Notre Dame Law Review

Volume 5 | Issue 6 Article 5

3-1-1930

Discrimination against Persons Because of Race or Color

Marshall F. Kizer

Discrimination Against Persons Because of Race or Color

By MARSHALL F. KIZER

Since the end of the Civil War and the abolishment of slavery in the United States by virtue of the Thirteenth Amendment to the Constitution of the United States, many questions of the right of one individual to discriminate against another in the carrying on of business have arisen. The Fourteenth Amendment was adopted in 1870, just five years after the Thirteenth, and was in the form of a prohibition upon the states, expressly prohibiting any state from passing any law which would abridge the privileges or immunities of citizens of the United States, by depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. In 1875 Congress passed what is known as the Civil Right Act, the material part of which concerning the prohibition against discrimination is as follows: "That all persons within the jurisdiction of the United States shall be entitled to full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theaters and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." The Civil Rights Act was an attempt by the Federal Government to control the activities of individuals in their relationship with other individuals and was finally declared unconstitutional for the reason that nowhere in the Constitution nor the Amendments could it be found where Congress had been given such a power. The Federal government attempted to justify the Act under the powers granted to it by the Thirteenth and Fourteenth Amendments. Let us consider first the Thirteenth Amendment and its relation to the Act. The above amendment simply prohibits slavery, and no one would content that the refusal to any person of accommodations in an inn, or public conveyance would be inflicting slavery upon them. The Fourteenth Amend-

ment was a prohibition upon the states from denying to any person the equal protection of the laws because of race or color and gave Congress the power to enforce it. But what the Civil Rights Act attempted to do was not to enforce any provisions against the states but against individuals engaged in occupations of innkeepers and common carriers, and provide for a penalty for the refusal to any person of full and equal accommodations because of race or color.

Many cases went to the Supreme Court of the United States, being appeals from convictions under the Federal Civil Rights Act. These cases are known as the Civil Rights Cases, and consist of *Robinson v. Memphis and C. R. Co.; U. S. v. Stanley; U. S. v. Ryan; U. S. v. Nichols;* and *U. S. v. Singleton,* all being reported in 109 U. S. 3. Stanley and Nichols were convicted for denying accommodations of a hotel to persons of color, Ryan and Singleton were convicted for refusing a person of color entry to a theater, while the Memphis and C. R. Co. was sued for refusing Robinson's wife, colored, admittance to a ladies' car in the train. Mr. Justice Bradley gave the decision of the court and declared the Act unconstitutional for the reason that it was not authorized either by the Thirteenth or Fourteenth Amendments, nor under the power of Congress to legislate in reference to passengers under authority to regulate commerce among the several states.

Therefore, Congress acquired from the Fourteenth Amendment power to counteract and render nugatory all state laws which deny to any the equal protection of the laws, but Congress did not get the right of direct and primary legislation over the conduct of individuals in their social relationship. The duty of protecting all citizens in the enjoyment of the fundamental rights mentioned in the Fourteenth Amendment was originally assumed by the state, and that duty was not changed by the Fourteenth Amendment, which simply furnished an additional guaranty against any encroachment by the state upon those fundamental rights, which belong to every citizen as a member of society.

Even though the Federal Civil Rights Act was declared unconstitutional for the reasons above mentioned, its influence spread among the several states, with the result that nearly one-half of the states have used it as a model

in making Civil Rights Acts in their respective states. We must now consider the state statutes, their scope and penalties attached for violation, for only a state question is involved when an individual is denied full and equal accommodation to an inn, public conveyance, and other public places of amusement and accommodation. The only time that a Federal question can be raised when an individual person denies equal accommodation because of race or color, is when such denial is under the authority or sanction of the state.

State laws which provide for equally safe, commodious, and comfortable accommodations for white and colored have been held not to offend the constitutional provisions securing to all citizens equality of rights, privileges and immunities. A state can provide for such regulation under the police power of the state, and color can be a basis for classification. *Plessy v. Ferguson* (163 U. S. 537) is a leading case on the right of a state under its police power to pass a law not only permitting railroads to provide separate but equal accommodations for white and colored passengers, but also requiring railroads to provide for such equal, but separate accommodations. In that case Plessy, a person of one-eighth African blood, was prosecuted for violation of the statute, in that he insisted upon going into a car reserved for persons of another race. The statute was upheld as constitutional. Mr. Justice Brown in that case states: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized within the competency of state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."

In the absence of a state statute providing that all persons within the jurisdiction of the state shall be entitled to full and equal accommodations in inns, restaurants, theaters, and public conveyances, a person denying such equal accommodations is guilty of neither a state nor a federal offense. The only possible liability is that of common law applicable to innkeepers and common carriers for the improper refusal of accommodations to guests and passengers. The extent of liability in such cases, based on a tort action, is measured on the theory of compensation for the wrong and injury. Some courts allow damages for injury to feelings and humiliation while others do not, and the same controversy over whether or not punitive damages are recoverable for the improper refusal of a guest or passenger exists.

Twenty-two states have Civil Rights Acts, modeled on the Federal Civil Rights Act. Some have additional public places enumerated, and the penalties vary from one to another. Indiana has such a statute found in Burns Annotated Indiana Statutes, 1926, at Sec. 4633 et seq. "All persons within the jurisdiction of said State shall be entitled to full and equal enjoyments of the accommodations, advantages, facilities, and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land and water, theaters and other places of public accommodation and amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens." The statute further provides for a payment not to exceed one hundred ($100.00) for each offense, to be recovered in a court of competent jurisdiction in the county where the offense was committed by the person aggrieved. It also provides for a fine not to exceed $100 or imprisonment of not more than 30 days. *Fruchey v. Eagleson,* 15 Ind. App. 88 is a leading Indiana case on the above statute and holds that the proprietor of a hotel is liable for refusal by a clerk of a person to entertainment, because of race or color. In that case the Indiana University football team were the guests of a group in an Indiana city and the clerk informed the manager of the team that the colored member of the team could not be furnished entertainment at the hotel. The colored boy never went to the hotel to assert his rights, but the court held that refusal to the manager as the agent of

the colored boy was refusal of colored boy because of race and color, and the liability attached, it being proved that the boy in question was of good character and manners and no other sufficient reason for his exclusion being shown. 74 Ind. App. further interprets the statute by holding that an ice cream parlor does not come under the meaning of an eating house as used in the statute, and refusal of two colored ladies from services in such parlor was not a violation of the statute. Other states have similar statutes to that of Indiana, but provide for more or less places where full and equal accommodations shall be given, and different sums for penalties for improper refusal. The Ohio statute at Sec. 12940 differs from the Indiana statute in that a person improperly refused can recover in a court action a sum not less than $50 nor more than $500, and that the recovery of either the penalty by the person or the fine by the state bars further proceedings.

In general, statutes containing specific enumerations of places within the act and followed by a clause, "and all other places of public accommodation" have been held not to include bootblacking stands, barber shops, drug stores where soda water is sold, cemeteries, apartment or family hotels, private businesses such as a private eating house where meals are served only in pursuance to previous arrangements. That is, unless the above designated places of business are not specifically stated in the statute, they will not be declared places of public accommodation under a general clause. Inns, hotels, and public conveyances are places of public accommodation in the broadest sense, because they have always been such under common law.

Palace and sleeping cars, while places for the reception of travelers, are usually owned by independent companies and are neither common carriers nor innkeepers unless declared so by statute. *Calhoun v. Pullman Palace Car Co.* (149 Fed. 546) 86 Miss. 87; *Garrett v. Southern R. Co.* (172 N. C. 737; L. R. A. (1917 F.) 885.

Therefore, retail stores and private business houses not declared by statute to be places of public accommodation may discriminate against anyone, refusing to deal with them and no one has any rights violated, of whatever race or color he may be.