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Civil Rights--Sham Private Clubs and Racial Discrimination

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CASE COMMENTS

Civil Rights—Sham Private Clubs and Racial Discrimination

Doris Daniel and Rosalyn Kyles, two black women, were denied admission to the Lake Nixon Club by the defendant-owner Euell Paul who operated the club in a racially segregated manner.[1] Located on a country road twelve miles from Little Rock, Arkansas, the Lake Nixon Club was an amusement-recreational area offering swimming, boating, picnicking, dancing and snack bar facilities. Plaintiffs brought a class action in the Federal District Court for the Eastern District of Arkansas to enjoin the defendant from refusing them admission to the club. Although Paul referred to Lake Nixon as a private club and required a twenty-five cent membership fee (which secured for the purchaser a membership card entitling him to admission to the club for its entire season), the complaint alleged Lake Nixon was a public accommodation within the scope of Title II of the Civil Rights Act of 1964,[2] and that defendant Paul was in violation of this Act by denying plaintiffs and other black persons admission to the Lake Nixon Club solely on the basis of race. Plaintiffs further asserted that the Lake Nixon Club was operated under the pretense of being a private club in order to exclude plaintiffs and all other black persons from Lake Nixon and avoid coverage under the 1964 Civil Rights Act. The Arkansas district court found that the plaintiffs were refused admission to the club solely because of their race, and that Lake Nixon was not a private club but was merely a privately owned establishment operated for profit and open in general to all persons of the white race. However, the district court dismissed plaintiffs' complaint on the ground that the Lake Nixon Club did not fall within any of the public accommodations categories of

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[1]At the trial, defendant testified affirmatively that black persons were denied admission to Lake Nixon simply on the basis of their race. Daniel v. Paul, 395 U.S. 298, 300 n.2 (1969).

[2]Public Accommodations Act, 42 U.S.C. § 2000(a) (1964). Plaintiffs charged that the club's snack bar was a covered public accommodation under §§ 201 (b)(2) and 201 (c)(2) of the 1964 Civil Rights Act and that consequently, the entire club fell within the scope of the Act under § 201 (b)(4) and § 201 (c)(4). Plaintiffs also alleged the Lake Nixon Club fell within the coverage of the Act under § 201 (b)(3) and § 201 (c)(3). Section 201 (b) defines four categories of covered public accommodations if their operations affect commerce or if discrimination by it is supported by state action. Sections 201 (b)(2), (3), and (4) include:

> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including but not limited to, any such facility located on

the 1964 Act.[3] The Court of Appeals for the Eighth Circuit affirmed.[4] The Supreme Court of the United States granted certiorari.[5] *Held,* reversed. Lake Nixon Club was a public accommodation within the coverage of Title II of the 1964 Civil Rights Act. *Daniel v. Paul,* 395 U.S. 298 (1969).[6]

The Court found that Lake Nixon was a covered public accommodation under sections 201 (b) (2) and 201 (c) (2) of Title II because its snack bar was "principally engaged in selling food for consumption on the premises,"[7] and its advertising via magazines, newspapers, and radio demonstrated that the defendant sought "broad-based patronage from an audience he knew to include interstate travelers."[8] Thus, the Lake Nixon snack bar affected commerce in offering to serve interstate travelers. In addition, at least three of the four food items sold at the snack bar contained ingredients originating from outside the state and thus its snack bar affected commerce because "a substantial portion of the food

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the premises of any retail establishment; or any gasoline station; (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Section 201 (c) contains guidelines for determining if the categories of section 201 (b) "affect commerce."

Sections 201 (c) (2), (3), and (4) provide:

(2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, commerce, transportation, or communication among the several States. . . .

[3]Kyles v. Paul, 263 F. Supp. 412, 419 (E. D. Ark. 1967).

[4]Daniel v. Paul, 393 F.2d 118 (8th Cir. 1968). *noted* in 21 ALA. L. REV. 361 (1969).

[5]Daniel v. Paul, 393 U.S. 975 (1968).

[6]For a summary of the decision see 1 RACE REL. L. SURVEY 89 (July 1969).

[7]Daniel v. Paul, 395 U.S. 298 (1969).

[8]*Id.* at 304. "And it would be unrealistic to assume that none of the 100,000 patrons actually served by the Club each season was an interstate traveler."

which it serves . . . has moved in commerce."[9] Since the club's snack bar was within the ambit of the Act, the entire club became a covered public accommodation under sections 201 (b) (4) and 201 (c) (4).

Secondly, Lake Nixon Club was within the scope of the 1964 Civil Rights Act under sections 201 (b) (3) and 201 (c) (3) because any generally accepted definition of the word "entertainment" would include recreational areas as well as spectator entertainment establishments.[10] As a place of entertainment, Lake Nixon affected commerce because some of the sources of entertainment (certain boats, phonograph records, and a juke box) were manufactured outside the state and therefore had moved in commerce.

On the issue of the alleged private club character of Lake Nixon, the Court found that the lower courts were "plainly correct"[11] in holding that Lake Nixon was not a private club. The Court defined Lake Nixon as "simply a business operated for a profit with none of the attributes of self-government."[12] The membership fee device was seen as a subterfuge to avoid coverage under the 1964 Act as white persons were "routinely"[13] given memberships while black persons were denied memberships. Justice Douglas concurred; Justice Black dissented.

The significance of the *Daniel* decision may reach some private clubs in West Virginia. Private clubs in West Virginia fall into three categories.[14] Since Lake Nixon was neither a nationally

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[9]42 U.S.C. § 2000a (c) (1964). *See* Daniel v. Paul, 395 U.S. 298, 305 (1969).

[10]Daniel v. Paul, 395 U.S. 298, at 306 n.7 cites Webster's Third New International definition of "entertainment" at 757 as "the act of diverting, amusing or causing someone's time to pass agreeably: [synonymous with] amusement."

[11]*Id.* at 302.

[12]*Id.* at 301.

[13]*Id.* at 302.

[14]W. VA. CODE ch. 60, art. 7, § 2 (a) (Michie Supp. 1969):

(a) "Private club" means any corporation or unincorporated association which either (1) belongs to or is affiliated with a nationally recognized fraternal or veterans organization, which is operated exclusively for the benefit of its members, which pays no part of its income to its shareholders or individual members, which owns or leases a building or othes premises, to which club are admitted only duly elected or approved dues paying members in good standing of such corporation or association and their guests while in the company of a member and to which club the general public is not admitted, and which club maintains in said building or on said premises a suitable kitchen and dining facility with related equipment for serving food to members and their guests, or (2) is a nonprofit social club, which is operated exclusively for the benefit of its members, which pays no part of its income to its shareholders

recognized fraternal or veterans organization nor a nonprofit social club, it appears *Daniel* is relevant only to private clubs within the third category of the West Virginia Code. Under the assumption that a private club within this category follows a Lake Nixon Club form of racial discrimination and has no other justifiable membership qualifications, it is possible that such a club could be held to be a covered public accommodation under the 1964 Civil Rights Act if such club's operations affect commerce within the meaning of this Act. The following discussion is made under the latter assumption.

In *United States vs. Fraley*,[15] the question whether a tavern which was equipped with kitchen and dining room facilities but whose food sales amounted to only 10 per cent of the gross receipts was a restaurant within the range of the 1964 Civil Rights Act was answered in affirmative. The court found that the tavern possessed all the characteristics of a restaurant and that its dining and kitchen facilities were principally engaged in the sale of food for consumption on the premises.[16] These dining and kitchen facilities brought the tavern within the scope of the 1964 Act. In West Virginia, a private club categorized under the third definition of the private club law is required to have a "suitable kitchen and dining facility."[17] Therefore, such a club's license might have the paradoxical result of simultaneously giving that club both a pri-

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or individual members, which owns or leases a building or other premises, to which club are admitted only duly elected or approved dues paying members in good standing of such corporation or association and their guests while in the company of a member and to which club the general public is not admitted, and which club maintains in said building or on said premises a suitable kitchen and dining faculty with related equipment for serving food to members and their guests, or (3) is organized and operated for legitimate purposes, which has at least one hundred duly elected or approved dues paying members in good standing, which owns or leases a building or other premises, to which club are admitted only duly elected or approved dues paying members in good standing of such corporation or association and their guests while in the company of a member and to which club the general public is not admitted, and which club maintains in said building or on said premises a suitable kitchen and dining facility with related equipment and and employs a sufficient number of persons for serving meals to members and their guests.

[15]282 F. Supp. 948 (M.D.N.C. 1968).

[16]*Id* at 952. The court stated:

There can be no question that the sizable dining room and kitchen areas of the defendant's establishment are principally, if not wholly, engaged in the preparation and sale of food for consumption on the premises. Moreover, the tavern holds itself out to the public as an eating establishment, and it has all the characteristics of a restaurant.

[17]W. VA. CODE ch. 60, art. 7, § 2 (a) (3) (Michie Supp. 1969).

vate club status under West Virginia law and public accommodation status as a restaurant under the *Fraley* decision. The defendant in *Fraley* did not claim exemption from the 1964 Act as a private club. Rather, the defendant alleged that his tavern was not within the Act's scope on the ground that his tavern was not principally engaged in selling food for consumption on the premises. If a West Virginia section 2 (a) (3) club loses its private club immumunity as the Lake Nixon Club did, it seems that such club could be brought within the scope of the 1964 Act upon application of the *Fraley* decision, on account of its required kitchen facilities.

It also appears possible that a West Virginia private club may fall within the coverage of the 1964 Civil Rights Act as a place of entertainment under section 201 (b) (3) in light of *Miller v. Amusement Enterprises.*[18] The Court in *Miller* held that an amusement park which provided mechanical rides for children was a "place of entertainment" within the meaning of the 1964 Act. The interpretation in *Miller* of the phrase "place of entertainment" (which *Daniel* approves)[19] is applicable to a section 2 (a) (3) private club.

> We find that the phrase "place of entertainment" as used in § 201 (b) (3) includes both establishments which present shows, performances and exhibitions to a passive audience and those establishments which provide recreational or other activities for the amusement or enjoyment of its patrons.[20]

The Court in *Miller* also cited the following synonyms for the word "entertainment":

> amusement, bodily enjoyment, fun, recreation, diversion, relaxation, sport, pleasure, play, merriment, festivity, celebration and revelry.[21]

Such works would seem to be pertinent to the atmosphere found in most section 2 (a) (3) private clubs. As the amusement park in *Miller* was held to be a place of enjoyment, fun, and recreation and thus, a place of entertainment, so it seems could a section

[18]394 F. 2d 342 (2nd Cir. 1968).
[19]Daniel v. Paul, 395 U.S. 298, 308 (1969).
[20]Miller v. Amusement Enterprises, 394 F.2d 342, 350 (2nd Cir. 1968). Suppose, a private club allows its members to dance to live or recorded music whether its members passively listen or actively dance, the club under *Miller* appears to be a "place of entertainment."
[21]*Id.* at 351.

2(a)(3) private club. It would then remain only to prove that the club's sources of entertainment (such as phonograph records, juke box, musical groups, singers, etc.) have moved in commerce.

The membership criteria of the club must also be considered. The district court in *United States v. Clarksdale King & Anderson Co.*[22] held that the only private clubs exempt from the provisions of the 1964 Civil Rights Act are those whose membership is genuinely selective on some reasonable basis.[23] The only stated qualification for membership considered in that case was a $2.00 membership fee and white skin. The court stated that the artificial device of the attempted exclusion of Negroes by the establishment of a sham club does not vitiate the application of the public accommodation law.[24] In *United States v. Richberg,*[25] it was found that the membership criteria of an exempt private club must have "substance."[26] In *Richberg,* this substance was not present since the defendant's only grounds for membership were race and a "nominal admittance fee."[27] The alleged private club in *United States v. Jack Savin's Private Club*[28] also failed to possess "substance" and genuine selectivity in membership. The district court found that:

> There are, as a matter of fact, no real requirements whatsoever that one must meet in order to enjoy the privileges of dining at this restaurant except that he be a non-Negro, and able to pay his bill. Members of the white race are admitted and served whether they have applied for

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[22]288 F. Supp. 792 (N.D. Miss. 1965).

[23]*Id.* at 795. Only two or three memberships were rejected out of an approximate 1000 applications.

[24]*Id* at 796.

[25]398 F.2d 523 (5th Cir. 1968).

[26]*Id.* at 529.

[27]*Id.* at 528. The court quoted with approval the statement by then senator Humphrey during the debates on the act:

> If a club were established as a way of bypassing or avoiding the effect of the law, and it was not really a club—I am sure the Senator knows What I mean—and there are clubs like that in existence, where anyone can step up and pay $2 and in that way become a member, and with the $2 being used as a kind of cover charge, that kind of a club would come under the language of the bill.

Sen. Magnuson was quoted:

> The clubs exempted by section 201 (e) are bona fide social fraternal, civil and other organizations which select their own members. No doubt attempts at subterfuge or camouflage may be made to give a place of public accommodation the appearance of a private orgnaization, but there would seem to be no difficulty in showing a lack of bonafides in those cases.

[28]265 F. Supp. 90 (E. D. La. 1967).

> membership in the Club or not. Members of the white race may, if they so request, be issued a membership card without meeting any standards or requirements and without being passed upon for membership by any committee or by the Board of Trustees. Negroes, as a matter of fact, cannot under any circumstances use the facilities of this restaurant, nor be issued membership cards.[29]

In the case of *Nesmith v. Y.M.C.A. of Raleigh*,[30] the Fourth Circuit Court reversed a lower district court's denial of injunctive relief which was sought by a black minister for the purpose of enjoining the racial discrimination policies of the Y.M.C.A.'s athletic club facilities. In rejecting defendant's contention that the Y.M.C.A. was exempt as a private club from the scope of the 1964 Civil Rights Act, the court found that though the Raleigh Y.M.C.A. required membership application, had a membership committee, recorded its list of members, and charged substantial membership dues, it could not be deemed a private club because evidence showed that over 99 percent of the white applicants were accepted while 100 percent of the black applicants were rejected, that there were no limits on membership, and that there were no admission standards or regular membership meetings. Thus, the Court held the Y.M.C.A. to be "too obviously unselective in its membership to be adjudicated a private club."[31]

CONCLUSION

The Daniel decision demonstrates that the requirements of a white skin and a nominal membership fee are not sufficient to establish private club status and immunity under Title II of the 1964 Civil Rights Act. Other cases cited on the same subject show the necessity of a genuine selectivity in membership before private club status can be established. It would seem reasonable to conclude that the courts would not condone the operation of a West Virginia private club formed under chapter 60, article 7, section 2 (a) (3) of the West Virginia Code if the club practiced a Lake

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[29] *Id.* at 94.
[30] 397 F. 2d 96 (4th Cir. 1968).
[31] *Id.* at 102.

Nixon Club type of racial discrimination and sham membership policy. Such a club might well be found to:

1) violate the 1964 Civil Rights Act; and
2) fail to qualify as a private club under West Virginia law.

Although not examined here, such a West Virginia club might logically be in violation of the West Virginia Human Rights Act[32] which prohibits denial of admission to public accommodations because of race, and of the West Virginia Constitution which prohibits the sale of intoxicating liquors in a "saloon or other public places".[33]

James Roy Gerchow

Constitutional Law—Freedom of Expression

The appellant, a member of the Ku Klux Klan, had invited a television reporter to a Klan "rally." Films of this gathering were broadcast on both a Cincinnati station and a national network. Portrayed were several hooded figures, some carrying firearms, and several engaged in the burning of a cross. A number of racially derogatory remarks were comprehensible, and one non-volatile speech by the appellant was presented in its entirety.[1] The appellant was convicted under the Ohio Syndicalism Statute of " 'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.' "[2] On appeal, the ap-

[32]W. VA. CODE ch. 5, art 11, § 9 (Michie Supp. 1969).

[33]W. VA. CONST. art. VI, § 46: The legislature shall by appropriate legislation regulate the manufacture and sale of intoxicating liquors within the limits of this State, and any law authorizing the sale of such liquors shall forbid and penalize the consumption and the sale thereof for consumption in a saloon or other public place.

[1]None of the derogatory remarks were made by the appellant. His speech was not inflammatory in nature, the only reference to any possible disorder being that "[w]e are marching on Congress July the Fourth. . . . From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other . . . into Mississippi." Brandenburg v. Ohio, 395 U.S. 444, 446 (1969).

[2]*Id.* at 444-5 citing OHIO REV. CODE ANN. § 2923.13. Penalty for violation of this act was a fine of not more than five thousand dollars or imprisonment of not more than ten years, or both.

"Criminal syndicalism is the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform." OHIO REV. CODE ANN. § 2923.12.