 44 Tex. Civ. App. 218, 99 S.W. 166 (1906), the court said of such a situation: "Neither would a press of business excuse the railroad company from a compliance with the terms of the statute, since, if it chooses to do business in this state, it must do so according to the regulations of the law."

¹⁷⁵ *Ammons v. Murphree*, 191 Miss. 238, 2 So. 2d 555 (1941).

¹⁷⁶ *Louisville & N.R. Co. v. Commonwealth*, 160 Ky. 769, 170 S.W. 162 (1914).

¹⁷⁷ *Shelton v. Chicago, R.I. & P.R. Co.*, 139 Tenn. 378, 201 S.W. 521 (1917).

It was these burdensome adjustments, and the occasional necessity of denying substantially equal treatment to Negro passengers in order to comply with state segregation laws without unreasonable financial expense, that led the Supreme Court prior to 1954 to forbid compliance with such laws in interstate transportation. In *Mitchell v. United States*,¹⁷⁸ the Court decided that a carrier cannot refuse to accord identical accommodations to Negroes who pay the same fare even if desegregation must thereby occur. The Court in effect ruled that equal treatment was a more important value than the associational preferences of white passengers.¹⁷⁹ Insofar as this relates to facilities only, it is difficult to quarrel with such a value judgment.

In *Morgan v. Virginia*,¹⁸⁰ the Court decided that segregation statutes were invalid as applied to interstate buses since they compelled passengers to move back and forth to comply with them. Thus the enforcement of these statutes constituted a burden on

¹⁷⁸ 313 U.S. 80 (1941).

¹⁷⁹ The Court said: "The Government puts the matter succinctly: 'When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race'. And the Commission has recognized that inequality persists with respect to certain other facilities such as dining-car and observation-parlor car accommodations."

"We take it that the chief reason for the Commission's action was the 'comparatively little colored traffic'. But the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it made the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. . . . While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, we said, who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers. . . . And the Interstate Commerce Act expressly extends its prohibitions to the subjecting of 'any particular person' to unreasonable discriminations." *Id.* at 96-97.

¹⁸⁰ 328 U.S. 373 (1946).

interstate commerce. However, Mr. Justice Reed also remarked that such statutes restrict "freedom of choice in selecting accommodations."¹⁸¹ Insofar as the selection does not infringe on the associational preferences of other passengers, this conclusion, too, cannot be faulted.

The final blow came in *Henderson v. Interstate Commerce Commission*.¹⁸² In this case, the district court had under consideration railroad dining car segregation. It held that the railroad could not lawfully set aside tables for white persons without setting aside some tables for Negroes. It therefore ruled that a system whereby Negroes could only be served if no white passengers were occupying seats conditionally reserved for Negroes, but that white passengers could always be served in the white section, was unlawful discrimination against Negroes. The district court decided that if white passengers could sit in unoccupied Negro seats, Negroes ought to be entitled to sit in unoccupied white seats. It added that service at the passenger's seat was not an equal substitute to service in the dining car.¹⁸³

However, the district court went on to hold that where certain tables were reserved for white passengers and one table, separated by a partition, was reserved exclusively for colored passengers, there was equality of treatment. Moreover, where experience showed that about four percent of the meals were served to Negroes, reserving one table out of eleven, or eight percent of the seating, for Negroes, was held to be fair and non-discriminatory. The court said that if more than four Negroes wanted to eat at one time, the ones waiting would be in no different a position than white persons who arrived when the white section was overcrowded.

A dissenting judge, however, took the position that the railroad could not refuse to serve anybody if there were any empty seats in either section.¹⁸⁴ In reversing the district court, the Supreme

¹⁸¹ *Id.* at 383.

¹⁸² 80 F. Supp. 32 (D. Md. 1948), *rev'd*, 339 U.S. 816 (1950).

¹⁸³ *Id.* at 34-35, where the court declared: "The alternative offered the Negro passenger of being served at his seat in the coach or in the Pullman car without extra charge does not in our view afford service substantially equivalent to that furnished in a dining car. True, some passengers may prefer not to patronize a diner, and we will assume that the menu is the same and the service scarcely, if at all, less expeditious when meals are served in coaches or Pullman cars. Nevertheless, the Negro passenger is entitled to dine with friends if he sees fit to do so, and should not be unnecessarily subjected to the inconvenience of dining alone under the crowded conditions which service, especially in a coach or in a sleeper, may entail."

¹⁸⁴ *Id.* at 40, where he declared: "This arrangement on its face seems fair to the Negro race, but it is based on the erroneous assumption that

Court agreed with the dissenting view. That Court remarked: "That the regulations may impose on white passengers, in proportion to their numbers, disadvantages similar to those imposed on Negro passengers is not an answer. . . ." ¹⁸⁵

Another criticism of segregation laws was that they violated freedom of choice in association by keeping people apart who wanted to associate with each other. ¹⁸⁶ For example, the Kentucky laws were "intended to force the separation of white and colored people while traveling upon railroads in this state." ¹⁸⁷ The Fifth Circuit recently recognized the fact that the state has no legitimate interest in separating people who want to ride together, talk with each other, or use some private facility in common. It held that white persons were entitled to eat with Negroes in restaurants free from state-imposed segregation, pointing to "the freedom of a white man peacefully to associate with Negroes in a public restaurant free from the actual or threatened arrest by police officers as a means of enforcing segregation." ¹⁸⁸

In one pre-1954 case, it was held that segregated public recreational facilities are constitutional even though both whites and Negroes complained that they wanted to play sports together. The court said:

the rights which the Fourteenth Amendment is designed to protect are racial rather than personal in their nature. The regulations set aside one table in the dining car exclusively for Negroes and ten tables exclusively for whites, and the result is that occasionally a member of one race is denied service which is then available to a member of the other. Whenever this occurs, the Railroad Company discriminates against one passenger in favor of another because of his race, and deprives him of equality of treatment, and it is no answer to say that the Railroad Company has taken reasonable precautions to prevent the occurrence. It is true that segregation of the races is lawful provided 'substantial equality of treatment of persons traveling under like conditions' is accorded; but the right belongs to the individual and not to the race, and segregation must be abandoned, or at least temporarily suspended, whenever its enforcement deprives the individual of treatment equal to that accorded to any other person at the same time.

"Segregation in railroad traffic may be maintained if there are sufficient accommodations for all; but a vacant seat may not be denied to a passenger simply because of his race."

¹⁸⁵ 339 U.S. at 825.

¹⁸⁶ See *Taylor v. Leonard*, 30 N.J. Super. 116, 119-20, 103 A.2d 632, 633-34 (1954): "The evil of a quota system is that it assumes that Negroes are different from other citizens and should be treated differently. . . . It makes no difference that equal facilities are provided to Negroes. Segregation necessarily implies that Negroes must be kept separate and apart from all other people. Like the quota system it is premised on the concept that Negroes are different."

¹⁸⁷ *Commonwealth v. Louisville & N.R. Co.*, 120 Ky. 91, 87 S.W. 262 (1905).

¹⁸⁸ *Nesmith v. Alford*, 318 F.2d 110, 124-25 (5th Cir. 1963).

It is suggested by counsel for the plaintiffs that this case differs from the typical situation in which one or more Negroes alone are seeking to enforce equality of treatment, because here they are joined by some whites who insist upon the right to participate in inter-racial sports. In my opinion the attempted distinction is unsound. If the Board's requirement as to segregation was valid, it was equally binding upon whites and Negroes. Their mutual desire to participate together in athletic activities might be a proper consideration for the Board in formulating its policy but cannot of itself affect the power to make the regulation.¹⁸⁹

But the most serious objection to segregation laws in respect to private business is that it constitutes a usurpation by the state of the discretion of the business proprietor. For example, it has been held that an ordinance requiring segregation in bars is unconstitutional.¹⁹⁰ Likewise, it has been held that an ordinance requiring taxicabs to be registered as either colored or white, and to take only passengers as registered, is unconstitutional.¹⁹¹

In *McCain v. Davis*,¹⁹² a majority of the court held that a law forbidding white hotels from accommodating Negroes violated the rights of Negroes under the equal protection clause of the Fourteenth Amendment. However, in a special concurrence, Judge West declared that the only question presented was whether the state had the right to force a private hotel owner to refuse accommodations to a Negro when there were some white guests in the hotel. He said that the right of Negroes to be accommodated was not in issue since even if the statute were invalidated, hotel owners could still refuse to accept them. Therefore, he said that "the only right involved is the right of the hotel owner to conduct his business without undue government interference, rather than the right of the Negro to be admitted to the hotels in question."¹⁹³

As for the constitutionality of the statute, Judge West rightly declared:

¹⁸⁹ *Boyer v. Garrett*, 88 F. Supp. 353, 359 (D. Md. 1949), *aff'd*, 183 F.2d 582 (4th Cir. 1950), *cert. denied*, 340 U.S. 912 (1951).

¹⁹⁰ *Robertson v. Johnston*, 376 F.2d 43 (5th Cir. 1967); *Pania v. City of New Orleans*, 262 F.Supp. 651 (E.D.La. 1967); *De Angelis v. Board of Liquor License Commrs.*, 1 RACE REL. L. Rep. 370 (Balt. City Ct., Md. 1955).

¹⁹¹ *Bergerson v. City of New Orleans*, 11 RACE REL. L. REP. 945 (U.S.D.C., E.D. La. 1965). The court here also held that if a taxicab was considered a public utility, and it could not have refused to take any passenger of the race for which it was registered, under this ruling it now could not refuse to take any passenger.

¹⁹² 217 F. Supp. 661 (E.D. La. 1963).

¹⁹³ *Id.* at 669. He added: "[T]o hold that this statute forbidding the operator of a so-called white hotel to rent to a Negro is unconstitutional should in no way be construed to mean that such a hotel operator is required to rent a room to a Negro."

Just as I believe that the federal government may not legally force the owner or operator of a private business to integrate, so do I believe that the state or local government may not compel the owner or operator of a private business to segregate. Such continued and extended interference by state and federal government into the operations of purely private business will surely spell doom to our long cherished system of free enterprise. In our zeal to protect the fundamental rights of minority groups, let us not forget that a hotel owner, just as the owner of any other private business enterprise, also has certain constitutionally guaranteed rights. One of these rights is the right to own and operate his business without undue interference by either the state or national government. Where, such as in the case of hotels, the business is not a state or federally franchised, monopolistic enterprise, the right of freedom to choose those with whom the owner or operator wishes to do business is just as fundamental as any of the so-called civil rights of which we lately hear so much.¹⁹⁴

III. COMPULSORY INTEGRATION IN PRIVATE BUSINESS

When the rule of the school segregation decisions¹⁹⁵ was applied to hold segregation laws unconstitutional in transportation¹⁹⁶ and in entertainment,¹⁹⁷ business owners were freed from the restrictions of these governmental regulations and were free to follow their own policies. Most businesses in the South would probably have continued segregation in response to the wishes of their customers.¹⁹⁸ In other words, the demise of these statutes simply restored the original common law.

¹⁹⁴ *Id.* at 669. He also said: "As far as I am concerned, this decision merely gives greater latitude to a hotel operator and other persons covered under the statute in question in the management of their business. It does not substitute a mandate requiring him to *integrate* his hotel for a prior mandate requiring him to *segregate* it. It eliminates both mandates. It permits him to operate his own private business without unwarranted governmental interference.

"The right of a person to operate his privately owned business as he sees fit is just as sacred a right as any other civil right. I am not willing to assist in driving the final nail in the coffin of free enterprise." *Id.* at 670-71.

¹⁹⁵ *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁹⁶ *Bailey v. Patterson*, 369 U.S. 31 (1962); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963); *United States v. City of Jackson*, 318 F.2d 1 (5th Cir. 1963); *Christian v. Jemison*, 303 F.2d 52 (5th Cir. 1962); *Fleming v. South Carolina Elec. & Gas Co.*, 239 F.2d 277 (4th Cir. 1956), 224 F.2d 752 (4th Cir. 1955), *appeal dismissed*, 351 U.S. 901 (1956); *Taylor v. City Council of Augusta*, 7 RACE REL. L. REP. 227 (U.S.D.C., S.D. Ga. 1962).

¹⁹⁷ *Due v. Tallahassee Theatres, Inc.*, 333 F.2d 630 (5th Cir. 1964).

¹⁹⁸ See *Bullock v. Tamiami Trail Tours*, 266 F.2d 326 (5th Cir. 1959), taking judicial notice of southern customs of segregated seating. In *Baldwin v. Morgan*, 287 F.2d 750, 760 (5th Cir. 1961), the court observed: "While no law, or custom or usage which is the equivalent of law, may compel the segregation of races in the area of public transportation, it is equally clear that people of good will of both

Moreover, there had been no change in the common law while the segregation statutes were in effect; this law was merely suspended for the time being. Under these common law rules, a theater owner had the right to seat different classes or races wherever he chose.¹⁹⁹ The proprietor also had the right to segregate customers in hotels,²⁰⁰ carriers,²⁰¹ and restaurants.²⁰² As one court observed: "The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants."²⁰³

It is interesting to note that several of the earlier cases held that anti-discrimination laws did not require desegregation of facilities.²⁰⁴ For example, the Pennsylvania Superior Court held that

... races are free to observe traditions which for generations have been an intimate part of their way of life."

¹⁹⁹ *State v. Cobb*, 262 N.C. 262, 136 S.E.2d 674 (1964); *Taylor v. Cohn*, 47 Ore. 538, 84 P. 388 (1906); *De La Ysla v. Publix Theatres Corp.*, 82 Utah 598, 26 P.2d 818 (1933). For the Canadian view, see *Loew's Montreal Theatres, Ltd. v. Reynolds*, 30 Que. K.B. 459 (1919). For a good general review of the subject, see *Turner & Kennedy, Exclusion, Ejection, and Segregation of Theater Patrons*, 32 IOWA L. REV. 625 (1947).

²⁰⁰ *De Wolf v. Ford*, 193 N.Y. 397, 401, 86 N.E. 527, 529 (1908): "And while he is bound to accept as guests all proper persons, so long as he has room for them, he is under no legal obligation to assign a guest to any particular apartment."

²⁰¹ See *Simmons v. Atlantic Greyhound Corp.*, 75 F.Supp. 166, 176 (W.D. Va. 1947): "No matter how much we may deplore it, the fact remains that racial prejudices and antagonisms do exist and that they are the source of many unhappy episodes of violence between members of the white and colored races. If it is the purpose of the defendant here to lessen the occasions for such conflicts by adoption of a rule for the separate seating of white and colored passengers, this court cannot say that such a rule is purely arbitrary and without reasonable basis."

²⁰² *Nash v. Air Terminal Services*, 85 F.Supp. 545 (E.D. Va. 1949).

²⁰³ *State v. Clyburn*, 247 N.C. 455, 460, 101 S.E.2d 295, 299 (1958).

²⁰⁴ See *Redding v. South Carolina R. Co.*, 5 S.C. 67 (1873). In *People v. School Bd.*, 161 N.Y. 598, 601, 56 N.E. 81, 82 (1900), the court interpreted the New York Civil Rights Law as prohibiting only denial of facilities, but not segregation, saying: "It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained." See also *Comment, Race Equality by Statute*, 84 U. PA. L. REV. 75, 82-83 (1935): "An important practical matter concerns the legality of providing separate, but equal, accommodations in theatres and the like.... The theory appears to be that having a portion of the theatre open to whites and not to Negroes, constitutes discrimination. This may be true if the whites are allowed seats in any portion of the theatre, but it is open to serious question in case Negroes have a section from which whites are excluded and which is fully as adequate as other sections. In such a case both races are treated equally."

theater segregation does not violate the state civil rights act.²⁰⁵ It was also held that restaurant segregation was not unlawful under the statute. One court declared "that refusal to serve in one room does not necessarily mean refusal to accommodate..."²⁰⁶

However, the majority of cases hold that anti-discrimination statutes have the effect of prohibiting segregation as well. Some of them can be explained on the ground that the facilities offered the Negro were not only separate but also inferior, such as letting a Negro who comes into a restaurant only eat in the kitchen²⁰⁷ or not allowing Negroes to sit on the first floor of a theater.²⁰⁸ It has also been held that if a theater sells a ticket to a Negro, it cannot refuse to allow him to occupy the seat he has purchased because

²⁰⁵ *Commonwealth v. George*, 61 Pa. Super. Ct. 412, 421 (1915), where the court said: "Remembering that the Supreme Court of the United States has held that civil rights do not mean the same or identical rights, and that our own Supreme Court has held that the owner of a theatre is a private citizen engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may agree to admit to it (provided he cannot refuse admission on account of race and color); that penal statutes must be strictly construed; that the art of subtle reasoning should not be employed to bring within the folds of the statute acts which would not otherwise be an offense, should the defendant have been permitted to show that the accommodations offered were equal and sufficient to those accorded others in the theatre? Accepting appellee's contention that this 'right' was 'to admit and accommodate,' the title to the act might well have read 'equal and sufficient right.'... Had the legislature, in view of the law as it existed, wished this 'right' to be the same right, they should have said so in plain language... The common law recognized the right to make different classes of accommodation and one was accommodated when enjoying any one of those classes..."

²⁰⁶ *Commonwealth v. Oberbeck*, 32 Am. L. Reg. (n.s.) 753 (Pa. C. P. 1889). See also *Puritan Lunch Co. v. Forman*, 29 Ohio Ct. App. 289, 295 (1918), which, in applying the separate but equal doctrine to restaurants, said: "This rule of requirement does not call for identity of accommodation, but it does mean substantial equality of service..."

²⁰⁷ *Crosswaith v. Bergin*, 95 Colo. 241, 35 P.2d 848 (1934); *Puritan Lunch Co. v. Forman*, 29 Ohio Ct. App. 289 (1918). In *Fruchey v. Eagleson*, 15 Ind. App. 88, 101-02, 43 N.E. 146, 150 (1896), the court said: "Even if... the clerk of the hotel agreed to permit appellee to stop there on condition that he would take his meals in the 'ordinary,' and away from the other guests, it would be a denial of equal privileges, such as the statute contemplates..."

²⁰⁸ *Randall v. Cowlitz Amusements*, 194 Wash. 82, 76 P.2d 1017 (1938). In *Pickett v. Kuchan*, 323 Ill. 138, 142, 153 N.E. 667, 669 (1926), the court declared: "It was no defense to the action to show that appellant offered to sell to appellee a ticket to the gallery. Proof of the refusal to sell her, on account of her race, the ticket requested entitled her to a verdict."

it is in the white section of the theater.²⁰⁹ But several cases do flatly outlaw segregation under the statutes.²¹⁰

For example, in one case it was held that segregation in a motion picture theater was not permissible because the statute gave all persons the "full enjoyment" of the theater. The court argued that they were entitled to enjoy the privileges of the theater alike with white patrons, and that if white patrons were seated in the center and they were seated on the sides they were thereby denied the privilege of sitting in the center.²¹¹ This refines "full enjoyment" or equal privileges too far. If the sections are equally good, all patrons have equal enjoyment. Not everybody can sit in the same seat, and some method has to be allocated for distributing seats. There is no more reason for distributing them at random than any other way. As long as the seats are equally good, who is allotted what seat is immaterial to the enjoyment of the theater.

Probably the leading case in this field is *Ferguson v. Giles*.²¹² In this case, a restaurant owner refused to serve a Negro on one side of a room, but offered to serve him on the other side. The lower court held that this was satisfactory compliance with a statute giving all persons full and equal accommodations.²¹³ The

²⁰⁹ *Joyner v. Moore-Wiggins Co.*, 152 App. Div. 266, 136 N.Y.S. 578 (1912), *aff'd*, 211 N.Y. 522, 105 N.E. 1088 (1914).

²¹⁰ *Suttles v. Hollywood Turf Club*, 45 Cal. App. 2d 283, 114 P.2d 27 (1941); *Jones v. Kehrlein*, 49 Cal. App. 646, 194 P. 55 (1920); *Baylies v. Curry*, 128 Ill. 287, 21 N.E. 595 (1889); *Matter of Rollercoaster Skating Rink*, 7 RACE REL. L. REP. 985 (Ohio Civil Rights Comm. 1962). See also *Hull v. Eighty-Sixth St. Amusement Co.*, 144 N.Y.S. 318 (Sup. Ct. 1913), holding that the Civil Rights Law does not prevent seating on a first-come, first-served basis.

²¹¹ *Guy v. Tri-State Amusement Co.*, 7 Ohio App. 509, 513 (1917): "It might be contended here that these persons had just as good an opportunity to see the pictures or vaudeville performance, if such there may have been, seated on the right-hand side, as if they were seated in the center section. However, if these colored people were required to be so seated they would only be allowed partial enjoyment of the privileges of that theater, because white persons were permitted to occupy the center section; that is to say, colored people could enjoy the privilege of seeing the pictures, they could enjoy the privilege of hearing the music, they might enjoy the privilege of greeting their friends and acquaintances within the building, at the same time they were certainly denied some of the privileges that were given to persons of the white race, because the latter might enjoy the privilege of the center section of seats."

²¹² 82 Mich. 358, 46 N.W. 718 (1890).

²¹³ The trial judge charged the jury: "While the defendant had no right to make a rule providing for an unjust discrimination, still he would have the right, under the law, to make proper and reasonable rules for the conduct of his business, and governing the conduct of his patrons; and whether this was a reasonable rule I will submit to you

Supreme Court of Michigan reversed the trial court. It held that the statute forbade segregation in public places. The reasoning of the court, that segregation by a restaurant owner was a denial of equality before the law,²¹⁴ is clearly inapplicable, for even if segregation were a denial of equality, that denial was not made by law, but only by a private person.²¹⁵ The reason why segregation violated the statute is equally hard to follow. The court's reasoning on this point consisted largely of declamation on racial prejudice.²¹⁶ Finally, the court denied that its interpretation of the statute infringed on freedom of choice in association. It said:

for determination. Thus, the defendant has the right to reserve certain portions of his business for ladies, and other portions for gentlemen, while he may also reserve other portions for his regular patrons or boarders. He might also, under the law, reserve certain tables for white men, and others where colored men would be served, providing there be no unjust discrimination. And this brings me to an explanation of the term which I have used, viz., 'full and equal accommodations.' By this term 'full and equal' is not meant identical accommodations, but by it is meant substantially the same accommodation. A guest at a restaurant has no more right to insist upon sitting at a particular table than a guest at a hotel has the right to demand a particular room, as long as the accommodations offered are substantially the same. This is all the law demands and requires. . . . *Id.* at 362, 46 N.W. at 719.

²¹⁴ The court said on this point: "But in Michigan there must be and is an absolute, unconditional equality of white and colored men before the law. The white man can have no rights or privileges under the law that is denied to the black man. Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction. . . . This statute exemplifies the changed feeling of our people towards the African race, and places the colored man upon a perfect equality with all others, before the law in this state. Under it, no line can be drawn in the streets, public parks, or public buildings upon one side of which the black man must stop and stay, while the white man may enjoy the other side, or both sides, at his will and pleasure; nor can such a line of separation be drawn in any of the public places or conveyances mentioned in this act." *Id.* at 363, 46 N.W. at 720.

²¹⁵ See Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966).

²¹⁶ The following is a fair sample of this declamation: "Because it was divinely ordained that the skin of one man should not be as white as that of another furnishes no more reason that he should have less rights and privileges under the law than if he had been born white, but cross-eyed, or otherwise deformed. The law, as I understand it, will never permit a color or misfortune, that God has fastened upon a man from his birth, to be punished by the law unless the misfortune leads to some contagion or criminal act; nor while he is sane and honest can he have less privileges than his more fortunate brothers.

The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he cannot in a public place carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears. All citizens who conform to the law have the same rights in such places, without regard to race, color, or condition of birth or wealth. The enforcement of the principles of the Michigan civil rights act of 1885 interferes with the social rights of no man, but it clearly emphasizes the legal rights of all men in public places.²¹⁷

This proposition, of course, assumes the very point to be decided. If a restaurant is a private business, then a customer has the right to influence the owner to separate other customers from him, if he can. Whether the owner will do so depends on whether the owner finds it profitable to accede to the request. If the owner declines the request, the customer may leave and go elsewhere to a restaurant which caters to his associational preferences. If an automobile executive does not want to eat with mechanics, for example, he may not be able to persuade Joe of Joe's Greasy Spoon, whose customers are 99 percent mechanics, to segregate them. However, he has the option of patronizing the Ritz, the owner of which, to keep his executive trade, may well segregate persons in humbler stations of life. In this way, the executive's freedom of choice in association is preserved. Accordingly, the court's statement that a person, when he leaves his home, should expect to have to mingle with all classes of persons, is entirely unjustified, absent government interference.

If the government restricts the scope of the restaurant owner's discretion, it in effect denies freedom of choice to the customer, who cannot legally attempt, along with other customers of like disposition, to influence the owner to adopt a policy more to their

The law is tender, rather than harsh, towards all infirmity; and, if to be born black is a misfortune, then the law should lessen, rather than increase, the burden of the black man's life.

"The prejudice against association in public places with the Negro, which does exist, to some extent, in all communities, less now than formerly, is unworthy of our race; and it is not for the courts to cater to or temporize with a prejudice which is not only not humane, but unreasonable. Nor shall I ever be willing to deny to any man any rights and privileges that belong in law to any other man, simply because the Creator colored him differently from others, or made him less handsome than his fellows...." *Ferguson v. Giles*, 82 Mich. 358, 367, 46 N.W. 718, 721 (1890).

²¹⁷ *Id.* at 367-68, 46 N.W. at 721. But see *Central R.R. v. Green*, 86 Pa. St. 427 (1878), holding that an anti-segregation law in respect to railroads is deemed penal.

liking. Under common law, the owner may ignore their associational preferences, or may accede to them, as he values their patronage. But if government forbids all restaurants to accede to the associational preferences of the customers, then their ability to find some proprietor who will comply is eliminated.

This point is illustrated by a case which involved a phrase in a brochure sent out by a resort hotel in the mountains used primarily for vacations saying: "Serving Christian Clientele Since 1911." The New York State Commission Against Discrimination declared that use of this phrase was illegal since it "unmistakably conveys the idea that the resort solicits guests of one religious creed."²¹⁸ A similar ruling was made when a resort farm advertised that it had served a "gentile clientele" for 63 years.²¹⁹ Likewise, in *Camp-of-the-Pines v. New York Times Co.*,²²⁰ the court ruled that a summer resort camp cannot publish an advertisement saying "selected clientele," "restricted clientele," or "restricted" on the ground that this violated the law against discrimination. The court declared: "As a practical matter such words as 'selected clientele' connote in the public mind that colored persons, Jews, and others who are not lily-white need not apply to plaintiff for accommodation."²²¹ The court also said:

The duty of courts is ever to be watchful and alert against open as well as covert and stealthy attacks and encroachments against the social as well as the political and economical (sic) rights of persons.... Our Constitution guarantees every citizen the right to life, liberty, and the pursuit of happiness. It sternly prohibits religious intolerance. Section 40 of the Civil Rights Law is a laudable effort to blot out racial hatred. It strikes at the bigot and all

²¹⁸ State Commission Against Discrimination v. Trowbridge, 5 RACE REL. L. REP. 552, 556 (1960). But see *Trowbridge v. Katzen*, 23 Misc. 111, 114, 203 N.Y.S. 2d 736, 739 (1960), *rev'd*, 14 A.2d 608, 218 N.Y.S.2d 808 (1961): "It is not unusual to read advertisements which state 'Italian cuisine,' 'French cooking,' or 'Kosher diet observed.'" Would one say that such descriptive words would establish that the author was engaging in a discriminatory practice pursuant to the provisions of the aforesaid statute.... It is unfair to determine that such a practice has been employed by indulging in a strained and sensitive interpretation of the meaning and purpose of the wording used."

²¹⁹ Op. No. 2524, OPS. ATTY. GEN. MICH., 1 RACE REL. L. REP. 988, 990 (1956): "The words 'for 63 years we have served a gentile clientele' can have only one purpose and meaning in the understanding of the general public; namely, to communicate the idea that Jews are not welcome, not desired and not solicited by those responsible for issuing the calendar containing the language under discussion. Thus, the words are restrictive in design and intent, though artfully worded, and constitute a 'cloak and disguise and are indirect means to hide discrimination.'"

²²⁰ 184 Misc. 389, 53 N.Y.S.2d 475 (1945).

²²¹ *Id.* at 398, 53 N.Y.S.2d at 484.

promoters of discord and unhappiness. Every effort is made and should be made and it is the duty of the courts to prevent, so far as is humanly possible, social and economic ostracism.²²²

It is interesting to note that although state anti-discrimination laws now prohibit a proprietor from segregating his premises to satisfy the associational preferences of those who do not want integrated facilities, they also compel him to satisfy those who want integrated service. This is fairly recent law. In 1918, the lower courts in New York held that the thrust of anti-discrimination laws was to compel service and not to satisfy integrationists. They therefore ruled that a restaurant could refuse to serve white persons who accompanied a Negro. One court said: "We think it is quite plain that that act cannot be availed of by a white man because of discrimination against him that is based upon his association with colored men."²²³

However, more recently it has been held that a person cannot be excluded from an amusement park because he belongs to the NAACP or a local integrationist group.²²⁴ It has also been held that a Negro and his white wife are both entitled to damages from

²²² *Id.* at 399-400, 53 N.Y.S.2d at 485.

²²³ *Matthews v. Hotz*, 173 N.Y.S. 234, 235 (Sup. Ct. 1918). In *Cohn v. Goldgraben*, 103 Misc. 500, 501, 170 N.Y.S. 407, 407-08 (Sup. Ct. 1918), the court said: "There was no refusal to serve because of color or race. The plaintiff was white, and his companion was colored. They were both refused service, so it could not have been on account of color. It was as stated by the waiter, because the rule forbade serving 'mixed parties.' The rule that 'mixed parties' should not be served applied to white as well as colored. There was no discrimination as to one color in favor of the other. The record plainly indicates that both parties would have been served at separate tables, and that plaintiff knew this, and refused service at a separate table. How can it be said, then, that he was refused service because of his color?"

"I do not think the refusal to serve 'mixed parties,' white and colored, at the same table, when there is a willingness to serve the same people at separate tables, should be construed as a violation of the statute. The rights granted to the citizen by the statute are strictly personal, and the statute may only be invoked when the refusal is based upon the ground personal to the plaintiff. The plaintiff was not refused service solely upon his own color, but upon the fact that his companion had a different color. Had the plaintiff been alone, or had he separated himself from his companion, he would have been served."

²²⁴ See *Fletcher v. Coney Island, Inc.*, 121 N.E.2d 574, 581 (Ohio C.P. 1954), *rev'd on other grounds*, 100 Ohio App. 259, 136 N.E.2d 344 (1955), *aff'd*, 165 Ohio St. 150, 134 N.E.2d 371 (1956): "The blanket exclusion of all members and of all persons who associate with members of a particular group or organization, because of the misconduct of some members and without regard to the fact that a particular person who may be affected by such blanket exclusion is without personal fault, is not a reason applicable alike to all other citizens."

a hotel which excludes them because of their miscegenation.²²⁵ Another court has ruled that the anti-discrimination law prohibits a landlord from raising the rent of a white woman for receiving Negro visitors.²²⁶

The federal law is now the same. Under Title II of the Civil Rights Act of 1964,²²⁷ segregation is forbidden in restaurants²²⁸ and movie theaters.²²⁹ Thus, it has been held that a short-order food and beverage stand which serves whites at two windows and Negroes at a third window violates the federal law, even though there is no difference between the windows or the service.²³⁰

Even without benefit of statute, a number of federal cases have forbidden discrimination. It has been held that segregation in a restaurant, or separate restrooms and drinking fountains, in an area leased from a municipal airport²³¹ or toll road²³² violates the fourteenth amendment. The same ruling has been made in respect to transportation facilities²³³ and hospitals which receive government funds.²³⁴ The Fifth Circuit has even decided that a franchised public utility cannot enforce its segregation rule by arrest and criminal sanctions.²³⁵

The commerce clause has also been pressed into the integration fray. Although the Supreme Court has decided that state anti-discrimination laws do not burden interstate or foreign commerce,²³⁶ it has held that racial segregation in restaurants attached to bus

²²⁵ *Hobson v. York Studios*, 208 Misc. 888, 145 N.Y.S.2d 162 (1955).

²²⁶ *McGill v. 830 S. Michigan Hotel*, 68 Ill. App. 2d 351, 216 N.E.2d 273 (1966).

²²⁷ 78 Stat. 243, 42 U.S.C. § § 2000a—2000a-b (1964).

²²⁸ *United States v. Bradshaw*, 12 RACE REL. L. REP. 1022 (U.S.D.C., E.D. N.C. 1967); *United States v. Moorefield*, 11 RACE REL. L. REP. 2008 (U.S.D.C., W.D. Va. 1966).

²²⁹ *Bryan v. Guillory*, 11 RACE REL. L. REP. 426 (U.S.D.C., W.D. La. 1965); *United States v. Gulf-State Theatres, Inc.*, 256 F. Supp. 549 (N.D. Miss. 1966); *Thomas v. Orangeburg Theatres, Inc.*, 241 F. Supp. 317 (E.D. S.C. 1965).

²³⁰ *Davis v. Hill*, 11 RACE REL. L. REP. 425 (U.S.D.C., S.D. Ala. 1965).

²³¹ *Turner v. City of Memphis*, 369 U.S. 350 (1962); *Adams v. City of New Orleans*, 208 F. Supp. 427 (E.D. La. 1962), *aff'd*, 321 F.2d 493 (5th Cir. 1963); *United States v. City of Shreveport*, 210 F.Supp. 36 (W.D. La. 1962).

²³² *McDuffie v. Florida Turnpike Authority*, 7 RACE REL. L. REP. 505 (U.S.D.C., S.D. Fla. 1962); *cf. Muir v. Louisville Park Theatrical Assn.*, 202 F.2d 275 (6th Cir. 1953), *vacated*, 347 U.S. 971 (1954).

²³³ *United States v. Lassiter*, 203 F. Supp. 20 (W.D. La. 1962).

²³⁴ *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

²³⁵ *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960).

²³⁶ *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948).

terminals is "unjust discrimination" forbidden by the Interstate Commerce Act.²³⁷ In one case, the Sixth Circuit forbade a bus company to enforce a segregation rule in respect to interstate passengers on the ground that this rule was a burden on interstate commerce because the passengers would have to change their seats. The court rejected cases "drawing a distinction between the action of a state in attempting to regulate the business of a carrier and the right of a carrier to operate its own business."²³⁸ But the opinion clearly indicates that ideological considerations, rather than an overriding concern for the free flow of commerce, was decisive here.²³⁹

While the business concern covered by federal law can make no concession to those who wish to segregate themselves, it must give effect to the associational preferences of integrationists. Thus, the Fifth Circuit has recently held that a restaurant may not refuse to serve a white person because he is actively engaged in helping Negroes desegregate the restaurant.²⁴⁰

It is hardly surprising that these policies have brought forth vehement protests. As early as 1893, one writer observed that compulsory integration gave Negroes superior rights, a status which could not be justified.²⁴¹ Two years before the Supreme Court eliminated segregation, a federal judge remarked that government had no right to interfere with natural associational preferences.²⁴²

²³⁷ *Boynton v. Virginia*, 364 U.S. 454 (1960).

²³⁸ *Whiteside v. Southern Bus Lines*, 177 F.2d 949, 953 (6th Cir. 1949).

²³⁹ *Id.* at 951, where the court said: "It may be that in a period when the democratic way of life is challenged by another political and economic faith, the times invite a reappraisal of the scope of the Fourteenth Amendment to the end that in our effort to contain ideological concepts of government conflicting with our own (which have already... swept over half of Europe and great areas of Asia...), local practices may more nearly conform to our democratic professions."

²⁴⁰ *Offner v. Shell's City, Inc.*, 376 F.2d 574 (5th Cir. 1967).

²⁴¹ Wister, *Discrimination Not Between Sex But the Color of Citizens*, 32 AM. L. REG. (n.s.) 748, 756 (1893): "The above line of cases, taken from before 1861 until 1893, sets forth very clearly the history of a national prejudice, and our progress from an inhuman and unenlightened attitude through an oversentimental attempt to correct this (1867-1870), resulting in statutes and decisions which practically (as Judge Paxson pointed out) gave the blacks superior rights, to a poised and temperate level of common-sense, in which the courts most usually declare that in any community where the relations between the two races are of such a character that a compulsory herding of them together is likely to result in breaches of the peace or discomfort, in such circumstances it is wise and proper that they should have equally good but separate accommodations."

²⁴² *Hayes v. Crutcher*, 108 F. Supp. 582, 585 (M.D. Tenn. 1952): "It seems that segregation is not only recognized in constitutional law and

However, the most elaborate and pointed criticism of compulsory integration in business activities was penned by Judge Mallery of the Washington State Supreme Court in *Price v. Evergreen Cemetery Co.*²⁴³ Here, the defendant cemetery had an integrated section and a segregated white section. A Negro couple who wanted to bury a dead child was offered a plot of ground in the integrated section. They demanded the right to bury the child in the white section. When the cemetery refused, they sued for damages under the state anti-discrimination law. The majority of the court ruled on another point. However, Judge Mallery attacked the N.A.A.C.P., which had backed the suit, for seeking special privileges for Negroes, and the right to infringe on freedom of association of white persons.²⁴⁴ He observed:

This case demonstrates that the Negro desegregation program is not limited to *public* affairs. The right of white people to enjoy a choice of associates in their *private* lives is marked for extinction by the N.A.A.C.P. Compulsory total togetherness of Negroes and whites is to be achieved by judicial decrees in a series of Negro court actions.²⁴⁵

Judge Mallery concluded:

A victorious crusade of the N.A.A.C.P. for the special privilege of Negroes to intrude upon white people in their private affairs can

judicial decision, but that it is also supported by general principles of natural law. As nature has produced different species, so it has produced different races of men. . . . [I]t seems natural and customary for different species and different races to recognize and prefer as intimate associates their own kind. . . . "But our Government and its law does not intrude into the private and social affairs of life. In their private and social affairs all men are free."

²⁴³ 57 Wash. 2d 352, 357 P.2d 702 (1960).

²⁴⁴ *Id.* at 355, 357 P.2d at 704, where he protested: "In view of the cemetery's long-standing segregation restrictions, it could not sell the Negro appellants a burial plot in 'Babyland.' The white parents who have relied upon the white restriction in question have acquired a right to the association of their own race exclusively. It is this specific right of segregation which this particular case in a series was brought to eliminate.

"The appellants' grievance is the mere *existence of any exclusive section* for white children into which Negroes cannot intrude at will. In view of the fact that the respondent cemetery provides unsegregated facilities of equal quality for the general public, including Negroes, there is no other possible issue herein than that of compulsory total desegregation in cemeteries."

"This lawsuit is but an incident, the second of a series, in the over-all Negro crusade to judically deprive white people of their right to choose their associates in their private affairs."

"The Negro race, ably led by N.A.A.C.P., makes the result of every Negro lawsuit the measure of its success in securing not only rights equal to whites in public affairs, but also of *special privileges* for Negroes in *private* affairs."

²⁴⁵ *Id.* at 355, 357 P.2d at 703.

only be won at the expense of the traditional freedom of personal association which has always characterized the free world. Unfortunately, special privileges seem preferable on the part of those who enjoy them to other people's freedom. Specifically, Negroes rate their special privilege of *compulsory* private association more highly than the ancient right of white people to enjoy *voluntary* association.

From time immemorial the scope and extent of an individual's choice in his private affairs has been the Anglo-Saxon measure of his liberties. No individual right has been more cherished than the right to choose one's associates. Regimentation in the private affairs of life, on the other hand, has been the badge of the police state. It remains to be seen how resistant our ancient liberties of private association will be to the variety of mass pressures being mobilized by the N.A.A.C.P. It is, indeed, a concerted and aggressive force to be reckoned with. Experience has shown that an aggressive minority can frequently exact special privileges from an indifferent majority. It may be that the realization of the Negro dream of compulsory total togetherness is just around the corner.²⁴⁶

IV. COMPULSORY INTEGRATION IN PUBLIC FACILITIES

A. TRANSPORTATION

A year after *Brown v. Board of Education*²⁴⁷ was decided, the Interstate Commerce Commission applied the sociological rationale of that case to railroads, and ended the right of interstate railroads to segregate their passengers,²⁴⁸ which right the Supreme Court had sanctioned almost a half century before.²⁴⁹ Almost simultaneously, the Commission forbade segregated seating on interstate buses;²⁵⁰ somewhat later, it ruled that bus companies could not segregate terminal facilities based on race, creed, color, or national origin.²⁵¹ In 1956, without giving any reason, the Supreme Court upheld a lower court decision holding that state segregation statutes as they apply to transportation are unconstitutional.²⁵² It

²⁴⁶ *Id.* at 357, 357 P.2d at 704-05.

²⁴⁷ 347 U.S. 483 (1954).

²⁴⁸ *N.A.A.C.P. v. St. Louis-San Francisco Railway Co.*, 297 I.C.C. 335, 347 (1955): "The disadvantages to a traveler who is assigned accommodations or facilities so designated as to imply his inherent inferiority solely because of his race must be regarded under present conditions as unreasonable. Also, he is entitled to be free of annoyances, some petty and some substantial, which almost inevitably accompany segregation even though the rail carriers, as most of the defendants have done here, sincerely try to provide both races with equally convenient and comfortable cars and waiting rooms."

²⁴⁹ *Chiles v. Chesapeake & Ohio R.*, 218 U.S. 71 (1910).

²⁵⁰ *Keys v. Carolina Coach Co.*, 64 M.C.C. 769 (1955).

²⁵¹ *Discrimination in Operation of Interstate Motor Carriers of Passengers*, 86 M.C.C. 743 (1961).

²⁵² *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956).

has also been held a violation of the fourteenth amendment for a municipal airport to segregate waiting rooms²⁵³ or restaurant facilities.²⁵⁴

The rationale of the application of *Brown* to transportation facilities has not been explained by the Supreme Court. One district judge has asserted that segregated recreational facilities involve only a lesser psychological injury than do segregated school facilities,²⁵⁵ but the reasoning behind this remains as mystifying to this author as it does to several federal judges. One judge observed:

Besides, the Court rested its opinion in the *Brown* case almost exclusively upon sociological and psychological factors. It discussed such intangibles as opportunities to exchange in discussions and to exchange views with students of a different race, and the supposed sociological effect which segregation might have on a Negro child's motivation to learn. The whole basis of the decision is the claimed adverse effect which segregation has on the educational and mental development of Negro children, or as otherwise stated, 'the children of the minority group.' Certainly, no such effect can be legitimately claimed in the field of bus transportation. One's education and personality is not developed on a city bus.²⁵⁶

In addition, the Fifth Circuit has refused to hear evidence that the psychological factors involved in *Brown* do not apply to park and

²⁵³ *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 279 F.2d 751 (4th Cir. 1960); *United States v. City of Montgomery*, 201 F. Supp. 590 (M.D. Ala. 1962); *Brooks v. City of Tallahassee*, 6 RACE REL. L. REP. 1099 (U.S.D.C., N.D. Fla. 1961). See generally, Dixon, *Civil Rights in Air Transportation and Government Initiative*, 49 VA. L. REV. 205 (1963).

²⁵⁴ *United States v. City of Montgomery*, 201 F. Supp. 590 (M.D. Ala. 1962); *Coke v. City of Atlanta*, 184 F. Supp. 579 (N.D. Ga. 1960). See also *Castle v. Davis*, 9 RACE REL. L. REP. 884 (U.S.D.C., E.D. La. 1964), enjoining segregation in a city hall cafeteria.

²⁵⁵ See *Fayson v. Beard*, 134 F. Supp. 379, 381-82 (E.D. Tex. 1955): "If the provisions for equal tangible facilities in the field of public education do not eliminate intangible or psychological discrimination in the field of public education, how can it reasonably be said that equality in tangibles in the field of public recreation eliminates psychological factors so clearly involved in segregation based upon the color of a man's skin?"

"It can, of course, be argued that the intangibles are less effective in the public recreational field than in the field of public education, but that is to say that a little discrimination is to be condoned, but a great deal should be condemned. If the reasoning in the School Segregation Cases concerning psychological factors is sound as it relates to public education, then it must necessarily apply to the field of public recreation."

²⁵⁶ *Flemming v. South Carolina Elec. & Gas Co.*, 128 F. Supp. 469, 470 (E.D. S.C. 1955), *rev'd*, 224 F.2d 752 (4th Cir. 1955), *appeal denied*, 351 U.S. 901 (1956).

golf course segregation;²⁵⁷ presumably this disinterest would apply to transportation also. So the psychological factors are hardly decisive.

Finally, no blanket condemnation can be made of carrier segregation on the theory that it infringes on freedom of association. One federal judge put the matter as follows:

A like comment properly should be made concerning the further assertion in plaintiff's affidavit that he 'was required to be segregated.' What that loose expression means is any one's guess. From whom was he segregated? The affidavit doesn't say. Was he segregated from his family or from his friends, acquaintances or associates, from those who desired his company and he theirs? There is nothing in the affidavit to indicate such to be true. Was he segregated from people whom he did not know and who did not care to know him? The affidavit is silent as to that also. But suppose he was segregated from people who did not care for his company or association. What civil right of his was thereby invaded? If he was trying to invade the civil rights of others, an injunction might be more properly invoked against him to protect their civil rights. I know of no civil or uncivil right that any one has, be he white or colored, to deliberately make a nuisance of himself to the annoyance of others, even in an effort to create or stir up litigation. The right to equality before the law, to be free from discrimination, invests no one with authority to require others to accept him as a companion or social equal. The Fourteenth Amendment does not reach that low level. Even whites, as yet, still have the right to choose their own companions and associates...²⁵⁸

B. RECREATIONAL FACILITIES

The Supreme Court has applied the *Brown* doctrine to recreational facilities, holding that state or municipal facilities cannot be segregated.²⁵⁹ Likewise, facilities leased from state or local govern-

²⁵⁷ *New Orleans City Park Improvement Assn. v. Detiege*, 252 F.2d 122 (5th Cir. 1958), *aff'd*, 358 U.S. 54 (1958).

²⁵⁸ *Henry v. Greenville Airport Comm'n*, 175 F. Supp. 343, 347 (W.D. S.C. 1959), *rev'd on other grounds*, 279 F.2d 751 (4th Cir. 1960).

²⁵⁹ *Barthe v. City of New Orleans*, 219 F. Supp. 788 (E.D. La. 1963), *aff'd*, 376 U.S. 189 (1964) (city may not segregate parks, playgrounds, community centers); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *Anderson v. City of Albany*, 321 F.2d 649 (5th Cir. 1963) (segregation enjoined in public parks, tennis courts, swimming pools, library and auditorium); *Freeman v. City of Little Rock*, 8 RACE L. REL. L. REP. 173 (U.S.D.C., E.D. Ark. 1963) (segregation enjoined in auditorium, parks, playgrounds, golf courses, tennis courts, and comfort facilities); *Hampton v. City of Jacksonville*, 5 RACE REL. L. REP. 1145 (U.S.D.C., S.D. Fla. 1960) (desegregation ordered in city-owned parks, playgrounds, tennis courts, swimming pools, football fields, baseball park, zoo, and facilities therein such as separate entrances, rest rooms, and drinking fountains); *Anderson v. Kelly*, 9 RACE REL. L. REP. 1382 (U.S.D.C., M.D. Ga. 1963) (segregation enjoined in publicly operated

ment cannot discriminate against Negroes.²⁶⁰ Little more than *ipse dixit* has been offered to justify extending *Brown* to parks, playgrounds, golf courses, and community centers,²⁶¹ and the reasons are not apparent from the nature of the facilities.

For example, park segregation has been declared unconstitutional²⁶² even though as a result freedom of choice in association may thereby be infringed. The Fifth Circuit thus observed:

Unfortunately, the public parks of the City of Montgomery are comparatively small in size. The largest, Oak Park, consists of about 40 acres in the form of a square. If public parks no larger than that are operated on a nonsegregated basis, the probable breach of another right becomes imminent; that is, the right of each person to select his own associates. We can only call attention to the limit of the pertinent constitutional provision as construed by the Supreme Court, i.e., that it does not compel the mixing of the different races in the public parks. . . . Neither the Fifth nor the Fourteenth Amendment operates positively to command integration of the races but only negatively to forbid governmentally enforced segregation.²⁶³

Segregation has also been forbidden on government-owned golf courses,²⁶⁴ although several federal judges have followed this rul-

libraries, auditorium, parks and playground). In *Holly v. City of Portsmouth*, 150 F. Supp. 6, 7 (E.D. Va. 1957), the court observed: "There is no longer any room for doubt that the separate but equal doctrine has ceased to exist with respect to governmental facilities including golf courses, swimming pools, bathing beaches, parks, etc."

²⁶⁰ *Dukes v. Madison County*, 10 RACE REL. L. REP. 1274 (U.S.D.C., M.D. Fla. 1965).

²⁶¹ In *Watson v. City of Memphis*, 373 U.S. 526, 538 (1963), the court said: "In support of its judgment, the District Court also pointed out that the recreational facilities available for Negroes were roughly proportional to their number and therefore presumably adequate to meet their needs. . . . [e]ven if true, it reflects an impermissible obedience to the now thoroughly discredited doctrine of 'separate but equal.' The sufficiency of Negro facilities is beside the point; it is the segregation by race that is unconstitutional."

²⁶² *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F.2d 122 (5th Cir. 1958), *aff'd*, 358 U.S. 54 (1958); *Brown v. Lee*, 331 F.2d 142 (4th Cir. 1964); *Hanes v. Shuttlesworth*, 310 F.2d 303 (5th Cir. 1962); *Brown v. South Carolina State Forestry Comm'n*, 226 F. Supp. 646 (E.D.S.C. 1963); *Willie v. Harris Co.*, 202 F. Supp. 549 (S.D. Tex. 1962); *Fayson v. Beard*, 134 F. Supp. 379 (E.D. Tex. 1955).

²⁶³ *City of Montgomery v. Gilmore*, 277 F.2d 364, 369 (5th Cir. 1960).

²⁶⁴ *Wolfe v. North Carolina*, 364 U.S. 177, 182 (1960); *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F.2d 122 (5th Cir. 1958); *Cummings v. City of Charleston*, 288 F.2d 817 (4th Cir. 1961); *Ward v. City of Miami*, 151 F. Supp. 593 (S.D. Fla. 1957) *aff'd*, 252 F.2d 787 (5th Cir. 1958); *Moorhead v. City of Ft. Lauderdale*, 152 F. Supp. 131 (S.D. Fla. 1957), *aff'd*, 248 F.2d 544 (5th Cir. 1957); *Hayes v. Crutcher*, 137 F. Supp. 853 (M.D. Tenn. 1956); *State v. Cooke*, 248 N.C. 485, 103 S.E.2d 846 (1958).

ing with extreme reluctance.²⁶⁵ Desegregation has also been ordered for beaches, bathhouses, and swimming pools.²⁶⁶ The fact that this right also results in infringements on freedom of choice in association has likewise been deemed irrelevant.²⁶⁷ But it has been held that a municipal swimming pool may be restricted to residents of

²⁶⁵ In *Lagarde v. Recreation and Park Comm'n*, 229 F. Supp. 379, 383 (E.D. La. 1964), the court said: "It is no longer a valid defense to show that an order to desegregate these facilities might result in the closure of all public recreational facilities in the City and Parish, thus depriving all persons, of all races, of the excellent facilities which are now available in Baton Rouge to both races, on a traditional, well-managed, segregated basis." In *Cummings v. City of Charleston*, 5 RACE REL. L. REP. 1137, 1139 (U.S.D.C., E.D.S.C. 1960), the court protested: "The cases are clear and I am bound by my judicial oath to follow them. I do so with reluctance, and with the hope and belief that Congress will some day pass legislation forbidding the Supreme Court from rendering decisions not supported by the Constitution."

²⁶⁶ *Dawson v. Mayor*, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 887 (1955); *Tonkins v. City of Greensboro*, 162 F. Supp. 549 (M.D. N.C. 1958), 175 F. Supp. 476 (M.D. N.C. 1959), *aff'd*, 276 F.2d 890 (4th Cir. 1960); *Lagarde v. Recreation and Park Comm'n*, 229 F. Supp. 379 (E.D. La. 1964); *Brown v. South Carolina State Forestry Comm'n*, 226 F. Supp. 646 (E.D.S.C. 1963); *House v. City of Grenada*, 262 F. Supp. 19 (N.D. Miss. 1966); *Wood v. Vaughn*, 209 F. Supp. 106 (W.D. Va. 1962). See also *Bullock v. Wooding*, 123 N.J.L. 176, 8 A.2d 273 (Sup. Ct. 1939) (segregation of Negroes on public beaches is unconstitutional and a municipality cannot reserve three beaches for white persons); *Patterson v. Board of Education*, 11 N.J. Misc. 179, 164 A. 892 (Sup. Ct. 1933), *aff'd*, 112 N.J.L. 99, 169 A. 690 (Ct. Err. & App. 1934) (a segregated public high school swimming pool constitutes unlawful discrimination).

²⁶⁷ In *Williams v. Kansas City*, 104 F. Supp. 848, 852-53 (W.D. Mo. 1952), *aff'd*, 205 F.2d 47 (8th Cir. 1953), *cert. denied*, 346 U.S. 826 (1953), the court declared: "Defendants further assert that their policy of operating separate swimming pools for the two races is reenforced by a recognized natural aversion to physical intimacy inherent in the use of swimming pools by members of races that do not mingle socially. This policy, they say, conforms to a custom long established in the local community of separate institutions, services, and facilities for white persons and Negroes; that, based on the experience of other communities, the use of the same swimming pool facilities of the defendant City by both races would produce a condition detrimental to the best interests of both races.... Natural aversion to physical intimacy among persons of different race, or their right to associate with each other, contain no legal issues that may be considered or determined in this action. Such matters are within the province of ethics which deals with the science of moral duty and human actions. This juridical action deals with matter in relation to the law of the land. The argument so made by defendants, which it can only be considered, is scarcely worthy of legal attention. It provides a court with no legal guide to the principles of law here involved."

the municipality; apparently geographic segregation is not an unlawful discrimination.²⁶⁸

Segregation has also been outlawed in a municipal auditorium,²⁶⁹ baseball park and combination auditorium and ballroom where musical entertainment is performed,²⁷⁰ state coliseum,²⁷¹ library,²⁷² combination library and museum,²⁷³ opera house,²⁷⁴ and public skating rink.²⁷⁵ It has also been held that a segregated amusement park only for Negroes is illegal.²⁷⁶ The Fifth Circuit has ruled that a private corporation which leases land from the state for use as a golf course must admit Negroes even if the lease is merely designed to raise revenue for the state.²⁷⁷ Indeed, it has even been decided that where a city cannot act as a trustee to operate a park for white persons only under a private trust and a new trustee cannot be appointed to do so, the property must revert to the heirs since the trust has failed.²⁷⁸

Moreover, the federal courts have ruled that a state park cannot be segregated even if it would be unprofitable to operate it as a desegregated facility.²⁷⁹ In addition, the fact that a city operates a swimming pool in a proprietary capacity rather than a governmental capacity does not allow it to keep the pool segregated to avoid loss of patronage.²⁸⁰ The Fourth Circuit, with Supreme Court approval, has remarked that if police power "cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced

²⁶⁸ *McClain v. City of South Pasadena*, 155 Cal. App. 2d 423, 318 P.2d 199 (1957).

²⁶⁹ *Bynum v. Schiro*, 219 F. Supp. 204 (E.D. La. 1963).

²⁷⁰ *Brown v. City of Richmond*, 204 Va. 471, 132 S.E.2d 495 (1963).

²⁷¹ *Council of Federated Organizations v. Mississippi Fair Comm'n*, 9 RACE REL. L. REP. 1390 (S.D. Miss. 1964).

²⁷² *James v. Carnegie Public Library*, 235 F. Supp. 911 (E.D. S.C. 1964).

²⁷³ *Cobb v. Montgomery Library Bd.*, 207 F. Supp. 880 (M.D. Ala. 1962).

²⁷⁴ *Jones v. Marva Theatres, Inc.*, 180 F. Supp. 49 (D. Md. 1960).

²⁷⁵ *Walker v. Shaw*, 209 F. Supp. 569 (W.D. S.C. 1962).

²⁷⁶ *Lincoln Beach Corp. v. Board of Comm'rs*, 195 So.2d 367 (La. Ct. App. 1967).

²⁷⁷ *Wimbish v. Pinellas County*, 342 F.2d 804 (5th Cir. 1965).

²⁷⁸ *Evans v. Newton*, 221 Ga. 870, 148 S.E.2d 329 (1966).

²⁷⁹ *Tate v. Department of Conservation & Development*, 133 F. Supp. 53 (E.D. Va. 1955), *aff'd*, 231 F.2d 615 (4th Cir. 1956), *cert. denied*, 352 U.S. 838 (1956).

²⁸⁰ *City of St. Petersburg v. Alsup*, 238 F.2d 830 (5th Cir. 1956). In *Shuttlesworth v. Gaylord*, 202 F. Supp. 59, 63 (N.D. Ala. 1961), the court said: "[s]egregated operation of recreational facilities may not be justified as falling within the ambit of proprietary as distinguished from governmental functions of the City government. It is also clear that such segregated operation may not be justified as a means to preserve public peace, and is not a proper exercise of police power."

comingling of the races, it cannot be sustained with respect to public beach, and bathhouse facilities, the use of which is entirely optional."²⁸¹

All of this points out in emphatic language that the Supreme Court forbids segregation in recreational facilities, but fails to tell why. In fact, the only case which attempts to explain in any detail why *Brown* applies to recreational facilities is *Mehta v. City of Salisbury*,²⁸² decided by the High Court of Southern Rhodesia, and affirmed on appeal on other grounds by the Federal Supreme Court of the Federation of Rhodesia and Nyasaland, before the breakup of that federation. In this case, the High Court held that a municipality had no right to segregate its swimming pools by race. The court cited the applicable American decisions, and argued that the result was justified by intangible factors even where the separate physical facilities were equal. It said that when separate facilities were provided for Europeans because they disliked swimming with Asians, the latter felt humiliated, insulted, and inferior. The court asserted that individuals had a right to be free of offensive, degrading, or humiliating treatment which impaired their dignity. It added that segregation of Europeans did not impair their dignity because they wanted to be segregated. On this basis the court distinguished segregation by sex or age from racial segregation.

The short answer to all of this is that no matter how segregation is described by adjectives it is nothing more than a case of Europeans withdrawing themselves from the company of Asians or others. Inasmuch as Europeans are equal in law to non-Europeans, the law should demand equal respect for their feelings. Presumably, anybody has the right to withdraw his company from anybody else because he does not like the latter person, no matter how offensive or degrading the latter person finds it and no matter how humiliated, insulted, or inferior he may feel. Once it is established that such a feeling is *damnum absque injuria*, it should give rise to no rights or liabilities even though carried out on public property. The Saskatchewan Court of Appeal has rightly pointed out that segregation is not necessarily in and of itself discrimination even though based on ethnic factors.²⁸³ If government manage-

²⁸¹ *Dawson v. Mayor*, 220 F.2d 386, 387 (4th Cir. 1955), *aff'd*, 350 U.S. 887 (1955).

²⁸² 1961 Rhod. & N. Rep. 450, 1962 (1) So. Afr. L. Rep. 675, *aff'd*, 1961 Rhod. & N. Rep. 1000, 1962 (1) So. Afr. L. Rep. 691. *Accord*, see *Mabelreign Town Management Bd. v. Chamboko*, 1962 Rhod. & N. L. Rep. 450 (High Ct., S. Rhod.), *aff'd*, 1962 Rhod. & N.L. Rep. 493, 1962 (4) So. Afr. L. Rep. 156 (Fed. Sup. Ct.).

²⁸³ *Bintner v. Regina Public School Bd.* 55 D.L.R.2d 646 (Sask. C. A.).

ment allows Europeans to segregate themselves away on a government facility that, in itself, should not be deemed violative of the rights of anybody else. The rationale for integration of recreational facilities is as deficient in Southern Rhodesia as it is in the United States.

C. MEDICAL FACILITIES

Another unexplained extension of *Brown* has been to the medical field. The federal courts have required desegregation of a nursing home²⁸⁴ and the facilities of the state tuberculosis board.²⁸⁵ One federal judge ruled that where a state maintains two tuberculosis sanatoria, one for Negro patients and the other for white patients, a Negro tuberculosis patient is entitled to be admitted to the white sanitarium, because segregation denies equal protection of the laws.²⁸⁶ What the Negro patient has not been equally protected against was left to conjecture.

The major litigation has concerned hospitals. It has been held that racial segregation of patients in wards, rooms, and restrooms of municipal hospitals or of hospitals receiving either federal or state grants is unconstitutional.²⁸⁷ Such segregation has been enjoined even where the court found that it was beneficial to the health of some of the patients.²⁸⁸ One federal judge made an exception to his ruling forbidding racial segregation. He allowed patient reassignment based on therapeutic, medical, or psychiatric considerations, as determined by a physician in the best interests of a particular patient.²⁸⁹ But another district court ruled that even if white patients would be better off from a psychological point of view in recuperating, the hospital could not segregate them.²⁹⁰

²⁸⁴ *Thaxton v. Vaughan*, 321 F.2d 474 (4th Cir. 1963). *But see* *Wood v. Vaughan*, 209 F. Supp. 106 (W.D. Va. 1962), allowing segregation of aged patients in a nursing home to preserve safety.

²⁸⁵ *Pringle v. State Tuberculosis Bd.*, 11 RACE REL. L. REP. 1427 (U.S.D.C., N.D. Fla. 1966).

²⁸⁶ *Burton v. Board of Trustees*, 11 RACE REL. L. REP. 1933 (U.S.D.C., E.D. Ark. 1966).

²⁸⁷ *Flagler Hospital, Inc. v. Hayling*, 344 F.2d 950 (5th Cir. 1965); *Rackley v. Orangeburg Regional Hospital*, 310 F.2d 141 (4th Cir. 1962); *Rogers v. Druid City Hospital*, 10 RACE REL. L. REP. 1273 (U.S.D.C., N.D. Ala. 1965); *Lewter v. Lee Memorial Hospital*, 11 RACE REL. L. REP. 1425 (U.S.D.C., M.D. Fla. 1965); *Batts v. Duplin General Hospital*, 11 RACE REL. L. REP. 1427 (U.S.D.C., E.D.N.C. 1965).

²⁸⁸ *Wood v. Hogan*, 215 F. Supp. 53 (W.D. Va. 1963).

²⁸⁹ *Rax v. State Dept. of Hospitals*, 11 RACE REL. L. REP. 384 (U.S.D.C., E.D. La. 1965).

²⁹⁰ *Rackley v. Board of Trustees*, 238 F. Supp. 512, 518-19 (E.D.S.C. 1965): "[D]efendants asserted strongly that there were sound medical reasons for separating the patients by race when they were admitted

This view has not gone without criticism. One federal judge remarked:

I am convinced that no sufficient showing has been made to warrant the issuance of an order of injunction interfering with the operation of a hospital which should be in the hands of those competent to operate it. The health—even the lives—of individuals could be endangered by a non-expert effort to operate a hospital upon sociological or social considerations rather than considerations of health. The health of a community is of vastly more importance than where some non-patient shall sit while waiting on a public or private conveyance.... Whatever there is of controversy concerns the adult plaintiff's complaint that she was asked to move from the seat which she apparently had selected after making an inspection of seating facilities. That seems to have been the center of her interest at the hospital, not the treatment of her daughter's injured finger.... This is an action based... on the claim that the defendants violated the civil rights of the plaintiffs by not allowing them to select their seats while waiting for some outsider to come for them after the hospitalization was terminated. Assuming that the Hospital accepted gifts from the United States (a world-wide practice), it provided no support for the assertion that plaintiffs' civil rights were violated.²⁹¹

In *Cypress v. Newport News General & Nonsectarian Hospital Ass'n*,²⁹² a majority of the Fourth Circuit asserted that any racial segregation by a government-aided hospital was a violation of the Constitution. The majority approved segregation based on almost any other grounds, but forbade racial segregation. No reason why it was unconstitutional was given.²⁹³ But in a dissent, Judge Bryan declared:

to the hospital. The principal thrust of this argument... was that the patients, in their normal lives, were 'comfortable' in a segregated society, and because they would be more sensitive and otherwise 'disoriented' as they were away from home and loved ones while in a hospital receiving treatment, they should be allowed to be assigned to beds in proximity to members of their own race. This court does not question the argument that psychological factors are an important element of patient recovery. Psychological factors are important to all citizens.... However, it is clearly established that governmental officers and agents cannot practice racial segregation."

²⁹¹ *Rackley v. Board of Trustees*, 7 RACE REL. L. REP. 837 (U.S.D.C., E.D.S.C. 1962).

²⁹² 375 F.2d 648 (4th Cir. 1967).

²⁹³ See *id.* at 656-57, where the court said: "In a colloquy with plaintiffs' counsel, the District Judge asked whether it was 'discrimination per se merely because a hospital has deemed fit to place white patients in one ward, Negro patients in another ward?' We answer that it is. Any distinction made on the basis of race in a publicly-supported institution is a patent violation of the law, not to be tolerated by a court that is controlled by the constitution of the United States.... [R]ace cannot be a factor in the admission, assignment, classification or treatment of patients in an institution like this, which is state-

I think the opinion should contain an acknowledgement of the necessity in certain instances of varying the assignment rule laid down by the Court, that is something in the following sense: If in the judgment of the attending or hospital physician or surgeon, it would be detrimental to the recovery of a patient, because of his actual though unfounded prejudice, to be placed or remain in a ward or room with a patient of another race, then the hospital by removing the objecting patient to another ward or room will not contravene the equality of treatment enjoined in this opinion. ... Such intimately personal considerations are left to the decision of those skilled in the healing arts and particularly sensible to the feelings of the sick person.²⁰⁴

The *Brown* opinion is premised, at least ostensibly, on psychological considerations. It is difficult to understand why the psychic makeup of a white patient is not as precious in the eyes of the law as the alleged inferiority feelings of the Negro patients. The federal courts have never even attempted to develop a coherent rationale for banning segregation in hospitals. They have relied on *ipse diximus*. But such pronouncements are hardly satisfactory. Their efficacy to force desegregation on patients in hospitals cannot be disputed. Patients have little choice but to stay in a hospital, for, by definition, if they were well enough to leave they would go home. They are helpless to resist, and too ill or disabled to leave. Thus, a hospital differs from a recreational facility, which one may forego. The denial of freedom of choice is doubly grave because the patient is a captive. The federal courts have offered no adequate justification for such denial.

D. OTHER GOVERNMENTAL FACILITIES

As a matter of administrative policy, this author could never understand any good reason for maintaining racially segregated toilets, drinking fountains, or other sanitary facilities. Presumably, use should be made of them by those whose needs, at the moment, are greatest, and any duplication of facilities ought to go to reducing the waiting time of persons in need of public sanitary conveniences. But the most efficient use of lavatories and water fountains can best be determined by somebody at the level of building janitor or park supervisor. One would have thought that there are some things, such as the place where water is drunk or liquid and solid wastes are eliminated, which are too trivial to be covered by the United States Constitution. To this author, it seems somewhat

supported and receives federal funds. Room assignments may be made with due regard to sex, age, type of illness, or other *relevant* factors, but racial distinctions are impermissible, since the law forbids the treatment of individuals differently or separately because of their race, color, or national origin."

²⁰⁴ *Id.* at 661.

incongruous for federal judges to be spending their time inquiring into the precise location of water fountains, urinals, and toilet bowls.

Nevertheless, it has been repeatedly held that segregation in drinking fountains and toilets violates the equal protection clause of the fourteenth amendment.²⁹⁵ Why a person is less well protected if he drinks at one fountain rather than another, or uses one bowl instead of a different bowl, mystifies this author. Applying *Brown* to drinking fountains and toilets seems to be running the theory of psychological inferiority into the ground. At least one federal judge has taken this view.²⁹⁶ He said:

The reasoning is that members of the Negro race should not be precluded from associating with members of other races when it tends to deprive them of the opportunity of enjoying facilities which should be common to all, and from which the Negro will benefit equally with others. To assign this logic to the use of toilet facilities admittedly equal is, in the opinion of the Court, a bit far-fetched.²⁹⁷

²⁹⁵ *Smith v. City of Birmingham*, 8 RACE REL. L. REP. 1566 (U.S.D.C., N.D. Ala. 1963); *Freeman v. City of Little Rock*, 8 RACE REL. L. REP. 173 (U.S.D.C., E.D. Ark. 1963); *United States v. City of Montgomery*, 201 F. Supp. 590 (M.D. Ala. 1962); *Bohler v. Lane*, 204 F. Supp. 168 (S.D. Fla. 1962); *Robinson v. Board of Supervisors*, 11 RACE REL. L. REP. 1423 (U.S.D.C., S.D. Miss. 1965); *Turner v. Randolph*, 195 F. Supp. 677 (W.D. Tenn. 1961). See also *Jones v. Marva Theatres, Inc.*, 180 F. Supp. 49 (D. Md. 1960).

²⁹⁶ *Dawley v. City of Norfolk*, 159 F. Supp. 642, 648 (E.D. Va. 1958): "[I]t is suggested that the 'separate but equal' doctrine may still exist with respect to public rest rooms. It is certainly true that if anything remains of this doctrine, it could be upheld in a case such as presented herein. The underlying reasons for the rejection of the 'separate but equal' doctrine would not appear to be applicable to toilet facilities.... It may well be that the maintenance of separate but equal toilet facilities for the races falls within the classification of a reasonable rule and regulation, particularly where the courthouse itself is available to all races. Certainly it could not be argued that the water closets reserved for the two judges should be made available to the general public merely because of the principle of law above stated."

²⁹⁷ *Id.* at 646, n.3. See also *id.* at 645: "Irrespective of the wisdom of maintaining separate white and colored toilet facilities in a state courthouse, there is no more reason to suggest that judges deem Negro attorneys inferior than there is to say that a white attorney is inferior because he may use a rest room marked 'White'. In federal buildings throughout Virginia, where separate facilities for colored and white have generally been abolished, it in no sense increased or decreased the prestige of any attorney in the mind of the judge or the public. To say that there is a loss of earning power, or a denial of equal protection of laws, or a denial under color of law of equality of treatment, would reduce the law to an absurdity."

Another area into which the *Brown* decision has been extended is courtroom segregation. This author believes that in most places and situations segregation of spectators is not necessary. However, some deference is due to the opinions of those whose duty it is to keep order in court in determining whether such segregation is necessary at any particular time and place. For example, an important case with strong racial overtones may engender such racial antipathy in the audience that disturbances could break out. Preventive segregation may be as wise a measure as the exclusion from the courtroom of spectators when particularly lurid testimony is being given. The people on the spot can probably make the best decision.

Courtroom desegregation is a recent offspring of *Brown*. As late as 1961 a federal judge showed marked impatience with the argument that state judges were required to desegregate the seating areas for spectators.²⁹⁸ But in 1963, the Supreme Court declared: "State-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal

²⁹⁸ *Wells v. Gilliam*, 196 F. Supp. 792, 794-95 (E.D. Va. 1961): "[T]he plaintiffs contend there is no moral or legal justification requiring or condoning segregated seats in the Municipal Court of the City of Petersburg; that it is a mockery of justice and repugnant to the Due Process Clause and Equal Protection Clause of the Constitution of the United States; that it is degrading and shameful to permit such a custom. That these allegations are totally without merit is best evidenced by the fact the plaintiffs offered no evidence in support thereof. What rights, if any, the plaintiffs have as citizens of the United States in self-determining where they may sit in the Municipal court room of the City of Petersburg, have not been delineated with any degree of clarity. If they have the right to determine where they sit, they have the right to applaud, the right to take pictures, and many other similar rights; carried to the extreme, proper court room decorum and order would be non-existent. The evidence in this case establishes beyond question that the practice and custom complained of has been directed and enforced by every judge occupying the bench of that court; that the reason therefor is to preserve order and decorum and to assure the orderly administration of justice to all, regardless of race or color. There is no allegation or offer of proof that the order complained of is not being enforced equally among all citizens regardless of race or color. Whether other courts of Virginia deem it necessary or unnecessary to promulgate a similar order is immaterial. Suffice it to say, it has recently been necessary for a Virginia court to clear the court room of all spectators in order to maintain decorum and order.

"That a judge has control of his court room and the conduct of those attending this court is axiomatic. Indeed, it is a power inherent in any court. In the administration of justice, the judge is charged with the preservation of order and to see to it that justice is not obstructed by any person or persons whatever."

protection of the laws."²⁹⁹ The Court did not trouble itself to explain who was being denied equal protection of the laws by spectator segregation, or how it was being denied. For example, if both plaintiff and defendant were white, who was being denied equal protection by segregating the races in the courtroom? The parties seemed equally protected, and the spectators were not being tried. No elucidation of this was given. The ruling came down as another bolt of lightning out of the sky.

The Supreme Court of Alabama has tried to mitigate the effect of this ruling by deciding that voluntary courtroom segregation was still permissible.³⁰⁰ It has also been held that a court may keep its files and records on a segregated basis.³⁰¹ At least the argument that the file jackets will develop an inferiority complex has not yet found favor with the federal judges.

The federal courts have also held that reform schools have to be desegregated.³⁰² Even though reform schools are penal institutions, the federal courts have relied on *Brown* for the proposition that separate reform schools are inherently unequal.³⁰³ It has also been held that if a white prisoner is allowed to read a "white" newspaper, a black prisoner must be allowed to read a "black" newspaper; otherwise there is unconstitutional discrimination based on the race and color of the prisoner.³⁰⁴ Why this is so is not readily apparent. A newspaper has no race; and typically its color is black ink on white paper, a matter of no constitutional significance. As for discrimination regarding the type of reading matter, this has nothing to do with the race of the prisoner. A Negro might want to read a "white" newspaper such as the New York Times and a white prisoner might want to read a Negro magazine. This is just another of the weird extensions of *Brown*.

As for prisons themselves, *Brown* has been a late arrival. As late as 1963, one federal judge held that it would be unconstitu-

²⁹⁹ *Johnson v. Virginia*, 373 U.S. 61, 62 (1963). *Accord*, *Wood v. Vaughan*, 321 F.2d 480 (4th Cir. 1963); *Bevel v. Mallory*, 11 RACE REL. L. REP. 1422 (U.S.D.C., S.D. Ala. 1966).

³⁰⁰ *Howard v. State*, 278 Ala. 361, 178 So.2d 520 (1965).

³⁰¹ *Robinson v. Board of Supervisors*, 11 RACE REL. L. REP. 1423, 1424 (U.S.D.C., S.D. Miss. 1965): "It cannot be easily conceived as to any possible right of anyone of these plaintiffs that could be or is infringed by the method in which these justices of the peace keep their records, even though they may designate or identify them as colored. It is a tenuous claim indeed that would contend that any vested rights of the plaintiffs are impinged upon by either such practices and this Court holds that they are not violated."

³⁰² *Singleton v. Board of Comm'rs*, 356 F.2d 771 (5th Cir. 1966).

³⁰³ *Board of Managers v. George*, 377 F.2d 228 (8th Cir. 1967).

³⁰⁴ *Rivers v. Royster*, 360 F.2d 592 (4th Cir. 1966).

tional to order integration of a white prison dormitory.³⁰⁵ Another federal court in California ruled that racial segregation in prisons was not unconstitutional, saying: "By no parity of reasoning can the rationale of *Brown v. Board of Education*, supra, be extended to State penal institutions where the inmates, and their control, pose difficulties not found in educational systems."³⁰⁶ In *Bolden v. Pegelow*,³⁰⁷ the district court ruled that a prison inmate has no constitutional right to use either a white or colored barbershop, and was not discriminated against when white inmates were directed to the white barbers and colored inmates were directed to colored barbers. However, the Fourth Circuit relied on *Brown* to hold prison barbershop segregation unconstitutional.

More recent lower court cases have held that racial segregation in prisons is unconstitutional.³⁰⁸ A good example of this view is contained in *Edwards v. Sard*.³⁰⁹ In this case, a Negro inmate sued to enjoin racial segregation of dormitories in Lorton. The prison contained 1,100 Negroes and 110 whites. Of the twenty-two dormitories, six were integrated, the assignments being made by a Negro deputy superintendent. Racial considerations were among the factors considered in an overall security picture.

The court applied *Brown* to prisons, holding that "since full racial integration is invariably a desirable goal, racial discrimination may be seen as any unjustifiable delay in achieving this goal."³¹⁰ It added:

By assigning members of the white minority exclusively to the six integrated dormitories, the effect is of necessity to restrict the opportunity of some members of the Negro majority group to live in these six dormitories. In addition, the effect is obviously to reduce the likelihood that any given Negro inmate will be able to reside in integrated housing.³¹¹

The court declared that the prison authorities "indicated a sincere awareness of the desirability of achieving the greatest possible intermingling of the races consistent with the security of the insti-

³⁰⁵ *Dixon v. Duncan*, 218 F. Supp. 157 (E.D. Va. 1963).

³⁰⁶ *Nichols v. McGee*, 169 F. Supp. 721, 724 (N.D. Calif. 1959), *appeal denied*, 361 U.S. 6 (1959).

³⁰⁷ 218 F. Supp. 152 (E.D. Va. 1963), *rev'd*, 329 F.2d 95 (4th Cir. 1964).

³⁰⁸ *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968); *Jackson v. City Comm'n*, 11 RACE REL. L. REP. 1436 (U.S.D.C., S.D. Fla. 1965).

³⁰⁹ 250 F. Supp. 977 (D.D.C. 1966).

³¹⁰ *Id.* at 979.

³¹¹ *Id.* at 979.

tution,"³¹² but that security factors prevented complete integration. The court observed:

Although analogies to instances of previous judicial intervention to prevent racial discrimination in schools, housing, recreational facilities, and employment may seem at first inviting, upon careful scrutiny the Court is convinced that the differences between these areas and prisons are far more significant than are the similarities. The association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings. Moreover, a great many of the inmates of correctional institutions are dangerous men, and those charged with supervising them understandably have less confidence in their ability to adapt peacefully to changed social conditions than one would have in men who reside in society at large. The operation of penal institutions is a highly specialized endeavor, and the sober judgment of experienced correctional personnel deserves the most careful consideration by the courts.³¹³

Applying these considerations, the court concluded that complete integration was being achieved as quickly as possible consistent with security factors. However, the court ruled that if integration was ever dropped as a goal in Lorton, the plaintiff could reinstitute his suit.³¹⁴

³¹² *Id.* at 980. The court quoted from a prison report as follows: "We believe that there is an advantage to both races if there can be inter-racial mixing to the extent that this can be done, and maintain the security and safety of the institution.... [W]e feel... [intermingling of races] has a socializing effect on that individual. Many of our Negroes are from the southern states and have never before lived in an integrated situation. We believe that there is a benefit to them to be exposed to this. We would like very much to have every dormitory we have integrated if we had a sufficient proportion of white to Negro to do this safely." *Id.* at 980 & n. 8. See, however, N.Y. Times, Sept. 12, 1968, at 31, col. 4, setting forth homosexual gang rapes on white prisoners by Negroes in Philadelphia jails. A report by the Philadelphia District Attorney's office said that racial tensions played a part in these rapes.

³¹³ *Id.* at 981.

³¹⁴ *Id.* at 981-82, where the court declared: "Although the race of an inmate is a factor—in some cases the determinative factor—in making dormitory assignments, this is so only because prison officials believe that anything approaching total numerical integration would be highly dangerous, given the conditions of racial unrest which exist at Lorton, and that the racial conflicts which would result from such integration would be likely to decrease instead of increase the intermingling of races there. The dangers of prison life, the extreme complexity of the factors which must be considered in making dormitory assignments, and the consequent difficulties in handing down any decree favoring the plaintiffs in this case confirm the court's belief that safety and sound administrative practice demand that the opinions of conscientious prison supervisors be given great respect when challenges of this kind are made to them."

The Supreme Court has now ruled that prisons must be desegregated just like other facilities. Once again its cryptic, *per curiam* opinion sets forth no rationale.³¹⁵

However, taking the question of prison integration from a general viewpoint, it seems that application of *Brown* is an exercise in illogical thinking from beginning to end. To start with, the "separate-but-equal" doctrine has no application to prisons since the only facilities prisoners are entitled to are high walls and strong bars. A Negro prisoner can hardly complain that the walls of the white prisons are higher and the bars are stronger. The prison authorities are entitled to confine him wherever they think best. Hence, if his prison is inferior in its physical plant, it is no cause for complaint, and if segregation results in psychologically inferior quarters, it is also no cause for complaint. There is no such thing as a legal right to prison amenities since prison is not a hotel but rather a place where the prisoner is being punished. As prisoners have no legal standing to complain that someone else's punishment is less severe than their punishment, they have no standing to complain that their amenities are fewer than someone else's amenities. The risk of more severe punishment is a normal risk of committing a crime and serves as a good deterrent to criminals. Every person has it in his own power, by refraining from crime, to avoid prison entirely.

On the other hand, here is one area where freedom of choice in association by white prisoners is not involved. By being sentenced to prison, the convict loses his freedom of choice along with other aspects of his liberty. Indeed, the courts may decide to punish segregationists who commit crimes by placing them with Negro prisoners. This is a perfectly legitimate punishment since they have lost their liberty and such punishment may serve as an added deterrent.

It is ironic that prison is the only place in which racial segregation will sometimes still be tolerated by the federal courts. A person has to commit a crime to obtain liberty of association on a governmental facility. The application of *Brown* to prisons has resulted in an absurdity in which the law-abiding citizens have lost their free-

"This decision is rendered on the basis of current practices at Lorton. Should it appear in the future, however near, that through passage of time or change in circumstances sufficient efforts are no longer being made at Lorton to achieve the maximum integration of the races consistent with the security of the institution, nothing would prevent the question raised in this case from being reopened."

³¹⁵ *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968).

dom of choice in association while the criminals may still be segregated if they so desire and if it will help keep the peace. Committing a crime is an odd way of fighting for liberty, but this is the end result of federal court decisions.

The federal courts have drawn the same distinction between desegregation and integration in respect to government facilities that they have in respect to schools.³¹⁶ They have declared that public facilities need not be integrated, but need only be desegregated,³¹⁷ and that if after desegregation Negroes continue to use Negro facilities and white persons continue to use white facilities, this is not unconstitutional.³¹⁸ As one federal judge said: "Voluntary segregation does not violate the Constitution of the United States which does not prohibit a municipality from permitting, authorizing, or encouraging voluntary segregation."³¹⁹

Now, however, that the Fifth Circuit has just abolished the distinction between school desegregation and school integration, and held that all southern schools must be integrated,³²⁰ it remains to be seen how long this distinction will be permitted to last in respect to government facilities. Perhaps the controversy over racial imbalance in the schools will have its counterpart in respect to other facilities. As the Lorton situation shows, jails create a particular problem of racial imbalance. The only solution will be to incarcerate a given number of white persons, selected at random every year from the population, who have not committed any crime, to keep the jails racially balanced.

³¹⁶ See Avins, *Towards Freedom of Choice in Education*, 45 J. URBAN L. 23 (1967).

³¹⁷ *Shuttlesworth v. Gaylord*, 202 F. Supp. 59, 62 (N.D. Ala. 1961): "Though so referred to in public discussion, this action is not one to compel integration of the public facilities herein involved. The law does not compel integration, whatever the guise under which relief is sought. It only prohibits governmentally enforced segregation."

³¹⁸ See *Robinson v. City of Fairfield*, 11 RACE REL. L. REP. 909 (N.D. Ala. 1965): "Negroes now have the full use of these facilities if they desire to use the same. The fact that not many are using the facilities cannot be laid to any fault or discrimination on the part of the defendants. The use of the facilities is now a matter of individual choice. Having desegregated the same, there is no affirmative duty on the part of the City or its officials to enter upon a campaign of dissuasion for a lesser use of the former 'Negro' facilities by Negroes, or of persuasion for a greater use of the former 'white' facilities by them."

³¹⁹ *Clark v. Thompson*, 7 RACE REL. L. REP. 558, 559 (U.S.D.C., S.D. Miss. 1962).

³²⁰ *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966).

V. FREEDOM OF CHOICE

Does the drive during the current era for compulsory integration in places of public and private accommodation infringe on the right of freedom of choice in association? In this author's opinion, it does. The reason for this is well stated in an opinion of the Court of Appeals of Kentucky which is worth quoting at some length:

It is obvious that the rights attempted to be secured in this case are social and not political; that plaintiff seeks to commingle with the members of the white race in the enjoyment of summer opera and to play golf with white persons in a park set aside for the use of members of the white race. To grant the relief which the plaintiff seeks would compel white persons to associate with colored persons, whether it were to their pleasure or not. This would be an infringement on the rights of white persons who would object to being compelled to commingle with colored persons. This in no way is a reflection on the members of the colored race, for they have among their number many who have honored their race by their contribution to the higher arts and sciences; but the realistic fact remains, 'like attracts like,' and it is just plain human nature for persons of the same tastes and desires, whether they be black or white, to associate together for the purpose of enjoying themselves to the best advantage. That fact accounts for the separate strata of society even among members of the same race. People move in circles wherein they are likely to be suited or matched.

If it were possible to grant the plaintiff the social relief he seeks, where should the line be drawn? Should one in another stratum of society other than the one in which the plaintiff moves in his own race, whether it be on a higher or a lower level than his own, demand the same relief and this Court grant it, could it be assumed that the strata would by court action be eliminated? It would merely result in one stratum moving in and the other out. So in the natural course of events, should the white race be compelled to accept into the enjoyment of its parks and amphitheater with all of its recreational facilities, the members of the colored race, and the white race move out and the colored race possess it, the net result would be that the right to the enjoyment of parks would be denied to the white race; and the process would be continued *ad infinitum*.

Social equality between persons of the white and colored races, or in fact between persons of the same race, cannot be enforced by legislation or by the courts, nor can the voluntary association of persons of different races, or persons of the same race, be constitutionally prohibited by legislation or the courts, unless such association is shown to be immoral, disorderly, or for some other reason so palpably injurious to the public welfare as to justify a direct interference with the personal liberty of the citizen.³²¹

The issue of whether any particular form of integration constitutes a violation of freedom of choice in association, and there-

³²¹ *Sweeney v. City of Louisville*, 309 Ky. 465, 475-76, 218 S.W.2d 30, 35-36 (1949).

fore an unfair practice for the owner or other person who controls or manages a place of public or private accommodation to engage in, cannot be decided without first establishing that someone objects to such integration who has a substantial interest in the matter. Obviously, a person is not entitled to walk in off of the streets and claim that a business should change its policy to conform to his notions of conducting its affairs. Before even considering whether a claim of denial of freedom of association is valid, the person objecting to integration should have some interest in the matter.

People who are interested in whether a facility integrates fall into two main categories, employees and customers or others who use its facilities. Employees may include a proprietor or partner working actively in the business, if he comes in contact with those who use the facilities. Volunteer workers, as, for instance, in a charity, have a sufficient interest to be classified as employees.

The other category of people who are interested in new people using a facility are those who already use it. These may be customers of a paying facility, whether profit making or nonprofit or beneficiaries of a charity. For example, charity patients of a hospital, even though they pay nothing, still are interested in who shares their room.

A habitual user of a facility also has an interest in who else is being admitted to the facility even though he is not using it at the time of admission. For example, a person who has a season ticket to a swimming pool is interested in who else is being admitted to the pool even though he is not using it at the time of admission, since he may use it later when the new customer uses it. Likewise, a person who habitually stays in a resort every year is interested in new patronage which might change its character although he has not yet made his reservation for the new season.

Finally, a potential user for whom the accommodations, facilities, or services were specially designed, is also interested in integration thereof. For instance, if a man buys a cemetery plot, it can reasonably be anticipated that when he dies his children will come to visit his grave. The children are therefore potential visitors at the cemetery for which the facilities of the cemetery have been specially designed, for their coming is reasonably probable, though delayed. They are therefore interested in who else buys a plot in the same cemetery even though their father is still alive and they do not go to the cemetery at all. If a trust were set up to run a summer camp for blind children of a certain locality, these children would be potential users for whom the camp was specially designed and would be interested in who else was admitted to the camp

even though they had not yet reached the age when they could, under the terms of the trust, take advantage of the camp's facilities.

It is not enough that an objector have an interest in who else is using the facility. That interest must be substantial. In other words, use of the accommodation, facility, or services must substantially impinge on his associational preferences. What a substantial infringement is can only be determined by circumstances, and differs depending on the type of facility. Nevertheless, some broad outlines can be suggested.

First, the period of time during which the persons are thrown together is a significant factor in determining whether associational interests are important. For example, persons who sit next to each other on a crowded city bus or subway for a half hour ride to work or home are unlikely to want to socialize with each other. Likewise, standees in a rush-hour vehicle, although packed together like sardines, typically treat each other impersonally, like part of the wood-work. In such a case, association is virtually nonexistent and riders have, in the usual situation, no substantial interest in who else is on the bus or subway. On the other hand, passengers on a long distance bus ride for several days often seek out somebody congenial to converse with to pass the time. In such a case, they have a substantial interest in who is sitting next to them.

Secondly, whether the activity is functional or recreational will have a bearing on the legitimacy of associational preferences. A person waiting in line in a bank or post office hardly has much real interest in who is waiting ahead of him or behind him. On the other hand, one who goes for a vacation to a resort, camp, swimming pool, or similar establishment has an interest in having vacationers with similar interests so that he can enjoy his vacation in activities with those of like preferences.

Proximity and personal contact may also be important, especially in the case of employees whose associational preferences are in issue. A taxi driver has more of an interest in who his passengers are than an airline pilot. A nurse, barber, or a professional man is more interested in the client, customer, or patient, than a movie theater owner who sells a ticket to see a film. Patrons of a zoo, museum, or library have less contact with other patrons than patients at a hospital; hence they have less of an interest in who the other person is.

Even if the associational interest of the user of the facility is substantial, that in itself does not mean that the facility should not integrate over his objection. His interests must be weighed against the interests of the owner. The principal interest of an owner of

a private business is economic. Under a free enterprise system, he desires to make a profit and is entitled to make the largest profit his skill and capital will bring him. To make a profit he must fill his facilities and utilize his labor force in the most efficient manner possible. To serve his economic interests, the owner or manager of an enterprise is entitled to take any customer he can get and to arrange them in order to maximize return and minimize costs. The associational interests of both employees and other customers must yield to this interest. If they do not choose to associate with those persons whom the economic interests of the business dictate be accommodated, both employees and dissatisfied customers can change to a business with a policy more to their liking. However, if the business takes new customers, not to serve its financial ends but simply to force existing customers or employees to associate with these new people, that is unfair in this author's view.

The same principle applies to non-profit institutions. They are likewise entitled to run in the most efficient manner possible. For instance, a hospital is entitled to fill all of its beds since this lowers its cost per bed. A patient who objects to new people being brought in, when these are the only new patients available to fill vacant beds, cannot expect to have his associational interests, however substantial they may be, prevail over the hospital's needs.

Another principle should be that a facility may invite new persons to use it over the objection of one who has a substantial associational interest in the matter, if the addition is directly related to the basic purpose for which the facility was set up. For example, if a camp is specifically founded to bring together persons of different religions, a vacationer cannot object to its carrying out its purpose. Likewise, museums, libraries, orchestras, opera, and similar cultural centers are typically designed to spread culture through a whole community. This requires that they be open to all, and one who uses it can hardly complain that others whom he does not care to associate with use it also. In addition, some churches are set up on a parish system, and all adherents of the faith in the parish are required to belong to one church. In such a church, no member could object to another resident of the parish on associational grounds. Of course, this does not apply to congregational churches.

Finally, public utilities are typically required to serve the whole public as a condition of obtaining a monopoly franchise. A customer can hardly complain about service rendered to another customer, any more than the latter can object to the former. Both must be accommodated or, for want of competition, neither will find alternate services available.

The fact that there are valid reasons for the refusal of a business or other facility to honor an objection by one who is substantially affected in his freedom of choice in association to the entry of a new user of the facility does not mean that the objection ought to be ignored entirely. The owner or manager of the facility should exercise reasonable diligence and take appropriate steps to go as far as he can in satisfying the objector and still carry out the legitimate interests of the facility. In other words, keeping in mind the overriding interests of the business or institution, the owner or manager should so arrange the facility as to afford the largest measure of freedom of choice in association consistent with this prime interest which makes it impossible to satisfy the objector entirely.

For example, a public utility such as a bus company has to serve all persons equally. It therefore cannot satisfy a Democrat who objects to a Republican taking the bus. But if two Democrats want to sit next to each other it can arrange, when loading the bus, to place them side-by-side. As a matter of efficiency, it may be impossible to poll passengers for their preferences. Nevertheless, if there are two empty, adjoining seats and the two Democrats ask to be seated together, it would be a denial of freedom of choice in association for the bus company to deliberately separate them without a good business reason.

Another example might be a college tennis court which was built especially as an athletic facility for use by all of the students at a particular college. In such a case, a student from a prominent family who objected that sons of factory workers were using the court could hardly expect to have his objection honored since such poorer students were equally in the group for whom the court was built. But if students were permitted to reserve the court, the college would be bound to honor a request that the court be reserved for the prominent student and his three student friends in the social register. His desire not to play with others of a lower economic class could be satisfied consistently with the basic purpose for which the court was built and it would be a denial of freedom of choice in association to force him to play with poorer students.

Similarly, a hospital might have decided to take all applicants without regard to race to fill up its facilities. A white patient's objection to admission of Negroes need not, therefore, be honored. But if two white patients wished to be placed in semi-private rooms with white patients, it would be a denial of freedom of choice to refuse to put both of them in the same room and to deliberately place each in a room with a Negro. Likewise, a restaurant which

accepts all business in order to earn more money does not deny freedom of choice in association. But if four white people want to sit together at the same table it would infringe on their liberty to separate them solely for the sake of integration.

Many of the foregoing standards have been violated in the current era because of the mandates of federal or state laws, the directives of governmental integration commissions or other departments of government engaged in bringing about integration, or because of pressure by private groups such as churches and universities which put integration clauses in their contracts. It should be considered an unfair practice for either a governmental agency or a private organization to compel or persuade the owner or manager of a business or non-profit facility to force integration on the employees or those people using the facility. They are entitled to freedom of choice in association free from such third-party pressure on those with whom they deal. No penalties should be allowed to be inflicted on businesses or institutions which permit freedom of choice therein, or on persons who actually exercise such freedom of choice.³²²

³²² If it were necessary to put the concept of freedom of choice in business in the form of a rule or regulation, the following form may prove satisfactory:

A. It is an unfair business practice for the owner, lessee, or other person in control of any place of public or private accommodation, to extend the use of such accommodation, its facilities, or services, to any person, when any employee or existing user, habitual user, or potential user for whom such accommodation, facilities or services, were specially designed, and who has a substantial interest in whom the person objected to is, objects, and

(i) The extension of such use is not made for economic reasons, and

(ii) The extension of such use does not directly relate to the basic purpose for which the facilities or services were established, and

(iii) In the case of a public utility, the extension of such use is not necessary to provide required public service.

B. Should an objector specified in this section object, and should parts (i), (ii), or (iii), or any of them not be true, then it is an unfair business practice to extend to use of such accommodations, services, or facilities, only insofar as such place of accommodation or agency has failed to exercise reasonable diligence and take appropriate steps to satisfy such objector insofar as this may be done consistently with due regard to the factors enumerated in such parts.

C. The above considerations are relevant to institutional housing.

D. It is an unfair practice for any governmental agency, institution, corporation, organization, association, or person, to compel, coerce, direct, influence, or persuade another to commit any unfair business practice, or to subject any person, organization, association, corporation, institution, or agency to any detriment or disadvantage for exercising his or its freedom of choice or allowing another to do so.

The considerations relevant to freedom of choice in governmental facilities are very similar to those which should be operative in public utilities. Governmental agencies should take into account the preferences of both their employees and of those who use the facilities or for whom the facilities were especially designed, if the use by others will in fact impinge on associational preferences. If no associational interests are substantially affected, the question of freedom of choice does not arise. For example, people waiting in line to take a driving test do not have any interest in who else is waiting in line. On the other hand, people in quarantine for extended periods would have a strong interest in who their companions were.

Since all citizens are equally obliged to support government by taxes or personal activity such as military service, the various layers of government in turn must treat all citizens alike and must extend equal facilities and services to everyone in the relevant group, class, or area, who is similarly situated. Since the distinctions drawn between those who will receive the benefit of government facilities and services and those who will not must be relevant to the facilities and services provided, the associational preferences of employees and users of the facilities and services must be a subordinate consideration. For example, if there is one municipal library, everybody is entitled to use it and no class of residents may be excluded therefrom even if some other class does not want to be sitting next to them in the library. The only time that freedom of choice is infringed is if a government facility integrates simply for the purpose of forcing existing users of the facility to associate with other persons they find disagreeable.

Extension of facilities to all persons may be required to carry out the basic purpose for which the facilities were established. For example, a sports competition designed to allow all participants in that sport to compete against each other would be frustrated if one competitor had the right to bar another competitor from the facility. In addition, the objection of an interested employee or user cannot be heeded if to do so will materially impede the administration of the facility or the program of the agency. The first duty of government is to operate its facilities efficiently and economically and thus to reduce the tax burden on taxpayers. If it is necessary to infringe on associational preferences to operate a government facility with maximum efficiency or to produce maximum services for the expense incurred, then these preferences must be subordinated to the need for efficiency and economy in government. Military service is a good example of a governmental agency in which associational preferences must typically be ignored

to avoid chaos. But even in the military, if integration is carried out beyond that necessary for maximum efficiency, so that it becomes an end in itself, it is a violation of freedom of choice in association in respect to those who object to it.

From the foregoing, it is clear that freedom of choice in association has only a minimal scope insofar as exclusion from government facilities is concerned. However, it is of major importance in respect to arrangement of persons using governmental facilities. When a person whose substantial associational interests will be infringed by the use of a governmental facility objects, and because of some overriding consideration the facility should be made available to all notwithstanding the objection, as will typically be the case, the facility should exercise reasonable diligence and take appropriate steps to satisfy the interests of the objector insofar as this can be done without contravening some legitimate, overriding government policy unrelated to forcing association on the objector. In other words, where freedom of association cannot be preserved completely, it should be preserved as far as possible. Typically, this can be effectuated by allowing the objector and others of like persuasion to segregate themselves on a portion of the facility allocated to them.

For example, a government hospital containing rooms, each with four beds, must serve all patients in the community. Should a Protestant patient object to anyone but Protestants entering the hospital this objection could not be acted on. But if there were four such patients, they could all be put together in the same room, thereby, as far as possible, satisfying their associational interests. If the hospital separated them and moved each one into a room with Roman Catholics and Jews, not because of the requirements of efficiency or better medical treatment, but solely to force integration on them, it would violate their freedom of choice, notwithstanding the fact that this was a government hospital.

Another illustration might be a municipal handball court which could only accommodate four players. If a group of veterans demanded that no anti-war protestors be allowed to play in the court this request could not be complied with since everyone is entitled to equal use of the facility. But if the veterans objected to playing with the anti-war demonstrators, the park authorities could give all the veterans who wanted to play one appointment for the court and give the demonstrators a different time to use the court. This would constitute reasonable diligence and appropriate steps to satisfy the associational interests of the veterans consistent with the rights of the anti-war advocates.

Allowing the exercise of freedom of choice in association on government facilities should not be deemed unconstitutional government-enforced segregation. The vital difference is that the individuals involved, and not the government, make the choice. The element of government compulsion is therefore absent. Government simply provides the facilities and stands neutral as to how the individuals desire to use them. It is true that no one may associate with another on government facilities over the objection of the latter but this is true generally. Freedom of choice therefore constitutes an exercise on government facilities of a general liberty of all citizens. By being enabled to exercise such freedom on government facilities, the liberty of citizens is enlarged and regimentation is that much reduced.

It is no answer to say that by allotting facilities to any particular class in accordance with the wishes of the individuals involved the government aids or abets self-segregation. The capacity of all facilities is limited and no two people can occupy the exact same space at the same time. For example, no two people can sit on the same seat in a municipal auditorium or lie on the same stretch of sand in a state beach at the same moment. The rights of all to occupy that seat, sand, or other area are exactly equal. As between two exactly equal rights to occupy the same portion of a facility, it is perfectly legitimate for government to allow two people to occupy the facility next to each other, who want to be next to each other, instead of allowing one person to inflict himself on an unwilling neighbor. The former enlarges the liberty of both persons; the latter restricts the freedom of non-association of one in order to permit another to commit an unjustified social aggression. As long as it is the individuals, and not government, which makes the choice, government should be able to provide the means by which the choice may be effective.³²³

³²³ Should freedom of choice in government facilities be formalized in a rule or regulation, the following form can be suggested:

A. It is an unfair governmental practice for any governmental agency engaged in the extension of facilities or rendition of services to extend the use of such facilities or services to any person when any employee or existing user, habitual user, or potential user for whom such facilities or services were especially designed, and who has a substantial interest in who the person objected to is, objects, and

(i) The extension of such use is not necessary to provide substantially equal treatment for all persons in the group, class, or area, entitled to receive the benefit of equal services by virtue of being similarly situated, and

(ii) The extension of such use does not directly relate to the basic purpose for which the facilities or services were established, and

Authority exists to support the proposition that public agencies may constitutionally permit people to segregate themselves on public facilities. Thus it has been held that a city may make short term leases to lessees sponsoring private meetings for members and friends, if no racial discrimination is made as to the selection of lessees or the terms of the leases.³²⁴ Likewise, a federal court has ruled that even though the District of Columbia furnishes some free space to a boys club and assigns some police officers to assist in its operations, this does not make the club a government agency required to accept Negroes.³²⁵ In one case where a boys club was permitted to conduct athletic contests among its own members for an hour or two on public facilities, a Maryland Circuit Court held that such occasional use of these facilities did not require desegregation of the club. The court ruled that as long as the facilities could be used by any organization regardless of the racial or religious composition of its members, the use of the facilities by an all-white organization was not unconstitutional. The court said:

A caricature of the situation sought by plaintiffs will demonstrate that complete evenhandedness in the granting of use of this kind of public facility may go beyond that which the plaintiffs may have a Constitutional right to demand. Suppose a family of Negro citizens were to apply to the Board of Education for permission to use its grounds at a certain location for the purpose of having a reunion and picnic. Should this application be denied because there were no white members of the family? Should the operator of a public golf course permitting the use of the course for playing golf to a foursome consisting of members

(iii) The failure to extend such use will not materially impede the administration of the agency or its program.

B. Should an objector specified in this section object, and should parts (i), (ii), or (iii), or any of them, not be true, then it is an unfair governmental practice to extend the use of such accommodations, services, or facilities, only insofar as such place of accommodation or agency has failed to exercise reasonable diligence and take appropriate steps to satisfy such objector insofar as this may be done consistently with due regard to the factors enumerated in such parts.

C. The above considerations are relevant to governmental housing.

³²⁴ *Freeman v. City of Little Rock*, 8 RACE REL. L. REP. 173 (U.S.D.C., E.D. Ark. 1963). See also *Jones v. Marva Theatres, Inc.*, 180 F. Supp. 49, 51-52 (D. Md. 1960): "Plaintiffs have asked for an injunction so broad that the City would not be able to allow religious, social or fraternal groups to use the Opera House for a single day for their own purposes if they limit admission to members or other ticket holders. Frederick is not a large city, with the many private facilities available in metropolitan areas. Racial equality can be achieved without an injunction which prohibits any private meeting on public property at any time."

³²⁵ *Mitchell v. Boys Club of Metropolitan Police*, 157 F. Supp. 101 (D.D.C. 1957).

of the Negro race or one made up only of members of the white race, be enjoined because a person of a different race was not permitted if he so chose, to displace one of the members of such a foursome?

The answer is that as long as applications of other private groups for the use of the facilities are not denied solely because of racial or religious reasons, and permission is granted to all applicants on the same basis, the requirements for eligibility of membership of any particular group may be as strict as the group sees fit, even including racial or religious qualifications.³²⁶

A federal court similarly held that a private athletic league using city facilities for baseball and other games for boys need not desegregate. The court observed:

[T]here is no basis for an injunction against the City requiring the desegregation of the Babe Ruth League over which the City has no control.... The mere granting of permission to a certain team to play at a park on a certain day or days is quite different from a long term exclusive lease of the park. It is true that the City could deny the League the use of the baseball fields unless it integrated its teams. But there is nothing in the United States Constitution to require the City to do so. The leagues are voluntary associations and the members are free to choose their own associates.... 'It has not yet been held to be unconstitutional for individuals to prefer to associate with others of their own race, class, background, or, if you like, prejudices.' And there is no reason for the City to interfere with such freedom of choice—or freedom of association as it is sometimes called.³²⁷

The right of private businesses to permit segregation on the premises ought to be considered even more clear. A federal court has remarked:

³²⁶ *Statom v. Board of Comm'rs*, 8 RACE REL. L. REP. 175, 177 (Md. Cir. Ct. 1963), *rev'd on other grounds*, 233 Md. 57, 195 A.2d 41 (1963). On appeal, the Maryland Court of Appeals ruled that if the club habitually uses public school playgrounds and parks to play ball in without charge, with the permission of public officials in charge of these facilities, the club is required by the fourteenth amendment not to discriminate against Negroes. This author believes this ruling to be erroneous. However, the court said: "The cost of public buildings, school buildings, schoolhouses and playgrounds are paid from public funds and such buildings and playgrounds may not, systematically and habitually (as distinguished from an occasional or casual use), be utilized, or permitted to be utilized, on a basis of racial discrimination. We do not wish the above ruling to be interpreted as a holding that every organization or association which occasionally or casually uses, or is permitted to use, public property must be conducted on a nonsegregated basis.... A mere casual or occasional use of, or permission to use, public facilities by a private organization does not 'involve' the State in the conduct and affairs of the organization to such 'significant extent' as to require the private organization to operate on a nonsegregated basis." *Id.* at 66-67, 195 A.2d at 47.

³²⁷ *Wood v. Vaughan*, 209 F. Supp. 106, 114 (W.D. Va. 1962).

In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth Amendment. Indeed, we think that such liberty is guaranteed by the due process clause of that Amendment.³²⁸

Even the fact that the business is a public utility should not prevent the owner from permitting people to segregate themselves on it as they choose. The Scottish Court of Session, in a context having nothing to do with race relations, has pointed out that a railway has the right to assign seats on a basis other than "first-come, first-served."³²⁹

An instructive case which reviews the entire matter was decided by the High Court of Ontario. In *Brazeau v. Canadian Pacific R.W. Co.*,³³⁰ five business associates were traveling on a train talking about matters of interest to themselves but to nobody else. One of them left temporarily to go to the lavatory. While he was there, the train stopped at a station. Plaintiff got on and came into the car. He saw the seat vacant and sat down. Before sitting he was told that this seat was occupied by somebody in the lavatory and asked to take a vacant seat nearby. In the words of the court:

"Whether there was something in the state of his health or his business which rendered him disregardful of the ordinary courtesies of life, or whether the plaintiff is by nature or education an ill-mannered boor, does not appear. Whatever the cause, he refused to comply with this most usual and reasonable request—he said he did not care, and insisted upon occupying this seat."³³¹

Shortly afterwards, the seat was reclaimed by the fifth man who returned from the lavatory. The five associates explained to

³²⁸ *Browder v. Gayle*, 142 F. Supp. 707, 715 (M.D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956).

³²⁹ *Scott v. Great North of Scotland Ry. Co.*, 22 R. 287, 291, 32 Scot. L.R. 218 (Ct. of Sess. 1895), where Lord M'Laren said: "I do not think that because a train is drawn up at a station and the doors are left open, and passengers may be in the habit of taking seats that please them, that this amounts to an abandonment by the company of its right to regulate its traffic by assigning seats to passengers in the way which they find to be convenient. It is not like the case of selling seats at a theatre, where... the seats are of an unequal value, and it is an implied term of the contract that whoever first gets possession of a seat is entitled to keep it during the performance. The contract of carriage makes it necessary that the railway company should regulate the seats of the passengers, and we know that it is quite common to reserve particular carriages for particular classes of passengers, for ladies travelling alone, or for invalids, or even for no special reason..."

³³⁰ 11 Ont. W. R. 136 (1908).

³³¹ *Id.* at 137. The court also called him an "ill-conditioned and selfish boor."

the plaintiff that they were discussing matters of common interest and asked him to change to another vacant seat. Plaintiff adamantly refused and told the fifth man to go to a vacant seat elsewhere in the car. The man then got the conductor, who, after hearing the matter, told plaintiff to change to a vacant seat in the car. When plaintiff continued obstinate, the conductor removed him by force, resulting in his suit for damages against the railroad.

The plaintiff claimed that he had an absolute right to take any vacant seat in the car and that nobody had the right to interfere with his possession of the seat once occupied by him. The court agreed that if he had this right, he was entitled to exercise it for the purpose of annoying the other passengers, as the court found his purpose to be. But the court held that the railway had the absolute right to decide where to sit any particular passenger, and that as long as it offered the plaintiff a seat equally as good as the one he was called upon to vacate, it was his duty to comply with the request of the appropriate railway official. The court reasoned:

It would indeed be intolerable if the law were different. There must be some authority to determine, and to determine on the spot, between two persons contending over a seat, and that authority can only be the conductor, who is 'to control and conduct the passengers.'³³²

And, although this case was decided 60 years ago, the court added some thoughts which are very current:

That intolerance of personal restraint characteristic of our age and clime cannot be permitted to interfere with the company's management of their traffic, and the people at large must benefit by an orderly management of such traffic by those who are responsible for it. Some one must be charged with such management, and that duty is best left with the company.³³³

It is difficult to see why the principles of this case should not extend to race relations. It is poor manners for persons of any race to thrust their association on any people who do not desire such association, and the reasons for rejecting them are immaterial, as everyone is entitled to his own preferences. There is no reason why such enforced association, which in any other context but ethnic relations would be deemed an intolerable imposition only engaged in by "ill-mannered boors" should enjoy a higher legal standing than the right of everyone to select his company in both public as well as private places. It is difficult to imagine what Negroes can gain by perpetual irritation of such white persons as

³³² *Id.* at 141.

³³³ *Id.* at 142.

prefer not to have them around. Such tactics can only convert what might have been indifferent disdain into positive ill-will. Whatever short-term psychic dividends this pays are distributed out of the general good-will assets of the white community, this depleting long-term good-will. For a minority, this is indeed a myopic policy.

Negroes have the most to gain by having their rights fixed according to immutable legal rules rather than resting on the shifting sands of public opinion and sociological fads. Social science is a two-edged sword, and not so long ago, law professors were using it to determine how best to quarantine Negroes with rigid segregation laws.³³⁴ The pendulum may shift again, and the only refuge of any group in society, especially one which is economically depressed, is to take shelter under the general rules of law applicable to all.³³⁵ However, ultimately Negroes must make their own decision as to what aims they desire to press for, taking the benefits and bearing the burdens of such a decision.

However, white persons who resent compulsory integration may justifiably criticize infringement of their rights, whatever policies Negroes care to pursue. One of those rights is the privilege of freedom of choice in association in both places of private accommodation and in places of public accommodation. This author believes that no satisfactory solution of race relations or other ethnic relations can ever be attained until such freedom is recognized, protected, and enforced.

³³⁴ Martin, *Segregation of Residences of Negroes*, 32 MICH. L. REV. 721 (1934); Minor, *Constitutionality of Segregation Ordinances*, 18 VA. L. REG. 561 (1912).

³³⁵ See the remarks of Senator Blanche K. Bruce, a Mississippi Republican and the last Negro Senator before the end of the reconstruction era. He said: "We believe that, clothed with all the powers and privileges of citizens, we are able, if I may use the expression, 'to paddle our own canoe;' and, indeed, if we fail to do so successfully under just and proper laws, I do not know but that it is about time for us to sink. We do not ask particular favors. We believe we have passed that period. We believe now that we must rest our claim upon our manhood, and that our integrity, industry, capacity and all those virtues that go to make up good men and citizens are to measure our success before the American people.... I hope we have passed the critical period in our history in which race distinctions even for protection are to be considered necessary...." 7 CONG. REC. 2441 (1878).

To the same effect, see the remarks of Rep. Richard H. Cain, a Negro Republican from South Carolina. 3 CONG. REC. 957, 982 (1875). One of the leaders in the drive to emancipate the slaves, Senator Lot M. Morrill, a Maine Republican, said that if Negroes were liberated they could take care of themselves, and would not need the government to look after them. CONG. GLOBE, 37th Cong., 2d Sess. 1477 (1862).