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LEGAL PROBLEMS IN SOUTHERN DESEGREGATION: THE CHAPEL HILL STORY*

DANIEL H. POLLITT†

In 1963-1964, Chapel Hill, North Carolina, joined the ever-increasing number of southern communities to experience an effort at racial integration by tactics variously called "creative disorder,"¹ scofflaw Christianity,² and "insurrection and rebellion."³ Newspaper headlines give flavor and dimension to what took place:

New Year Brings Race Violence to Chapel Hill⁴
Chapel Hill Board Sidesteps Accommodations Law Issue⁵
Governor Sanford Warns CORE on Chapel Hill Ultimatums⁶
University Won't Boycott Segregated Firms⁷
Sit-Ins, Arrests, Mediation Continue⁸
Stepped Up Sit-Downs Block Town's Traffic⁹
Men's Council Acquits Student Demonstrator¹⁰
Hearing on 932 Cases in Federal Court on Tuesday¹¹
Judge Cites Student Editor for Contempt¹²
5 Protest Fasters Under Harrassment¹³

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¹ The term is borrowed by Harvard sociologist David Riesman in his foreword to *The Free Man*, a book by Chapel Hill novelist John Ehle which portrays with critical sympathy the events which follow. Riesman, *Foreword* to EHLE, *THE FREE MEN* at ix (1965) [hereinafter cited as EHLE].

² The term is that of Henry Brandis, Jr., Dean Emeritus of the University of North Carolina School of Law, in reference to the Chapel Hill ministers who defended the street-blocking tactics by the student demonstrators.

³ The term is that of City Councilman Roland Giduz in connection with a sit-in at the City Hall.

⁴ Daily Tar Heel, Jan. 7, 1964, p. 1.

⁵ Durham Morning Herald, Jan. 14, 1964, p. 9A, col. 3.

⁶ *Id.*, Jan. 16, 1964, p. 1, col. 3.

⁷ Chapel Hill Weekly, Jan. 29, 1964, p. 1, col. 3.

⁸ *Id.*, Feb. 2, 1964, p. 1, col. 2.

⁹ Daily Tar Heel, Feb. 9, 1964, p. 1, col. 1.

¹⁰ *Id.*, Feb. 15, 1964, p. 1, col. 5.

¹¹ Chapel Hill Weekly, March 15, 1964, p. 1, col. 1.

¹² Durham Morning Herald, March 18, p. 1, col. 4.

¹³ Chapel Hill Weekly, March 25, 1964, p. 1, col. 1.

Ku Klux Klan Comes to Chapel Hill . . .¹⁴

Mallard Sends 4 More Demonstrators to Jail; Dunne Gets
Year¹⁵

So it went through five long months of December, January, February, March, and April. The administrators of the University of North Carolina at Chapel Hill (which is almost the sole employer and dominates the rural community of 15,000) shut their eyes to the problem with a position of neutrality;¹⁶ the city fathers sidestepped leadership by appointing a series of citizen committees to seek desegregation on a voluntary basis; while the protagonists, the demonstrators and white shop owners, grew ever more adamant in their demands for unconditional surrender. The demands, the tactics, the legal and moral problems are familiar throughout the South; the only wonder is that it could happen in Chapel Hill, the most "enlightened" town in the most "enlightened" state in the South, self-styled the "Southern Part of Heaven."^{16a} This article will discuss in sequence the events which took place in Chapel Hill and the legal issues growing out of these events.

I. THE EVENTS

A. *The Community Background*

The community has not been a leader in racial desegregation, but neither has it lagged too far behind. In 1951, the University (pursuant to court order) admitted Negroes to the medical and law

¹⁴ *Id.*, March 29, 1964, p. 2B, col. 1.

¹⁵ Daily Tar Heel, April 25, 1964, p. 1, col. 5.

¹⁶ The University, if anything, was "neutral" on the side of segregation. It refused to eliminate the vestiges of segregation in the University Hospital. It refused to transfer the weekly athletic press luncheons from the segregated Pines Restaurant and thereby withdraw its prestige and support from the target of the student demonstrations. It refused to carry on its educational television station a controversial series of programs produced by the National Educational Network. The series, "Dynamics of Desegregation," was the first NET series turned down by the University. *ENLE* 174, 175, 202, 203. The University even instituted, but never put into effect, a rule that Negro students would be segregated from white students in the dormitories. *Id.* at 325. As far back as 1950 the Supreme Court held that a university cannot afford the Negro student different treatment from other students solely because of his race because such isolations "impair and inhibit his ability to study, to engage in discussions and exchange views with other students." *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950).

^{16a} See PRINCE, *THE SOUTHERN PART OF HEAVEN* (1950). See also *Time*, Nov. 16, 1962, p. 42.

schools;¹⁷ and in 1955 (again pursuant to court order) as undergraduates.¹⁸ No difficulties resulted from these admissions; indeed, Negroes have been elected to important campus positions.¹⁹

In 1960, the Chapel Hill School Board (dominated by University professors) complied in part with the 1954 Supreme Court mandate in the famous *School Desegregation Cases*²⁰ by ordering school integration at the first grade level on a voluntary basis. The integration plan subsequently was extended to all grades, with no difficulties in the community.²¹

Also in 1960, a number of restaurants agreed to serve Negroes. This resulted from a series of sit-ins, picketing, full-page ads by the Ministerial Association, and intervention by a newly created Mayor's Human Relations Committee.²²

In 1961, the town's two movie theaters were picketed constantly for four months and then agreed to admit Negroes. Thereafter, there were no unpleasant incidents, and there was no loss of business.²³

Progress was manifest and visible, but in July of 1963, much remained to be done. The three motels (although not the University-owned Carolina Inn), the only bowling alley, all the barbershops except the one located in the campus student union, approximately a third of the restaurants (especially those ringing the town), two grocery stores fronting the highways leading into the community, and several service stations were segregated; some with "White Only" signs in prominent display.²⁴ A movement was then initiated for the enactment of a public accommodations law prohibiting discrimination, at least by restaurants. There were public discussion, petitions, newspaper advertisements, and a series of "silent marches." The Board of Aldermen rejected the proposed public accommoda-

¹⁷ *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir.), *cert. denied*, 341 U.S. 951 (1951).

¹⁸ *Frasier v. Board of Trustees*, 134 F. Supp. 589 (M.D.N.C. 1955).

¹⁹ For example, that of Editor-in-Chief of the *Review*. See N.Y. Times, May 5, 1961, p. 18, col. 2.

²⁰ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

²¹ Prothro, Chapel Hill, North Carolina: A Case Study of a Community's Needs in Relations to H.R. 7152 (The Civil Rights Act) (1964).

²² *Ibid.*

²³ *Ibid.*

²⁴ A survey revealed discrimination at 25% of the 116 businesses included within a study of barber shops, billiard parlors, drugstores, groceries, hospitals, ice cream parlors, motels, restaurants, and service stations. Daily Tar Heel, Jan. 12, 1964, p. 1, col. 1.

tions law with a substitution motion to create a new committee to seek desegregation on a voluntary basis. The silent marches then turned into direct action, with a sit-in at the office of the Merchants Association (which had spearheaded the campaign against the public accommodations law), and thirty-four persons were jailed in short order. The town was in an uproar, and the Mayor intervened to secure a truce: all demonstrations would cease, the charges against the demonstrators would be dropped, and the Mayor would seek to bring about further integration on a voluntary basis.²⁵

B. *The Sit-Ins*

The truce agreement failed. The demonstrations stopped, but the charges against the demonstrators were not dropped: four demonstrators were tried, and three elected to serve sentences of thirty days rather than pay the fine of fifty dollars. The newly created Mayor's Human Relations Committee made no progress.

So matters stood on December 13, 1964, when a visiting speaker was invited to dinner by three University students, one white, two Negro. In his words:

We drove out to the Pines, Chapel Hill's only elegant eatery, and walked in. The hostess dashed over as soon as we got in the door and asked us to leave. Dunne [the white student] didn't refuse, but he didn't leave. The manager, a Mr. Leroy Merritt, came on the scene. He exploded almost immediately: "We're segregated! Everybody in Chapel Hill knows we're segregated! You got to leave right now!" Dunne spoke quietly about how he had made a reservation by phone and hadn't been told Negroes wouldn't be served, and pointing to me, said I was a visiting speaker and he had planned to have me out for dinner at the best place in town, and now he was terribly embarrassed, etc. . . .

All this time the moral elite of Chapel Hill continued to come into the restaurant, walk by, and sit down to their dinners. And all this time Mr. Leroy Merritt got redder in the face and kept yelling, "You gotta get out of here!" Then he called the police. They arrived almost at once

The four of us were ushered out and, to our dismay, notified we would be arrested as soon as Mr. Leroy Merritt could get down to the station to sign the warrants. Would we be so kind as to come down to the station at 8 p.m. for arrest, by which time the warrants would be ready? Yes, we would.²⁶

²⁵ Prothro, *supra* note 21.

²⁶ *A New Kind of Christmas in Chapel Hill*, reprinted from *The Village*

The arrest did not stop matters; in fact it had the opposite effect. A day or so later, another integrated group arrived at the Pines for dinner and were denied service. When the police arrived, the demonstrators went "limp," *i.e.*, they relaxed, fell on the floor, and had to be carried out. Pictures of a policeman dragging a white coed across a rough parking lot, of two policemen more gingerly carrying an eighty-year-old Episcopal minister to a police car, were recruitment fodder to the growing group of demonstrators.

On December 14, two white and two Negro demonstrators entered Clarence's Beer Hall (near the bus station) and were bodily picked up and ungently tossed out on the street.²⁷ Other groups were arrested that night when they ordered a Coke at the Shack, another downtown beer hall, or sought service at Leo's Restaurant (which serves the bus station). At the Tar Heel Sandwich Shop (diagonally across from the city hall), the demonstrators were locked out and sat on the sidewalk where they were kicked by white bystanders until the police arrived from across the street. Seventeen demonstrators were arrested, one taken to the hospital, and the police went out looking for the white attackers. A house-painter and an off-duty policeman from Hillsboro (the nearby county seat) were subsequently arrested.

On December 15, seventy people marched silently through Chapel Hill with signs which read: "Give Freedom for Christmas"; and after the march, forty of them were arrested at Brady's Restaurant when they went limp after being denied service. The deans from the University arrived and offered to bail out any student who would agree to withdraw from the demonstrations; one of them did. The deans notified, by phone and telegram, the parents of the other students that their children were in jail.²⁸

Six of the demonstrators then braved the Rock Pile, a segregated grocery store. They walked in, ordered a box of crackers, and were told to leave. When they refused, the manager began to douse the unresisting demonstrators with a mixture of clorox and ammonia. Some left choking, others stuck it out. Finally, the manager got out a baseball bat, but the police then arrived and stopped further

Voice (of Greenwich Village, New York City), in the Daily Tar Heel, Jan. 7, 1964, p. 3, cols. 1, 4-5.

²⁷ The individual sit-ins are described in EHLE 123-30.

²⁸ At least one parent did not appreciate this manifestation of University concern, as it merely served to inform everyone in his small community that his son had been arrested for demonstrating. *Id.* at 132.

mayhem. The demonstrators were taken to the hospital, treated for first degree burns, and then arrested for trespass and resisting arrest (several had gone "limp" when they escaped the gas-fumed interior).²⁹

By the New Year, almost 150 demonstrators had been arrested while awaiting service at some seven or eight different restaurants. The town newspaper seemed to pooh-pooh the whole episode as some sort of a new-fangled student prank, which probably prompted a group of professors from the University of North Carolina and Duke to add their age and prestige to the effort for equal service. Their initial target, on the night of January 3, was Watts' Grill, on the southern outskirts of town. Professor Albert Amon later testified in court what happened.

We arrived in front of two sets of swinging glass doors. As we got up, Mrs. Watts and a waitress were standing behind these doors. I pulled one of them towards me and said, "May we come in?" And then in the background . . . "Yes, let him come in." Then he, Mr. Watts . . . took me by the coat . . . And pulled me forcibly into the restaurant. Then I stood for about twenty to thirty seconds, I would say, while they momentarily redirected their attention to those who were standing outside. Then they turned on me and Mr. Watts and Mr. Scott hit me. I fell to the floor . . . I received five blows, kicks to the head which were large enough to be medically detectable, three of which were severe, one of which opened my hair in a 3½ inch patch on the back of my head.³⁰

Two students then entered the restaurant and threw themselves atop the professor's prone body to protect him from further kicking. Then, as Professor Amon continued his testimony: "[W]e were lifted and thrown out, flying through the air, landing on top of the seated professors on the outside. While we were out there, we continued to be beaten with a broom"³¹

The police arrived, Professor Amon was taken to the hospital, the other professors to jail. Included in the "jailed group" were three Methodist ministers from the School of Divinity of Duke University. Mr. Watts was not arrested.

The student *Daily Tar Heel* was then in recess, and the other local papers (one owned by Councilman Giduz) gave scant heed to

²⁹ *Id.* at 141-43.

³⁰ *Id.* at 146-47.

³¹ *Id.* at 147.

the details of the sit-ins. However, thirty miles away the Raleigh *News and Observer* editorialized against these and similar tactics utilized against the demonstrators:

The word already has been spread in Chapel Hill and the nation, too, that the wife of the proprietor of one segregated cafe stood above a floored demonstrator and urinated upon him. Such action in supposed defense of Southern custom gives a sickening impression of some of those who assume to defend old ways in Chapel Hill.³²

C. A Public Accommodation Law Again Considered

As the University and Negro high school students (who formed the bulk of what became the Chapel Hill Freedom Committee) continued to demonstrate with marches and sit-ins, a portion of the adult community took action. The Committee of Concerned Citizens, mostly ministers, professors, and church women, began to picket the segregated restaurants. Tired of picketing, it suggested the enactment of a city ordinance requiring all businesses licensed to serve the public to serve all members of the public. Within a matter of two or three days, almost 2,000 citizens agreed over the telephone to let their names be included in a newspaper advertisement urging the city council to enact such an ordinance.³⁴ A rival petition against such a law received only seventy-one signatures.³⁵ The Board of Aldermen agreed to consider the proposal at its meeting on Monday, January 14, 1964.

On Sunday, January 13, there was a "freedom walk" from Durham to Chapel Hill to support the enactment of the proposed law. Some 200 demonstrators from Durham, mostly students at Duke and North Carolina College, marched the fifteen mile distance in a freezing rain. As they reached the outskirts of Chapel Hill, they were joined by an equal number of local citizens, and they marched together through the main street to a Negro church where CORE national director James Farmer highlighted a meeting.³⁶

Prospects for the enactment of the public accommodations law appeared bright. The University's Institute of Government prepared

³² Reprinted in the *Daily Tar Heel*, March 12, 1964, p. 2, cols. 1-2.

³³ See *id.*, Jan. 12, 1964, p. 1, col. 6.

³⁴ *Chapel Hill Weekly*, Jan. 12, 1964, pp. 2-3.

³⁵ *EHLE* 157.

³⁶ *Durham Morning Herald*, Jan. 13, 1964, p. 1-B, col. 5.

a legal memorandum supporting the town's authority to enact such legislation.³⁷ It appeared popular in the community. The Ministerial Association supported it. The Chairman of the Mayor's Human Relations Committee supported the law because her committee, and the Mayor's Businessmen Committee, had done everything possible to achieve desegregation by voluntary means, and had failed. The only public opposition, apart from the petition of seventy-one businessmen, came from the local newspaper. In an editorial incongruous to "states' righters," the *Chapel Hill Weekly* claimed that "the Chapel Hill Board of Aldermen . . . is not the proper place to originate law which bears so directly on fundamental freedoms. . . . We hope the Town Board will direct those seeking redress of racial injustice to a somewhat higher authority."³⁸

When the meeting opened, Alderman Adelaide Walters introduced a public accommodations law patterned on the one enacted in Rockville, Maryland,³⁹ and supported it by quoting from President Johnson's then recent State of the Union⁴⁰ message: "All members of the public should be given equal access to facilities open to the public." She said the President's statement seems "reasonable to most people in Chapel Hill since this is a university town where freedom flavors the spirit of a great university."⁴¹ She reckoned without her colleagues, however, for the Aldermen voted four to two for a substitute motion to create yet another committee to seek integration on a voluntary basis.⁴²

Reaction was varied. A group of demonstrators sat all night in twenty-three-degree weather on the city hall steps to protest. Inside, a determined young lady began a two week sit-in vigil (until the next scheduled Alderman meeting) to remind the Aldermen of their "unfinished business." At least one of the segregated business owners was also disappointed that the Aldermen had appointed a new committee to urge integration on a voluntary basis. The man who had used the ammonia wrote the new committee that:

³⁷ Subsequently, North Carolina Assistant Attorney General Ralph Moody, who had defended city ordinances requiring segregation in places of public accommodation, advised that North Carolina cities are without authority to enact ordinances prohibiting segregation in places of public accommodation. *Id.*, Jan. 29, 1964, p. 1, col. 6.

³⁸ *Chapel Hill Weekly*, Jan. 12, 1964, p. 2-B, col. 2.

³⁹ See 7 RACE REL. L. REP. 266 (1962).

⁴⁰ N.Y. Times, Jan. 9, 1964, p. 16.

⁴¹ Durham Morning Herald, Jan. 14, 1964, p. 9A, col. 3.

⁴² *Chapel Hill Weekly*, Jan. 15, 1964, p. 1, col. 3.

All we ask is not to be molested by any group, this includes not only the groups the demonstrators belong to or follow, but to all the race committees and different groups which we truly feel are only causing the two races to draw further apart instead of closer together. . . .⁴³

D. The Street Sit-Ins

CORE national director James Farmer had come to Chapel Hill for the "walk for freedom" on the Sunday preceding the Monday Aldermen vote on the public accommodations law. He had been unable to leave Chapel Hill because of bad flying conditions, and on Tuesday he held a press conference which completely altered the up-to-then generally friendly attitude toward the demonstrators. Farmer told the press that "I dislike ultimatums; I dislike deadlines . . . but we believe Chapel Hill should live up to its reputation as a leader in racial relations." He then threatened that if Chapel Hill were not desegregated by February 1, "all the resources of the national office of CORE will be focused on the city."⁴⁴

Reaction was swift and unfriendly. On the next day, Governor Terry Sanford pledged his full support to the Chapel Hill Aldermen, and warned CORE that the state "will not allow any group to coerce public officials with threats or ultimatums."⁴⁵ Dr. I. Beverly Lake, the segregationist gubernatorial candidate was even more blunt. He characterized the CORE ultimatum as a "brazen threat," as "intolerable," and urged the quick dismissal of any faculty member, employee, or student participating in the demonstrations.⁴⁶

The town purchased a "paddy-wagon" (a reconverted bread truck) to facilitate arrests, made arrangements for police reinforcements with the state police and the nearby city of Burlington, and girded itself for the February 1 deadline. A small group of citizens sought to head off the collision, and invited the demonstration leaders to meet with the top town officials in a church. There, the demonstrators agreed that the February 1 deadline was not rigid, and could be called off if there was hope of progress. Their main demands centered around the town's prosecuting attorney: that he be instructed to agree to postponement of the sit-in trials until the Supreme Court had opportunity to rule on the similar cases pending

⁴³ EHLE 176.

⁴⁴ Durham Morning Herald, Jan. 15, 1964, p. 1-B, col. 3.

⁴⁵ *Id.*, Jan. 16, 1964, p. 1, col. 3.

⁴⁶ *Ibid.*

there; that he be instructed to agree to bail bonds in trespass cases in the nominal amount usually set; and that he be instructed to practice courtesy toward the Negro citizens in his official courthouse business. These compromise proposals came to naught.⁴⁷

On Saturday, February 1, Chapel Hill Chief of Police Blake was ready for any eventuality with about 100 police reinforcements, over thirty patrol cars, and the new paddy-wagon. In mid-afternoon, over 350 demonstrators marched from a Negro church, down the main street to the Town Hall where freedom songs were sung, and then back to the church. As they marched, small groups totaling twenty-two persons peeled off from the main body and sat themselves down in the street intersections where they were promptly arrested and hauled off in the new paddy-wagon. That night, forty-four persons were arrested at a sit-in in Brady's restaurant; and just down the road, nine more when they tried to buy groceries at the Rock Pile. All told, seventy-five persons were arrested that day.⁴⁸ Six of these were white hecklers, one of whom had picked up a shovel when the demonstration marched past the Western Auto store and who had begun hitting every Negro within reach.

This was a prelude to the following Saturday, when the town was filled with visitors to attend the traditional basketball game between North Carolina and Wake Forest. In a concerted move, the demonstrators lay down on all four major highways at about 4:00 p.m. when the roads were jammed with cars leaving the game. Ninety-eight street-blockers were arrested, the largest number of single arrests since the demonstrations began at the Pines Restaurant on December 12.

A *Daily Tar Heel* reporter followed one of the street-blocking groups, and here is his inside view:

"They will try to tell you that you are trespassing. We know that this is not so."

The speaker was a tall blond-headed young man. On his dungaree jacket he wore an emblem of a white and colored hand locked in a handshake. His listeners were young people, too[.] three white and five Negro.

I had followed them on their massive march in silence down Franklin Street in one of the largest anti-segregation protests ever staged in the town of Chapel Hill.

The march was minutes over and this small group of nine had

⁴⁷ EHLE 183.

⁴⁸ Chapel Hill Weekly, Feb. 5, 1964, p. 2, col. 6.

reconvened on the sidewalk in front of the University Baptist Church. I moved closer to hear what was said.

"Remember, we are not looking for trouble. We are only dramatizing the failure of Chapel Hill to insure rights to each of its citizens. Our only crime is race."...

"The police are not going to hurt you. When they ask you to leave, you will let your entire body go limp. You will be carried into a police car and taken to the station..."

"Act like a stick of butter getting ready to melt. You are not resisting arrest. You are just refusing to assist in your arrest... You are not alone. It's being done all over Chapel Hill today..."⁴⁹

Two nights later, Fifty more arrests were made as the demonstrators, after a meeting of the Aldermen, sat down in the main street intersections to protest the current refusal to enact a public accommodations law.⁵⁰

E. The Anti-Picketing Ordinance

Reaction against the street-blocking tactics was immediate, widespread, and almost universally hostile. One manifestation of this displeasure came two nights after the Saturday demonstrations when the Board of Aldermen met and enacted a law limiting picketing. In two paragraphs, the town fathers provided:

Picketing shall be conducted only between the hours of 7:00 a.m. and 7:00 p.m. Picketing at any other time shall be unlawful and is hereby prohibited.

This amendment shall be in full force and effect on and after February 10, 1965.

This measure was passed by a four-to-three vote (with Mayor McClamrock breaking the tie) at the request of Police Chief Blake, "who stated that he was worried about spreading his force so thin that they would be unable to prevent possible violence"⁵¹ (several white professors had been assaulted the previous Saturday night while picketing a beer hall). A scant two hours later, a policeman told two picketers about the ordinance, and warned them away.

The town reacted against the anti-picketing ordinance just as it had reacted against the street-blocking incidents. The Ministerial Association was against it. The Mayor's Human Relations Com-

⁴⁹ Daily Tar Heel, Feb. 9, 1964, p. 1, col. 4.

⁵⁰ Durham Morning Herald, Feb. 9, 1964, p. 1, col. 4.

⁵¹ Daily Tar Heel, Feb. 11, 1964, p. 1, col. 5.

mittee was against it. The Committee of Concerned Citizens was against it. The *Daily Tar Heel* editorialized that "you do not take away a man's constitutional right to picket because your police force is overworked and underpaid— . . . or because you fear some hoodlum may attack a picketer."⁵²

By Wednesday, two days later, plans for a test case were complete. The Reverend Charles Jones called Chief Blake to say that he, another minister, and two long-time women residents of Chapel Hill were going to test the law by picketing the town hall any time at the Chief's convenience during the prohibited hours. The Chief asked Reverend Jones to hold off, and came to the church shortly with the news that the anti-picketing ordinance was not yet in effect: an overlooked state law required that all town ordinances pass by a two-thirds vote, or, failing that, be passed by majority vote at two successive meetings.

The picketers, reinforced by many others, proceeded to the city hall for a reading of the first amendment and then resumed nightly picketing.

The anti-picketing ordinance was not considered at the next meeting of the Aldermen, and passed into limbo.⁵³

F. The Easter Week Fast at the Post Office

While the adult Committee of Concerned Citizens continued peaceful picketing, the student-oriented Chapel Hill Freedom Committee apparently sensed the community disapproval of its street-blocking tactics, and quietly, unofficially, but firmly put a moratorium on further demonstrations. This moratorium continued from February 15 with but few exceptions.

One of the exceptions, an exception which regained much of the community support, was a week-long fast during Easter week on the small lawn of the post office across from the campus in the heart of the business block. At first, there was heckling, name-calling, egg-throwing, protests by a postal employees' union, and even a cross-burning just outside town by the first regional meeting of the Ku Klux Klan in several years. The *News of Orange County*⁵⁴ carried the rumor that the fasters were eating on the sly. One lady

⁵² *Id.*, Feb. 15, 1964, p. 2, col. 2.

⁵³ EHLE 195-99.

⁵⁴ *News of Orange County*, March 26, 1964, § 1, p. 12, col. 5, quoted in EHLE 255.

disapproved because the fasters weren't wearing hats, and others thought it an unsightly publicity gimmick. But the ladies from the Concerned Citizens stood by with a leaflet answering the criticism that the post office lawn was no place for a religious fast.⁵⁵

Jesus was not crucified in a cathedral between two candles but on a hill between two thieves . . . at the kind of place where cynics talk and thieves curse and soldiers gamble, because that is where he died, and that is what he died about, and that is where churchmen should be and what churchmen should be about.⁵⁶

As the days wore by, the simple, sincere message of the quiet, uneventful fast seemed to reach out. John Dunne, one of the fasters, told a *Daily Tar Heel* reporter that "the incidents of kindness have far outnumbered the incidents of name-calling. . . . People have stopped to talk to us and encourage us. Some brought cigarettes, blankets and other items. One lady brought us a vase of flowers."⁵⁷ Soon, others followed this example and the concrete base of the flagpole was clustered with many vases of dogwood, red bud, and daffodils.

G. The Student Trials

On February 15, the day of the moratorium, another important event took place. University officials referred the cases of the student sit-in demonstrators to the student-elected Honor Council for possible disciplinary action.⁵⁸

There was no way of knowing how the students on the Honor Council would react—most of them native to North Carolina, most of them starting to think about plans after graduation. Earlier, student body President Mike Lawler (from California) and student vice-president Bob Spearman (of Chapel Hill) had favored a student boycott of all businesses which refused to serve all students; and this was supported by the student legislature, the student news-

⁵⁵ *Id.* at 246-52.

⁵⁶ *Id.* at 252.

⁵⁷ *Daily Tar Heel*, March 25, 1964, p. 1, col. 1.

⁵⁸ The University long ago delegated to the student "court" the power to discipline (even expel) students who violated the honor code, and this power has been upheld. *In re Carter*, 262 N.C. 360, 137 S.E.2d 150 (1964), 43 N.C.L. Rev. 152. There is a growing doubt, however, that the state universities have constitutional power to expel students for off-campus activities unrelated to the primary functions of the educational institutions. The matter is well-canvassed in a recent article by Duke Professor William Van Alstyne. See Van Alstyne, *Student Academic Freedom*, 2 LAW IN TRANS. Q. 1 (1965).

paper, and a petition signed by about 1,500 of the 10,000 students. However, several of the sororities and fraternities held banquets at the segregated Pines Restaurant (where they were picketed by their fellow students from the Wesley Foundation), and opponents of the boycott claimed a petition of fifteen hundred signatures, which was never released.⁵⁹

The charge against the student demonstrators was that they had violated the Campus Code which requires all students at all times and places to conduct themselves as "Carolina Gentlemen."⁶⁰ After four hours of deliberating the concept of a Carolina Gentleman, the student Honor Council acquitted the sit-inners.

The student court first determined that it had jurisdiction over the off-campus activity ("the Men's Council has definite jurisdiction over student conduct outside the University itself"); then it determined that not every violation of a state or federal law is necessarily a violation of the Campus Code ("The most common example of this is the driver who drives his car in excess of a speed limit"); and then concluded:

We must consider the element of timing, or the succession of events leading to the sit-in demonstrations. Had this non-violent civil disobedience been the first step in the attempts to achieve desegregation, the situation would be different. However, only after countless futile attempts at negotiating and picketing were made did the sit-ins begin.

Under these circumstances, the actions of the defendant were held to be well within the bounds of gentlemanly conduct.⁶¹

This set the pattern for all future cases. A few weeks later, the Women's Council dismissed charges against two coeds who had violated the rule against staying out all night without permission. The two girls had been arrested at a sit-in demonstration and taken to jail. They testified that they had not been allowed to make any phone calls while in jail and that the late arrival of the bondsman prevented their notifying the dormitory mother of their predicament or their arriving back at the dormitory in time.⁶²

Late in May, there was a third trial when the University officials referred to the Men's Council the cases of the students who had been sentenced to jail on the charge of street-blocking. Again

⁵⁹ EHLE 199-200.

⁶⁰ See 68 CAROLINA HANDBOOK 112-13 (1964-1965).

⁶¹ Daily Tar Heel, Feb. 15, 1964, p. 1, col. 6.

⁶² *Id.*, March 4, 1964, p. 1, col. 2, p. 3, col. 7.

the Men's Council held that this conduct was not prohibited to a "Carolina Gentleman."⁶³

H. The Hillsboro Trials

With the mid-February moratorium on demonstrations in Chapel Hill, interest turned to the trials in Hillsboro, the county seat. There were two relatively distinct groups of defendants awaiting trial. The larger group of approximately 250, mostly University of North Carolina and Chapel Hill students, faced a total of 1,076 charges of trespass, resisting arrest, obstructing the sidewalk, disorderly conduct, obstructing streets, and related offenses growing out of the demonstrations. This larger group was represented by attorneys Floyd B. McKissick, C. C. Malone, Jr., and Moses C. Burt, Jr.⁶⁴ The smaller group consisted of five U.N.C. and Duke University professors, and the members of this group were represented by Durham attorney Wade Penny, a recent graduate of the Duke Law School.

1. *The Trial of the Professors.*—The professors were called to trial first, on the single charge of "trespass" at Watts' Grill on the night of January 3. The North Carolina trespass law⁶⁵ makes it a misdemeanor for any person "after being forbidden to do so," to enter upon the lands of another without permission, or to remain upon the lands of another after being told to leave. The primary defense by the professors was that only Professor Amon (who had not been charged because of his head injuries) had entered the premises, and none of them had been told to leave the parking lot.

Duke math professor David Smith was tried first, in the regular February term of court before Superior Court Judge J. C. Hall. The first witness for the state was Mr. Watts, who testified that the professors had come into his restaurant and refused to leave when he told them to. On cross examination, Watts denied that he had used any force, denied any difficulty in controlling his emotions, but

⁶³ Durham Morning Herald, May 30, 1964, p. 1, col. 2.

⁶⁴ Attorney McKissick of Durham, North Carolina, is the National President of CORE, and by far the most experienced and well-known of the three attorneys. He reports that almost without exception the opposing counsel in his previously scheduled cases (both civil and criminal) denied him the courtesy of a postponement, and that consequently he was unable to participate in the Hillsboro demonstration trials.

⁶⁵ N.C. GEN. STAT. § 14-134 (1953): "If any persons being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor. . . ."

admitted to a series of convictions for trespass (upon the house of his former wife) and assault, the most recent being about two weeks earlier.⁶⁶

Deputy Sheriff W. E. Clark was the second state's witness. He testified that the professors were wet and huddled on the ground in front of the restaurant when he arrived, and that he arrested them when they refused to leave at the direction of the proprietor, Mr. Watts. The two Negro policemen who were the first officers on the scene were not called to testify.⁶⁷

The defense then put on four professors (two were not under charge, the other two were Methodist ministers at the Duke School of Divinity) who testified that Professor Amon entered the restaurant and was beaten and thrown out, but that none of the other professors entered the premises, or were ever told to leave the parking lot where they were being beaten with brooms and hosed with icy water when the sheriff arrived.⁶⁸

The jury apparently believed the testimony of Watts and the deputy sheriff, for it found Professor Smith guilty of trespass. Judge Hall sentenced Professor Smith to sixty days of hard labor on the state roads.

Had this sentence come at a later date, it would have seemed mild indeed. But at that time the *Raleigh News and Observer* called this "Mississippi Justice" and editorialized that:

Wherever the original blame may lie, they are manufacturing ill-will for North Carolina in the trial of the professors in the Orange County Superior Court in Hillsboro.

Already in important centers in the North shock and surprise has been registered as a result of the 60-day sentence given a young Duke math teacher for joining a group including Negroes peaceably seeking service at a Chapel Hill cafe.⁶⁹

The regularly scheduled February term of court then ended, and Judge Hall went elsewhere. A special term of court was called, and this time Judge Raymond B. Mallard presided. (The North Carolina judges ride circuit.)

The trials of the professors for trespass at the Watts Grill continued, and ultimately all were convicted. Judge Mallard called

⁶⁶ EHLE 217-18.

⁶⁷ *Id.* at 218.

⁶⁸ *Id.* at 219-25.

⁶⁹ Reprinted in the *Daily Tar Heel*, March 12, 1964, p. 2, col. 1.

three of them for sentencing and asked if they would again violate the trespass law.

Professor Herzog replied: "I acted in obedience to God as God gave me light to understand. I wanted to bear witness to the equality of all men before God and their fellow men." Judge Mallard asked a second time if he would again violate the trespass law. Professor Herzog replied: "I have done it once, and I have seen the consequences. I cannot again do the same." Judge Mallard sentenced him to a fine of fifty dollars and court costs.⁷⁰

Professor Wynn was asked the same questions and replied that he thought he had "exercised the best judgment . . . and shown the most responsibility to Christian and democratic traditions," that he had violated the trespass law as "an act of persuasion of the last resort in an attempt to change the law." Judge Mallard sentenced him to ninety days.⁷¹

Professor Osborn answered the Judge's questions with the comment that "If the circumstances arose again in which my conscience before God conflicted with the trespass law of the state—and I don't think it will—I don't think I could do otherwise." Judge Mallard sentenced him to ninety days.⁷²

Professor Herzog, the only one to escape with a fine, felt the worst. He wept outside the courtroom, feeling that the Judge had misunderstood his replies as a "recantation," whereas he had only intended to say that the courtroom hardship was so detrimental to his work and emotional well-being that he probably would never disobey another law.⁷³

2. *The Contempts of Court.*—As these sentences indicate, Judge Mallard is known as a hard judge, a stickler for the letter of the law. One widely circulated rumor has it that the Judge once sentenced and fined himself for contempt of court when he was a few minutes late in arriving at the bench.

When the special term opened, Judge Mallard was true to form. He made it clear that certain rules would be followed strictly, all of them enforced by the sheriff and his deputies. There was to be no reading ("This is not a reading room"), no eating or drinking ("This is not a lunchroom"), no talking or laughing ("This is a

⁷⁰ Chapel Hill Weekly, March 22, 1964, p. 1, col. 5.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ EHLE 242.

court of law"). Later, to the consternation of a woman spectator who happened in, there was a rule against knitting as well. Moreover, all defendants were required to be in the courtroom at all times.⁷⁴

Several of the defendants felt the wrath of these orders. On one occasion, Professor Klopfer, when his jury had retired for deliberation, left the courtroom and went to the clerk's office to make a few notes. Judge Mallard promptly ordered his bond forfeited. The stunned defendant returned at once and told the judge that he had been given permission on the previous day to work in the clerk's office, and had assumed this permission still held. Judge Mallard denied this, but did order the forfeiture of bond stricken.⁷⁵

Professor Wynn also got into trouble. His jury had been out for about an hour, the lunch period was nigh, no business was going on, and Wynn picked up a newspaper left near the defense table by some court attaché. Judge Mallard saw what was going on and immediately charged the professor with "‘contemptuously and insolently reading a newspaper in the courtroom’ during the trial."⁷⁶

⁷⁴ The students learned this lesson early. On the first day of the first trial, Judge Hall presiding, the solicitor called the roll of all the defendants. Twenty of them were on the porch of the courthouse, they entered when they were informed they were wanted inside, but were fined \$5.00 each. Ben Spaulding, nineteen-year-old Negro treasurer of the Chapel Hill Freedom Committee wrote a check for \$80.00 to cover the fines. A third party authorized to write checks had made a recent withdrawal, and the bank account at that time was \$79.52—forty-eight cents short of the \$80.00 fine. The check was not honored, Spaulding was indicted by the grand jury for writing a bad check, and was sentenced by Judge Mallard to serve four months in jail, suspended for five years. *Daily Tar Heel*, March 21, 1964, p. 1, col. 8.

⁷⁵ EHLE 232.

⁷⁶ *Daily Tar Heel*, March 8, 1964, p. 1, col. 6. A trial judge is authorized by the Constitution to punish summarily for contempt "where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *In re Oliver*, 333 U.S. 257, 275 (1948). A recent example of this is *Ungar v. Sarafite*, 376 U.S. 575 (1964), where a witness refused to answer questions when so directed by the judge and said: "I am being coerced and intimidated and badgered. The Court is suppressing the evidence." *Id.* at 580. If the alleged contempt is a personal attack on the judge, as in *Cooke v. United States*, 267 U.S. 517 (1925), or if the judge is personally embroiled in the contemptuous conduct, as in *Offutt v. United States*, 348 U.S. 11 (1954), or if the judge has a financial interest in the outcome of the suit, as in *Tumey v. Ohio*, 273 U.S. 510 (1927), or if the contempt is not in open court but *in camera* proceedings, as in *In re Murchison*, 349 U.S. 133 (1955), or where there is "bias, or such a likelihood of bias or an appearance of bias that the judge . . . [is] unable to hold the balance between vindicating the interests of the court and the interests of

The judge fined the professor ten dollars.

The third "contempt" was against Gary Blanchard, the co-editor of the student *Daily Tar Heel*. Earlier, the *Tar Heel* had protested the judge's rule against studying while in forced attendance in the courtroom, and ended the editorial with this paragraph: "After several hours of this iron-hard courtroom discipline, you begin to get an idiotic urge to stand, stretch, yawn, and say to Judge Mallard something like, 'Well, I've had enough of this nonsense. I'm going home.'"⁷⁷

Blanchard had covered the demonstration at the Watts' Grill for the *Tar Heel*, and testified on behalf of the Duke professors in regard to the "trespass" that he had been present and had not heard Mr. Watts order the professors to leave his property. On cross-examination, Solicitor Thomas Cooper attempted to attack the credibility of Blanchard by asking him about the earlier *Tar Heel* editorial:

Question: Mr. Blanchard, do you feel this court is nonsense?

Answer: No, sir, I do not.

Question: Do you feel, sir, that the Court's action in attempting to keep order and to keep the courtroom quiet for its business, is nonsense?

Answer: Some of the restrictions imposed to ensure the end of orderly justice, to which all of us agree, I did feel to be nonsensical.⁷⁸

Blanchard was allowed to step down at this point, and nothing was said. At the end of the day, however, Judge Mallard called Blanchard to the bench and told him to come back the next day and "show cause" why he should not be cited "for direct contempt expressed in testimony under oath in court which tends to discredit this court."⁷⁹

the accused," *Ungar v. Sarafite*, 376 U.S. 575, 588 (1964), the Constitution requires the judge to disqualify himself from the contempt proceedings. Otherwise, the trial judges can preside over the contempts committed in their presence, for the Supreme Court will not "assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority. . . ." *Id.* at 584.

⁷⁷ *Daily Tar Heel*, March 7, 1964, p. 2, col. 2.

⁷⁸ *Raleigh News and Observer*, March 11, 1964, p. 4, col. 2.

⁷⁹ *Id.*, March 19, 1964, p. 2, col. 2. It is now well-established that out-of-court statements by litigants, *Bridges v. California*, 314 U.S. 252 (1941), by newspapers, *Pennekamp v. Florida*, 328 U.S. 331 (1946), *Craig v. Harney*, 331 U.S. 367 (1947), and by attorneys for litigants, *In re Sawyer*, 360 U.S. 622 (1959), are protected by the first amendment from judicial punishment, no matter how false, how defamatory the statements may be.

Blanchard returned the next day with Barry Winston, a young attorney from Chapel Hill. For the first time since the trials started, reporters from the major state newspapers and television stations were present. "The word had evidently gone out that a newspaperman was in trouble in Hillsboro."⁸⁰

Attorney Winston asked the judge to dismiss the contempt charges, pointing out that Blanchard had no choice but to answer as he had: if he refused to answer, he would be in contempt; if he lied, he would be guilty of perjury and contempt; his answer was the only one possible, and, referring as it did to the earlier editorial, fell within the protection of first amendment freedom of press.

The judge skirted around the issue. He ruled that the Blanchard testimony was "considered contemptuous" but that owing to a number of circumstances including "the apparent immaturity of the respondent, the court takes no further action and respondent is discharged."⁸¹

3. The Removal to Federal Court.—The Chapel Hill defendants grew restless as they attended each day of the professors' trials, and became distressed by what they saw. In a surprise move, the attorneys for the student defendants removed 730 demonstration

A recent illustration of this is *Wood v. Georgia*, 370 U.S. 375 (1962), which started when the three superior court judges of Bibb County, Georgia, charged a grand jury that it should look into allegations that elected officials had "bought" a "Negro block vote." This charge to the jury was issued before invited representatives of the press, and the obvious target was Sheriff Wood. The sheriff immediately called a press conference of his own where he attacked the judges in no uncertain terms: calling the grand jury investigation "race agitation" and comparing the judges with the Ku Klux Klan. The sheriff personally carried a copy of his press release to the grand jury room where it was delivered to the grand jurors. Mr. Justice Harlan described this as action by "a member of its official entourage who has scandalized the conduct of the court in relation to and during the course of a pending judicial proceeding. . . ." *Id.* at 395. The press release had been issued from the sheriff's office in the courthouse, and the subsequent contempt citation charged that its language "imputed lack of judicial integrity to the three judges" and "created . . . a clear, present and imminent danger to the investigation being conducted . . . and . . . to the proper administration of justice in Bibb Superior Court." *Id.* at 381. The sheriff was adjudged guilty of contempt, and his conviction was affirmed by the Georgia courts. But the Supreme Court reversed the conviction as an abridgement of the sheriff's liberty of free expression. The Court concluded that the sheriff's conduct "did not present a danger to the administration of justice . . .," *id.* at 395, and that the naked conclusion of the Georgia judges that it had this "tendency" did not make it so. The above Supreme Court decisions are slender reeds indeed if they can be circumvented by the route utilized against editor Gary Blanchard.

⁸⁰ EHLE 236.

⁸¹ Daily Tar Heel, March 19, 1964, p. 1, col. 4.

charges for trial to the federal district court in Greensboro. This was done pursuant to a provision in the Civil Rights Act of 1866⁸² which authorizes the removal of any state criminal prosecution under either of two circumstances: first, when the criminal prosecution is brought against a person "who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States . . .," or, second, when the state criminal prosecution results from "any act under color of authority derived from any law providing for equal rights. . . ."

Superior Court Judge Mallard was obviously angry and termed the removal petition a "false and scurrilous attack upon every court in North Carolina and upon the Supreme Court as well."⁸³ Solicitor Thomas D. Cooper, Jr., immediately filed a motion in the federal court to remand the cases back to the state court. North Carolina Assistant Attorney General Ralph Moody joined with Solicitor Cooper in this motion to remand and argued that there was no statute in North Carolina which prohibited a fair trial and that the trespass laws under which the defendants were charged "are neutral and applicable to both white and colored."⁸⁴

On March 20, Federal District Judge Edwin M. Stanley sent the cases of the 217 student demonstrators back to the state court in Hillsboro for trial. He ruled that he would "not presume that the courts of the state will not decide constitutional questions in harmony with the United States Supreme Court's determination of the Federal Constitution" and that "since no discriminatory state statutes or constitutional provisions are claimed, it is abundantly clear that the petitioners must look to the state courts for the protection of any rights they may have under the Constitution and laws of the United States."⁸⁵

4. *The Nolo Contendere Pleas.*—When the cases were returned for trial to the North Carolina Superior Court in Hillsboro, there was another surprise. The approximate 117 defendants involved in the street sit-down of February 7 threw themselves on the mercy of the Court by pleading *nolo contendere* to the charge of blocking the highway and to the related charge of resisting arrest. This plea

⁸² 28 U.S.C. § 1443 (1959).

⁸³ Daily Tar Heel, March 14, 1964, p. 3, col. 6.

⁸⁴ Chapel Hill Weekly, March 18, 1964, p. 1, col. 5.

⁸⁵ *Id.*, March 22, 1964, p. 1, col. 8.

(from the Latin, "I will not contest") has much the same effect as a plea of "guilty" in so far as sentencing is concerned, but unlike a plea of guilty the *nolo contendere* plea may not be used as an admission in other proceedings elsewhere. Solicitor Cooper agreed to *nolle prosequi* or refrain from prosecuting the approximate 700 trespass and other resisting arrest charges against these 117 defendants, "with leave," however, to change his mind on this matter and reopen the proceedings.⁸⁶

There is no sure explanation for this *nolo contendere* plea. Had each individual defendant insisted upon his right to a jury trial on the hundreds of charges, the court proceedings would have gone on for many weeks, if not months, at great expense to the state and to the defendants.

When the federal judge remanded the cases back to the state court in Hillsboro for trial, the *News of Orange County* commented on "the slow course of the 1,200 cases yet pending trial," and said: "It is known that discussions are going on at a decision-making level as to the possibility of speedier disposition."⁸⁷ Attorneys for the student defendants publicly denied that there had been a "deal." However, the students told novelist John Ehle that the decision to plead *nolo contendere* had been made at a packed meeting of all those charged with street-blocking, on the understanding (from their attorneys) that if they pleaded *nolo contendere*, and showed penitence, only a few leaders would go to jail on sentences of not more than ninety days; the others would be let off with a harsh scolding and suspended sentences. All charges except for the single charge of "street-blocking," so the students understood, would be dropped by the District Solicitor.⁸⁸

5. *The Sentences.*—The university community of Chapel Hill has long felt it necessary to punish "street-blocking." In Book 2 at page 145 of the Chapel Hill Ordinances it is made unlawful to "obstruct a public street or highway . . . in such a manner as to delay, impede and hinder the free passage of the public along and over said highway." Violation of this ordinance is punishable by a fine of fifty dollars or by confinement up to thirty days.

Unlike the Aldermen in Chapel Hill, the North Carolina legislature had never before felt it necessary to punish street-blocking

⁸⁶ *Id.*, April 26, 1964, p. 1, col. 7.

⁸⁷ Quoted in EHLE 265.

⁸⁸ *Id.* at 265.

as such. The North Carolina legislature had deemed it necessary to prohibit and punish the use of profane or indecent language on the highway,⁸⁹ to make it unlawful for any person to place glass or injurious obstructions on the highway,⁹⁰ or to obstruct highway drains,⁹¹ but there was no general prohibition against blocking highways. The only such provision was limited in operation. Entitled "Obstructing way to places of public worship," it makes it a misdemeanor for any person to "stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation."⁹² The legislature has now seen fit, however, to prohibit sitting or lying upon highways or streets.⁹³

The grand jury indictments against the Chapel Hill demonstrators were verbatim copies of the Chapel Hill ordinance, and in many cases the indictments referred to their source, Book 2, Page 145 of the Chapel Hill Ordinances. In short, the only relevant offense was that made unlawful by Chapel Hill ordinance, the demonstrators were charged by the grand jury with violating this ordinance, and the maximum penalty permitted by this ordinance was thirty days in jail. The demonstrators were not risking much when they pleaded *nolo contendere*.⁹⁴

⁸⁹ N.C. GEN. STAT. § 14-197 (Supp. 1963).

⁹⁰ N.C. GEN. STAT. § 136-91 (1964).

⁹¹ N.C. GEN. STAT. § 136-92 (1964).

⁹² N.C. GEN. STAT. § 14-199 (1953). A similar provision is found in the statutes dealing with roads and highways. N.C. GEN. STAT. § 136-90 (1965) makes it unlawful for any person to obstruct "any highway, cartway, mill road or road leading to and from any church or other place of public worship. . . ." The section makes it unlawful for any person "to hinder or in any manner interfere with the making of any road or cartway laid off according to law."

⁹³ N.C. GEN. STAT. § 20-174.1 (1965 Advance Legislative Service No. 2), which provides: "(a) No person shall willfully stand, sit, or lie upon the highway or street in such a manner as to impede the regular flow of traffic. (b) Any person convicted of violating this section shall be punished by fine or imprisonment, or both in the discretion of the court." Cf. *Garner v. Louisiana*, 368 U.S. 157 (1961), where the amendment of the trespass law was an indication "that the Louisiana trespass statute in force at the time of the petitioners' arrests would probably not have applied to these facts." *Id.* at 164 n.11.

⁹⁴ It is well-established constitutional law that when a grand jury returns an indictment the defendant can only be found guilty of the charge made, otherwise the grand jury is put to naught. "Conviction upon a charge not made would be sheer denial of due process." *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among

But they might have had second thought when they heard about the speech Judge Mallard gave to the Future Farmers of America. During an overnight court recess, the Judge saw fit to discuss the pending Chapel Hill cases publicly, and, as the Greensboro *Daily News* saw it, "straight from the hip." Judge Mallard told his young audience that the "alien in North Carolina," with "Yankee money," is feeding young Tar Heels a "bill of goods." According to the news story, he went on to say that the demonstrators "lying down in Chapel Hill streets" had been sent from the north and that "they were paid \$6 per day from northern funds."⁹⁵

The penniless demonstrators, practically all life-time residents of Chapel Hill or students at the University there, were apprehensive that the Judge should speak thus prior to sentencing, and their apprehension deepened when the Judge told one young demonstrator that he was serving the cause of an "international conspiracy."⁹⁶

Although all the demonstrators were equally guilty of the charge to which they pleaded *nolo contendere*, the Judge was lenient with the Negro demonstrators; only one received an active jail sentence, and he had been described by the County Solicitor as "the ramrod."⁹⁷ The Judge was lenient with the girl demonstrators; only one received an active jail sentence, and she had been described by the District Solicitor as from California.⁹⁸ The Judge was not lenient on the young white men who had been leaders in the demonstrations.

the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). In the *Cole* case, the defendants had been indicted for violation of § 2 of a statute and sent to jail for violation of § 1 of that statute. The Supreme Court reversed with the comment that "it is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." 333 U.S. at 201.

⁹⁵ Greensboro *Daily News*, April 21, 1964, p. 4A, col. 7, quoted in EHLE 271.

⁹⁶ After the sentencing, John Dunne wrote a letter home complaining that Judge Mallard did not "lecture us about our lack of responsibility" or "about the wrongness of civil disobedience as a method" (all of which Dunne thought debatable). "Instead," continued the letter, "he spoke in the incredibly ignorant and guilt-ridden words of the Klan, that we are all pawns or malicious agents of 'the international conspiracy,' that we were all paid \$6.00 a day by Northern funds." *Id.* at 279.

⁹⁷ *Id.* at 273.

⁹⁸ *Id.* at 271.

John Dunne, the co-chairman of the Chapel Hill Freedom Committee, is a mystery to some whites who reason that other whites go into the integration movement because they are unsuccessful in their own society. Dunne is a native of Ohio and a graduate of the Choate prep school in Connecticut. There, he was awarded the School Seal Award for leadership, was voted the outstanding musician in his class (violin), was a star fullback on the football team, and was awarded the Joseph P. Kennedy Memorial Scholarship. He entered the University of North Carolina with one of the prized Morehead Scholarships,⁹⁹ and was an honor student until he dropped out in his senior year to give full time to the local integration activities. Judge Mallard sentenced him to twelve months in jail on the charge of obstructing traffic and to two years in jail on the charge of resisting arrest: the two-year sentence, however, to issue "upon further orders of the court at any time in the next five years."¹⁰⁰

Pat Cusick, another of the Freedom Committee leaders, was born and raised in Gadsden, Alabama, where his great-grandfather had founded the Ku Klux Klan. He attended a Catholic boarding school in Alabama where he was taught that segregation was morally wrong. At the University, he was active in the Student Peace Union¹⁰¹ and, one course short of a B.S. degree in mathematics, dropped out of the University to give full time to the Chapel Hill Freedom Committee. Judge Mallard sentenced him to a term of twelve months in jail on the charge of obstructing traffic and to a term of two years in jail on the charge of resisting arrest. The two-year jail sentence was suspended for a period of five years with the condition that Cusick not engage in or be a part of, or physically associate with any demonstrations or physically accompany any person or persons engaged in any demonstrations for any cause, on any public street, highway, or sidewalk, or any other public place in North Carolina.¹⁰²

Lou Calhoun was also a senior at the University of North Carolina. Born in Alabama and reared in Tennessee, he was a Golden Gloves boxing champion. At the University, he worked his way through as a waiter and had headed the Methodist Wesley Founda-

⁹⁹ *Id.* at 4.

¹⁰⁰ Chapel Hill Weekly, April 26, 1964, p. 1, col. 7.

¹⁰¹ *ENLE* 6-8.

¹⁰² Chapel Hill Weekly, April 26, 1964, p. 1, col. 7.

tion.¹⁰³ Judge Mallard sentenced him to six months in prison, the sentence to start when Calhoun graduated from college.¹⁰⁴ So it went. J. V. Henry, a recent graduate from the University and a native of Asheville, received the same sentence as Dunne—twelve months in jail and a fine of 150 dollars. Buddy Tieger, a former Angier B. Duke Scholar and recent graduate of Duke University, was sentenced to a year in jail and a fine of 250 dollars. Quinton Baker, the only Negro to go to jail, was sentenced to six months and a fine of 150 dollars, the jail sentence to commence upon his graduation from North Carolina College in Durham. Rosemary Ezra, the first Jewess ever to enter the Women's Prison, was sentenced to six months and fined 500 dollars for obstructing traffic.¹⁰⁵

The rank-and-file defendants received jail sentences ranging in severity from twelve months to ten days. These sentences were suspended, however, with "probations carrying absolute prohibitions against participation in any public demonstrations."¹⁰⁶

Judge Mallard's sentences stripped the Chapel Hill Freedom Committee of its leaders (who were sent to jail) and of its followers (who were prohibited from any public demonstration for any cause). And the Chapel Hill Freedom Committee was deeply in debt.

The jail sentences were suspended, in part, on the condition that each defendant pay his court costs, which were assessed at around 81 dollars. With over 100 such defendants, this was quite a sum for the students to pay. Moreover, there were many fines levied, ranging from a low of fifty to a high of 500 dollars. And there were expenses of "bonding" which had to be met: upon arrest, there was a bond of 175 dollars to ensure appearance before the Chapel Hill Recorder's Court; when the cases were transferred to the superior court in Hillsboro (as they all were), there was an additional bond of another 175 dollars to ensure appearances there. The total bonding fees exceeded 7,500 dollars; and the out-of-pocket expenses for court costs and court fines were even larger.

¹⁰³ EHLE 14.

¹⁰⁴ Chapel Hill Weekly, April 26, 1964, p. 1, col. 7.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

I. Conclusion

What, if anything, was gained by this heavy expenditure of money, of time in jail, of disruption to the normal community activities? Not a single restaurant, cafe, or motel which refused to serve Negroes when the demonstrations began in December had changed its policies when the Chapel Hill Freedom Committee was broken in April. There was some slight shift in the opposite direction. A radio repair shop refused to accept former Negro customers; and a downtown florist refused to sell flowers to student leaders who advocated a student boycott of segregated businesses.¹⁰⁷

But there was something on the credit side. Freedom Committee leaders speak of a newly-developed spirit in the Negro community, a spirit of confidence, of energy, of determination. And they point to voter registration in the Negro wards, up fifty per cent and more over the level when the December demonstrations began.

And the demonstrations reached the conscience of the white community, or at least some of its members. The mother of one of the demonstrators put it this way:

On Sunday night, Dec. 19, at midnight an official of the University of North Carolina called to tell me my son was in the Chapel Hill jail. . . .

He explained that a group of Negro and white youths entered a restaurant which does not serve Negroes. They were refused service, ordered out, but would not leave. . . .

I knew about demonstrations, arrests for trespassing and resisting arrest, for Greensboro has been a center of Negro protests.

The Negroes—yes, but my boy is white. He can eat anywhere, with anyone, except Negroes. What was his cause? . . .

I went back to bed—to get warm, to hide and cry in the dark. “Charles is in jail in Chapel Hill,” I explained the call to his father. . . .

“You mean he doesn’t want to get out,” I cried when the officer said Charles was among those refusing bail.

Charles did get out for Christmas. We didn’t bail him out, belittle his efforts or his actions. I wanted to tell him to pursue his studies and forget the cause. To educate a son is an expensive process and we just cannot finance “the cause.” I wanted to tell him he would lose friends by participating in the movement. I wanted to tell him he should take the middle of the road as we have done. But when it came time I couldn’t say anything.

¹⁰⁷ Daily Tar Heel, March 11, 1964, p. 1, col. 7.

Charles has returned to Chapel Hill and was in jail again on New Year's Eve. Again I wondered if he was warm, hungry, uncomfortable. . . . I was very sad and yet proud.

Even I am beginning to wonder if there really is some other way. Maybe he is right. I grew up in a little town down next to the South Carolina line and Negroes to my people were always just "niggers."

But Charles is a generation apart and maybe his mother's attitudes are dead wrong. Maybe I am just beginning to understand.¹⁰⁸

The Chapel Hill demonstrators did not persuade the Chapel Hill Aldermen to enact a local public accommodations law; but these demonstrators, with thousands of others in hundreds of similar demonstrations throughout the South took their case, as the *Chapel Hill Weekly* urged, "to higher authority."¹⁰⁹ On July 2, 1964, President Johnson signed the Civil Rights Act of 1964¹¹⁰ into law. That law makes it unlawful for the Pines, the Rock Pile, the Watts Grill, and all other restaurants and motels in Chapel Hill, in North Carolina, and throughout the country to discriminate in service on the basis of race.¹¹¹ This, then, is the due of the demonstrators.

J. Addenda

On July 3, several of the Chapel Hill youngsters decided to "test" the effectiveness of the federal law. They went to Brady's Restaurant and were served. They went to Watts Grill and were denied service. One of them asked why Mr. Watts did not comply with the Civil Rights Act, and as he later told it, "Austin Watts hit him hard in the jaw with his fist." He may have been hit a second time before hitting the floor. "By this time, there were fifteen or twenty people there . . . and they started slugging others in our group. We went for our cars and a woman stuck a butcher knife into the window of the car I was in and said, 'I'm going to kill all you niggers and nigger lovers.' " Charges of assault were filed against Mr. Watts, he was found guilty in the Chapel Hill Recorder's Court, and Judge Jim Phipps laid upon him the penalty of ten dollars and forty cents court costs.¹¹²

¹⁰⁸ *Id.*, Jan. 7, 1964, p. 3, cols. 5-8.

¹⁰⁹ See text accompanying note 38 *supra*.

¹¹⁰ 78 Stat. 241.

¹¹¹ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

¹¹² EHLE 293-94.

The next day, Independence Day, July 4, the Reverend Charles Jones led a team of interracial groups into all the segregated restaurants, including Watts, and received service. By noon they could report the integration of just about all the places of public accommodations in Chapel Hill.¹¹³

In August, 1964, the students jailed by Judge Mallard in April were paroled from prison. John Dunne received a scholarship from Harvard College to complete his senior year. Quinton Baker received a similar scholarship from the University of Wisconsin. Buddy Tieger received a fellowship from Brandeis University for graduate study. Lou Calhoun was paroled to the Christian Association in Philadelphia to work (as he had in the past) as a counselor at a camp for the disadvantaged youngsters. Pat Cusick went to Boston to work in a "poverty program."¹¹⁴

In early December, 1964, Governor Sanford commuted the sentences and fines of all Chapel Hill demonstrators then appealing their convictions. This included the professors who had participated in the January 3 demonstrations at the Watts Grill.¹¹⁵

In mid-December, 1964, the Commissioners of Orange County adopted the following resolution: "We...do hereby commend Judge Raymond B. Mallard for his devotion to his judicial duties and for (his) learned and impartial manner...and for his deep knowledge of humanity as shown by judgments rendered, all in the highest tradition of the administration of justice in the state of North Carolina."¹¹⁶

In late December, 1964, the Supreme Court of the United States freed all demonstrators in a ruling that the Civil Rights Act of 1964 was effective retroactively.¹¹⁷ As John Ehle put it, "This did away with hundreds of charges against Chapel Hill demonstrators and complicated to near-distraction the debate about who all along had indeed been on the side of law and who against it."¹¹⁸

II. THE LEGAL PROBLEMS

Solutions to the legal problems arising out of the Chapel Hill demonstrations, like the similar legal problems arising out of the

¹¹³ *Id.* at 293.

¹¹⁴ *Id.* at 310, 311.

¹¹⁵ *Id.* at 337.

¹¹⁶ *Id.* at 338.

¹¹⁷ *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964); *Blow v. North Carolina*, 379 U.S. 684 (1965).

¹¹⁸ EHLE 337.

new student demonstrations generally, are at best unsettled. The tactics are new, the conflicting societal interests must be balanced in a novel environment. Precedents are few; abstract reasoning of necessity is colored by the viewpoint of the speaker. It follows that the conclusions drawn below are tentative and conjectural.

A. *Resisting Arrest by "Going Limp"*

The student demonstrators typically "sat in" at the segregated restaurants, and when the police arrived, "went limp" and had to be carried by the policeman to the waiting police cars.¹¹⁹ The students denied that they were "resisting" arrest; they claimed that they were merely refusing to assist in their arrest. Nevertheless, each demonstrator who "went limp" was charged under General Statutes section 14-223 which provides that: "If any person shall wilfully and unlawfully resist, delay, or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor."¹²⁰

There are very few North Carolina reported decisions construing this statute. Most of them go to form rather than substance, and construe the statute closely, and in favor of the defendants.¹²¹ *State v. Estes*,¹²² however, provides guidelines. There, a state

¹¹⁹ See, e.g., text accompanying note 49 *supra*.

¹²⁰ N.C. GEN. STAT. § 14-223 (1953).

¹²¹ Most of the recently decided cases dismiss the indictments because of error in form. See, e.g., *State v. Dunston*, 256 N.C. 203, 123 S.E.2d 480 (1962); *State v. Scott*, 241 N.C. 178, 84 S.E.2d 654 (1954); *State v. Mobley*, 240 N.C. 476, 83 S.E.2d 100 (1954); *State v. Raynor*, 235 N.C. 184, 69 S.E.2d 155 (1952). Other states also have construed comparable statutes in favor of the defendants. In *Cooksey v. State*, 84 Ark. 485, 106 S.W. 694 (1907), the city marshal testified that he had told Cooksey to go to court to pay a fee, but that Cooksey refused and that

the next time I saw him he was in the butcher shop, and I went in there and told him he hadn't gone, and that he must go, and he said I couldn't carry him, and I told him he was too large for me to "tote." . . . Later in the evening he came and sat down by the blacksmith shop, and I walked up and said to him, "Mr. Cooksey, you must go down to the court with me," and he said, "All right, I will go up and appear, but I don't want you to go with me," and I said, "All right." He then got up and went to court.

Id. at 486-87, 106 S.W. at 674-75. The jury convicted on this evidence, but the Arkansas Supreme Court reversed: "There was no evidence of an attempt to arrest appellant, and consequently there was no resistance or an obstruction to an arrest. The officer's effort seems to have been to persuade him to go of his own volition to court, and he finally agreed and did go." *Id.* at 487, 106 S.W. at 675.

¹²² 185 N.C. 752, 117 S.E. 581 (1923).

health officer testified that he went to the defendant's store in Granite Falls, shook hands with him, and said:

"I find you have not complied with the law with regard to your toilet"; that the defendant cursed him, and replied, "I don't want you to follow me another inch"; that the witness rejoined, "It is the law..."; that defendant again cursed him, and the witness asked whether the defendant meant to obstruct him as a public officer, and the defendant said that was exactly what he meant; that the witness then started out, and the defendant used obscene language. . . .

"Defendant at no time rose from his desk and did not strike or offer to strike me. He made no demonstration of violence whatever."¹²³

The defendant was charged with violation of a statute which provides that "Any person or persons who willfully interfere with or obstruct the officers of the State Board of Health in the discharge of any of the aforementioned duties shall be guilty of a misdemeanor. . . ."¹²⁴ The trial judge, after hearing the above testimony, directed the jury to find the defendant guilty if they believed the testimony to be true. The jury convicted. The North Carolina Supreme Court reversed and held:

In the present case there was no force or violence; but if the jury should find from the evidence that the defendant at the time used language or was guilty of conduct which was calculated and intended to put the officer in fear or to intimidate or impede him as a man of ordinary firmness in the present discharge of his official duties and did thereby hinder or impede him, the defendant would be guilty. These, however, are questions of fact for determination by the jury, and not inferences of law for the decision of the court.¹²⁵

In short, a defendant does not "willfully interfere with or obstruct" an officer unless he impedes an officer "of ordinary firmness in the present discharge of his official duties."

Decisions from other jurisdictions add flesh to this bare-bones legal definition.¹²⁶

¹²³ *Id.* at 753, 117 S.E. at 581.

¹²⁴ *Id.* at 754, 117 S.E. at 582. (Citation omitted.)

¹²⁵ *Id.* at 755, 117 S.E. at 583.

¹²⁶ *Despard v. Wilcox*, 102 L.T.N.X. 103 (1910), is an English case with only surface relevance. There, a large group of suffragettes from The Women's Freedom League assembled in front of No. 10 Downing Street to deliver a petition to the Prime Minister. An even larger group of spectators gathered around, thereby blocking the street. The women were

In *Charge To Grand Jury*,¹²⁷ Circuit Judge Curtis explained to the jurors a federal statute making it unlawful to "obstruct, resist, or oppose" the federal officials. Hundreds of Boston citizens had stood shoulder to shoulder to prevent federal marshals from executing warrants under the Fugitive Slave Act.¹²⁸ The judge explained that:

[I]f a multitude of persons should assemble, even in a public highway, with the design to stand together and thus prevent the officer from passing freely along the way...and the officer should thus be hindered or *obstructed*, this would, of itself, and without any active violence, be such an obstruction as is contemplated by this law. If to this be added, use of any active violence, then the officer is not only *obstructed*, but he is *resisted* and *opposed*....¹²⁹

In short, "to obstruct" is to prevent and frustrate the execution of the police obligation; to "resist and oppose" contemplates active violent obstruction.

District Judge Dyer gave a similar construction to the federal statute in *United States v. McDonald*.¹³⁰ He charged the jury that:

The words of the statute are, "obstructs, resists or opposes any officer of the United States." Resistance to an officer is to oppose him by direct, active and more or less forcible means. It means something more than to hinder, or interrupt, or prevent, or baffle, or circumvent. The gist of the offense of resisting is personal resistance of the officer... by direct, active, and in some degree forcible means.¹³¹

The court then added that the statute also includes "willful acts of obstruction or opposition" and that

to obstruct is to interpose obstacles or impediments, to hinder, impede or in any manner interrupt or prevent, and the term does not necessarily imply the employment of direct force, or the exercise of direct means. It includes any passive, indirect or

arrested and convicted of violating two statutes. One required the police to keep Downing Street free from congestion, the other made it unlawful to obstruct the police in the performance of their duty. As the women did not in any way resist the arrest, the basis of the conviction in reality was "street blocking" rather than obstructing the police.

¹²⁷ 30 Fed. Cas. 983 (No. 18,250) (D. Mass. 1854).

¹²⁸ 9 Stat. 482 (1850).

¹²⁹ 30 Fed. Cas. at 984. (Emphasis added.)

¹³⁰ 26 Fed. Cas. 1074 (No. 15,667) (E.D. Wis. 1879).

¹³¹ *Id.* at 1076-77.

circuitous impediments... such as hindering or preventing an officer by not opening a door or removing an obstacle or concealing or removing property.¹³²

More current federal decisions are even more demanding in their requirement that there be an overt, active, and more or less forcible hindrance. In *Long v. United States*,¹³³ federal officials had a warrant for the arrest of one Carl Ballard. They went to the home of Long (where they believed Ballard to be hiding) and knocked on the door. Long delayed in opening the door, and when he did, denied that Ballard was there. The officers then searched the house and found Ballard hiding in the attic. Long was tried under a federal statute¹³⁴ which punishes whoever "forcibly assaults, resists, opposes, impedes, intimidates, or interferes" with the performance of official duties by federal officers. The trial court instructed the jury that it could find Long guilty if it found that Long had attempted to mislead the officer or had delayed in opening the door. The Fourth Circuit (per Chief Judge Parker) reversed the conviction and held that the "resisting" statute did not apply unless there was "some use of force or threat to use it or display of force in such a way as to intimidate or interfere with the officer..."¹³⁵

*Miller v. United States*¹³⁶ arose in a similar factual context. Federal marshals had a subpoena to serve on Richard Morris (wanted as a witness in a bankrobbing case) and went to the house of Evelyn Miller, his cousin. The marshals saw the wanted man in the back yard, knocked on the front door and demanded entrance. Miss Miller would not let them in without a search warrant, and told them that Morris was not there. The officers then separated, one kept watch on the house, the other obtained an arrest warrant, and within a few hours they captured Morris in the home of Evelyn Miller.

Miller was then indicted and convicted under a statute which punishes "whoever knowingly and willfully obstructs, resists, or opposes any officer of the United States... in serving... any legal... process."¹³⁷ The Fifth Circuit (per Judge Brown) reversed the conviction. It said that there was no resisting, obstructing, or

¹³² *Id.* at 1077.

¹³³ 199 F.2d 717 (4th Cir. 1952).

¹³⁴ 18 U.S.C. § 111 (1958).

¹³⁵ 199 F.2d at 719.

¹³⁶ 230 F.2d 486 (5th Cir. 1956).

¹³⁷ 18 U.S.C. § 1501 (1958).

opposing the officers when Miller gave them information which she and the officers knew to be false. There was "an irritation and an annoyance" but no more because the lie "did not deflect the officers from their conviction that Morris was in the house and their determination to wait him out or enter after him once the Warrant of Arrest was received."¹³⁸

In *District of Columbia v. Little*¹³⁹ the homeowner was convicted at the trial court under a statute which made it unlawful to interfere with or prevent any inspection by a health officer.¹⁴⁰ A health officer had received a complaint about the home of Geraldine Little, and went there to inspect. Little refused to unlock the door so he could enter, and remonstrated against his attempts to enter without a search warrant. The Supreme Court reversed the conviction and held that

even if the Health Officer had a lawful right to inspect the premises without a warrant, we are persuaded that respondent's statements to the officer were not an "interference" that made her guilty of a misdemeanor under the controlling district law. . . . [M]ere remonstrances or even criticisms of an officer are not usually held to be the equivalent of unlawful interference. . . . The word "interfere" . . . cannot fairly be interpreted to encompass respondent's failure to unlock her door. . . .¹⁴¹

The Court pointed out that "Had the respondent not objected to the officer's entry of her house without a search warrant, she might hereby have waived her constitutional objections."¹⁴²

The decisions by the state supreme courts also indicate that mere passive conduct which does not in fact frustrate the officers in the performance of their duty does not come within the scope of the normal "resisting" arrest statute.

In *People v. Pilkington*¹⁴³ the defendant advised some friends being arrested "to keep their mouths shut, and that a lawyer would be soon on the way." The New York court held that this did not

¹³⁸ 230 F.2d at 489.

¹³⁹ 339 U.S. 1 (1950).

¹⁴⁰ Commissioners' Regulations Concerning the Use and Occupancy of Buildings and Grounds, promulgated April 22, 1897, amended July 28, 1922, quoted in *District of Columbia v. Little*, *supra* note 139, at 4-5 n.2.

¹⁴¹ 339 U.S. at 4, 6-7.

¹⁴² In *Frank v. Maryland*, 359 U.S. 360 (1959), the Supreme Court held that the concept of the fourth amendment did not preclude the state from punishing a householder for denying entrance to a health officer even though the health officer lacked a search warrant.

¹⁴³ 103 N.Y.S.2d 64 (Broome County Ct. 1951).

"harm, obstruct, or resist any officer . . . in the performance of any duty"; and that the "right of free speech . . . shall [not] be denied . . . [a] citizen in order to cast a perfect calm over the . . . officer making an arrest."¹⁴⁴

*State v. Scott*¹⁴⁵ arose from a charge to the jury that if one told an officer that "he would not be arrested and would die first" he would be resisting the officer. The Louisiana Supreme Court reversed a conviction under the statute which makes it unlawful "to oppose, resist or assault any officer. . . ."¹⁴⁶ The Court explained that "If an officer is deterred from making the arrest by the mere announcement of an intention not to be arrested, he may be said to have been dissuaded, but cannot be said to have been actually opposed or resisted; and the statute provides only for the latter." It is only when there are circumstances "affording the officer reasonable ground to believe that he could not proceed with the arrest without incurring evident risk of serious injury"¹⁴⁷ that the statute is violated.

In *Knoff v. State*,¹⁴⁸ the defendant was convicted under a statute which punished any person "who willfully delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office. . . ."¹⁴⁹ The trial evidence was given by an officer who said he went to defendant's house to "attach" some cotton. The officer testified: "I walked up to where they were sitting down, eating dinner, and I asked him to pay it. He said, 'No'; and I said, 'I will have to attach this cotton.' He got up from where he was eating dinner, and started toward me, and said, 'Get off the place.' He had a knife or something in his hand."¹⁵⁰ The Oklahoma Court reversed the conviction, holding that there had been no "obstruction" within the meaning of the statute since the officer had been able to attach the property.

Georgia made it unlawful for any person to "willfully obstruct, resist, or oppose" an officer.¹⁵¹ In *Hutchinson v. State*,¹⁵² the Georgia Court of Appeals held that this statute was not violated

¹⁴⁴ *Id.* at 65.

¹⁴⁵ 123 La. 1085, 49 So. 715 (1909).

¹⁴⁶ *Id.* at 1085, 49 So. at 716.

¹⁴⁷ *Id.* at 1086, 49 So. at 716.

¹⁴⁸ 18 Okl. Cr. 36, 192 Pac. 596 (1920).

¹⁴⁹ *Id.* at 37, 192 Pac. at 596.

¹⁵⁰ *Id.* at 38, 192 Pac. at 597.

¹⁵¹ Ga. Penal Code 1910, § 311.

¹⁵² 9 Ga. App. 62, 70 S.E. 352 (1911).

when the defendant "placed himself in the door of a house and violently threatened an officer, by declaring that a summons for a named person could only be served over his dead body." The Court explained that: "Neither threats alone, unaccompanied by any effort or apparent intention to execute them, nor even the doing of an act which impedes, delays, or defeats the executions of the process with which the officer is armed, but without resisting him, is sufficient to constitute the offense. . . ." ¹⁵³

*Moses v. State*¹⁵⁴ is even closer to point. There, the defendant was arrested by a deputy sheriff on a warrant charging "wife-beating." The defendant made no resistance to the arrest, and drove the deputy sheriff in his buggy to the jail. There, however, the defendant said

he was not going to jail; that he had done nothing for which to go to jail. He tried to jerk loose from the officer two or three times, and the officer called upon a negro bystander to assist him in putting the defendant in jail. . . . When the officer first commanded him to go into jail, and he refused, the officer left him and went into the jail, got his pistol, and returned with it; the defendant remaining quietly outside until the officer returned.¹⁵⁵

The Georgia Court of Appeals reversed the conviction and held: "The words of the statute, 'obstruct, resist, or oppose,' imply force as a necessary element of the resistance. . . . The defendant did not resist his arrest. . . . He simply protested against his unreasonable imprisonment and emphasized his natural objection to being incarcerated under the circumstances, by refusing to voluntarily go into the jail."¹⁵⁶

*Sloan v. City of Moultrie*¹⁵⁷ is the third Georgia case on point. There, a policeman arrested defendant in a barbershop,

caught hold of the defendant's arm and said, "Let's go." The defendant grabbed hold of the barber chair and would not turn loose. The policeman hit him over the hand and got him to the door, where he again braced himself. The policeman knocked him down with the blackjack, and then picked him up and carried him to jail. The defendant never at any time made any attempt to strike the policeman, neither did he curse him.¹⁵⁸

¹⁵³ *Ibid.*

¹⁵⁴ 6 Ga. App. 251, 64 S.E. 699 (1909).

¹⁵⁵ *Ibid.*

¹⁵⁶ *Id.* at —, 64 S.E. at 699-700.

¹⁵⁷ 61 Ga. App. 885, 7 S.E.2d 760 (1940).

¹⁵⁸ *Id.* at 887, 7 S.E.2d at 762.

The Court of Appeals reversed the conviction and said very briefly: "Under the decision in *Moses v. State* . . . the defendant was not guilty of resisting arrest. . . ." ¹⁵⁹

In *Ratcliff v. State* ¹⁶⁰ the defendant was charged with "obstructing" a public officer in the discharge of his duty. The defendant had seen a cow belonging to his wife, and not knowing that the cow had been seized by a deputy sheriff pursuant to court order, drove the cow home. The Oklahoma Criminal Court of Appeals reversed the conviction and held: "[T]he word 'obstruct' must be construed with reference to the other words, 'resist or oppose,' which imply force. The crime consists in obstructing, resisting or opposing an officer, not merely in impeding or defeating the execution of the process with which the officer is armed." ¹⁶¹

Two recent South Carolina decisions warrant discussion. In *City of Charleston v. Mitchell* ¹⁶² twenty-four Negro high school students entered a drugstore and sat down at the lunch counter. The manager twice commanded them to leave, but they refused. The Chief of Police then ordered them to leave, and they again refused. They were then placed under arrest, and at this point, they "all stood up." ^{162a} They were then convicted and sentenced to either a fine of fifty dollars or a sentence of fifteen days under a city ordinance which makes it unlawful to "assault, resist, hinder, oppose, molest or interfere with any employee of the . . . police department. . . ." ¹⁶³

The South Carolina Supreme Court reversed for lack of any evidence to support the convictions. The Court said that "the term 'interfere' has been said to import action, not mere inaction, an active rather than a passive condition, and has been defined as meaning to interpose . . . sometimes in a bad sense . . . and specifically to do something which hinders or prevents . . . the performance of legal duty." ¹⁶⁴ After quoting with approval from the North Carolina decision in *State v. Estes*, ¹⁶⁵ the court concluded: "It appears to us that the conduct of the appellants in refusing obedience to the request of the Chief of Police . . . was merely inaction on

¹⁵⁹ *Ibid.*

¹⁶⁰ 12 Okl. Cr. 448, 158 Pac. 293 (1916).

¹⁶¹ *Id.* at 452, 158 Pac. at 294.

¹⁶² 239 S.C. 376, 123 S.E.2d 512 (1961).

^{162a} *Id.* at 393, 123 S.E.2d at 520.

¹⁶³ *Id.* at 381, 123 S.E.2d at 514.

¹⁶⁴ *Id.* at 394, 123 S.E.2d at 520-21.

¹⁶⁵ 185 N.C. 752, 117 S.E. 581 (1923).

their part and did not constitute interference with said officer in the discharge of his official duty.”¹⁶⁶

*City of Columbia v. Bouie*¹⁶⁷ is closer to point. There, Bouie and a companion went into a drugstore and sat down at a booth. The manager came up with a police officer and twice asked them to leave. They refused, and the police officer told them that they were under arrest. Bouie did not get up, and the officer “thereupon caught him by the arm and lifted him out of the seat . . . seized him by the belt and proceeded to march him out of the store.”^{167a} The officer testified that Bouie “started pushing back and said ‘Take your hands off me’”. Bouie was charged and convicted of resisting arrest. The South Carolina Supreme Court reversed:

It is apparent from the testimony of the arresting officer that the only “resistance” on Bouie’s part was his failure to obey immediately the officer’s order, with the result that the latter “had to pick him up out of the seat.” Resisting arrest is one form of the common law offense of obstructing justice; and the use of force is not an essential ingredient of it. But we do not think that such momentary delay in responding to the officer’s command as is shown by the testimony here amounted to “resistance” within the intent of the law, *City of Charleston v. Mitchell*. . . .¹⁶⁸

There are also two decisions by New York City trial courts which are relevant, but which arise in a unique statutory context. New York laws make it unlawful (a) to assault an officer to prevent arrest, (b) to use threats or violence to deter or prevent arrest, (c) to use force or violence to interfere with an officer in the performance of his duty, and finally (d) “in any case or under any circumstances not otherwise specially provided for” to “willfully resist, delay, or obstruct a public officer in discharging *or attempting* to discharge, a duty of his office.”¹⁶⁹ The two trial court decisions arose under this last mentioned statute.

*People v. Knight*¹⁷⁰ arose out of a “peace rally” by two to three thousand people in Duffy Square. When the rally ended, some of the participants refused to leave, but instead sat down on the street

¹⁶⁶ 239 S.C. at 395, 123 S.E.2d at 521.

¹⁶⁷ 239 S.C. 570, 124 S.E.2d 332 (1962).

^{167a} *Id.* at 573, 124 S.E.2d at 333.

¹⁶⁸ *Id.* at 574, 124 S.E.2d at 333.

¹⁶⁹ N.Y. CITY PENAL CODE § 1851, quoted in *People v. Knight*, 228 N.Y.S.2d 981, 984 n.2 (Magis. Ct. 1962).

¹⁷⁰ 228 N.Y.S.2d 981 (Magis. Ct. 1962).

blocking traffic. A policeman told defendant Knight to move to the sidewalk, and Knight did not move. The policeman then said, "You are under arrest. I am taking you in."^{170a} The officer put his hand on defendant's shoulder, defendant pulled it off and ran into a group upon the sidewalk. The officer was knocked down by others, lost a glove, was hit on the shoulder, but nevertheless went into the crowd to apprehend the defendant. Thereupon, the defendant lay down on the sidewalk and would not move. It was necessary to carry him into the police wagon.

Defendants Itkin and Supernaw were also directed twice by the arresting officers to get up and move on. They continued sitting mute in the street. The officer then placed them under arrest. As he proceeded to take a hold of Supernaw, Itkin locked arms with Supernaw. It was necessary for the arresting officer, together with fellow officers to pry them apart and to carry them to the police wagon.

The Committing Magistrate held that "to interfere and obstruct and delay within Penal Law, Section 1851 does not and need not require active resistance and force by the defendants," and that "the People have adduced sufficient evidence as warrants that these defendants be held for trial by the Court. . . ."¹⁷¹

*People v. Martinez*¹⁷² arose under a somewhat similar situation. Four defendants (and three others who failed to appear and whose bonds were therefore forfeited) went to complain to the Police Commissioner about alleged police brutality. They were told that the Commissioner would not or could not see them, and they seated themselves on the floor of the public corridor about 100 feet from the Police Commissioner's office. They were told to leave, and when they refused, they were charged with "unlawful intrusion."^{172a} As they continued to sit, they were further told that if they did not move voluntarily, they would be charged with obstructing and resisting a public officer in the discharge of his duty. Defendants Martinez and Sanchez refused to do so, and had to be carried out bodily to the public elevator. The City Criminal Court, with absolutely no discussion, concluded that "The defendants Raphael

^{170a} *Id.* at 983.

¹⁷¹ *Id.* at 987.

¹⁷² 43 Misc. 2d 94, 250 N.Y.S.2d 28 (N.Y. County Crim. Ct. 1964).

^{172a} *Id.* at —, 250 N.Y.S.2d at 29.

Martinez and Jose Sanchez are also found guilty of resisting a public officer in the discharge of his duty. . . ."^{172b}

The two above New York decisions (apart from the scuffling and arms-locking in *Knight*) are perhaps the closest factual cases, and they would be highly persuasive on the Chapel Hill situation were it not for the unique statutory context and the almost preliminary nature of the decisions. The South Carolina decisions reversing the "resisting" convictions of the demonstrators,¹⁷³ and the Georgia decisions reversing the "resisting" convictions of Moses¹⁷⁴ and Sloan,¹⁷⁵ suggest that the Chapel Hill demonstrators did not "resist" arrest under the North Carolina statute. The federal cases, and the decisions by the Supreme Courts of other states, suggest that the "resisting" arrest statutes are intended to apply only when there is active resistance, or when officers in fact are deterred from the performance of their duty. This is certainly the implication of the North Carolina decision in *State v. Estes*.¹⁷⁶ Such an interpretation of the statute would be in harmony with the North Carolina cases which construe the "resisting arrest" statute narrowly, and in favor of the defendants.¹⁷⁷

In any event, a citizen is entitled to resist an arrest if the arrest is illegal,¹⁷⁸ which raises the issue of whether the Constitution precludes the arrests in the restaurant sit-ins.

^{172b} *Id.* at —, 250 N.Y.S.2d at 32.

¹⁷³ *City of Columbia v. Bouie*, 239 S.C. 570, 124 S.E.2d 332 (1962); *City of Charleston v. Mitchell*, 239 S.C. 376, 123 S.E.2d 512 (1961).

¹⁷⁴ *Moses v. State*, 6 Ga. App. 251, 64 S.E. 699 (1909).

¹⁷⁵ *Sloan v. City of Moultrie*, 61 Ga. App. 885, 7 S.E.2d 760 (1940).

¹⁷⁶ 185 N.C. 752, 117 S.E. 581 (1923). Most of the North Carolina cases involve situations of this sort. See, e.g., *State v. Wray*, 217 N.C. 167, 7 S.E.2d 468 (1940). There, when defendant Wray was placed under arrest, two other defendants "caught hold of the officers and of Wray and stated that the officers should not take Wray to jail. . . . [A] struggle with the officers ensued wherein all three defendants were engaged. . . ." *Id.* at 168, 7 S.E.2d at 468. The court held that the demurrers to this evidence were properly overruled, "since the State's evidence, if believed, was amply sufficient to sustain the convictions." *Id.* at 169, 7 S.E.2d at 469.

¹⁷⁷ See cases cited note 121 *supra*.

¹⁷⁸ *Thompson v. City of Louisville*, 362 U.S. 199 (1960). There, the petitioner was arrested in a cafe for "loitering" and when he was taken outside, according to the police testimony, he "was very argumentative—he argued with us back and forth and so then we placed a disorderly conduct charge on him." *Id.* at 200. The Supreme Court held that the disorderly conduct charge could not stand because the "law itself seems to provide that if a man wrongfully arrested fails to object to the arresting officer, he waives any right to complain later that the arrest was unlawful." *Id.* at 206. See also *State v. Mobley*, 240 N.C. 476, 83 S.E.2d 100 (1954); *State v. Belk*, 76 N.C. 10 (1877); *State v. Curtis*, 2 N.C. 471 (1797).

B. *Sit-Ins and the Fourteenth Amendment*

In Chapel Hill, the demonstrators went to the segregated restaurants, were denied service, and sat quietly until the police arrived. They were then arrested, charged and convicted of trespass. This, by now, is a familiar pattern throughout the South.¹⁷⁹ Over 3,000 demonstrators have been arrested and convicted in state courts for this type of activity. But, despite a dozen Supreme Court decisions (each one reversing a sit-in conviction by the state courts), it is still not clear whether the owner of a restaurant can call upon the state police and judicial machinery to enforce his desire to exclude patrons on the basis of race.

Several things, however, are clear. Generally speaking, the owner of property does not have an absolute right to do with it as he will. Our society does not tolerate what Walter Lippman calls the "despotic theory of private property."¹⁸⁰ "The twelfth century assize of nuisance began the body of law which cuts down what the owner of Blackacre can do in view of his duty of neighborliness."¹⁸¹ More specifically, a restaurant owner is not deprived of property or liberty when a state or the federal government commands that he terminate discrimination among his patrons on the basis of race.¹⁸² Equally clear, however, is the fact that not every individual act of racial discrimination runs afoul of the fourteenth amendment, for that amendment prohibits "only such action as may fairly be said to be that of the States. . . . [It] erects no shield against merely private conduct, however discriminatory or wrongful."¹⁸³

1. *The Contentions of the Demonstrators.*—The demonstrators relied upon a series of arguments to prove that the restaurant discrimination resulted from "state action."¹⁸⁴ First, it was con-

¹⁷⁹ Pollitt, *Dime Store Demonstrations*, 1960 DUKE L.J. 315.

¹⁸⁰ Newsweek, Sept. 16, 1963, p. 21.

¹⁸¹ Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135, 142-43 (1963).

¹⁸² Heart of Atlanta Motel, Inc. v. United States, 370 U.S. 241, 258 (1964). Mr. Justice Black, concurring, added that "The motel's argument that Title 11 violates the Thirteenth Amendment is so insubstantial that it requires no further discussion." *Id.* at 278 n.12.

¹⁸³ Shelley v. Kraemer, 334 U.S. 1, 13 (1947), citing the Civil Rights Cases, 109 U.S. 3 (1883).

¹⁸⁴ The "demonstrations" were clearly designed to publicize the fact and implication of segregation, and additionally it was contended that the sit-ins were protected as "free speech" within the first and fourteenth amendments. See note 201 *infra*.

tended that the restaurants were public in nature, although private in ownership,¹⁸⁵ and the state involvement (through licensing, inspection and regulation) made the fourteenth amendment applicable. In short, the state could not (within the constitutional prohibitions) license a public restaurant to practice discrimination based on race.¹⁸⁶

Second, it was contended that there was "state action" when the state aided private discrimination through its police powers of arrest and accusation, and through its judicial powers of trial and conviction. Reliance was placed upon the "restrictive covenant case," *Shelley v. Kraemer*.¹⁸⁷ There, the Supreme Court held that it was unconstitutional "state action" when a state court in a private action at law enforced a real estate covenant which forbade any neighbors to sell to Negroes. The demonstrators argued from this decision that "if the Constitution precludes judicial vindication through civil remedies for a right of private discrimination in the selection of neighbors, then it must at least equally preclude judicial enforcement by criminal law of a restriction of premises catering to the public."¹⁸⁸ The Supreme Court of Delaware, at least, was in

¹⁸⁵ In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Supreme Court reversed a trespass conviction when the petitioner disobeyed the order to cease distributing leaflets on the streets of a "private" town and said: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* at 506.

¹⁸⁶ Reliance was placed on Mr. Justice Harlan's dissenting opinion in the 1883 Civil Rights Cases: "In every material sense applicable to the practical enforcement of the Fourteenth Amendment... keepers of inns and managers of places of public amusements are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation." 109 U.S. at 58-59. If Mr. Justice Harlan was wrong in 1883, the increasing public importance of restaurants, and the corresponding increase in state regulation and control, make him right today.

¹⁸⁷ 334 U.S. 1 (1948). Long before *Shelley*, the Court emphasized that the fourteenth amendment's requirement of equal treatment by the state reaches "state action of every kind," legislative, executive, and judicial. *Ex parte Virginia*, 100 U.S. 339 (1880).

¹⁸⁸ Brief of Petitioners, p. 17, *Griffin v. Maryland*, 378 U.S. 130 (1964). Attorney Joseph Rauh there argued that

Indeed, the instant case is far stronger than *Shelley*. Here the State process which enforces racial discrimination is not merely civil process as in *Shelley*, but the substantive criminal law of the State... Even more so than in *Shelley*, where the State merely opened its courts for private redress, here, in the application of a criminal prohibition, the State is expressing and applying a public policy favoring discrimination. Moreover, ... the asserted private and property interest in *Shelley* was

agreement with this argument.¹⁸⁹

The third major contention was that there is no "right" in the restaurant owners to refuse service on the basis of race. "Rights" are created by law, and it was argued that the states can neither recognize, countenance, or protect a "right" of discrimination against Negroes at places of public accommodation.¹⁹⁰ The converse was also argued, that the constitutional guarantee of "equal protection" imports an affirmative obligation on the state to assure non-discriminatory treatment in the areas of public life where the state is otherwise intimately concerned and involved.¹⁹¹

The Supreme Court reversed all the sit-in convictions without squarely reaching any of the above contentions.

that in the home-owner's choice of his neighbors—an interest which certainly stands high in the traditional respect and protection of the law. By contrast, here the State's process has been made available to enforce discrimination... on a merry-go-round at an amusement park catering to the general public.

Id. at 16.

¹⁸⁹ State v. Brown, 195 A.2d 379 (Del. 1963). The Delaware court concluded that

the private actions of the owners... of a place of public accommodation in refusing service to a patron which are predicated upon racially discriminatory grounds do not contravene the requirements of the Fourteenth Amendment....

Secondly, we hold that such owner may not call upon the State to assist him in enforcing his private policy of racial discrimination. If the State acts in such a manner, the judicial power would be placed behind and in favor of racial discrimination, and such action is forbidden by the Fourteenth Amendment.

Id. at 387. The Delaware Court acknowledged that this might result in "self help" by the proprietor but said that "the State may not act unconstitutionally merely to avoid a threat of violence." *Id.* at 386.

¹⁹⁰ In brief, there can be no "sit-in" unless there is a "throw-out," and the contention is that the State cannot create or recognize the right to throw-out customers on the basis of race. Subsequent to this argument, the Supreme Court recognized that there was "state action" within the meaning of the fourteenth amendment when Alabama recognized and enforced a common-law right to recover in a private law suit for libel. "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

¹⁹¹ Brief of Petitioner, pp. 28-29, *Griffin v. Maryland*, 378 U.S. 130 (1964). An allied contention was that the refusal to serve Negroes was based on a "widespread custom," which in turn had received massive and long-continued support from state law and policy. It was suggested that "where Arkansas and South Carolina themselves move to send petitioners to jail for disobeying orders given in conformance with the segregation custom which has for many decades been the keystone of the public policy of each state, the state will not be allowed to visit this penalty on these petitioners on the utterly unrealistic theory that state power is to no extent involved." Brief of Petitioners, pp. 48-49, *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

2. *The Initial 1961 Decisions.*—The first case arose, of all places, in Delaware. The Wilmington Parking Authority built a public parking facility in downtown Wilmington, and leased space on the street level to the Eagle Coffee Shoppe. The Coffee Shoppe refused to serve a Negro patron because of his color, and the patron brought action for an injunction and declaratory relief. The Delaware Supreme Court held that under Delaware statutory law (which incorporated common law), a restaurant owner had a right to refuse service on the basis of race. The Supreme Court of the United States reversed and held that the exclusion of the Negro was discriminatory state action in violation of the equal protection clause of the fourteenth amendment. *Burton v. Wilmington Parking Authority*.¹⁹² Mr. Justice Clark, for the Court, held that private conduct violates the fourteenth amendment when "to some significant extent the State in any of its manifestations has been found to have become involved in it."¹⁹³ There was "significant involvement" in this landlord-tenant relationship because

the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination . . . when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.¹⁹⁴

The holding certainly approaches the contention generally made by the sit-in defendants, *i.e.*, that the equal protection clause requires affirmative protective action by the State within the area of its public concerns.¹⁹⁵

¹⁹² 365 U.S. 715 (1961).

¹⁹³ *Id.* at 722.

¹⁹⁴ *Id.* at 725, 726.

¹⁹⁵ Mr. Justice Stewart concurred in the result on the theory that the Delaware courts had given effect to the state law permitting restaurant discrimination, and that "Such a law seems to me clearly violative of the Fourteenth Amendment." *Id.* at 727. Justices Frankfurter, Harlan, and Whittaker agreed with Justice Stewart that a state statute "'authorizing discriminatory classification' . . . is offensive to the Fourteenth Amendment,"

*Garner v. Louisiana*¹⁹⁶ was the first typical sit-in case to reach the Court. There, a group of Negro students entered dime stores in Baton Rouge, sat at the lunch counter where they were denied service, were arrested, and then convicted for the crime of disturbing the peace. In Louisiana, the crime of disturbing the peace is not complete without "boisterous or unruly conduct" by the defendants, or peaceful conduct which incites "an imminent public commotion."¹⁹⁷ The Court (per Mr. Chief Justice Warren) reversed the convictions without deciding the major contentions on the theory that there was a complete absence of evidence to support the elements of the crime, and that conviction without evidence is a denial of due process.¹⁹⁸

Mr. Justice Douglas concurred in the reversal of the convictions, but on different theories. He reasoned, first, that the petitioners were denied service because of a state fostered "custom," that the custom of segregation in Louisiana "is at least as powerful as any law," and that "where the segregation policy is the policy of a State, it matters not that the agency to enforce it is a private enterprise."¹⁹⁹ Additionally, Mr. Justice Douglas ruled that these restaurants were licensed by the state to serve the public and that "those who license enterprises for public use should not have under our Constitution the power to license it for the use of only one race. For there is the overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group."²⁰⁰

Mr. Justice Harlan concurred in reversing the convictions but for other reasons. First, in two of the situations the demonstrators sat with the apparent consent of the proprietor until the police arrived, and that this sitting "was a form of expression within the

but these Justices were not sure that the Delaware courts had so held and would remand for further clarification. *Id.* at 729 (Harlan, J., dissenting).

¹⁹⁶ 368 U.S. 157 (1961).

¹⁹⁷ *Id.* at 169.

¹⁹⁸ 368 U.S. at 164.

¹⁹⁹ *Id.* at 181.

²⁰⁰ *Id.* at 185. Mr. Justice Douglas elaborated:

The authority to license a business for public use is derived from the public. Negroes are as much a part of that public as are whites. A municipality granting a license to operate a business for the public represents Negroes as well as all other races who live there. A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public.

Id. at 184.

range of protection afforded by the Fourteenth Amendment."²⁰¹ Secondly, Mr. Justice Harlan believed that the Louisiana penal statute was "unconstitutional for vagueness and uncertainty as applied."²⁰²

3. *The 1963 Decisions.*—In 1963, there were four more sit-in cases, out of Greenville, South Carolina,²⁰³ Birmingham, Alabama,²⁰⁴ Durham, North Carolina,²⁰⁵ and New Orleans, Louisiana.²⁰⁶ In the Greenville, Birmingham, and Durham cases, segregation in restaurants was required by city ordinance, and for this reason the Court reversed the convictions for "trespass." It said in *Peterson v. City of Greenville*:²⁰⁷

[T]hese convictions cannot stand, even assuming... that the manager would have acted as he did independently of the existence of the ordinance.... When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.²⁰⁸

In the New Orleans case of *Lombard v. Louisiana*²⁰⁹ there was no state law or city ordinance requiring restaurant segregation, but there was the typical breach-of-the-peace law. When the demonstrations started in that city, both the Chief of Police and the Mayor

²⁰¹ *Id.* at 199.

We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country.

Such a demonstration... is as much a part of the "free trade of ideas" ... as is verbal expression, more commonly thought of as "speech." It, like speech, appeals to good sense... just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This Court has never limited the right to speak... to a mere verbal expression. If the act of displaying a red flag... is a liberty encompassed within free speech... the act of sitting at a privately owned lunch counter with the consent of the owner as a demonstration of opposition to enforced segregation, is surely within the same range of protection.

Id. at 201-02.

²⁰² *Id.* at 205.

²⁰³ *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

²⁰⁴ *Gober v. City of Birmingham*, 373 U.S. 374 (1963).

²⁰⁵ *Avent v. North Carolina*, 373 U.S. 375 (1963).

²⁰⁶ *Lombard v. Louisiana*, 373 U.S. 267 (1963).

²⁰⁷ 373 U.S. 244 (1963).

²⁰⁸ *Id.* at 248.

²⁰⁹ 373 U.S. 267 (1963).

issued well-publicized statements that they would enforce the breach-of-peace law and would not permit Negroes to seek desegregated service in restaurants. When the Negroes sought service, the restaurant manager denied it "in obedience to the directive of the city officials." The Supreme Court reversed the convictions and said: "A State, or a city, may act as authoritatively through its executive as through its legislative body.... Consequently, the city must be treated exactly as if it had an ordinance prohibiting such conduct." After then referring to the *Peterson* decision, the Court continued: "[T]he State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance."²¹⁰

A final case in 1963 was *Shuttlesworth v. Birmingham*.²¹¹ There, two ministers had been convicted of "inciting, aiding, and abetting" students to violate the criminal trespass laws by seeking service at a segregated restaurant. The evidence was that the students had met at the home of the ministers, where persons volunteered to "try" certain restaurants, and the ministers arranged for their transportation and bail. As the trespass conviction of the students had been reversed,²¹² the "aiding and abetting" conviction of the ministers was likewise reversed, because "It is generally recognized that there can be no conviction for aiding and

²¹⁰ *Id.* at 273. Mr. Justice Douglas, concurring, had two additional reasons for finding that Louisiana had become involved to a "significant extent" within the concept of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). First, he repeated his concept in *Garner v. Louisiana*, 368 U.S. 157 (1961) that "There is no constitutional way, as I see it, in which a State can license and supervise a business serving the public and endow it with the authority to manage that business on the basis of *apartheid*, which is foreign to our Constitution." 373 U.S. at 283. Second, Mr. Justice Douglas advanced the concept of *Shelley v. Kraemer*, 334 U.S. 1 (1948), that judicial action is state action within the meaning of the fourteenth amendment. He said:

We live under a constitution that proclaims equal protection of the laws. That standard is our guide. And under that standard business serving the public cannot seek the aid of the state police or the state courts or the state legislatures to foist racial segregation in public places under its ownership and control... we have 'state' action here, wholly apart from the activity of the Mayor and police, for Louisiana has interceded with its judiciary to put criminal sanctions behind racial discrimination in public places. She may not do so consistently with the Equal Protection Clause of the Fourteenth Amendment.

373 U.S. at 277-78. (Citation omitted.)

²¹¹ 373 U.S. 262 (1963).

²¹² *Gober v. Birmingham*, 373 U.S. 374 (1963).

abetting someone to do an innocent act."²¹³ Mr. Justice Harlan concurred for reasons of freedom of speech:

[D]ealing as we are in the realm of expression, I do not think a State may punish incitement of activity in circumstances where there is a substantial likelihood that such activity may be constitutionally protected. . . . To ignore that factor would unduly inhibit freedom of expression, even though criminal liability for incitement does not ordinarily depend upon the event of the conduct incited.²¹⁴

4. *The 1964 Decisions.*—In 1964, there were five more sit-in cases, but again there was no majority opinion which decided any of the crucial issues.

One of the five cases, *Robinson v. Florida*,²¹⁵ was an extension, and decided on the basis, of the *Peterson*²¹⁶ decision of the previous year. Eighteen demonstrators went into Shell's City Restaurant in a department store in Miami and refused to leave when so directed by the manager. They were tried and convicted under a statute which penalized such refusal.²¹⁷ At the time, however, the Florida Board of Health had in effect a regulation which required that "where colored persons are employed or accommodated" separate toilet and lavatory rooms must be provided.²¹⁸ The Court (per Mr. Justice Black) reversed the convictions because of this health department regulation.

While these Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together. Of course, state action, of the kind that falls within the proscription of the Equal Protection Clause of the Fourteenth Amendment, may be brought about through the State's administrative and regulatory agencies just as through its legislature. . . . Here as in *Peterson v. City of Greenville*, *supra*, we conclude that the State through its regulations has become involved to such a significant extent in bringing about restaurant segregation that appellants' trespass convictions must be held to reflect that state policy and therefore to violate the Fourteenth Amendment.²¹⁹

²¹³ 373 U.S. at 265.

²¹⁴ *Id.* at 260. (Citation omitted.)

²¹⁵ 378 U.S. 153 (1964).

²¹⁶ *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

²¹⁷ FLA. STAT. ANN. § 509.141 (Supp. 1964).

²¹⁸ FLA. ADMIN. CODE, ch. 170C, § 8.06 (1962).

²¹⁹ 378 U.S. at 156-57. (Citation omitted.)

One of the other 1964 decisions also involved an extension of the "state action" concept, this time to private policemen given "special deputy" status by the state. In *Griffin v. Maryland*,²²⁰ a group of demonstrators went to the Glen Echo Amusement Park in the Maryland suburbs of Washington, D.C., purchased tickets, and got on the merry-go-round. One Collins, who headed the amusement park guard force, came up and told them to get off, that it was the park's policy "not to have colored people on the rides." The demonstrators refused to leave, and Collins put them under arrest. Collins was paid by the park, but had been deputized as a "special" deputy sheriff by the county and wore a deputy sheriff's badge.

The Court held that "to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment."²²¹ The Court found such an unlawful State obligation in the fact that Collins "wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the park. . . . If an individual is possessed of state authority and purports to act under that authority, his action is state action."²²²

*Barr v. City of Columbia*²²³ is similar to *Garner v. Louisiana*.²²⁴ Five Negro college students entered a South Carolina drugstore and were promptly arrested by waiting policemen and convicted of "breach of the peace." It was admitted that the demonstrators were "polite, quiet and peaceful from the time they entered the store to the time they left." Under these circumstances, ruled the Court, the breach of peace conviction cannot stand, "because of the frequent occasions on which we have reversed under the Fourteenth Amendment convictions of peaceful individuals who were convicted of breach of the peace because of the acts of hostile on-

²²⁰ 378 U.S. 130 (1964).

²²¹ *Id.* at 136.

²²² *Id.* at 135. Mr. Justice Clark concurred because "under the peculiar facts here . . . the State 'must be recognized as a joint participant in the challenged activity.' See *Burton v. Wilmington Parking Authority*." *Id.* at 137. Mr. Justice Harlan dissented because "the involvement of the State is no different from what it would have been had the arrests been made by a regular policeman dispatched from police headquarters." *Id.* at 138. Justices Black and White joined in this dissent.

²²³ 378 U.S. 146 (1964).

²²⁴ 368 U.S. 157 (1961).

lookers. . . ."^{224a} Additionally, ruled the Court, "Since there was no evidence to support the breach-of-peace convictions, they should not stand. *Thompson v. City of Louisville*, 362 U.S. 199."²²⁵

*Bowie v. City of Columbia*²²⁶ was decided under the due process proscription of vagueness in criminal statutes. Two Negro students entered the Eckerd Drug Store in Columbia, South Carolina, and sat down at a booth. They were not served, but asked to leave. When they refused, they were arrested, charged, and convicted of criminal trespass. The trespass law then on the books penalized "every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other land of another, after notice from the owner . . . prohibiting said entry."²²⁷

It was not until after their trial conviction that the South Carolina Supreme Court initially construed the trespass statute to penalize, not only entry but also the act of "remaining on" the premises of another after receiving notice to leave.²²⁸ Therefore, argued the demonstrators, they were punished "for conduct that was not criminal at the time they committed it." The Supreme Court agreed with this contention and reversed the conviction because it rested on a statute which "violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits."²²⁹

*Bell v. Maryland*²³⁰ was the longest (100 pages in the United States Reports) and the most important of the 1964 decisions, as six justices therein discussed the merits of the basic contentions. The Court opinion, however, reversed the convictions for non-constitutional reasons.

Twelve Negro students entered the Hooper's Restaurant in Baltimore, Maryland, and were arrested for violation of the criminal trespass law. After their convictions had been affirmed by the state

^{224a} 378 U.S. at 150.

²²⁵ *Id.* at 151.

²²⁶ 378 U.S. 347 (1964).

²²⁷ S.C. CODE § 16-386 (1962). (Emphasis added.)

²²⁸ 378 U.S. at 350, referring to *City of Columbia v. Bowie*, 239 S.C. 570, 124 S.E.2d 332 (1962).

²²⁹ 378 U.S. at 350. Mr. Justice Black dissented on the theory that the common law punished as trespass both entering and remaining upon property without permission, and that the South Carolina courts were justified in giving the criminal trespass statute this interpretation. Mr. Justice Harlan and Mr. Justice White joined in this dissent. *Id.* at 363.

²³⁰ 378 U.S. 226 (1964).

supreme court, both the Baltimore City Council, and the Maryland legislature enacted public accommodations laws which "accord petitioners a right to be served in Hooper's restaurant, and make unlawful conduct like that of Hooper . . . in refusing them service because of their race."²³¹

Mr. Justice Brennan (joined by Clark and Stewart) announced the opinion of the Court, which was to remand the case to the Maryland courts for further proceedings. This course was taken because "Maryland follows the universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct."²³²

In elaboration, the Court opinion noted: "A legislature that passed a public accommodations law making it unlawful to deny service on account of race probably did not desire that persons should still be prosecuted and punished for the 'crime' of seeking service from a place of public accommodations which denies it on account of race."²³³

"Because of the possibility that the state court would now reverse the convictions" it is inappropriate, reasoned Mr. Justice Brennan, for the Supreme Court to render an "advisory opinion" on the grave constitutional issues otherwise before it.

Mr. Justice Douglas reached the merits of the controversy, and ruled for the demonstrators for three separate reasons. *First*, the fourteenth amendment made all persons born in the United States "citizens" and provided that no State shall enforce any law which shall abridge the "privileges and immunities of citizens of the United States." "[T]he right to be served in places of public accommodations," he said, "is an incident of national citizenship, . . ."²³⁴ and therefore: "When one citizen because of his race, creed, or color is denied the privilege of being treated as any other citizen in places of public accommodations, we have classes of citizenship, one being more degrading than the other. This is at war with the one class of citizenship created by the Thirteenth, Fourteenth, and Fifteenth Amendments."²³⁵

²³¹ *Id.* at 228.

²³² *Id.* at 230.

²³³ *Id.* at 235.

²³⁴ *Id.* at 250.

²³⁵ *Id.* at 252.

Second, Mr. Justice Douglas wrote that the modern restaurant is "affected with a public interest," and that "state action" was therefore involved:

Private property is involved, but it is property that is serving the public. . . . Here it is a restaurant refusing service to a Negro. But so far as principle and law are concerned it might just as well be a hospital refusing admission to a sick or injured Negro . . . , or a drugstore refusing antibiotics to a Negro, or a bus denying transportation to a Negro, or a telephone company refusing to install a telephone in a Negro's home.²³⁶

Third, Mr. Justice Douglas saw a denial of equal protection when Maryland enforced a policy of segregation "with her police, her prosecutors, and her courts".²³⁷

The preferences involved in *Shelley v. Kraemer* and its companion cases were far more personal than the motivations of the corporate managers in the present case when they declined service to Negroes. Why should we refuse to let state courts enforce *apartheid* in residential areas of our cities but let state courts enforce *apartheid* in restaurants? If a court decree is state action in one case, it is in the other.²³⁸

Mr. Justice Goldberg concurred with Mr. Justice Douglas, and also wrote an opinion of his own (in which the Chief Justice and Mr. Justice Douglas concurred).

In the following passages, which in no way give credit to his full thirty-two-page opinion, Mr. Justice Goldberg expounded the view that the fourteenth amendment equal protection clause creates a positive obligation on the state to remove the disabilities barring Negroes from the public conveyances and places of public accommodation. Mr. Justice Goldberg pointed out that:

Underlying the Congressional discussions, and at the heart of the Fourteenth Amendment's guarantee of equal protection, was the assumption that the State . . . was obligated to guarantee all citizens access to places of public accommodation. This obligation was firmly rooted in ancient Anglo-American tradition.²³⁹ The history of the affirmative obligations existing at common law serves partly to explain the negative—"deny to any person"—language of the Fourteenth Amendment. For it was assumed

²³⁶ *Id.* at 252-53. (Citation omitted.)

²³⁷ *Id.* at 257.

²³⁸ *Id.* at 259.

²³⁹ *Id.* at 296-97.

that under state law, when the Negro's disability as a citizen was removed, he would be assured the same public civil rights that the law had guaranteed white persons.²⁴⁰

Mr. Justice Goldberg also quoted from Mr. Justice Bradley, who had authored the majority opinion in the *Civil Rights Cases*,²⁴¹ that: "Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection."²⁴² This view of Mr. Justice Bradley, said Mr. Justice Goldberg, is "fully consonant with this Court's recognition that state conduct which might be described as 'inaction' can nevertheless constitute responsible 'state action' within the meaning of the Fourteenth Amendment."²⁴³ Mr. Justice Goldberg concluded that:

The decision of Maryland's highest court in sustaining these trespass convictions cannot be described as 'neutral,' for the decision is as affirmative in effect as if the State had enacted an unconstitutional law explicitly authorizing racial discrimination in places of public accommodation. A State, obligated under the Fourteenth Amendment to maintain a system of law in which Negroes are not denied protection in their claim to be treated as equal members of the community, may not use its criminal trespass laws to frustrate the constitutionally granted right. Nor, it should be added, may a State frustrate this right by legitimating a proprietor's attempt at self-help.²⁴⁴

Mr. Justice Black also reached the merits, and wrote a dissenting opinion in which he voted to affirm the trespass convictions. Mr. Justice Harlan and Mr. Justice White joined in this dissent. This twenty-page dissent was summarized later by its author as follows:

[T]he Fourteenth Amendment does not of its own force compel a restaurant owner to accept customers he does not want to serve, even though his reason for refusing to serve them may be his racial prejudice, adherence to local custom, or what he conceives to be his economic self-interest, and . . . the arrest and conviction of a person for trespassing in a restaurant under such circumstances is not the kind of "state action" forbidden by the Fourteenth Amendment.²⁴⁵

²⁴⁰ *Id.* at 301.

²⁴¹ 109 U.S. 3 (1883).

²⁴² 378 U.S. 226, 309 nn.29-30, quoting the Bradley-Woods correspondence.

²⁴³ *Id.* at 310-11.

²⁴⁴ *Id.* at 311.

²⁴⁵ *Bouie v. City of Columbia*, 378 U.S. 347, 365 (1964) (dissenting opinion).

5. *The 1965 Decisions.*—In the October Term, 1964, the Supreme Court wrote the temporary finish to the sit-in controversy. On analogy to the situation in *Bell v. Maryland*,²⁴⁶ the Court held that the enactment of the Civil Rights Act of 1964 "abated" all such pending cases.

In the consolidated cases of *Hamm v. City of Rock Hill* and *Lupper v. Arkansas*,²⁴⁷ the highest courts of South Carolina and Arkansas had affirmed convictions based upon state trespass statutes against Negroes for participating in sit-in demonstrations in the luncheon facilities of retail stores. The Court (per Mr. Justice Clark) held that:

The Civil Rights Act of 1964 forbids discrimination in places of public accommodations and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to enactment of the Act, the still pending convictions are abated by its passage.²⁴⁸

The Court reasoned that if these had been federal prosecutions, the actions clearly would have abated ("inflicting punishment at a time when it can no longer further any legislative purpose . . . would be unnecessarily vindictive")²⁴⁹ and that here, "it follows that the same rule must prevail under the Supremacy Clause which requires that a contrary state practice or state statute must give way."²⁵⁰

A Federal Savings Statute provides that "the *repeal* of any statute shall not have the effect to release or extinguish any penalty . . . unless the repealing Act shall so expressly provide."²⁵¹ The Court held that the statute was concerned with "technical abatement" when a statute was amended or repealed. Here, in contrast, "the Civil Rights Act works no such technical abatement. It substitutes a right for a crime. So drastic a change is well beyond the narrow language of amendment and repeal."²⁵²

²⁴⁶ 378 U.S. 226 (1964).

²⁴⁷ 379 U.S. 306 (1964).

²⁴⁸ *Id.* at 308.

²⁴⁹ *Id.* at 313.

²⁵⁰ *Id.* at 315.

²⁵¹ 1 U.S.C. § 109 (1959). (Emphasis added.)

²⁵² 379 U.S. at 314. There were four dissents from this holding. Mr. Justice Black thought that the "savings clause" was applicable here and that nowhere in the Civil Rights Act, or in the volume of legislative history, was there any proposal to abate the pending criminal convictions. *Id.* at 318. Mr. Justice Harlan knew of no case which suggests that the doctrine of abatement can be applied to another jurisdiction, and he doubted the

The *Hamm* decision was applied in *Blow v. North Carolina*.²⁵³ There, a group of Negroes in the town of Enfield went to the Plantation Restaurant. The restaurant served whites only and carried a sign to that effect on its front door. When the Negroes arrived, the owner locked the door, opening it for white customers. The Negroes remained outside until arrested, and were convicted under the state trespass law. The Supreme Court reversed per curiam, quoting *Hamm*:

The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to the enactment of the Act, the still pending convictions are abated by its passage.²⁵⁴

Finally, also on the basis of *Hamm*, the Supreme Court without opinion reversed a Tennessee sit-in conviction for conspiracy to injure business of a "white" Tennessee cafeteria. *McKinnie v. Tennessee*.²⁵⁵

6. *Recapitulation*.—In these sit-in cases, the Supreme Court has made it clear that a state cannot convict unless the statute used to punish the demonstrators gives "fair warning of the conduct which it prohibits."²⁵⁶ The demonstrators may not be punished "because of the acts of hostile onlookers";²⁵⁷ or without competent evidence to support the charge as made.²⁵⁸

The Supreme Court continues to hold that private conduct abridging individual rights does no violence to the equal protection clause "unless to some significant extent the State in any of its

Constitutional power to so apply it here: "for the legislative record is barren of any evidence showing that giving effect to *past* state trespass convictions would result in placing any burden on *present* interstate commerce." *Id.* at 325. Mr. Justice Stewart wrote that "In *Bell v. Maryland*, we said that a State's abatement policy was for the State to determine. . . . I would vacate the judgments and remand the cases to the state courts for reconsideration in the light of the supervening federal legislation." *Id.* at 326-27. Mr. Justice White opined that "the common law presumption of abatement was reversed by" the Federal Savings Statute, and that "had Congress intended to ratify massive disobedience to the law, so often attended by violence, I feel sure it would have said so in unmistakable language." *Id.* at 328.

²⁵³ 379 U.S. 684 (1965).

²⁵⁴ *Id.* at 685.

²⁵⁵ 33 U.S. LAW WEEK 4319 (April 6, 1965) (per curiam).

²⁵⁶ *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

²⁵⁷ *Barr v. City of Columbia*, 378 U.S. 146 (1964).

²⁵⁸ *Garner v. Louisiana*, 368 U.S. 157 (1961).

manifestations has been found to have become involved in it."²⁵⁹ The Court has found significant state involvement when a municipal agency rents cafeteria space in a public parking building;²⁶⁰ when a county "deputizes" the private guard who first orders the demonstrators away and then arrests for trespass;²⁶¹ when the state health officials require separate toilet facilities if the restaurants choose to serve Negroes and whites;²⁶² when a city by ordinance requires segregated restaurants;²⁶³ or when high city officials threaten to apply "breach of the peace" laws against sit-in demonstrators.²⁶⁴

Individual justices go much further. Mr. Justice Douglas would find "significant state involvement" and a violation of the equal protection clause when the state licenses a restaurant to serve the general public and permits segregation within the licensed premises,²⁶⁵ or when a state enforces a policy of private segregation "with her police, her prosecutors, and her courts."²⁶⁶ Mr. Justice Goldberg (the Chief Justice and Mr. Justice Douglas agree) believes that a state is "obligated under the Fourteenth Amendment to maintain a system of law in which Negroes are not denied protection in their claim to be treated as equal members of the community."²⁶⁷ Mr. Justice Harlan believes that until the moment the proprietor tells the sit-in demonstrator to leave, the "free speech" provisions of the Constitution give the demonstrator immunity from state arrest.²⁶⁸

Other individual justices disagree. Justices Black, Harlan, and White have written that the fourteenth amendment "of its own force" does not compel a restaurant owner to serve anyone, and that the state is "neutral" when it enforces private segregation through the application of its criminal trespass laws.²⁶⁹

The Supreme Court has cleared its dockets by "abating" all sit-in cases in restaurants, cafes, motels, hotels, and other estab-

²⁵⁹ *Burton v. Wilmington Parking Authority*, 368 U.S. 715 (1961).

²⁶⁰ *Ibid.*

²⁶¹ *Griffin v. Maryland*, 378 U.S. 180 (1964).

²⁶² *Robinson v. Florida*, 378 U.S. 153 (1964).

²⁶³ *Peterson v. City of Greenville*, 373 U.S. 267 (1963).

²⁶⁴ *Lombard v. Louisiana*, 373 U.S. 267 (1963).

²⁶⁵ *Bell v. Maryland*, 378 U.S. 347, 252-53 (1964) (dissenting opinion).

²⁶⁶ *Id.* at 259.

²⁶⁷ *Id.* at 296-97.

²⁶⁸ *Garner v. Louisiana*, 368 U.S. 157, 201-02 (1961). See note 201 *supra*.

²⁶⁹ *Bell v. Maryland*, 378 U.S. 226, 318-46 (1964) (dissenting opinion).

lishments covered by the Civil Rights Act of 1964.²⁷⁰ But not all establishments—the ordinary barber shop, for example—are so covered. Thus, the issues and contentions of the parties²⁷¹ are not yet moot. However, unless and until the Supreme Court rules in a sit-in conviction in an establishment not covered by the Civil Rights Act, the law in this area must remain in doubt.

C. Street-Blocking and Freedom of Speech

The Chapel Hill demonstrators not only sat in the segregated restaurants, they also sat down on the street at the main intersections to confront the community with a problem long pushed into the background. It was now in the open.

Novelist John Ehle tells of the events and his emotional response:

On the Durham highway three Negroes and two whites sat down several hundred feet from the Eastgate Shopping Center. Astonished drivers pulled to a stop and stared in bewilderment. One driver inched forward until his bumper touched two of the prone young men. They didn't move. The driver turned off the car motor and sat there, exasperated. Soon cars were backed up for half a mile, two abreast. Even the police cars couldn't get through. . . .

At the main intersection of town, the chief of police asked the demonstrators to leave. They did so. But soon five Negro and three white demonstrators returned and lay down. Several cars wove their way between them at high speeds. They continued to lie there in the road even so.

The paddy wagon, which was being driven by the fire chief, kept hauling people away, until at last, some say, it broke down, blocking a road itself. . . .

In all, that day ninety-eight people were arrested.

Whatever complacency might have existed in the town that morning was gone by now. Never before had the town arrested so many people; not in many decades had it been so mightily interfered with. Many citizens were enraged. The homes of the aldermen and policemen were busy with telephone calls. . . .

Negro parents knelt in prayer in the churches and in their homes. Whatever belief had been promoted by segregationists that the Negro community was itself disinterested was dispelled now. The Negroes had offered up in one day scores of their young people. In spite of their fears of jails and policemen and

²⁷⁰ Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

²⁷¹ See text accompanying notes 184-91 *supra*.

authority, they had sent the best young people they had into the very jaws of civil authority, and their only appeal, the one many of them made all that night through, was in the form of prayer to the only Higher Authority they knew.²⁷²

John Ehle concluded that the sight of so many young persons being arrested for an ideal "was deeply moving, as perhaps the arrest of young people who are representing a cause they feel is right and good must always be moving, and that was the point of it all."²⁷³

The street blocking was a drastic appeal to the community conscience which the community could not ignore, but it was not, under existing decisions, a form of communication protected by the "free speech" provisions of the Constitution. A state or a city, under a well defined and evenly applied law, may regulate the time, place, manner, and circumstances of street parades and street gatherings. A brief review of the major cases makes this clear.

In *Hague v. CIO*,²⁷⁴ Jersey City had denied union organizers the right to parade, to hold rallies, to distribute literature on the street corners, and defended this denial on the theory that "the city's ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof. . . ."²⁷⁵ Mr. Justice Roberts rejected this view: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."²⁷⁶ Mr. Justice Roberts added by way of dictum that this protected use of the streets for public discussion "is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order. . . ."²⁷⁷

²⁷² EHLE 192-94.

²⁷³ *Id.* at 190.

²⁷⁴ 307 U.S. 496 (1939).

²⁷⁵ *Id.* at 514.

²⁷⁶ *Id.* at 515. There was no opinion by the Court in this case. Mr. Justice Black joined the opinion of Mr. Justice Roberts. Mr. Justice Stone wrote a concurring opinion joined by Mr. Justice Reed. Chief Justice Hughes wrote an individual concurring opinion. Mr. Justice McReynolds and Mr. Justice Butler each wrote dissenting opinions. Justices Frankfurter and Douglas took no part in the consideration or decision of the case.

²⁷⁷ *Id.* at 516.

This dictum shortly became the law. *Cox v. New Hampshire*²⁷⁸ was a situation where a number of Jehovah's Witnesses had been convicted for marching down the main street of Manchester without the "parade permit" required by city ordinance. The Witnesses contended that they had a right under the "freedom of speech" provisions of the Constitution to communicate with by-standers by means of a public parade, with or without a permit. The Supreme Court rejected this contention and upheld the convictions. Mr. Chief Justice Hughes said in explanation that:

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.²⁷⁹

When a city or state enacts a well-defined "permit" law, those who use the city streets or parks without a license can be punished, even though the licensing officials misapply and abuse the licensing system. *Poulos v. New Hampshire*.²⁸⁰ As Mr. Justice Black so aptly said in his dissent: "Poulos can be branded a criminal for making a talk at the very time and place which the State Supreme Court has held its licensing officials could not legally forbid."²⁸¹ In that case, the Court again reaffirmed the power of New Hampshire to regulate the time, place and manner for use of the streets for discussion purposes.²⁸² But the city council of Portsmouth had

²⁷⁸ 312 U.S. 569 (1941).

²⁷⁹ *Id.* at 574.

²⁸⁰ 345 U.S. 395 (1953).

²⁸¹ 345 U.S. at 422.

²⁸² The Court quoted with approval from its earlier decision in *Schneider v. New Jersey*, 308 U.S. 147, 160-161 (1939):

Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no

gone beyond the regulation of time, place, and manner, and denied a permit for a park discussion in a manner which was "arbitrary." The Jehovah's Witnesses used the park anyway and were convicted of speaking without the required permit. The New Hampshire Supreme Court affirmed the conviction on the theory that those unlawfully denied the permit could not take the law into their own hands, but had to seek redress in court proceedings.^{282a}

Poulos contended that his right to free speech could not be denied by a "wrongful refusal of the license" or by the requirement that he postpone his right while seeking court redress. His contention was that he "may risk speaking without a license and defeat prosecution by showing the license was arbitrarily withheld."²⁸³ The Supreme Court (per Mr. Justice Reed) rejected this contention and affirmed the conviction:

It must be admitted that judicial correction of arbitrary refusal by administrators to perform official duties under valid laws is exulcerating and costly. . . . Delay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning. Nor can we say that a state's requirement that redress must be sought through appropriate judicial procedure violates due process.²⁸⁴

Earlier decisions, however, hold that when the statute, ordinance or custom is not restricted to regulation of the time, place, and manner of street use, when the statute does not set sufficient standards to guide the administrative licensing processes, in short, when the statute permits the licensing officials to play favorites, the sanctions of the statute may not be imposed against one who uses the streets without a permit.

In *Kunz v. New York*²⁸⁵ a Baptist minister was convicted for

pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. . . .

345 U.S. at 406 n.11.

^{282a} *State v. Poulos*, 97 N.H. 352, 88 A.2d 860 (1952).

²⁸³ 345 U.S. at 409.

²⁸⁴ *Ibid.* Mr. Justice Frankfurter concurred and pointed out that "there is nothing in the record to suggest that the remedy to which the Supreme Court of New Hampshire confined Poulos effectively frustrated his right of utterance, let alone that it circumvented his constitutional right by a procedural pretense." *Id.* at 419-20.

²⁸⁵ 340 U.S. 290 (1951).

"street preaching" without a license. He had been denied a license because, in earlier meetings, he had ridiculed and denounced other religious beliefs. The city ordinance under which he had been convicted required a permit from the City Police Commissioner as a condition precedent to use of the streets for discussion purposes, but the ordinance failed to set out any standards to control the commissioner when he was requested to issue a permit. For this reason, the Court (per Mr. Chief Justice Vinson) held that the ordinance was unconstitutional and the conviction of Kunz invalid:

Although this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, . . . we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.²⁸⁶

The companion case of *Niemotko v. Maryland*²⁸⁷ is similar. There, the town of Havre de Grace had no laws related to park use, but there was a custom to apply for a use permit from the park commissioner. The Jehovah's Witnesses applied for use of a park for a religious meeting, and were denied. At approximately the same time, the Elks were permitted to use the park for a Flag Day ceremony, and the park was used often by other religious organizations for Sunday-school picnics. When the park commissioner denied them a permit, the Witnesses appealed to the City Council. They were there asked about their refusal to salute the flag, their views on the Bible, on "other issues irrelevant to unencumbered use of the public parks." The Witnesses were denied a permit, but used the park anyway. For this use they were convicted of disorderly conduct. The Supreme Court (per Mr. Chief Justice Vinson) reversed the conviction:

In the instant case we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amorphous 'practice' No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power. . . . Inasmuch as the basis of the convictions was the lack of the permits, and that lack was, in turn, due to the unconstitutional defects discussed, the convictions must fall.²⁸⁸

²⁸⁶ 340 U.S. at 293-4. (Citation omitted.)

²⁸⁷ 340 U.S. 268 (1951).

²⁸⁸ 340 U.S. at 271-72, 273.

The holdings in the *Kunz* and *Niemotko* cases were applied in *Fowler v. Rhode Island*.²⁸⁹ There, the City of Pawtucket had an ordinance which provided quite simply that "No person shall address any political or religious meeting in any public park. . . ."²⁹⁰ However, this statute had been interpreted to permit church services in the park. But when the Jehovah's Witnesses held a park meeting (the text was "The Pathway to Peace"), the minister was arrested and convicted for violation of the ordinance. The Supreme Court (per Mr. Justice Douglas) reversed because the testimony

plainly shows that a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one. In *Niemotko v. Maryland*, 340 U.S. 268, 272-273, we had a case on all fours with this one. There a public park, open to all religious groups, was denied Jehovah's Witnesses because of the dislike which the local officials had of these people and their views. That was a discrimination which we held to be barred by the First and Fourteenth Amendments.²⁹¹

These "improper standards" and "discriminatory application" cases in no way weaken the basic authority of the state to regulate the use of public streets. This state power is illustrated by the "sound truck" decision of *Kovacs v. Cooper*.²⁹² Trenton, New Jersey, enacted an ordinance which prohibited the use of a sound truck which emits "loud and raucous" noises, and applied the penalties of this ordinance to Kovacs as he cruised around the scene of a strike, broadcasting music and the labor union views about the strike. Kovacs argued that the ordinance prohibiting the street broadcasts infringed upon his freedom of speech, but the Supreme Court (per Mr. Justice Reed) rejected this contention: "City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control."²⁹³ The Court then discussed the distraction (and danger) caused by sound trucks in downtown traffic, and the necessity for quiet and tranquility in residential areas. The Court then concluded:

Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free

²⁸⁹ 345 U.S. 67 (1953).

²⁹⁰ Quoted in *ibid.*

²⁹¹ *Id.* at 69.

²⁹² 336 U.S. 77 (1949).

²⁹³ *Id.* at 87.

speech than is the unlimited opportunity to address gatherings on the streets. . . . To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. . . . We think that the need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance.²⁹⁴

If "loud and raucous" sound trucks can be barred from the city streets in the interest of downtown traffic safety and suburban tranquility, it seems that large groups of demonstrators can be barred from the city streets in the interest of traffic flow. Such is the implication of *Cox v. Louisiana*,²⁹⁵ although the conviction was there reversed for other reasons.

On December 14, 1961, twenty-three students from Southern University were arrested in downtown Baton Rouge for picketing stores that maintained segregated lunch counters. That night, the local CORE chapter decided to demonstrate against these arrests in front of the courthouse where the students were imprisoned on upper floors. The next morning about 2,000 students left the campus and walked the five miles (the drivers of their busses had been arrested) to the Old State Capitol building in downtown Baton Rouge. The student leaders were there arrested under an anti-noise statute for using a loudspeaker, so the Reverend Cox, a Field Secretary for CORE, took over. He led the students in an orderly procession two and a half blocks to the courthouse where a number of policemen directed them to the sidewalk on the far side

²⁹⁴ *Id.* at 87-89. Mr. Justice Black read the record as meaning that all sound trucks were outlawed in Trenton, not only those which emitted "loud and raucous noises." He therefore dissented on the theory that a city could not outlaw one of the competing media of communication, especially the only media which was accessible to the poor. He said:

There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Yet everybody knows the vast reaches of these powerful channels of communications which from the very nature of our economic system must be under the control and guidance of comparatively few people. On the other hand, public speaking is done by many men of divergent minds with no centralized control over the ideas they entertain so as to limit the causes they espouse. . . . And it is an obvious fact that public speaking today without sound amplifiers is a wholly inadequate way to reach the people on a large scale. Consequently, to tip the scales against transmission of ideas through public speaking, as the Court does today, is to deprive the people of a large part of the basic advantages of the receipt of ideas that the First Amendment was designed to protect.

Id. at 102-03. Justices Douglas and Rutledge joined in this dissent.

²⁹⁵ 379 U.S. 536 (1965).

of the street. Cox explained to the Chief of Police that the program would consist of songs (the Star Spangled Banner and a freedom song), the Lord's Prayer, the Pledge of Allegiance, and a short speech. The program proceeded as scheduled until the speech. Then, as Cox read the list of segregated restaurants and urged sit-ins, the law enforcement officials told him and the students that the demonstrations must be broken up. The students did not move, the deputies started to shove the students, and a policeman began shooting tear gas shells at the crowd. The students ran in all directions, and Cox was arrested and then convicted under a variety of charges, including violation of the Louisiana "Obstructing Public Passages" statute. This statute made it unlawful for any person to "wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway . . . by impeding, hindering, stifling, retarding, or restraining traffic or passage thereon or therein." A proviso to this statute exempted labor unions while engaged in "picketing, lawful assembly or concerted activity in the interest of its members. . . ." ²⁰⁶

The record in the case, and oral argument to the Court, disclosed that "certain meetings and parades are permitted in Baton Rouge, even though they have the effect of obstructing traffic" and that "the authorities in Baton Rouge permit or prohibit parades or street meetings in their completely uncontrolled discretion." ²⁰⁷ For this reason, the Court (per Mr. Justice Goldberg) reversed the conviction:

It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute. ²⁰⁸

²⁰⁶ *Id.* at 553.

²⁰⁷ *Id.* at 556-57.

²⁰⁸ *Id.* at 557-58. Mr. Justice Black concurred in this result, but for different reasons. He wrote that "the First and Fourteenth Amendments require that if the streets of a town are open to some views, they must be open to all." *Id.* at 580. In the proviso exempting labor unions from the general prohibition, "Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. . . . This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendment." *Id.* at 581. Mr. Justice Clark joined in this concurring opinion. Mr. Justice White dissented, reading the record as not

While reversing the conviction, the Court emphasized that "The rights of free speech and assembly . . . still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." The Court reiterated that "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order," and that "Governmental authorities have the duty and responsibility to keep their streets open and available for movement." The Court gave illustrations: "One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech and assembly."²⁹⁹ The Court concluded that it is,

of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances concerning the time, place, duration, or manner of use of the streets for public assembly may be vested in administrative officials, provided that such limited discretion is exercised with uniformity of treatment . . . free from improper or inappropriate considerations . . . with reference to the convenience of public use of the highways.³⁰⁰

Under existing decisions, then, the Constitutional freedom of speech provisions do not preclude the states from enacting statutes punishing street blocking tactics similar to those used by the Chapel Hill demonstrators. But, some speculation is nevertheless warranted.

Mr. Justice Black pointed out in *Kovacs* that "Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, moving pictures, and public address systems."³⁰¹ Television should now be added to this group. Mr. Justice Black also pointed out that these powerful channels of communications "from the very nature of our economic system must be under the control and guidance of comparatively few people."³⁰² Certainly, few minority groups control or guide these media of mass communication. Other forms of communication—the public meeting,

showing that any demonstration similar in intensity and location had ever been before permitted. Mr. Justice Harlan joined in this dissent.

²⁹⁹ *Id.* at 554.

³⁰⁰ *Id.* at 558.

³⁰¹ 336 U.S. at 102.

³⁰² *Ibid.*

picket line, the letter to the editor, even loud but non-raucous sound-trucks—are generally restricted in audience. If the message of protest is to be heard, resort must be had to the bizarre, the impolite, the offensive, the unruly tactic which makes front-page news.

The attention-gaining assets of these tactics suggest that they will continue to be utilized, someday perhaps with grudging court approval. The sister communication techniques of the poor were at one time beyond the pale and gained but an evolutionary acceptance. This is true of picketing,³⁰³ street parades,³⁰⁴ park meetings,³⁰⁵ leaflet distributions,³⁰⁶ and now possibly sit-ins in places of public accommodation.³⁰⁷ The free speech mantle slowly spread over these activities might someday be extended to a street blocking situation where the protest rings true, the target is well marked, and the general public not inconvenienced: for example, a Negro sit-down blocking the entrance to a government-sponsored construction project where the contractor employs "white only." After all, the flow of ideas is just as important to a city as is the flow of traffic; and on appropriate occasion in limited situations, perhaps even more so.

D. Picketing and Freedom of Speech

It will be remembered that the Chapel Hill Board of Aldermen enacted an ordinance which made it illegal to picket between 7:00 p.m. and 7:00 a.m. This ordinance was passed at the request of the Chief of Police, who lacked sufficient manpower to protect the picketers from hoodlums during the hours of darkness. Although this ordinance never became law,³⁰⁸ several other communities have enacted similar laws,³⁰⁹ and the problem warrants a brief discussion.

The picket sign is the poor man's newspaper, and as such is protected by the constitutional guarantee of freedom of speech and press. This has been established law for over twenty-five years.

³⁰³ *Thornhill v. Alabama*, 310 U.S. 88 (1940).

³⁰⁴ *Edwards v. South Carolina*, 372 U.S. 229 (1963).

³⁰⁵ *Davis v. Massachusetts*, 167 U.S. 43 (1897).

³⁰⁶ *Schneider v. New Jersey*, 308 U.S. 147 (1939).

³⁰⁷ See, e.g., *Bell v. Maryland*, 378 U.S. 226 (1964).

³⁰⁸ See text accompanying notes 51-53 *supra*.

³⁰⁹ Thomasville, N.C., has an ordinance which includes the clause that "Picketing shall be prohibited between the hours of 9 p.m. and 7 a.m." *Thomasville Times*, Feb. 17, 1964, p. 10, col. 1. Danville, Virginia, has an ordinance which requires that "All picketing . . . shall be during the business or work hours of the place of business or public facility being picketed. . . ." 8 RACE REL. L. REP. 698 (1963).

Thornhill v. Alabama.³¹⁰ There, Thornhill was arrested, while on a union picket line, pursuant to an Alabama statute which punished picketing "the works or place of business of such other persons . . . for the purpose of hindering, delaying, or interfering with . . . any lawful business or enterprise of another."³¹¹ The State sought to justify this ban on picketing at the location of strikes as a "protection of the community from the violence and breaches of the peace, which . . . are the concomitants of picketing."³¹² The Supreme Court rejected this contention and said: "[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."³¹³

In the companion case of *Carlson v. California*³¹⁴ the Court struck down a similar municipal ordinance, which banned picketing at or near the scenes of industrial disputes, with this comment:

The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. . . . [P]ublicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a State.³¹⁵

Labor unions are not singled out as favorites. Any person and any group enjoys this freedom. State efforts to restrict the right to picket to striking employees have been rebuffed by the Supreme Court,³¹⁶ and the Supreme Court has protected the rights of civil rights organizations to picket for equal employment opportunities,³¹⁷ unless, of course, the organization violates the state policy against "fair employment" by insisting upon an arbitrary and fixed "Negro quota."³¹⁸

The right to picket is not absolute. A state can punish picketing

³¹⁰ 310 U.S. 88 (1940).

³¹¹ Quoted in *id.* at 91.

³¹² *Id.* at 105.

³¹³ *Id.* at 105-06. (The brackets are the Court's.)

³¹⁴ 310 U.S. 106 (1940).

³¹⁵ *Id.* at 112-13.

³¹⁶ *AFL v. Swing*, 312 U.S. 321 (1941).

³¹⁷ *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

³¹⁸ *Hughes v. Superior Court*, 339 U.S. 460 (1950).

when "used as an integral part of conduct in violation of a valid criminal statute" because "it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language."³¹⁹ A state can enjoin picketing which is "enmeshed with contemporaneously violent conduct [by the union] which is concededly outlawed",³²⁰ but when the union violence is "scattered in time and much of it . . . unconnected with the picketing," the Supreme Court will permit an injunction against the violence but not against the picketing itself.³²¹

Picketing may be enjoined to protect the neutrals in a labor dispute,³²² to protect the employees' free choice of bargaining representatives,³²³ and to protect the right of non-union men in a right-to-work-law state from illegal discharge.³²⁴ But it has never been suggested that picketing may be enjoined to protect the picketers from attacks by hoodlums. Indeed, the Court in *Meadowmoor Dairies* commented on this and said that a state may not "enjoin peaceful picketing merely because it may provoke violence in others."³²⁵ This is in accord with many similar situations wherein the Supreme Court has held that constitutional rights are not to be sacrificed because of extreme public hostility to the exercise of those rights.³²⁶

³¹⁹ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 502 (1949). Here, a union was enjoined from picketing where the purpose of the picketing was to compel the employer to violate a valid state anti-trust law.

³²⁰ *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292 (1941).

³²¹ *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 139 (1957).

³²² *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722 (1942).

³²³ *Building Service Employees Int'l Union v. Gazzam*, 339 U.S. 532 (1950).

³²⁴ *Local 10, United Ass'n of Journeymen Plumbers & Steamfitters*, 345 U.S. 192 (1953).

³²⁵ *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 296 (1941).

³²⁶ Some of these cases follow in chronological order. *Cooper v. Aaron*, 358 U.S. 1 (1958). "[L]aw and order are not here to be preserved by depriving the Negro children of their constitutional rights" to attend desegregated schools. *Id.* at 16. *Garner v. Louisiana*, 368 U.S. 157 (1961). Negro students at "white" lunch counters cannot be arrested for breach of peace because their presence is "offensive to another class of the public." *Id.* at 167. *Taylor v. Louisiana*, 370 U.S. 154 (1962). Negro bus passengers cannot be arrested because their presence "in a white waiting room was likely to give rise to a breach of the peace." *Id.* at 155. *Edwards v. South Carolina*, 372 U.S. 229 (1963). The state may not apply "breach of the peace" laws to Negro students who march in large numbers to the State Capitol as "The Fourteenth Amendment does not permit a State to make

When the Chapel Hill anti-picketing ordinance was originally passed, the student *Daily Tar Heel* editorialized that "you do not take away a man's constitutional right to picket because your police force is overworked and underpaid—... or because you fear some hoodlum may attack a picketer."³²⁷ The student editor there cap-suled in a neat package a host of applicable Supreme Court decisions.

E. Public Accommodation Laws and Municipal Authority

There is nothing new or novel about a law requiring all members of the public to be given equal access to private facilities licensed by the state to serve the public generally. A century ago Massachusetts enacted a law which prohibited any "distinction, discrimination or restriction on account of race or color... in any licensed inn, in any public place of amusement, public conveyance or public meeting in this commonwealth."³²⁸ Four years later, in 1869, Congress wrote a similar law for the District of Columbia; and in 1874, Kansas and New York followed the lead of Massachusetts. In 1884, Iowa, New Jersey, Ohio, and Connecticut passed such laws, and the following year seven others—Colorado, Illinois, Indiana, Michigan, Minnesota, Nebraska and Rhode Island—followed suit. By 1964, some thirty-four states had enacted anti-discrimination laws in privately owned places of public accommodations.³²⁹

There is no question about the constitutionality of these state anti-discrimination laws. *Railway Mail Ass'n v. Corsi*³³⁰ concerned a New York law which forbade any labor organization to

criminal the peaceful expression of unpopular views. "[A] function of free speech... is to invite dispute." *Id.* at 237. *Wright v. Georgia*, 373 U.S. 284 (1963). Six young Negroes cannot be punished for peacefully playing basketball in a public park because "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right... to be present." *Id.* at 293. *Henry v. City of Rock Hill*, 376 U.S. 776 (1964). South Carolina cannot punish Negroes who demonstrate in front of the City Hall to protest segregations upon evidence which "'showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.'" *Id.* at 777-78.

³²⁷ *Daily Tar Heel*, Feb. 15, 1964, p. 2, col. 2.

³²⁸ Quoted in *id.*, Feb. 19, 1964, p. 2, col. 1 (wire-service story).

³²⁹ They are listed, with citations and dates of enactment, in the appendix to the opinion of Mr. Justice Douglas in *Bell v. Maryland*, 378 U.S. 226, 284 (1964).

³³⁰ 326 U.S. 88 (1945).

deny membership or representation to anyone on the basis of race, color or creed. A union contended that this law "offends the due process clause of the Fourteenth Amendment as an interference with its right of selection to membership and abridgement of its property rights and liberty of contract."³³¹ The Court (per Mr. Justice Reed) rejected these contentions with the comment that there is "no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees."³³² Mr. Justice Frankfurter, concurring, said, "to argue against this contention is to dignify a claim devoid of constitutional substance."³³³

In *Bob-Lo Excursion Co. v. Michigan*,³³⁴ the constitutionality of a state public accommodations law was conceded,³³⁵ the appellant contesting only the power of Michigan to apply its law to an excursion boat which carried vacationers from Detroit to an amusement park on an island in Canadian waters, and back to Detroit. The Court (per Mr. Justice Rutledge) admitted that the "voyage" was in "foreign commerce" within the meaning of the Commerce Clause, but then held that because of the "special local interest" in preventing discrimination, the Michigan law was applicable: "Certainly there is no national interest which overrides the interest of Michigan to forbid the type of discrimination practiced here."³³⁶

Finally, in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*,³³⁷ the Court (per Mr. Justice Black) sustained the constitutionality of a state "fair employment practices" act as applied to the employment of a pilot by an interstate air carrier. The air line argued that it was in interstate commerce, and hence subject to Congressional (to the exclusion of state)

³³¹ *Id.* at 93.

³³² *Id.* at 94.

³³³ *Id.* at 98.

³³⁴ 333 U.S. 28 (1948).

³³⁵ The Supreme Court of Michigan has sustained the statute against fourteenth amendment contentions, *People v. Bob-Lo Excursion Co.*, 317 Mich. 686, 27 N.W.2d 139 (1947), and Mr. Justice Douglas, concurring, cited *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945), for the proposition that "the police power of a State under our constitutional system is adequate for the protection of the civil rights of its citizens against discrimination by reason of race or color." 333 U.S. at 41.

³³⁶ *Id.* at 40.

³³⁷ 372 U.S. 714 (1963).

regulation. The Court held that hiring within a state of an employee is a "localized matter," and, moreover, there was no possibility of conflicting regulation by Congress or by other states because "any state or federal law requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."³³⁸

The same constitutional arguments made against the validity of a state public accommodations law were repeated when Congress in 1964 passed a national public accommodations law. The Supreme Court upheld this statute in *Heart of Atlanta Motel, Inc. v. United States*³³⁹ and said that the law requiring motel and restaurant owners to serve all patrons regardless of race did not "deprive [the owners] of liberty or property,"³⁴⁰ was not a law taking "property without just compensation,"³⁴¹ and did not put the restaurant owner in a position of "involuntary servitude."³⁴² The Court pointed out that "32 States now have such statutes and no case has been cited to us where the attack on a state statute has been successful, either in federal or state courts."³⁴³

City governments, when the state is slow to act or otherwise is uninterested in local municipal problems, have enacted public accommodation laws. Cleveland, Ohio, led the way in 1934, followed by Albuquerque, New Mexico. During the 1940's, laws prohibiting racial discrimination in public accommodations, in employment, in housing, or in transportation were enacted in Chicago, Minneapolis, Youngstown, Philadelphia, Milwaukee, Phoenix, New York City, Richmond, California, and elsewhere.³⁴⁴ The trend has continued, and in very recent periods public accommodations laws have been enacted by cities in Delaware (Wilmington),³⁴⁵ Kansas

³³⁸ *Id.* at 721.

³³⁹ 379 U.S. 241 (1964). In the companion case of *Katzenbach v. McClung*, 379 U.S. 294 (1964), the law was upheld as applied to Ollie's Barbeque, a family-owned restaurant in Birmingham, Alabama, catering to a family and white-collar local trade with a take-out service for Negroes.

³⁴⁰ 379 U.S. at 258.

³⁴¹ *Id.* at 261.

³⁴² *Ibid.*

³⁴³ *Id.* at 260.

³⁴⁴ The list of cities with citations is set forth in *John R. Thompson Co. v. District of Columbia*, 203 F.2d 579, 599-600 (D.C. Cir. 1953).

³⁴⁵ 6 RACE REL. L. REP. 885 (1961).

(Kansas City);³⁴⁶ Kentucky (Louisville);³⁴⁷ Maryland (Rockville³⁴⁸ and Montgomery County);³⁴⁹ Missouri (Kansas City,³⁵⁰ St. Joseph,³⁵¹ and St. Louis);³⁵² Oklahoma (Oklahoma City³⁵³ and Tulsa);³⁵⁴ and Texas (Corpus Christi³⁵⁵ and El Paso).³⁵⁶

These local laws take various forms. They vary in coverage. Some include all kinds of public accommodations—restaurants, inns, grocery stores, shoeshine parlors, barber shops, gas stations, the whole gamut. Others are more restrictive. Typically, private clubs, taverns, and barber shops are often excluded in the initial enactments, and sometimes later included when the law proves workable. The laws also vary in methods of enforcement. Some operate by a licensing system: the license is revoked if the establishment discriminates often enough. Others utilize criminal sanctions. Still others use civil injunctive methods; and others create private causes of action and leave enforcement in the hands of those who suffer the discrimination.

Although there are many possibilities available when considering the enactment of a public accommodations law, cities do not have an entirely free hand. A city is an agent of the state legislature to deal with localized problems, and has only those powers which the state legislature deems expedient to vest upon it. A state legislature may be generous, it may be parsimonious. As a general proposition, a city has only those powers granted in express terms or by implication, and those essential to the achievement of the declared objects and purposes of the municipality.³⁵⁷ When the power of a city to enact a public accommodations law is challenged, there are two questions to be faced: (1) Does the State have constitutional authority to delegate this power to the city?

³⁴⁶ 8 RACE REL. L. REP. 1682 (1963).

³⁴⁷ 8 RACE REL. L. REP. 719 (1963).

³⁴⁸ 7 RACE REL. L. REP. 266 (1962).

³⁴⁹ 7 RACE REL. L. REP. 263 (1962).

³⁵⁰ 8 RACE REL. L. REP. 1684 (1963).

³⁵¹ 8 RACE REL. L. REP. 1686 (1963).

³⁵² 6 RACE REL. L. REP. 881 (1961).

³⁵³ 9 RACE REL. L. REP. 998 (1964).

³⁵⁴ 9 RACE REL. L. REP. 1001 (1964).

³⁵⁵ 9 RACE REL. L. REP. 1897 (1964).

³⁵⁶ 7 RACE REL. L. REP. 1265 (1962).

³⁵⁷ See, e.g., Comment, *Validity of Municipal Law Barring Discrimination in Private Housing*, 58 COLUM. L. REV. 728 (1958); Note, *Municipal Contracts and Provisions for a Minimum Wage: Constitutional Considerations of State and Local Authority*, 47 VA. L. REV. 828, 841 (1961).

(The answer here is clearly yes.) (2) Did in fact the State delegate this power to the city, either expressly or by implication?

Answer to the second question must be sought in the general legislation applicable to all cities, and in the specific legislation applicable to the municipality in question. North Carolina and the other states delegate authority to cities in both of these ways. In answering these questions, doubt may be resolved against the grant of this power if the city ordinance is in conflict with or inconsistent with a state public policy as manifest in legislation of state-wide application.

Although many cities have enacted local anti-discrimination ordinances, their power to do so has been challenged on only rare occasions. When the issue has arisen, the decision depends upon the localized situation. Nevertheless, the few existing cases give some guidance.

The first such case was *Nance v. Mayflower Tavern, Inc.*³⁵⁸ There, the tavern refused to serve Nance, and Nance brought suit for damages pursuant to a Salt Lake City ordinance which made it unlawful for a restaurant owner to refuse service to an "orderly person." The Utah Supreme Court held that this ordinance, if designed as a "civil rights" measure, was "invalid as being beyond the delegated power of the city enacting it."³⁵⁹

Nance sought to show that the Utah legislature had delegated sufficient authority to Salt Lake City in a general statute which granted all Utah cities the power to "license, tax and regulate" not only restaurants, but also a host of other activities: hawking, pawn brokers, boarding houses, laundries, barber shops, storage houses, photographers, billboards, etc.³⁶⁰ The Utah Supreme Court held that there was no "express" grant of authority here to enact civil rights laws, and that the power was not granted by implication:

If the statute which authorizes cities to tax, license and regulate restaurants were to be construed as empowering the city to pass a civil rights bill regarding restaurants, the section would also have to be construed so as to permit civil rights legislation by cities in regard to all businesses and occupations enumerated in the same section. It is clear that the legislature never contemplated that cities should have such powers. Even the most liberal

³⁵⁸ 106 Utah 517, 150 P.2d 773 (1944).

³⁵⁹ *Id.* at 521, 150 P.2d at 775.

³⁶⁰ *Id.* at 520, 150 P.2d at 775.

civil rights statutes do not purport to embrace many of the types of businesses enumerated in this section.³⁶¹

A Wilmington, Delaware, public accommodations law was also invalidated for lack of city authority to enact such a law. *Mayor & Council of Wilmington v. Smentkowski*.³⁶² There, the city sought to justify power to enact the ordinance under a state-wide law which gave cities the general power "to do all those matters and things for the well being of the said city *which shall not be in contravention of any existing laws of this State...*"³⁶³ The Delaware Supreme Court, however, had recently held that the state "innkeeper" statute gave restaurant owners the right to discriminate against Negro patrons.³⁶⁴ The city ordinance banning segregation, therefore, was "in contravention" of an existing state law and beyond the power conferred upon the city.

*Marshall v. Kansas City*³⁶⁵ concerned a different degree of city authority, with a different result. Kansas City enacted an ordinance making it unlawful for any restaurant, hotel or motel to refuse to serve any person because of race or color. Marshall, who owned a restaurant, brought suit against the ordinance on the theory, *inter alia*, that the city lacked authority to enact such a law. The city defended its authority under a charter from the state legislature which granted power "to license, tax and regulate any and every person" engaged in the restaurant business and to "regulate all acts . . . businesses . . . [and] trades . . . detrimental . . . to the health, morals, comfort, prosperity, safety, convenience or welfare of the inhabitants. . . ." ³⁶⁶

The Supreme Court of Missouri upheld the city power under this statute. The "essential question," said the court, "is how much of the state's police power to regulate businesses and vocations at the

³⁶¹ *Id.* at 520, 150 P.2d at 774-75.

³⁶² 198 A.2d 685 (Del. 1964).

³⁶³ Quoted in *id.* at 686. (Emphasis added.)

³⁶⁴ *State v. Brown*, 195 A.2d 379 (Del. 1963). The four Supreme Court justices who passed upon this issue held that this "innkeepers law," "authorizing discriminatory classification...is offensive to the Fourteenth Amendment." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 728 (1961) (dissenting opinion). The majority of the Court held that the restaurant segregation there in issue was unconstitutional for other reasons. The Delaware "innkeepers" law permitting segregation had been repealed and a state-wide public accommodations law had been substituted by the time of the *Smentkowski* decision. 198 A.2d at 687.

³⁶⁵ 355 S.W.2d 877 (Mo. 1962).

³⁶⁶ *Id.* at 881.

local level can be and has been delegated to the defendant city."³⁶⁷ The court concluded that enough of the state's police power had been delegated:

We are constrained to hold that this municipal ordinance, designed to prevent discrimination by reason of race or color in restaurants, bears a substantial and reasonable relation to the specific grant of power to regulate restaurants and to the health, comfort, safety, convenience, and welfare of the inhabitants of the city and is fairly referable to the police power of the municipal corporation.³⁶⁸

In *Marshall*, the Missouri Supreme Court placed great reliance on the United States Supreme Court decision in *District of Columbia v. John R. Thompson Co.*³⁶⁹ That case is somewhat unique in its factual setting. In 1871, Congress gave "home rule" to the District of Columbia with power in its people to elect a Legislative Assembly, and gave to the assembly all the powers of a municipal corporation. The assembly in 1873 enacted a law making it criminal for any restaurant to deny service on the basis of race. "Home rule" for the District was short lived. In 1901, Congress established a "Commission" form of government for the District, and repealed all "general and permanent" laws enacted by the assembly, but expressly retained in force all "police regulations" and "acts relating to municipal affairs only."³⁷⁰

In 1950, the District of Columbia convicted the Thompson Company under the 1873 law when it refused to serve a Negro in one of its restaurants. The Thompson Company argued that the 1873 assembly had exceeded its powers as a "municipal corporation" when it enacted the public accommodations law, and that in any event, the law had been repealed in 1901 because it was a "general and permanent" type of law rather than a "police regulation" or an act "relating to municipal affairs."³⁷¹

The Supreme Court rejected this contention. It held that the police power of a municipality includes the power to enact legislation

in the interest of peace and order and conducive to the morals and general welfare of the community....

³⁶⁷ *Ibid.*

³⁶⁸ *Id.* at 883.

³⁶⁹ 346 U.S. 100 (1953).

³⁷⁰ *Id.* at 111-12.

³⁷¹ *Id.* at 112.

It is our view that these anti-discrimination laws governing restaurants in the District are 'police regulations' and acts 'relating to municipal affairs'....

The laws which require equal service to all who eat in restaurants... are as local in character as laws regulating public health, schools, streets, and parks.³⁷²

At least two state attorney generals have given a similar broad construction to legislative grants of "police powers." The Attorney General of Nevada ruled that the statute authorizing the State Gaming Commission to license all gaming establishments "so as to better protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada" included the power to determine that racial exclusion from gaming establishments is "inimical to the... good order and general welfare" and therefore reason for revoking the licenses of Jim Crow gaming establishments.³⁷³ More directly on point, the Attorney General of Maryland recently advised the City of Cambridge that when the Maryland legislature authorized it "by ordinance, to require any and all things to be done which will promote the welfare, good government and prosperity of the people of the town," the legislature thereby granted authority to enact an ordinance prohibiting discrimination in places of public accommodation.³⁷⁴

Reference must also be made to the so-called Jim Crow cases. There, various cities throughout the South required segregation of the races, and the courts in Georgia, Texas, Virginia, and Florida upheld these ordinances as within the bounds of municipal power.³⁷⁵ If the "police power" delegated by a state legislature to a city authorizes the city to require segregation in restaurants, the identical grants of "police power" authorize the city to cope with the same racial problems by requiring equal treatment.³⁷⁶

So much for a general background. Now it is time to examine the powers granted by the North Carolina legislature to Chapel Hill and other municipalities within the state.

North Carolina General Statutes section 160-200 grants to all cities the power:

³⁷² *Id.* at 112-13.

³⁷³ 6 RACE. REL. L. REP. 1234, 1235 (1961).

³⁷⁴ 8 RACE REL. L. REP. 763, 764 (1963).

³⁷⁵ The cases are cited and discussed in *John R. Thompson Co. v. District of Columbia*, 203 F.2d 579, 589-90 (D.C. Cir. 1953).

³⁷⁶ *Id.* at 601.

(6) To supervise, regulate, or suppress, in the interest of public morals...and to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people....

(7) To pass such ordinances as are expedient for maintaining and promoting the peace, good government, and welfare of the city, and the morals and happiness of its citizens, and for the performance of all municipal functions....

(10) To make and enforce local police, sanitary, and other regulations.³⁷⁷

It will be noted that these delegated powers are broader than the delegated powers involved in the Utah *Nance* case³⁷⁸ and in the Delaware *Smentkowski* case,³⁷⁹ but are quite similar to those in the Missouri,³⁸⁰ District of Columbia,³⁸¹ and Maryland situations³⁸² wherein the authorities held that the power delegated to the cities was adequate to support a public accommodation law.

Under these powers granted by the North Carolina legislature, the North Carolina Supreme Court has sustained municipal ordinances which regulate the sale of alcoholic beverages,³⁸³ require Sunday closing,³⁸⁴ prohibited the keeping of cows,³⁸⁵ and zone the location of lumber yards.³⁸⁶

The North Carolina legislature not only grants "municipal" powers to all cities by way of general legislation, it sometimes grants specific powers to designated cities. The North Carolina legislature has granted Chapel Hill a power not granted to all cities, namely, the power "to regulate or to license any occupations, businesses, trades, or forms of amusement or entertainment in the interest of the public health, welfare, order or safety, and to prohibit such as may be inimical to the public health, welfare, order or safety."³⁸⁷ This power makes the Kansas City case³⁸⁸ a strong precedent for the validity of a public accommodations law in Chapel Hill.

³⁷⁷ N.C. GEN. STAT. § 160-200 (1964).

³⁷⁸ *Nance v. Mayflower Tavern, Inc.*, 106 Utah 517, 150 P.2d 773 (1944).

³⁷⁹ *Mayor & Council of Wilmington v. Smentkowski*, 198 A.2d 685 (1964).

³⁸⁰ *Marshall v. Kansas City*, 355 S.W.2d 877 (Mo. 1962).

³⁸¹ *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953).

³⁸² 8 RACE REL. L. REP. 763, 764 (1963).

³⁸³ *State v. Austin*, 114 N.C. 855, 19 S.E. 919 (1894).

³⁸⁴ *State v. Trantham*, 230 N.C. 641, 55 S.E.2d 198 (1949).

³⁸⁵ *State v. Stowe*, 190 N.C. 79, 128 S.E. 481 (1925).

³⁸⁶ *Turner v. City of New Bern*, 187 N.C. 541, 122 S.E. 469 (1924).

³⁸⁷ N.C. SESS. LAWS 1961, ch. 87, sub ch. D, § 5.41.

³⁸⁸ *Marshall v. Kansas City*, 355 S.W.2d 877 (Mo. 1962).

In June of 1963, Chapel Hill's Mayor McClamroch requested both the state Attorney General and the University of North Carolina Institute of Government to advise on the legal authority of Chapel Hill to enact a public accommodations law.

The Institute of Government replied in a twenty-page memorandum with a conclusion that "although there is some doubt, there seems to be legal authority to pass a public accommodations ordinance." The Attorney General replied in a one-page letter that: "It is our *official opinion* that in North Carolina this is an open question and that no one can advise you with any degree of legal certainty what the Supreme Court would rule in such a situation." The Attorney General then added that "It is the writer's *personal opinion* that the Supreme Court of North Carolina would probably say that such a power to pass such an ordinance has not been delegated to Chapel Hill or any other municipality in this State."⁸⁸⁹

The disagreement between the Institute of Government and the "personal opinion" of the Attorney General might never be resolved. The enactment of the Civil Rights Act of 1964—prohibiting discrimination in restaurants, soda fountains, motels, inns, theaters, sports arenas, movies, and similar places of public accommodation—has blunted the drive for a local law of similar import. But not all establishments are covered by the federal law. The ordinary barber shop, a bowling alley, a beer tavern, suggest the types of public places not covered by the federal law and the continuing need for local laws. But unless and until the community of Chapel Hill enacts a public accommodations law fitting its particular needs, its legal powers to act must remain unclear, although legal precedent from other jurisdictions favors the legitimacy of such legislation.

⁸⁸⁹ Subsequently, in a long memorandum, the Attorney General advised the City of Durham that it could not enact a public accommodations law. The Attorney General primarily relied on the proposition that municipal ordinances must harmonize with the general laws of the state, and that a municipal public accommodations law would conflict with, and therefore must yield to, the state trespass statutes, which had been construed by the state supreme court to permit the owner of a business establishment to exclude patrons on the basis of race or color. 9 RACE REL. L. REP. 435 (1964). Since the Attorney General rendered this opinion, the United States Supreme Court has ruled that the North Carolina state trespass laws cannot be so applied. *Blow v. North Carolina*, 379 U.S. 684 (1965).

F. Conclusion

There are other legal problems arising out of the Chapel Hill situation which cannot be discussed here and now because of space limitations. The problem of removing state criminal prosecutions to federal courts pursuant to the Civil Rights Act of 1866³⁹⁰ is a problem which lay dormant for many years but which now needs examination. The severity of the sentences meted out by Judge Mallard raises problems in a novel context and merits exploration.³⁹¹

But these problems, and the events which gave them birth, could have been minimized had Chapel Hill but heeded the words of its most cherished literary son, Thomas Wolfe:

So, then, to every man his chance—to every man regardless of his birth, his shining, golden opportunity—to every man the right to live, to work, to be himself, and to become whatever thing his manhood and his vision can combine to make him—this, seeker, is the promise of America.³⁹²

In the bitter winter months of 1964, a small minority of merchants, backed by the city officialdom, sought to deny the Negro citizen "his shining, golden opportunity . . . to be himself." The consequence was disastrous to the participants, and to those caught in the backlash. But the experiences are of potential benefit. The pitfalls in healthy community relations are now marked. In the future, they can be avoided; or even better, they can now be repaired.

³⁹⁰ 28 U.S.C. § 1443 (1959).

³⁹¹ Charliese Cotton, the seventeen-year-old daughter of a domestic, played a very minor role in the demonstrations. But in August of 1964 Judge Mallard sentenced her to six months in the Women's Prison, to an additional eighteen-month term to begin anytime during the next five years at the discretion of the court, and to a fine of \$1,500. EHLE 316: For discussion of some of the sentences, see Penegar, *Criminal Law Sanctions in Two Civil Rights Cases—A Brief Comparison*, 43 N.C.L. REV. 667 (1965).

³⁹² WOLFE, *YOU CAN'T GO HOME AGAIN* 508 (1940), quoted in N.C. ADVISORY COMMITTEE ON CIVIL RIGHTS, *EQUAL PROTECTION OF THE LAWS IN NORTH CAROLINA* 229 (1962).