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EQUAL PROTECTION AND THE RACE PROBLEM

"... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."¹

The problems presented to the lawyer and society by the Fourteenth Amendment to the United States Constitution are twofold: (1) The interpretation of the ambiguous ideals contained therein, essentially a legal problem; and (2) the effect of these interpretations on the peoples involved, essentially a sociological problem. As a lawyer, the first of these problems is of foremost importance, but of necessity the lawyer must also concern himself with the second. The primary purpose of this paper is to explore the more recent cases in an attempt to point to trends and indications of the various aspects of the race problem.

The race problem is, of course, one of national aspect. At the same time, the race problem in a more limited sense is a regional problem. For this reason, we shall confine our search for the law to the cases decided in the South, the region which is most intimately embraced by the controversy.

Before we attempt to define the law, we must first define the problem which necessitates the law. This is primarily of interest to the sociologist. There is but one South. That is to say, it is easy to trace throughout the region a fairly definite mental pattern, associated with a fairly definite social pattern.² These two patterns may be best described as white supremacy. The reason for the existence of the white supremacy mental and social patterns is best described as the "vicious circle." White prejudice and discrimination keep the Negro low in standards of living, health, education, manners and morals. This, in its turn, gives support to White prejudice.³ As can be readily determined, the interworking of this "vicious circle" for generations has resulted in a complicated double standard of social intercourse. This social situation along with the fourteenth amendment thus present the legal problem.

This discussion of the legal aspects of the race problem will be limited to eight phases: (1) inns and restaurants; (2) theaters and places of amusement; (3) public conveyances; (4) places of

¹ U.S. Const., Amend. XIV, §11.
business or public resort; (5) public schools; (6) constitution of juries; (7) competency as witnesses; and (8) punishment of crime. Some of the questions raised can be answered by citing pertinent cases, but we must apply the principles of these cases to other situations by analogy.

1. **Inns and Restaurants**

It can safely be said that discrimination by private individuals in privately owned inns and restaurants is not a denial of equal protection of the laws. However, at the slightest trace of state activity or control, we have a completely different situation. Thus, in *Derrington v. Plummer*, where a county leased a cafeteria in a newly constructed courthouse to a private tenant to operate, the tenant's exclusion of persons merely because they were Negroes constituted state action in violation of the fourteenth amendment. The fact that there was no purpose of discrimination on the part of the county and no reservation of control under the terms of the lease was held immaterial.

Turning to the other side of the picture, the refusal of the proprietors of an ice cream and sandwich shop to serve Negroes in the portion of the shop reserved for white clientele impaired no rights of the Negroes under the fourteenth amendment. This decision was reached despite the fact that the complaint, on which warrant of arrest for violation of statutes imposing criminal penalties for interfering with possession or right of possession of realty privately held, was signed by the officer charged with the duty of enforcing the laws, rather than by the proprietors of the shop. This was held not to constitute state action.

The next problem is to determine what political subdivisions of a state may, by their acts, deny equal protection of the laws. As was seen in *Derrington v. Plummer*, supra, action by a county may constitute state activity. From this, it logically follows that discrimination by a city may constitute state action. In a recent Delaware case, it was held that where a city parking authority, a public tax exempt agency, leased space in its building for the operation of a restaurant under an agreement requiring the tenant to comply with

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4 *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956); Cert. denied 353 U.S. 924 (1957).
all applicable\textsuperscript{7} federal laws, the equal protection clause applied to
discriminatory practices by the tenant.

In summary, the "equal protection of the laws" clause will not
operate to prevent discrimination by private individuals in privately
owned inns and restaurants. However, a slight tinge of state activity
will tip the balance and bring such practices within the province of
federal protection. It is interesting to speculate whether forced
nondiscriminatory practices on the part of private owners would con-
stitute a denial of equal protection of the law as to them.

2. Theaters and Places of Amusement

In this area of the race problem, we once again must search for
state activity. The concept of individual discrimination not being
within the fourteenth amendment applies equally in all cases. For
this reason, we confine our discussion to those cases in which there
has been state action.

In an early case on the problem,\textsuperscript{8} the federal court held that the
city of Baltimore was under no legal obligation to provide golfing
facilities, but so long as it continues to do so, it must furnish sub-
stantially equivalent facilities to white and colored citizens. This
case seems to apply the "separate but equal" doctrine, but its impor-
tance may have been weakened by subsequent case law. The later
case of \textit{Beal v. Holcombe}\textsuperscript{9} required that Negroes be allowed to use
golfing facilities in parks reserved exclusively for the use of white
people. However, in that case the parks reserved for colored people
had no golf courses. No mention was made of the earlier case, and
it is entirely speculative whether or not the doctrine would apply
were the court confronted with a case where the facilities are sep-
parate but equal. A 1955 Virginia case\textsuperscript{10} held that the "separate but
equal" doctrine had been abolished, not only with respect to schools,
beaches and bathhouses maintained by public authority, but also
with respect to state parks. This language must be considered as
dictum because the court found as a matter of fact that the golfing
facilities furnished to Negroes were inferior to those furnished white
patrons. However, the weight of the earlier case is weakened.

\textsuperscript{7} Emphasis ours.


\textsuperscript{9} Beal v. Holcombe, 193 F.2d 384 (5th Cir. 1951); Cert. denied 347 U.S.
974 (1954).

\textsuperscript{10} Tate v. Dep't. of Conservation & Development, 183 F. Supp. 53 (E.D.Va.
1955); \textit{affirmed} 291 F.2d 615 (4th Cir. 1961).
Turning our attention to other recreational facilities, the Federal Court for the Southern District of West Virginia required a municipality to operate a swimming pool constructed with public funds under statutory authority without discrimination on account of race or color. This requirement applied whether the city operated the pool itself or leased it to a private citizen for operation. In connection with public swimming pools, there are no constitutional guarantees violated where the pool is closed or sold rather than to admit Negroes.

With respect to athletic contests, a statute prohibiting activities in which the participants are members of the white or colored races is in violation of equal protection. In that case, a boxing commission regulation adopted pursuant to the statute was the subject of the court's attention and was held unconstitutional.

As far as can be determined, there are no cases questioning the right to segregate the races in theaters and other public places of amusement. It would seem the question of private versus state action would apply and be the decisive factor.

3. Public Conveyances

Surprisingly, there are very few recent cases dealing with segregation of the races on public conveyances. An early case held such to be proper. However, the most recent case declared that statutes and ordinances requiring segregation of white and colored races on motor buses of a common carrier of passengers violated both due process and equal protection. The presence of the statutes in this case obviously shows state action. The only remaining question in this field is whether voluntarily adherence to the custom of racial segregation by a privately owned bus company would constitute state action where the franchise rights are granted by the state public service commission or its equivalent. As far as can be determined, this question remains unanswered.

4. Places of Business or Public Resort

There are no cases found in point on this phase of our search for the law. The most that can be said is that cases from other fields of the race controversy must be applied by analogy. The de-
cisive component, were the case to arise, would again appear to be the concept of state action. In the opinion of the writer, a trace of state action would result in a denial of equal protection to those required to segregate themselves. Voluntary discrimination by private individuals would be followed by the opposite result.

5. Public Schools

Since the landmark case of Brown v. Board of Education, there is no question that forced segregation of the races in public schools is a denial of equal protection of the law. This result follows whether the facilities are equal or unequal because the “separate but equal” doctrine as applied to public schools was expressly held unconstitutional. In the discussion which follows, we will look to those recent cases dealing with attempts to avoid desegregation of public schools.

In the case arising from the Little Rock situation, the court held a statute, allowing the governor to close schools and school districts and call for an election as to whether schools in the district should be integrated, to be unconstitutional. A complementary statute providing for withholding from a school district, in which the governor has ordered a school closed, a prorata share of the state funds, and making the same funds available on a per capita basis to any other school which was attended by students of the closed school was also invalid in that case.

The prohibition against segregation in public schools applies equally to state institutions of higher learning. In the latter case, one must admire the ingenuity displayed, despite the unworthy purpose. The requirement that each student must submit certificates from two citizens of Georgia, alumni of the institution he desires to attend, which certify that each such alumnus is personally acquainted with the applicant and the extent of such acquaintance, the applicant is of good moral character, bears a good reputation in the community in which he resides, and, in the opinion of the alumnus, is a fit and suitable person for admission and able to pursue successfully the courses of study offered by the institution, was held invalid because there were no Negro Alumni of the white colleges. Thus, it was difficult, if not impossible, for Negroes to comply with the requirement. The case also held that the scholarship program

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which aids Negro students to take graduate and professional work offered at institutions of the University System of Georgia and at other institutions which accept Negroes, either outside the state or at private Negro institutions within the state, does not meet the requirement of equal protection.

Turning to the various plans for desegregation, the provision of the plan applicable to Delaware schools stating that whenever possible every pupil within the grades affected would have the choice of attending the nearest school in the district in which he resided or attending the school he would have attended prior to the effective date of the desegregation order was considered unfair because those students who lived in a Negro community might be precluded from ever entering a white school. This provision along with the provision to desegregate on a grade-by-grade basis over a period of twelve years, requiring in the first year, all Negro children to register but not requiring white children to register, was stricken from the plan.

The latest case concerning integration of public schools held that the Commonwealth of Virginia, having accepted and assumed responsibility of maintaining and operating public schools, could not act through one of its officers to close one or more schools solely because of assignment to, or enrollment or presence in, that school of children of different races, and at the same time keep other public schools throughout the state open on a segregated basis. Another interesting aspect of this case is that the court stated that to deny the right to attend public schools under these circumstances to white children was a denial of equal protection as to them.

6. CONSTITUTION OF JURIES

The applicable law in this field is best stated by the Fifth Federal Circuit Court in Goldsby v. Harpole. In that case the court laid down the doctrine that "... the Federal Constitution does not guarantee to the defendant in a state court a trial before a jury in which his race is proportionately represented, nor a trial before a jury composed in any part of members of his race, nor even a jury trial at all, if other defendants are not accorded a jury trial, but it does assure him of equal treatment under the law and, so long as the

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21 263 F.2d 71 (5th Cir. 1959).
state elects to accord jury trials, it must not systematically exclude from jury service qualified persons of his race."

There are many cases holding that a criminal defendant is denied equal protection of the law if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race.22

Thus far, our survey has been concerned only with criminal prosecution, but by dicta the court in Goldsby v. Harpole, supra, indicated the doctrine was applicable as well to civil cases.

As can be easily determined, each case must rest on its own facts as to whether there is a systematic exclusion of members of the colored race. However, proof of long-continued exclusion of Negroes from jury service makes a strong prima facie case of denial of equal protection of the law in the prosecution of a person of the African race.23

7. Competency as Witnesses

Although local prejudice may affect the credibility of a Negro witness, the fact that he is a Negro should not affect his competency. We say "should not" because no reported cases are found in which a Negro has been denied the right to testify because of his race. Since a Negro defendant is denied equal protection, where members of his race are excluded from jury service, it follows that there would be equally strong reasons for so holding where a Negro is not permitted to testify in his behalf. The converse is true, only as to the party offering him as a witness, where a Negro is offered as a witness against a Negro defendant. Whether there would be a denial of any constitutional right to the witness is a matter of speculation.

Considering the liberal trends announced by the courts in interpreting the fourteenth amendment, it seems probable that any incompetency as a witness solely because of race would meet with failure.

8. Punishment of Crime

Application of a criminal statute so that it brings about, or results in, inequality of treatment to the two races is not justified.24

23 Goldsby v. Harpole, supra.
This doctrine seems to be so well established and so in accord with the concepts of criminal law that it can be described as "black letter" law.

An interesting sidelight on this problem is stated in a recent Louisiana case. The court held that marriage is a status controlled by the state, and criminal statutes prohibiting intermarriage or cohabitation between persons of different races in no way violate the equal protection clauses of the state and federal constitutions. This, of course is a state decision in a state court, and its finding will not be binding on a federal court should the case come up for determination of the federal rule to be applied.

We end as we began with recognition of the fact that the problems herein presented are essentially legal and sociological. The only safe observation to be made is that any practice or procedure under sanction of state action resulting in inequality of treatment to the Negro as compared to that applicable to the white citizen will fall within present condemnations of the courts. But the words and phrases, "equal protection," "inequality" and "state action," are not precisely defined and may find varied applications and uses in the years ahead. As Mr. Justice Story observed in Martin v. Hunter's Lessee, 1 Wheat. 304 (1816), the Constitution "was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence."

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