Law and the Negro Revolution; Ten Years Later

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Scarcely ten years ago the Supreme Court of the United States sounded the death knell for segregation in the public schools.¹ In so doing, the high court in fact did much more, for its decision drew together and united the diverse elements in American society which were arrayed against segregation in all its forms. Thus began the great social upheaval which we loosely term “the Negro revolution.”

The broad goal is readily discernible. The Negro demands admittance to American public life, to the schools, theatres, restaurants, hotels, job opportunities and the like which comprise the “public” sector of our society; in short, the Negro rejects the philosophy that he is a second class citizen, one perpetually barred from many segments of public life. And his revolution may be one without a significant historical parallel, for it draws considerable strength from the law itself, which, in the main, is committed to the same ends.

Ten years have witnessed enormous progress. A century of segregation has been shorn of its legal and moral underpinnings, and practices which went unchallenged but a few short years ago are now dead or dying. In the last few years the revolution has gathered enormous momentum, and it has taken on a far more pressing character. Promises no longer satisfy; “with all deliberate speed” is no longer a part of the Negro’s vocabulary. The Negro demands admittance to the main stream of American life now, not later, and he insists that apartheid be torn root and branch from every phase of American public life.

The Negro revolution is, however, approaching a critical juncture. New tensions are becoming increasingly evident as the Negro seeks to right the wrongs of centuries in less than a decade. The revolution’s accelerated pace, with its increasing and unyielding pressures for rapid change, now threatens to push it considerably beyond what the legal order can reasonably accept. Should this occur, no one can predict the outcome. Some measure of repression would be inevitable, and this, in turn, might transform the “revolution” to one of far more classic lines—that is, from one in which the Negro seeks admittance to American society to one in which he rejects that society.

Thus, while the law may in the main buttress the goals of the Negro revolution, parts of that revolution are moving on a collision course with the necessary demands of the legal order, and this is fast becoming an

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issue of overriding concern. The purpose of this paper is to sketch briefly some of the areas where the law and the Negro revolution are approaching open conflict.

I

The emerging conflicts between the law and the Negro revolution can only be understood in the context of the strong bond that has existed between the two. The tie has been one of significant proportion, one rooted in the organic law itself. The fourteenth amendment to the constitution provides that, “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws,” and it gives Congress power to enforce this mandate “by appropriate legislation.” That this great provision, born of the Civil War, was designed primarily to benefit the Negro is undisputed; indeed, shortly after it became part of the constitution the Supreme Court went so far as to doubt whether anyone other than a Negro would be permitted to invoke its protection.

Early decisions of the Supreme Court applying the equal protection clause rigorously struck down state discrimination against the Negro. But with the Civil Rights Cases in 1883, and Plessy v. Ferguson in 1896, utilization of that clause as the bridge for Negro access to American public life came to an abrupt halt. In the former cases, the Court, over the dissent of Mr. Justice Harlan, invalidated congressional legislation barring discrimination in public places, such as inns, theatres and public conveyances; the fourteenth amendment, said the Court, prohibits discrimination by the state, not by private persons. In Plessy, the Court,

2 U.S. Const. amend. XIV.
3 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).
4 E.g., Ex parte Virginia, 100 U.S. 339 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1879).
5 109 U.S. 3 (1883).
6 163 U.S. 537 (1896).
7 This is the fashion in which the case has been read for many years. In fact, however, the majority opinion was much narrower; it held only that Congress could not regulate private discriminatory conduct so long as there was no showing that in the given situation the state laws were inadequate or not enforced. 109 U.S. at 14; United States v. Harris, 106 U.S. 629, 640 (1883). See generally, Frantz, “Congressional Power to Enforce the Fourteenth Amendment Against Private Acts,” 73 Yale L.J. 1353 (1964). But this qualification was soon forgotten, and the case was interpreted as the text indicates. But see Goldberg, J., concurring in Bell v. Maryland, 378 U.S. 226, 311 (1964).

Viewing the fourteenth amendment as authorizing Congressional legislation against private discrimination where there is “a pervasive pattern of private wrongs sheltered by state inaction” (Frantz, id. at 1356-57) may afford a satisfactory measure of Congressional power, although some questions—such as the scope of judicial review over the legislative finding of illegal state inaction—would remain. But where Congress has not acted, this proposed standard apparently would also enlarge the scope of judicial review so that “a pervasive pattern of private wrongs sheltered by state inaction” would itself violate the fourteenth amendment. If that be true, exceedingly difficult problems of judicial administration would arise. Consider for example, what kind of a trial would be necessary under this standard? What relief would be afforded? Would the failure of state courts to afford tort relief to Negro plaintiff’s result in orders (what kind?) against state judges or juries, or would it result in federal court administration of state tort law?
again over the dissent of Justice Harlan, held that, in the area of state sponsored services, a state did not violate the equal protection clause where it provided “separate but equal” facilities to Negroes. Reinforced by these rulings, patterns of discrimination ingrained themselves deeply into the fabric of southern society. Thus was the door slammed shut on the Negro’s dream of becoming an American.

The Civil Rights Cases still stand formally unreversed, but much of the legislation there invalidated would now be sustained under congressional power to regulate commerce among the states. Erosion of the Plessy philosophy soon set in and, finally, it was repudiated altogether in 1954 in Brown v. Board of Education. Brown determined that separate but equal “had no place” in public school education; Brown’s progeny made it abundantly clear that separate but equal had no place in any state or federal activity.

The bond forged between the law and Negro aspirations is, therefore, of strong metal. Neither the federal government nor the states may impose patterns of discrimination upon society. Moreover, it is generally acknowledged that either the states or the federal government may, if it so chooses, go further and prohibit discrimination in most public sectors of the society, in theatres, restaurants and employment, for example. In sum, the legal foundations of segregation have been completely undermined.

It seems to me that as a measure of judicial power under the fourteenth amendment, state inaction poses insoluble administrative problems.


9 See note 1 supra.


10 Heart of Atlanta Motel, Inc. v. United States, 331 F. Supp. 393 (N.D. Ga. 1964) which was argued before the Supreme Court on October 5 (33 L.W. 3109), is expected to confirm this and become the leading precedent on the subject. In Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Anti-Discrimination Legislation, 49 Cornell L.Q. 228 (1964), Alfred Avins argues that much of the anti-discrimination legislation is invalid because it requires “involuntary servitude” which the Thirteenth Amendment forbids. This thesis is utter nonsense. It is without historical support (Schreiber, The Thirteenth Amendment and Freedom of Choice in Personal Service Occupations: A Reappraisal, 49 Cornell L.Q. 508 (1964)), and is analytically unsound. It was ridiculed by the Solicitor General in his argument in the Heart of Atlanta case (33 L.W. 3122), and in a letter to the New York Times (N.Y. Times, May 6, 1964, p. 24, col. 6). I wrote in relevant part:

“One’s occupational activities, like all his other activities, are subject to
However, the Negro desire for admittance to the main stream of American public life is one thing, the techniques employed to achieve that end quite another. It is here that tremendous demands are placed upon the legal system—demands, in part at least, to which it cannot accede. And it is precisely because use of these techniques for the first time threatens to push the Negro revolution beyond acceptable limits that the revolution portends crises of an entirely different order than any we have yet faced.

In the recent past, two major techniques have been employed to achieve general public integration: (a) the unyielding demand for eradication of de facto segregation in the public schools; (b) the "ins" technique—sit-ins, stall-ins, lie-ins, pull-ins, kneel-ins, etc. These two techniques will be considered in some detail in the next two sections of this paper, for both represent the Negro knocking for admittance to American public life, and both strain the legal system. Moreover, another technique is now emerging, the call for "special treatment" for the Negro. Since its philosophy seems to me also to lie at the core of reasonable regulation, and 'may be restricted or prohibited in the public interest' (Breard v. Alexandria, 341 U.S. 622, 632-33 (1951)). Accordingly, it is hardly possible to argue that it is unreasonable to condition one's continuance in an occupation serving the public on one's willingness to serve the entire public, irrespective of the color of their skin.

"Nor does such a condition violate the 13th Amendment. That amendment, as the Court pointed out in Pollock v. Williams, 322 U.S. 4, 17 (1944), is designed to 'maintain a system of completely free and voluntary labor throughout the United States'; accordingly, 'no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor,' although, presumably, the quitter may be compelled to respond in damages for breach of contract. In short, an employee may not be tied to his employer.

"But it is beyond reason to suggest that if the Government conditions a restaurateur's right to remain in business upon a willingness to serve all persons, a waitress of that restaurant suffers 'involuntary servitude.' Clearly her involuntary servitude, if any, would be to her employer, not to the restaurateur's patron, and anti-discrimination legislation does not purport to regulate the employer-employee relationship.

"Under the 14th Amendment, a state, which acts only through its agents, cannot discriminate on the basis of race. Are state agents, therefore, forced into involuntary servitude by being forced to 'serve' Negroes as well as Whites? Does the 14th Amendment contradict the 13th Amendment?

"Moreover, for the individual proprietor, like a barber, there is no involuntary servitude; he is free to quit and to move into any job which permits him to discriminate. But if he chooses a public calling, it is hardly tenable to suggest that anti-discrimination legislation impairs his constitutional rights.

"From time immemorial certain occupations, for example, innkeepers and common carriers have not been permitted to refuse their services on the basis of race. Anti-discrimination legislation merely extends the categories of public calling prevented from discriminating on racial lines. In Dist. of Columbia v. John R. Thompson Co., 346 U.S. 100, 109 (1953), the Court, in passing upon an act which made it a crime for the owners or managers of restaurants to discriminate on the basis of race, said:

"'And certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states.'"
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Negro efforts to eradicate de facto segregation, it will be considered in that context.11

II

De facto segregation in the public schools is a concept shrouded in a less than charming imprecision, but is precise enough as a starter. "It results," writes Professor John Kaplan, "where an otherwise fair school districting is superimposed upon privately segregated housing patterns."12 A fairly typical pattern has emerged. Social and economic discriminations have forced most Negroes to cluster into ghettos. The local school boards maintain a neighborhood school policy (one in which children are required to attend schools located near their homes) and, accordingly, the schools are segregated in fact. Newspapers constantly remind us that this condition exists in every city of any size; it often goes under a euphemism, "racial imbalance."

Negro opposition to de facto segregation is, in my judgment, the key to understanding the psychology of the Negro revolution. Most leaders of the Negro revolution do not at all see the battle in terms of eliminating intentional segregation in the public schools, or of improving the generally inferior educational character of the public schools in the Negro neighborhood. They are in fact not primarily interested in education in the traditional sense. Quite to the contrary; public school education is to them but one battleground of the Negro revolution, and must be viewed as such. The demand is for integration into the mainstream of society, and it is thought, not without justification, that the door to integrated

11 Before discussing these techniques and the problems they pose for the legal system, one other factor should be noted briefly. The past summer has seen Negro rioting and violence in such cities as New York, Philadelphia and Rochester. Admittedly, the significance of this for the Negro revolution is difficult to assess at this point. But I greatly doubt that this sporadic violence can yet be taken to be part and parcel of the revolution. No Negro leader espouses these methods as permissible techniques for bringing about public integration. Quite to the contrary. Negro leaders have made every effort to avoid violence, have publicly disclaimed its use, and have pressed for an investigation into the sources of the riots to determine if they are being organized by subversive elements (e.g., N.Y. Times, Sept. 10, 1964, p. 1, col. 3). Moreover, there is considerable basis for the belief that the rioting had less to do with segregation vel non than with the humid summer weather and an unusually high unemployment rate among Negro youth (e.g., N.Y. Times, Sept. 27, 1964, p. 82, col. 1). In any event, it is apparent that if violence becomes a significant aspect of the Negro movement, the "revolution" will have moved to an entirely different level. Violence is not an approach to Negro integration into public society; it is a total repudiation of that goal. Indeed, it is only to the extent that the Negro revolution is able to employ techniques that stay tolerably well within the limits of the law, thereby minimizing violence, that it has any realistic chance of achieving its ultimate goal. And this, of course, reestablishes the central importance of the inquiry with respect to the techniques which have been and are presently being used. Clearly, violence is likely to occur if "peaceful" techniques like sit-ins are used in a fashion which the law does not sanction.

living must open at the earliest stage, that if integrated living does not occur at the school level, its prospects elsewhere are made considerably more difficult. The Negro insists, therefore, that for him the evils of segregation are the same, whether the segregation be intentional or unintentional, de jure or de facto. Yet, it is here that potential conflict with the legal system occurs, for while the law unequivocally condemns intentional segregation of public facilities, it probably does not forbid—indeed, it may in some circumstances require—de facto segregation.

Negro efforts directed toward compelling local school boards to take affirmative steps to eradicate racial imbalance have as yet yielded small returns. The school boards have, by and large, refused to act, insisting that the neighborhood school district has not been drawn with a hostile eye and that the complained of segregation results from factors over which they have no control. Similarly unavailing have been Negro attempts to convince courts that de facto segregation denies them “equal protection of the laws.” In the leading case, which involved the racially imbalanced schools in Gary, Indiana, United States District Judge George Beamer refused any relief. “The neighborhood school,” he said, “is a long and well established institution in American public school education,” and there is no requirement, “that a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, must be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites.” The Court of Appeals for the Seventh Circuit unanimously affirmed, expressly approving Judge Beamer’s language. The Supreme Court declined to review the case, thereby leaving it at least temporarily as the benchmark. But consideration of the question by the high court cannot be postponed much longer. Other cases posing the issue are pending, indeed well over two dozen of them.

Some courts, it is true, have suggested that the mere fact that the public schools are racially unbalanced is unconstitutional. The California

13 Limited efforts by school officials to break down de facto segregation are now being taken in New York City. The results will bear special watching. See, e.g., N.Y. Times, Sept. 13, 1964, § 4 (Editorials), p. 11, col. 1.
14 The New Rochelle schools were thought by some to present a good “test case,” but the problem was mooted when a district court and a divided court of appeals found intentional segregation. Taylor v. Board of Education, 294 F.2d 36 (2d Cir.), cert denied, 368 U.S. 940 (1961). For a thorough discussion of the litigation, see Kaplan, Segregation Litigation and the Schools—Part I: The New Rochelle Experience, 58 Nw. U.L. Rev. 1 (1963).
16 213 F. Supp. at 829.
17 324 F.2d at 213.
Supreme Court recently—and obscurely—observed that “even in the absence of the gerrymandering or other affirmative discriminatory conduct by a school board, a student under some circumstances would be entitled to relief where, by reason of residential segregation, substantial racial imbalance exists in the schools.” 18 The views of some of the federal district judges in New York apparently tend in the same direction. 19 I confess that to me this seems quite untenable. It is unfortunate that the Negro be excluded from an integrated education, whatever the reason. But, quite apart from the impossibility of finding in the constitution a measuring rod to determine the amount of “imbalance” which will be “unconstitutional,” the source of the discrimination is important, and here the source is economic, not legal. 20 In addition, if there were a constitutional obligation on a school board to maximize integration, by what standard would a court determine whether the board had discharged that obligation? How, for example, does a court “weigh the achievement of integration through bussing children as against the greater cost and a somewhat larger class size,” 21 to mention but a few of the factors the local school boards would be compelled to consider? Questions of the organization of a school system present intricate problems which are peculiarly nonjudicial in character. “[P]erhaps the best we can expect,” observes Professor Kaplan, is that the school boards “remain neutral as far as race is concerned. It is difficult to find in the Constitution support for any greater duty.” 22

Moreover, affirmative attempts to correct racial imbalance in the schools gloss over a problem of fundamental significance. The argument often made is that even if a school board is not constitutionally compelled to eliminate de facto segregation, it may and should do so as a matter of sound educational policy, at least within reasonable limits, because over the long run the entire educational program will benefit and, in addition, the Negro dream—and moral claim—to integration into the mainstream of American life will become a reality. Thus, for example, it is said that in selecting a site for a new school house or in drawing school boundaries the school board should consider, among other things, whether its action

20 Kaplan, supra note 12, at 171 et seq. contains a good discussion of the subject.
21 Id. at 183.
22 Id. at 186. Of course, some of what passes for de facto segregation may be but a cover for intentional segregation. For example, a neighborhood school policy set against a background of enforced housing segregation would seem to be unconstitutional. But where the state or local government has abandoned sponsoring residential segregation there seems to me to be a point at which the present neighborhood school policy is no longer tarred by the brush of other past illegality. This problem was presented in the New Rochelle School case and is discussed by Professor Kaplan, supra note 14, at 36-38.
will cut down racial imbalance. There is, of course, a good deal more than surface charm to this proposition. But it cloaks a question of far reaching importance: May a state, consistent with the constitution, take any affirmative action to promote racial balance? If a state is forbidden to force the races apart, is it equally forbidden to force them together? The arguments for integration are persuasive, but it does not follow that this result may be reached through governmental action specifically designed to compel racial integration or racial balance. Brown specifically condemns discrimination against the Negro solely because of his color; is governmental action to promote or to compel integration any the more constitutionally permissible? And if it be permissible, what of its wisdom?

The constitutional problem takes its roots in the dissenting opinion of Justice Harlan in Plessy v. Ferguson, because the question is whether the recent segregation cases adopt his view that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens . . . . The law regards man as man, and takes no account of his . . . color when his civil rights . . . are involved." When Brown was first decided, it was fashionable to “explain” it in these terms. But if the explanation be correct, it is hard for me to see that racial considerations may enter the picture to help the Negro any more than to hurt him. Nor is the fact that I do not doubt the general constitutionality of anti-discrimination legislation inconsistent with this view, for it is one thing to tell a landlord or an employer that, like the state, he may not discriminate on the basis of race—that he must choose on a non-racial basis from whoever comes along—but quite another for the government to seek or require a specific racial balance in its school or its business establishments. State power to bar discrimination provides no automatic source for state power to foster or to decree integration. Once the legal basis for discrimination in the public sector of American life is removed, the amount of actual integration which results is, many feel, constitutionally required to be left to the free play of the “private” forces in our society.

Classifications based upon race are anathema to our jurisprudence, and they are almost invariably held unconstitutional under the fifth or fourteenth amendments. Nonetheless, it must be conceded that governmental action designed to promote racial balance presents novel constitutional problems. First, previously invalidated action by the government on racial lines has, without exception, been hostile to the minority.

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23 163 U.S. at 559.
24 See note 10 supra.
25 But some racial classifications may be valid. See Korematsu v. United States, 323 U.S. 214 (1944); Douglas, We The Judges 399 (1956). And it seems apparent that the state may obtain statistical information on race. Hamm v. Virginia State Board of Electors, 230 F. Supp. 156 (E.D. Va. 1964), aff’d per curiam 33 L.W. 3153.
Secondly, and more importantly, to hold unconstitutional action aimed at integrating the Negro into American society is to make ironic use of the fourteenth amendment. The plight of the Negro gave it birth, and it was at the very minimum intended to be a shield protecting him from hostile legislation, not a sword cutting down measures designed to hasten his entry into American public life. Accordingly, it is likely that the governmental action designed affirmatively to promote integration would not be invalid per se; rather, it might be measured against the traditional "due process" standard for passing upon the validity of regulatory legislation: is it reasonable, given the interests at stake?

Application of such a flexible standard to this problem has all the virtues inherent in its flexibility, for it does not out-of-hand condemn action designed to promote Negro integration into American society. And, given the peculiar role of the public school as the gateway to American public life, it—generally, at least—would not be unreasonable for a school board to affirmative action to obtain racial imbalance, as, for example, by some limited "bussing." But whatever its acceptability in the field of education, a general governmental policy designed to promote racial integration presents subtle and complex constitutional questions of grave moment. This is easily seen if consideration be given to the validity of governmental attempts to impose "benign quotas" in housing and employment, and the sole constitutional standard is assumed to be the traditional one of the "reasonableness" of the action taken in light of the existing context and the legislative objectives.

**Housing**

Suppose the population of a given city were 30 percent Negro. What of the validity of a state law or city ordinance requiring persons operating public housing developments (or even large private developments) to admit at least 30 percent Negroes, if they apply. Could not this minimum quota requirement reasonably be defended on the ground that some preference to Negroes is necessary to break down deeply ingrained patterns of residential segregation?

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26 Where the school board action (for example, in selecting a school site or drawing a school district line) would be wholly unobjectionable if the board had not considered race, it is a fortiori constitutional under the above view.

27 After a somewhat halting approach, the New York courts seem committed to application of the reasonableness standard. See, e.g., Balaban v. Rubin, 14 N.Y.2d 193, cert. denied 33 L.W. 3140 (1964); See 16 Stan. L. Rev. 434 (1964).

28 The existing case law on the subject is sketchy at best (e.g., Cassell v. Texas, 339 U.S. 282, 287 (1950); Collins v. Walker, 329 F.2d 100 (5th Cir. 1964), adhered to on rehearing, 335 F.2d 417) and cannot be taken as precluding a complete reexamination of the problem. For a brilliant discussion of the problems raised see Bittker, The Case of the Checker Board Ordinance, 71 Yale L.J. 1387 (1962); and see Kaplan, supra note 12, at 171 et seq.; Hellerstein, The Benign Quota, Equal Protection and The Rule in Shelley's Case, 17 Rutgers L. Rev. 531 (1963).
Take the matter one step further. Suppose that the law or ordinance limited the percentage of Negro residents in public housing projects to a specified percentage, for example 25 per cent, on the premise that if there were a higher percentage of Negroes the non-Negroes would move out, thus defeating the end of integration. Obviously, such a percentage limitation might be honestly drawn not to impose segregation but to promote integration, since it is common knowledge that housing projects and residential areas (and public schools) have “tipping points” —points at which the admission of additional Negroes would generate a mass exodus of Whites. Accordingly, might not the legislative body “reasonably” conclude that, by defining maximum percentages, Whites would be encouraged to remain in the area, and property values would remain relatively stable? Can such legislation fairly be characterized as arbitrary or unreasonable? If not, consider a more extreme regulation, also defended on the same basis. Suppose that a city amended its zoning code to specify for each of its residential zones the maximum permissible percentage of Negro residents: for example, in Zone 1 not more than 50 per cent Negro; in Zone 2, not more than 33 per cent Negro, etc. Would this, too, be valid?29

Employment

Suppose that a state law compelled a manufacturer to choose qualified Negroes over qualified Whites until certain racial percentages were achieved; or, alternatively, suppose that the statute compelled a manufacturer to give preference to qualified Negroes over qualified Whites for a limited period, for example, two years. As in the housing area, reasons can be adduced to justify governmental action of this type. The Negro points out that, even where statutes forbidding employers to discriminate on a racial basis are observed, White workers have had the benefits of a century of segregation, and this fact renders Negro access to employment far more difficult than anti-discrimination statutes recognize. Accordingly, some special treatment is necessary to break the log jam, treatment similar in kind, it is said, to that accorded veterans following the war. Are such statutes arbitrary or unreasonable?30

In a paper of this scope there is neither space nor time to explore in any detail the constitutional problems raised by these possible governmental attempts to promote integration. A few general observations must suffice.

The notion that the government should affirmatively promote integra-

29 Are the Negroes who are excluded because of attempts at racial balance denied equal protection or due process? Is their situation any different from that of excluded Whites?

30 For other examples see Bittker, supra note 28, at 1411-13.
tion is often said to be nothing short of preferential treatment for the Negro, a form of "reverse discrimination" in his favor. But the rejoinder is obvious. Given two centuries of slavery and segregation, such action can hardly be viewed as placing the Negro in a "preferred position." Rather, the Negro insists that one way of achieving "equal protection of the laws" is to correct the lingering injustices caused by racial discrimination. And he maintains that some special consideration is necessary to put him into the main stream of American public life, and, in a sense, is comparable to the aid given to underdeveloped nations in an attempt to pull them into the twentieth century.

Nonetheless, I am still greatly troubled by the general prospect of affirmative governmental action to promote integration, particularly when it takes the benign quota form. Such "special treatment" might in fact cover discrimination in states which seek "token" integration, but the objection runs much deeper than that. We surrender something if our government adopts a policy of viewing men differently because of the texture of their skin, or the content of their creed. This is, is it not, in large part what gave rise to "The Negro Problem" in the first place and is what the Negro revolution now seeks to obliterate? Moreover, even conceding that the Negro's status in American society is in many ways unique, special treatment for him provides a foundation for other racial or religious minorities to demand similar special treatment to rectify past wrongs.

To give to government power to achieve racial or religious "balance" is, I submit, alien to the spirit of our laws, which, in this context, are color blind. Every departure from that spirit is a matter of the greatest concern, and can be justified only upon a showing of overwhelming necessity. The constitutionality of any such departure is, of course, quite another matter. Unwise legislation does not automatically mean unconstitutional legislation. Some governmental action designed to promote integration, for example, preference in the awarding of government contracts to integrated private firms, seems to me unobjectionable from a constitutional viewpoint. Indeed, I find it hard to see that even governmental action in a more extreme form, such as use of "benign quotas" in housing and employment, can fairly be characterized as unconstitu-

31 For an elaborate and excellent defense of the "special treatment" philosophy see Lichtman, The Ethics of Compensatory Justice, 1 L. in Transition Q. 76 (1964).
32 The fact that numerous social and economic groups are the beneficiaries of special government solicitude in my view provides no warrant for special consideration rooted in a racial, religious or ethnic basis. Subsidies to businesses (as, for example, in the form of tariffs) or to the poor (as, for example, in the form of aid for dependent children) involve classifications which, plainly, do not purport to divide men on the basis of their skin or their prayer book.
tionally "arbitrary" or "unreasonable"; and moreover, if it once be conceded that the government may in some situations establish "benign quotas," I doubt the possibility of fashioning any judicially neutral principle to separate the permissible from the impermissible.

There is, however, an alternative constitutional approach possible to governmental attempts to promote integration. One could assert that, since legislation involving racial criteria is anathema to our jurisprudence, the traditional "reasonableness" standard of the economic regulatory cases is inapposite. Rather, as in the area of freedom of speech, action of this type can be justified only upon a showing that a substantial governmental objective is at stake, one in which less drastic measures are not available. Application of such standard would seem to me to bar use of the "benign quota" method to achieve integration in a great many contexts. For example, instead of requiring preferential hiring policies, alternative, and less drastic, legislative measures might be sufficient to eliminate union discrimination. (This would, of course include the elimination of the discrimination which often lies only thinly concealed in union requirements that new members be admitted only upon the recommendation of existing members.) And in the housing area methods less drastic than use of benign quotas seem clearly available. Consider, for example, "public subsidies, such as bonuses to landlords whose apartments enjoy a mixed occupancy, grants to Negroes to enable them to rent apartments or purchase homes in residential areas that would otherwise be beyond their means, or payments to include White families to move or to stay in integrated neighborhoods."

These problems are not going to disappear; more and more we hear of the need of "special" consideration for the Negro. This is, in my view, at the base of Negro demands concerning de facto segregation in the public schools. The Negro insists on the almost total subordination of other educational considerations to his need for an integrated education. (Some, indeed, have made it quite plain that they prefer total destruction of the public school system to de facto segregation.) Rumblings are now heard in other areas too. Adam Clayton Powell, an extremist to be sure, is forcefully advocating preferential hiring, and it is hardly to be doubted that many Negroes are coming to think in these terms. If a special treatment philosophy takes a firm foothold in this revolution, conflict is inevitable. That this is more than a shadowy possibility is apparent, particularly in the economic area, where a sluggish economy may evoke Negro demands for—and White reaction against—preferential hiring

84 Bittker, supra note 28, at 1411.
policies.\textsuperscript{85} And this conflict could quickly transform the revolution's character to one ugly in dimension. The possibilities are grim.

III

Whatever the possibilities for accommodation of Negro demands for affirmative governmental action to end racial imbalance, conflict will inevitably arise out of the promiscuous use of sit-ins, lie-ins, stall-ins, and, most recently, kneel-ins to achieve the goals of the revolution.

We start from the familiar. The fourteenth amendment forbids state discrimination along racial lines, however contrived. For example, a Negro cannot be convicted of "disorderly conduct" or of "breach of the peace" for using "White" drinking fountains in a public park, any more than he could be convicted for violating a statute or ordinance which specifically required segregation in the use of drinking fountains.\textsuperscript{86} However and whenever the state acts, it may not impose patterns of discrimination. But the elimination of segregation from governmental activity is only a part of the Negro revolution. The Negro demands admittance to all the components of American public life—employment, recreational facilities, stores, and the like. Accordingly, he demands that every vestige of segregation be eliminated from public life, whatever the source of the discrimination, and, unwilling to wait upon the law's delays, he freely employs the "ins" technique to achieve that end.

So long as the "ins" technique is used to eliminate discrimination which is itself a violation of law, no problem occurs. Thus, use of a sit-in at a restaurant which, contrary to a state anti-discrimination law, refuses to serve Negroes poses no special legal problems. But in a great many states there is no anti-discrimination legislation or it is, at best, fragmentary. Use of the "ins" technique in such a situation threatens to place the revolution at odds with the law, since obviously the owner will rely upon his privilege under state law to discriminate. The constitutional question then becomes the extent to which the state will be permitted to recognize or sanction a privilege on the part of private corporations and persons to discriminate on racial lines by providing a policeman or its courts to vindicate the privilege. This question is usually articulated in a different fashion: Since the fourteenth amendment prohibits "state," not "private," racial discrimination, what marks the line between "state action" and "private action"? Pressure has been generated to open up the concept "state action," so that the

\textsuperscript{85} In fact the largest repository of "White backlash" seems even now to be found in the economic area. Many White workers view the Negro as a threat to their job security and fear that civil rights legislation will give Negroes an opportunity to put them out of their jobs.

\textsuperscript{86} Wright v. Georgia, 373 U.S. 284, 293 (1963).
state may be charged with the discrimination in situations which arguably involve only "private" discrimination.

When the state is "significantly involved" in the activity in question, few doubt that the discrimination is properly chargeable to it. Thus, racial discrimination in state financed and regulated "private" hospitals, urban renewal projects, federally guaranteed mortgage lending programs and a host of other "private activities" which have significant governmental underpinnings are invalid. This result is of no small moment; federal, state and local governments are, after all, "significantly involved" in a great deal of "private" activity. Moreover, "private" discrimination in areas where the private person is exercising what has been historically a "governmental" function is properly chargeable to the state. For example, discrimination by private owners of a "company town" or in a primary election seems properly attributable to the state, since local government and voting have traditionally involved the exercise of governmental prerogatives.

This, of course, does not mean an open road to public life for the Negro. Considerable discrimination by "private" persons in the "public" sector of our society would not be prohibited as a matter of constitutional law. Not surprisingly, therefore, the absence of universal anti-discrimination legislation has generated pressures to condemn all discrimination in public life as unconstitutional. Such an attempt, however, poses difficult constitutional issues. The constitution prohibits only discrimination by the state, and here the state seems to do no more than record or recognize private discrimination in which it has no "significant involvement," as, for example, where it "merely" supports the privilege of a restaurant to discriminate by taking action to remove trespassers, or by granting injunctive relief against trespassing.

Inquiry as to governing legal rules in this area must, of course,

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37 Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Smith v. Holiday Inns of America, 336 F.2d 630 (6th Cir. 1964); and see generally Lewis, Burton v. Wilmington Parking Authority—A Case Without Precedent, 61 Colum. L. Rev. 1458 (1961); Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083 (1960); Comment, 12 Kan. L. Rev. 426 (1964). Interesting problems arise as to the ultimate reach of the notion that discrimination is chargeable to the government where it is significantly involved in the "private" activity. For example, does that principle now sweep within its compass charitable trusts (see In re Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844, appeal dismissed and cert. denied, 357 U.S. 570 (1958); Clark, Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard, 66 Yale L.J. 979 (1957); Note, 33 N.Y.U.L. Rev. 604 (1958)), or labor organizations (see Conley v. Gibson, 355 U.S. 41 (1957); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Sovern, The NLRA and Racial Discrimination, 62 Colum. L. Rev. 563 (1962); Weiss, Federal Remedies for Racial Discrimination by Labor Unions, 50 Geo. L.J. 457 (1962); Wellington, The Constitution, the Labor Organization and Governmental Action, 70 Yale L.J. 345 (1961)).

38 E.g., Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); see also the materials in the preceding note, particularly the articles by Professor Lewis; and see Note, 61 Harv. L. Rev. 1247, 1248 (1948).
begin with *Shelley v. Kraemer,* decided in 1948. There a vendor refused to comply with a racially restrictive covenant he had signed. The Supreme Court held that state court enforcement of the covenant against him was unconstitutional "state" action. *Shelley* fascinates constitutional lawyers to this day, and poses problems far too difficult to admit of proper treatment in this paper. The extent to which state recognition of private discrimination, where the state is not itself substantially involved and no public function is involved, is unconstitutional is still much debated. Professor Louis Pollak would apply *Shelley* to prevent a state from enforcing discrimination by a private person who does not wish to discriminate (e.g., the vendor who desires not to be bound by a restrictive covenant he signed), but does not read the case as preventing the state from assisting the *willing* private discriminator (e.g., the store owner who does not wish to serve Negroes). This view is not without its difficulties, and there are those who believe that *Shelley* is devoid of any satisfactory principle. It is not without significance that the case has not again been relied upon the Court.

The Sit-In Cases, decided in 1963, represent another rolling back of the line between state and private action. There, Negroes were denied service at "private" lunch counters, etc.; they refused to leave and were subsequently convicted of criminal trespass. On appeal to the Supreme Court, it was argued that in situations like this the state is not imposing segregation, but only neutrally employing its criminal process to permit a business to serve whomever it chooses. The convictions were set

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30 334 U.S. 1 (1948); and see Barrows v. Jackson, 346 U.S. 249 (1953).
40 The literature discussing the case is voluminous. See the materials cited note 37 supra, and notes 41-43 infra. See also excellent Comment, 44 Calif. L. Rev. 718.
43 Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 31 (1959); Recently, there have been several attempts to re-think the entire concept of what constitutes "state" action. It has been suggested that while all agree that a state command or prohibition involves state action, state inaction—merely permitting private persons to act as they chose and enforcing that choice (e.g., permitting vendors to sell or not to sell ice cream to Negroes or children)—is logically also state action, the nexus to the state inhering in its permitting and recognizing the private choice. The constitutional problem then becomes not whether there is state action, but whether the state's decision either to command, prohibit, or leave to private choice was a constitutionally permissible (i.e., reasonable) decision. See Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962). See also Van Alstyne & Karst, State Action, 14 Stan. L. Rev. 3 (1961). This view has met with criticism. E.g., Lewis, The Sit-In Cases—Great Expectations, 1963 S. Ct. Rev. 101, 119-130. Consider also at this point the state "inaction" discussion in note 7 supra.
aside. The Court noted that the states involved had decreed segregation through statutes, ordinances or executive action, and it held that where a 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." 45

These decisions go quite far, but they by no means throw the mantle of constitutional protection around Negro demands for access to public life, nor do they insulate from attack many uses of the "ins" techniques. Indeed, it is precisely because they do not that attempts are now being made to roll back further the divider between "state" and "private" action. Suppose, for example, that a Negro attempts entrance to an "exclusive" restaurant in a state which has no publicly imposed pattern of discrimination but also does not have a law forbidding discrimination by restaurants. He is refused service because the owner fears a marked loss of business, and eventually the owner uses that force necessary to eject him. Does the owner have a good defense to an action for assault and battery? Alternatively, may the owner sue the Negro for civil trespass or enjoin any further attempts by him to enter? Ultimately, the answers to all these questions turn on whether, in situations where there is no federal or state law forbidding private discrimination, the state court's enforcement of the private discrimination constitutes forbidden state action under Shelley or The Sit-In Cases. One state court apparently believes that under Shelley any state involvement of the kind being considered would constitute state action. 46 But to my mind neither Shelley nor the Sit-In Cases is dispositive. In Shelley the owner of the property was resisting attempts by other private persons to compel him to discriminate; the power of the state was being invoked to require a person to discriminate against his wishes. In the hypothetical above, the owner of the restaurant is a willing discriminator and seeks the aid of the law to preclude attempts at forcing him to abandon his decision to discriminate. In the Sit-In Cases the state was the party seeking redress, and through its criminal law was in fact seeking to maintain its policy of discrimination. In our hypothetical the state is not a party to the litigation, and, more significantly, it is not seeking to impose patterns of discrimination. Moreover, if the private discriminator cannot constitutionally avail himself of civil process, a clear anomaly results: a clash between a man with no legal right to be where he is and an owner with no enforceable right to eject him. In my judgment, so long as the constitution is not interpreted to bar all private discrimination, no policy is advanced by construing it so as to

45 Peterson v. Greenville, supra note 44, at 248.
leave force as the private discriminator’s only remedy. Law should be a substitute for force, not the occasion inviting its use.

In a glance at the kinds of problems we are dealing with here, Mr. Justice Douglas, building upon Mr. Justice Harlan’s dissent in the *Civil Rights Cases*, insists that the term “state action” embraces not only what we have traditionally thought of as action by the state but also the management of all “[p]laces of public accommodations such as retail stores, restaurants, and the like.” The effect of this view is, of course, to prohibit, as a matter of constitutional law, the exclusion of the Negro from “the main stream of our highly interdependent life.”

“There is no constitutional way, as I see it,” said the justice, “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.”

The Court has recently declined an opportunity to embrace this view, and desirable though it be as a statement of policy—indeed, it states the essence of the Negroes’ aspirations—the difficulties inherent in it are so great that its acceptance as constitutional doctrine is most unlikely.

Unfashionable though it may be, it seems to me that, short of Justice Douglas’ view, the limits of constitutional bars to private discrimination have been reached. Accordingly, in my view nothing in the constitution compels restaurants and retail stores to serve Negroes and, absent anti-discrimination legislation, the private “privilege” to discriminate may be vindicated by resort to civil process. Of course, what the constitution does not prohibit statutes may, and here lies the crucial importance of state and federal anti-discrimination laws, including the public accommodations and fair employment provisions of the Civil Rights Act of 1964, for they are the Negroes’ keys to many parts of public life. It is difficult to overemphasize their importance. In the last analysis they embody the soul of the revolution, they are the Negro saying: “I am an American first, a Negro second; and like every other American I should have access to all parts of American public life.”

Having noted all this, it is still apparent that, even with the assistance of sympathetic constitutional doctrine and antidiscrimination legislation, the Negro revolution may be headed for collision with the law. Federal

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48 Lombard v. Louisiana, supra note 47, at 283.
50 The mere fact that the state licenses the activity in question cannot render the licensee’s action “state action” unless one is prepared to say that all activity of the license (e.g., a restaurant’s labor policy or contracts for garbage disposal) raise constitutional questions because they involve “state action.” See materials note 43 supra.
legislation is not intended, and constitutionally might not be able, to open up all the doors of public life to the Negro; state anti-discrimination legislation is either incomplete or, in southern states, non-existent. Yet the Negro demands access to public life now, whatever the legal rights of the local retailer to refuse him; and where economic pressure is insufficient, resort ultimately will be the "ins" techniques. In the absence of anti-discrimination legislation, however, the Negro may soon find himself saddled with criminal prosecutions, money judgments for trespass, injunctions, and contempt citations. And, if so, the Negro for the first time will obtain no relief from the federal courts; for the first time he will find that the law and his aspirations are not necessarily identical.

Conflict on this score will by no means be confined to the south; indeed, the very differences between segregation in the south and in the north indicate that they will be first seriously confronted in northern states. In the south the Negro is still busy eradicating "official" supports for discrimination. Elsewhere his efforts are on a quite different plane. Official discrimination is in principle absent, and there is an ample supply of anti-discrimination legislation. But patterns of discrimination tenaciously persist among many employers, unions, restaurants, retail stores, etc. Discrimination northern style is at once less intense but more insidious, less pervasive but more elusive, less proclaimed but more hypocritical than its southern counterpart, and it is of far too significant dimension to be overlooked. The affront to Negro dignity is considerable too, for here he sees that, whatever the law, a great many of his fellow citizens refuse him recognition. Thus his temper mounts, and he places heavy reliance on sit-ins, lie-ins, and the like to push out private discriminations. However, in the North these tactical devices often may be employed in a way that demands enforcement of criminal and civil statutes against them, for as often as not they are not limited to the locus of the offending employer or restaurant. They are far more general in character, far more in the nature of dramatic public protests; they take on the character of secondary boycotts, with the general public being subjected to the boycott. Thus we constantly read of attempts to clog great highways and bridges at rush hour, stall trains, bar access to the World's Fair (although there is no contention that the Fair is discriminating), and the like. But, plainly, blocking a public way is criminal conduct and punishable as such, and no contention is possible that in enforcing these laws, the state is enforcing segregation. Manifestly, use of the "ins" technique in this fashion places the Negro revolution at odds with the law.

IV

Over one hundred years ago, Henry Thoreau posed sharply for his generation the issue of civil disobedience. The next few years will see
the same issue posed for us. The Negro grows increasingly impatient with the law's delays, and he is just now beginning to consider the extent to which he will violate "just" laws in order to dramatize and accentuate his protest. He has not, of course, adopted violence as a technique for violating the law; rather, his present concern is with the limits of peaceful non-compliance. But one cannot overemphasize the importance of the answer he gives to the general question of peaceful noncompliance. The law has enough soft spots (such as the prosecutor's discretion whether or not to prosecute) to permit toleration of some disobedience; but toleration of some is by no means toleration of all, and what is overlooked may well turn on what is done. The society will not tolerate "peaceful" protests which result in blocking highways, bridges, or the like; indeed, it cannot—to do so would submerge every value to the single one of integration. Accordingly, if the Negro persists in conduct of this kind, he renders serious collision between the law and the revolution inevitable, to say nothing of exacerbating the slowly mounting "White backlash."

The Negro revolution has reached a crossroad, and its ultimate path is by no means certain. The Negro is angry and above all impatient with delay; he has suffered too long to suffer change slowly. But the danger is that the momentum of the revolution will cause it to outrun the counsels of prudence and become a runaway train. Such a development could turn around the whole character of the revolution. At this stage, the Negro wants only to be an American; he does not reject the society he is in—he wants to be a part of it. And he realizes that the law, the official measure of society's conscience, is committed to his goal. But the revolutionary makes no fine legal distinctions; gray is not a color in his spectrum. If law becomes one more stumbling block, the Negro may come to view it as another yoke to be thrown off. Such a development, either alone or in conjunction with other factors, could radically alter the revolution's character, from one in which the Negro wants acceptance into the American society to one in which he rejects that society. Such a transformation has potential consequences so great as to stagger the imagination; in sum, it could turn what is loosely referred to as a "revolution" into something which more closely approximates the historical model of a revolution—organized resistance to the government.

A question persists, therefore, which needs to be answered. Can the Negro revolution stay tolerably well within the limits prescribed by the

51. Indeed, there is now some concern that Negroes are escaping prosecution for violation of criminal laws such as disorderly conduct precisely because they are Negroes, police officers and prosecutors being fearful of an "anti-Negro" label.
legal order? If it cannot, the end result might be a "Negro revolution" which rejects the whole society, and perhaps one which will destroy it one way or the other—a far cry from the principles which gave the "revolution" birth.