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## SOME DICTA ON DISCRIMINATION<sup>1</sup>

*by Mr. Justice William O. Douglas*

Man, being filled with intense likes and dislikes, seems to have an infinite capacity for discrimination. This is a condition that is not peculiar to the United States. Wherever one travels he finds laws, regulations, and customs that prefer some people over others.

In the Philippines, the Chinese are put under great handicaps when it comes to the retail trade. Naturalization in that country is very onerous for people of that race. Throughout Southeast Asia one finds laws and regulations that limit the trade or occupation in which members of the Chinese race may lawfully participate. Some limit the public offices that the Chinese can hold.

India, burdened with the problem of the Untouchables, has strived mightily to remedy their inequalities. But the villages of India still reflect a 17th century attitude rather than the more enlightened 20th century philosophy.

Kashmir is symbolic of the folly of trying to divide a nation on religious grounds.

In some Moslem countries, the Christian is under great disabilities. In the Middle East, the Jew is often singled out for special treatment. I remember one country where a Jew must mark his house with a distinctive symbol, pay special taxes, and suffer disability by not being eligible for service in the army.

Iraq and Turkey in particular practice rank discrimination against the Kurd. Communist regimes harbor discriminatory attitudes in their rules and regulations although often they are disguised.

Those who applaud the regime enjoy security both in Russia and in Formosa. But in each the dissident faces trial and possible banishment or imprisonment. As recently stated in the *Guardian*, "The tiny minority of critical thinkers in Soviet society is almost obliterated by the twin pressures of conformist passivity from below and repression from above."

The landlord in Latin America gets "justice" in the courts. But there, as in the Middle East and Southeast Asia, the sharecropper gets only the

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<sup>1</sup> These remarks were delivered at the Loyola University School of Law in Los Angeles, California, on February 11, 1970.

rough back of the hand.

Race, religion, economic status, ideology, and beliefs are often the reason for discrimination the world over.

Africa knows discrimination apart from Rhodesia and South Africa. The best witnesses to that are perhaps the Indians and Pakistanis who feel the harsh hand of Africanization. I remember one place in East Africa where I, a Christian, could not stay overnight because tradition and custom dictated that no Christian should sleep there—an attitude reminiscent of some towns in east Tennessee where the boast was that no Black had ever stayed there after the sun set.

I hasten to add that the Christians are no different from the others. When we the Christians took Jerusalem, 75,000 people were beheaded merely because they were infidels. When Saladin, the Kurd and great Arab leader, retook Jerusalem 110 years later, he executed no one, proving I guess that Saladin was the best "Christian" of all. That is why I always lay a wreath on Saladin's tomb whenever I visit Damascus.

The main political problem throughout history has been to develop viable societies with multi-racial, multi-religious, and multi-ideological communities. History shows that various forms and types of prejudices and discriminations have prevented the people of the world from making any great progress in that direction. The greatest experiment in all of history is here in the United States. What we do in this regard will have vast repercussions the world around, much greater than what we do in outer space or in other aspects of our developing technology.

Many of our constitutional provisions are aimed at the prevention of discrimination, not generally by individuals but by the state or federal government. The Fifteenth Amendment protecting the right to vote bars abridgment of that right on account of "race, color, or previous condition of servitude." The Thirteenth Amendment barring slavery and involuntary servitude was born out of the travail of the Blacks, although it is not restricted to them alone. The Fourteenth Amendment that speaks in terms of the rights of a "person" to Due Process and Equal Protection does not select people of any particular color or nationality. The Nineteenth Amendment bars discrimination in voting on the basis of sex. And the First Amendment, with its ban on laws respecting the "establishment of religion" or prohibiting the "free exercise" of it and its guarantee of "freedom of speech" and "of the press," goes far to protect the multi-religious and multi-ideological community. Moreover, the provisions in Article VI which give sanction to the affirmation as well as the oath and the provision that "no religious test shall ever

be required as a qualification to any office or public trust under the United States" help round out the guarantees of religious liberty for which we are famous.

Due Process and Equal Protection are not defined in the Constitution. Great arguments have taken place—indeed they are continuing ones—over the meaning of these words. One who construes them to the dislike of one group is accused of "legislating." Those who approve the decision call the author "farsighted" or "liberal."

A great deal of attention has recently been focused on the role of the Supreme Court in the battle against discrimination. The Court's work, however, varies from decade to decade. Lawyers know that the Court does not generate its own business—that it has no roving commission to investigate—that it performs no administrative functions. The public, however, often gets the contrary view and as a result has distorted ideas concerning the role and responsibilities of the Court.

Holmes used to say that the Court is like the oyster that clings to the rock feeding on what by chance the tides may bring in. The tides of American history vary and the work of the Court reflects the major worries and concerns of the people of the time.

Although every period of Court history shows a wide variety of problems presented in the cases on its docket, certain trends are discernible. The Marshall period is generally associated with the forging of the various doctrines emanating from the Commerce Clause both positive and negative, that is to say, the force of the commerce power in the hands of Congress and its implied prohibition that bans the exercise of power even when Congress has not acted.<sup>2</sup> The interpretation of the Commerce Clause in the days of Marshall certainly helped lay the foundation for the structure of the great common market we have today. But, though Marshall often gets the credit, much of the architecture followed in later years. As a matter of fact, the nadir was probably reached in 1942 when the Court held in *Wickard v. Filburn*<sup>3</sup>, that wheat never leaving the farm might nonetheless be within the reach of the Commerce Clause. *Wickard*—much criticized by my former Brother Charles Whittaker<sup>4</sup>—was actually reaffirmed without his dissent while he sat with us.<sup>5</sup>

The post Civil War period is generally associated with the constitu-

<sup>2</sup> See W. RUTLEDGE, *A DECLARATION OF LEGAL FAITH* 45 *et seq.* (1947).

<sup>3</sup> 317 U.S. 111 (1942).

<sup>4</sup> Whittaker, *A Confusion of Tongues*, 51 A.B.A.J. 27, 32 (1965).

<sup>5</sup> *United States v. Haley*, 358 U.S. 644 (1959).

tional attack upon social and economic legislation in which the Bar rather successfully employed the Due Process Clause of the Fourteenth Amendment to great advantage. Perhaps the high-water mark was *Lochner v. New York*.<sup>6</sup> That period was roughly from 1886 to 1937. Although the Fourteenth Amendment was inspired by the plight of the Blacks, the first beneficiaries were the corporations. The Court held in 1886 that a corporation was a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.<sup>7</sup> It was not until 1937 that substantive Due Process went into the eclipse. Since that time the Due Process Clause has been interpreted more restrictively, as Holmes in his famous dissents had long pleaded.

There was a fear that, when in 1935 *Colgate v. Harvey*<sup>8</sup> was decided, the Privileges and Immunities Clause of the Fourteenth Amendment would in turn be used as a refuge for business, financial, and economic interests that desired to escape regulation. That was the great fear that Justice Stone expressed. That fear, however, was short-lived as *Colgate v. Harvey* was overruled in 1940 by *Madden v. Kentucky*.<sup>9</sup>

In these days, like fears are sometimes expressed that the Equal Protection Clause or once more the Due Process Clause will be converted into an implement with which judges can strike down so-called "undesirable" or "unwise" legislation. I think, however, that that will not come to pass. I think judges have a keen realization that here, as in many other areas of the world, inequality and injustice are endemic in society and that the resolution of these problems must be entrusted in the main to the political processes and not to the courts.

The Equal Protection Clause is not designed to iron out all inequalities. It could not possibly do so even if such an effort were made. The poor cannot be given all the advantages enjoyed by the rich. Equality in this sense was never the purpose of the Equal Protection Clause. Its aim at most was to eliminate rank or invidious discrimination.<sup>10</sup> Government must always classify, draw lines, and make distinctions.<sup>11</sup> It is only in the rare case that equal protection is denied.

The main thrust of the work of the Court since World War II has

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<sup>6</sup> 198 U.S. 45 (1905).

<sup>7</sup> *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886).

<sup>8</sup> 296 U.S. 404 (1935).

<sup>9</sup> 309 U.S. 83 (1940).

<sup>10</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>11</sup> See, e.g., *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 808-10 (1969); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

been in the field of civil rights, both at the statutory and constitutional level.

Discrimination based upon race, creed, or color is certainly within the ban of the Equal Protection Clause. Certainly government may not bar a person from a school, a trade, occupation, or office because of his race, creed, or color, or place another burden or disability on him for such a reason. I suppose there would have been no great uproar if in 1954 the Court had held that Jews or Catholics could not be segregated in separate but equal public schools.

There is nothing in the Constitution about wealth or poverty, no guarantee to save paupers from their historic fate. Neither the Constitution nor the Bill of Rights refers to the Poor or to the Rich. But paupers have the same rights as the rest of the people. So if a constitutional right is withheld or barred because of a person's economic status, is not government administering law with an unequal hand?

And is it not an "invidious" discrimination to reserve or make easily available the right to vote only to those with property?<sup>12</sup> Or treat any other constitutional right in such a manner?

There is another group of equal protection cases that some have felt to be more dubious but which always seemed sound to me. They are in the criminal field. When government undertakes prosecution of the individual, is it not a form of unequal protection to weight the scales against a defendant merely because he is poor?

I speak primarily of *Griffin v. Illinois*<sup>13</sup> and *Douglas v. California*<sup>14</sup> where records and lawyers, both necessary for meaningful appeals, were required to be furnished to indigents in criminal cases. I also speak of *Skinner v. Oklahoma*,<sup>15</sup> where sterilization—an extreme penalty—was imposed on one class of offenders but not on another indistinguishable class.

Our Constitution is not the constitution of a welfare state. It was not designed to do things for people. It was designed to take government off the backs of people. That meant curtailing the power of the police, the prosecutors, the judges, the legislators, and the executive officers. If the Constitution were amended so as to embody the welfare state conception, then the work of the Court would radically change.

Poverty, however, is a fact of life and it casts a shadow over judicial

<sup>12</sup> *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

<sup>13</sup> 351 U.S. 12 (1956).

<sup>14</sup> 372 U.S. 353 (1963).

<sup>15</sup> 316 U.S. 535 (1942).

work apart from the instances I have mentioned.

One example concerns the guarantee of counsel contained in the Sixth Amendment which now extends to state as well as to federal trials in felony cases.<sup>16</sup> It says there is a right to counsel "in all criminal prosecutions." That phrase cannot be meaningfully construed merely with the help of a dictionary. It requires an interpretation that is relevant to the conditions of life. The poverty and ignorance of many criminal defendants emphasize the fact that the most critical part of the "criminal prosecution" may start when the police zero in on a man, arrest him, and hold him *incommunicado* for questioning. That practice is not peculiar to America. It exists throughout the world. One of the most notorious offenders are the Russians who provide by law that a suspect may be held *incommunicado* up to six months. The criminal trials that I have attended in the Soviet Union all concerned the question of punishment, not the question of guilt, for guilt had been resolved by the investigators and police during those long periods of detention *incommunicado*. Many have felt that our Sixth Amendment, coupled with the Fifth Amendment, should not be construed to produce that result. That was the basic philosophy of *Miranda v. Arizona*,<sup>17</sup> which of course protects the Rich as well as the Poor but came into focus as a landmark decision because of the outstanding legal needs of the disadvantaged in our midst.

The Equal Protection Clause is aimed at governmental discrimination, not at discrimination perpetrated by purely private acts. But many questions have arisen as to whether or not there has been "state action" with regard to a particular discrimination.

One category of cases involves state administrative control of private enterprise. In *Burton v. Wilmington Parking Authority*,<sup>18</sup> a Negro brought suit claiming that the refusal of a restaurant to serve him was violative of the Fourteenth Amendment. The restaurant was located in a building owned and operated by the State of Delaware as a public automobile parking service, and the private operator of the restaurant had leased the premises from the State. In these circumstances, the Court held that the State was a "joint participant"<sup>19</sup> in the discrimination.

The nexus between a state and private enterprise can take many forms. The lessor-lessee relationship involved in *Burton* is one. Another is the relationship that arises from licensing. I have had difficulty seeing

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<sup>16</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>17</sup> 384 U.S. 436 (1966).

<sup>18</sup> 365 U.S. 715 (1961).

<sup>19</sup> *Id.* at 725.

how a State can license a business serving the public and endow it constitutionally with the authority to operate on the basis of apartheid.<sup>20</sup> As stated by the first Mr. Justice Harlan in dissenting in the *Civil Rights Cases* in 1883:<sup>21</sup>

In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement 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. It seems to me that, within the principle settled in *Ex parte Virginia*, a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State, within the meaning of the Fourteenth Amendment. If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States.<sup>22</sup>

The Court, however, has never decided the extent to which licensing and other forms of state regulation of private enterprise operate, for purposes of the Fourteenth Amendment, to insinuate the state government into the scheme of private activity.

Another category of cases involves acts by private individuals under a state law requiring discrimination. Such a case was *Peterson v. Greenville*,<sup>23</sup> where ten Negroes who had seated themselves at a lunch counter in Greenville, South Carolina, were arrested and convicted of violating a state trespass statute, after the manager of the store where the lunch counter was located had asked the Negroes to leave and they had refused to do so. A Greenville city ordinance required separation of the races in restaurants, and on this basis the Court found that the discrimination was attributable to state action, even assuming that the manager would have acted as he did independently of the ordinance.<sup>24</sup> *Lombard v. Louisiana*,<sup>25</sup> another "sit-in" case, was different in that no state statute or city ordinance there required racial segregation in restaurants. Both the Mayor and the Superintendent of Police, however, had announced publicly that such "sit-in demonstrations" would not be permitted. The Court held that these announcements were equivalent

<sup>20</sup> See *Lombard v. Louisiana*, 373 U.S. 267, 281-83 (1963) (concurring opinion); *Garner v. Louisiana*, 368 U.S. 157, 181-85 (1961) (concurring opinion).

<sup>21</sup> 109 U.S. 3 (1883).

<sup>22</sup> *Id.* at 58-59.

<sup>23</sup> 373 U.S. 244 (1963).

<sup>24</sup> *Id.* at 248.

<sup>25</sup> 373 U.S. 267 (1963).



to a city ordinance, thus constituting the requisite state action.

A State need not officially require discrimination for its legislative pronouncements to involve it in discriminatory activity carried out by private persons. *Reitman v. Mulkey*,<sup>26</sup> for example, involved an addition to the California Constitution which expressly authorized an individual "to decline to sell, lease or rent [real] property to such person or persons as he, in his absolute discretion, chooses." The United States Supreme Court agreed with the California Supreme Court that the effect of this new constitutional provision was not merely to repeal several statutes recently passed by the California Legislature regulating racial discrimination in housing, but also to establish the right to discriminate as a basic state policy. Thus, this addition to the State Constitution was held to involve the State in private discriminations.

Perhaps the most controversial category of cases, however, are those in which the only relationship between the State and private acts of discrimination is the use of the State's judicial machinery to enforce that discrimination. Attempts to place logical limits on the doctrine of *Shelley v. Kraemer*,<sup>27</sup> have attracted a great deal of scholarly attention. One theory would limit *Shelley* to cases involving restrictive covenants in deeds of real property on the ground that they involve a sort of "zoning" for which the state is responsible even when perpetrated by private persons.<sup>28</sup> Another suggestion is that *Shelley* should apply to prevent a State from enforcing a discrimination by one who does not wish to discriminate, but should not prevent willing discrimination.<sup>29</sup> A third approach advocates a case-by-case balancing of the claims of liberty and property against those of equality.<sup>30</sup>

These attempts to limit *Shelley* stem from the fact that, without such limitation, the opinion might be read for the proposition that a state court cannot enforce *any* private discrimination if the State could not itself make that discrimination. Such a doctrine, pushed to its logical extreme, would mean that a court could not enforce a private will that draws a racial line. It would mean that a court could not uphold an action of

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<sup>26</sup> 387 U.S. 369 (1967).

<sup>27</sup> 334 U.S. 1 (1948).

<sup>28</sup> See, e.g., Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1115-18 (1960); cf. *Reitman v. Mulkey*, 387 U.S. 369, 381-87 (1967) (concurring opinion).

<sup>29</sup> Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 13 (1959); see *Bell v. Maryland*, 378 U.S. 226, 331 (1964) (dissenting opinion).

<sup>30</sup> Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

trespass against a white who refused to leave the property of a Black, desiring to exclude him on the basis of his race.

The commentators may each have their pet theory, but the cases have not yet resolved the limits of the *Shelley* doctrine.

Another question is the extent to which state policy may be expressed in *customs*, for purposes of the Thirteenth and Fourteenth Amendments, as well as in formal legislative, executive or judicial action. This idea again dates back to the *Civil Rights Cases*,<sup>31</sup> but the question has been little explored in the cases since then.<sup>32</sup>

The federal civil rights acts have become major weapons in the attack on discrimination. These acts draw on the full resources of congressional power, not merely on the provisions of the Fourteenth Amendment. Thus, the constitutionality of Title II of the Civil Rights Act of 1964,<sup>33</sup> which prohibits discrimination in motels, restaurants, and other places of public accommodation, was sustained, not under the Fourteenth Amendment, but under the Commerce Clause.<sup>34</sup> By resting the constitutionality of Title II on the Commerce Clause, the issue of "state action" was avoided. But new questions as to whether a particular restaurant or motel is within the commerce definitions of the Act or whether a particular customer is an interstate traveler were injected instead. It was for this reason that I preferred to rest the constitutionality of Title II on the Fourteenth Amendment rather than on the Commerce Clause.<sup>35</sup>

Another important civil rights statute, which lay partially dormant for many years, is 42 U.S.C. § 1982 (1964). This statute, which was part of § 1 of the Civil Rights Act of 1866, prohibits all racial discrimination, private and public, in the sale and rental of property. The congressional authority to reach the unofficial acts of private individuals by this statute was sustained under the Enabling Clause of the Thirteenth Amendment in *Jones v. Mayer Company*.<sup>36</sup>

Another statute which derives from § 1 of the 1866 Act is 42 U.S.C. § 1981 (1964). This statute provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make

<sup>31</sup> 109 U.S. 3 (1883).

<sup>32</sup> See, e.g., *Garner v. Louisiana*, 368 U.S. 157, 178-81 (1961) (concurring opinion).

<sup>33</sup> 42 U.S.C. § 2000a (1964).

<sup>34</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>35</sup> 379 U.S. at 279-80 (concurring opinion).

<sup>36</sup> 392 U.S. 409 (1968); see *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1964).

and enforce contracts . . . as is enjoyed by white citizens . . . .” The substantive terms of this broad guarantee have yet to be determined in litigation. Does this provision apply to the contracts of private social clubs with their members?

Many questions remain to be decided as to the scope of the federal civil rights statutes. The significant point for present purposes is that these congressional measures, which are designed to eradicate discrimination in our society, are not necessarily limited to governmental actions, but can reach the actions of private individuals.

All constitutional questions aside, there is much work to be done by the Bar in the years ahead in eliminating from the laws, as well as from the manner of their enforcement, the bias that often is evident against those who are poor and ignorant. Neighborhood Legal Services is symbolic of the start that is being made on the problem. Revamping the laws and the rules and regulations to eliminate bias against classes that often appear in them, or in their application, is the challenging task of the oncoming lawyers.