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resulting in imprisonment;⁴¹ nor is there such distinction drawn in the sixth amendment.

In the writer's opinion, *Argersinger* is only another way station on the path of eventual extension of the right to counsel to cover many civil⁴² and all criminal cases, including traffic violations.⁴³ Hopefully, Florida's Legislature and Supreme Court will, of their own accord, see the writing on the wall and not again be forced to meet their responsibilities.

WAYNE E. RIPLEY, JR.

THE RIGHTS OF PRIVATE CLUBS TO DISCRIMINATE AGAINST BLACK GUESTS DESPITE A STATE-ISSUED LIQUOR LICENSE

Plaintiff, the black guest of a member of a private club which restricted membership to Caucasians, was refused service of food and beverage solely because of his race. The complaint, brought in the federal district court under United States Code, title 42, section 1983 (1970)¹ for injunctive relief, alleged that since the Pennsylvania Liquor Control Board had issued defendant a private club license, the discrimination was state action, and thus a violation of the equal protection clause of the fourteenth amendment.² A three-judge district court, convened at plaintiff's request,³ entered a decree declaring invalid the liquor license issued to the club.⁴ On direct appeal to the United States Supreme

41. *E.g.*, *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license revocation). *See generally* Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

42. Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966); *cf.* *Boddie v. Connecticut*, 401 U.S. 371 (1971); Comment, *Indigent's Access to Civil Court*, 4 COLUM. HUM. RTS. L. REV. 267 (1972); *see* Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967).

43. *Blake v. Municipal Ct.*, 242 Cal. App. 2d 731, 51 Cal. Rptr. 771 (Cal. App. 1966). There is no constitutional basis for limiting the right to cases involving imprisonment, as the sixth amendment draws no such distinction. *See* note 4 *supra*. Placing "social nuisance" misdemeanors into a nonpunitive, social response setting might eliminate the need for counsel. *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 400 (1966). *But see* *People v. Letterio*, 16 N.Y.2d 307, 314, 266 N.Y.S.2d 368, 373, 213 N.E.2d 670, 673 (1965) (dissenting opinion).

1. 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. U.S. CONST. amend. XIV, § 1.

3. The three-judge court was convened pursuant to 28 U.S.C. § 2281 (1970).

4. *Irvis v. Scott*, 318 F. Supp. 1246 (M.D. Pa. 1970).

Court,⁵ *held*, reversed and remanded: Regulation of private clubs by the state liquor board did not sufficiently implicate the state in the discriminatory policies of the club as to make those practices "state action" within the purview of the equal protection clause. *Moose Lodge No. 107 v. Irviss*, 92 S. Ct. 1965 (1972).

The principle that the fourteenth amendment "erects no shield against merely private conduct, however discriminatory or wrongful," has become firmly imbedded in our constitutional tradition.⁶ Consequently, the dichotomy that exists between discriminatory action by the state, which is prohibited by the equal protection clause, and merely private conduct, which is not, is of paramount importance.

The boundaries that define what constitutes state action, however, are not always clear. It has been observed that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."⁷ For this reason it has been held that where the impetus is private, the state must have "significantly involved itself with invidious discrimination" in order for it to fall within the ambit of the constitutional prohibition.⁸ To establish whether such invidious discrimination exists, it was first held that it was necessary for a court to "assess the *potential impact* of official action."⁹

Prior to the Supreme Court's decision in *Moose Lodge*, it had been suggested that the issuance of any license by the state to a private establishment would be sufficient to constitute state action.¹⁰ *Moose Lodge* clearly established that this was not the case.

In determining that the Moose Lodge's membership and guest practices were discriminatory, the federal district court found state action by virtue of the fact that liquor licenses were far more extensively regulated than other licenses issued by the state. The court, after reviewing the extent of the state's regulation,¹¹ concluded that:

5. The appeal was pursuant to 28 U.S.C. § 1253 (1970).

6. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721 (1961); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). The principle was originally set down in *The Civil Rights Cases*, 109 U.S. 3 (1883).

7. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

8. *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967), wherein it was held that a recently-enacted amendment to the California State Constitution [CAL. CONST. art. I, § 26 (1964)], which prohibited the state from denying to any person the right to discriminate in the sale, lease, or rental of real property, involved the state in private racial discrimination to an unconstitutional degree.

9. *Id.* (emphasis added).

10. *Garner v. Louisiana*, 368 U.S. 157, 183-85 (1961) (Douglas, J., concurring).

11. The federal district court noted *inter alia* that the sale of liquor was monopolized by state stores; that resale was permitted only by licensed hotels, restaurants, and private clubs [PA. STAT. ANN. tit. 47, § 4-401(a) (1969)]; that the issuance or refusal of a license to a club is in the discretion of the Liquor Control Board [*Id.* § 4-404]; that only a limited number of such licenses were available in each community [PA. STAT. ANN. tit. 47, § 4-461 (Supp. 1970), and § 4-472.1 (1969)]; and that applicants for such licenses must comply with extensive requirements, including: (1) making physical alterations in the premises as

It would be difficult to find a more pervasive interaction of state authority with personal conduct. . . . Here . . . beyond the act of licensing is the continuing and pervasive regulation of the licensees by the state to an unparalleled extent.¹²

This conclusion was rejected by the Supreme Court,¹³ which pointed out that regardless of how detailed the type of state regulation was, it could not be said to have fostered or encouraged racial discrimination in any way.¹⁴ It was noted that, with one exception,¹⁵ there was no suggestion in the record that any state statutes or regulations governing the sale of liquor were intended "either overtly or covertly to encourage discrimination."¹⁶

The Court concerned itself with this factor in distinguishing its prior decisions involving discriminatory refusal of service in public eating places.¹⁷ Specific emphasis was placed on *Burton v. Wilmington Parking Authority*,¹⁸ which involved discrimination by the owner of a restaurant, privately operated for private profit, which was leased from a public authority and was part of a complex of parking and other facilities built by the state on public land and partly with public funds. In *Burton*, the Court had found state action, partially because the state could, as lessor, have insisted on preventing the discrimination, but failed to do so.¹⁹

required by the Board, and, if a club, filing a list of names and addresses of members and employees [PA. STAT. ANN. tit. 47, § 4-403 (1969)], (2) conforming overall financial arrangements to exacting requirements *Id.* §§ 4-411 and 4-493, (3) keeping extensive records [*Id.* § 4-493], (4) not permitting "persons of ill repute" to frequent the premises [*Id.* § 4-493 (14)], (5) not permitting at any time "lewd, immoral or improper behavior" [*Id.* § 4-493 (10)], and (6) granting the Board and its agents the right to inspect the licensed premises at any time [*Id.* § 4-493(21)].

A license may only be issued if the applicant complies with these and numerous other requirements, and if the Liquor Control Board is satisfied that such applicant is "a person of good repute" and that the license will not be "detrimental to the welfare, health, peace and morals of the inhabitants of the neighborhood" [*Id.* § 4-404].

12. *Irvis v. Scott*, 318 F. Supp. 1246, 1250 (M.D. Pa. 1970).

13. 92 S. Ct. at 1972-73.

14. *Id.* at 1973.

15. See discussion *infra* at pages 836-37.

16. 92 S. Ct. at 1972.

17. It was pointed out that in *Peterson v. City of Greenville*, 373 U.S. 244 (1963), the existence of a local ordinance requiring segregation of races in public eating places "was tantamount to the State having 'commanded a particular result.'" 92 S. Ct. at 1971. The ordinance in question provided in part that:

It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding-house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter Code of Greenville, 1953 as amended in 1958, § 31-8.

Peterson v. City of Greenville, 373 U.S. 244, 246-47 (1963).

See also *Lombard v. Louisiana*, 373 U.S. 267 (1963), and *Robinson v. Florida*, 378 U.S. 153 (1964), neither of which were discussed by the Court in *Moose Lodge*.

18. 365 U.S. 715 (1961) [hereinafter cited as *Burton*].

19. [T]he Authority could have affirmatively required Eagle [the restaurant owner] to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to

The holding in *Burton* was not extended to *Moose Lodge* because the facts in the former were significantly different from those in the latter; whereas *Burton* involved a public restaurant located in a public building, Moose Lodge was "a private social club in a private building."²⁰

The Supreme Court reviewed the various regulations enforced by the Pennsylvania Liquor Control Board,²¹ taking special note that a quota system limited the maximum number of liquor licenses that could be issued in each municipality.²² It was recognized that this system could affect the rights of other Pennsylvanians "to buy or be served liquor on premises other than those of Moose Lodge."²³ The majority, however, determined that this could not, in any realistic sense, be said to make the state "a partner or even a joint venturer in the club's enterprise."²⁴ When the overall availability of liquor was taken into consideration,²⁵ the quota system was held to have limited effect.²⁶ The Court ultimately concluded that

with the exception hereafter noted, the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge so as to make the latter "State action" within the ambit of the Equal Protection Clause of the Fourteenth Amendment.²⁷

The exception to which the Court referred concerned a Liquor

discharge them whatever the motive may be . . . By its inaction . . . the State . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

Id. at 725.

See, NEWSWEEK, August 5, 1968, at 76, for an account of how the city of Madison, Wisconsin threatened to revoke the liquor license of the prestigious Madison Club, which had never admitted a Jewish member. The threat resulted in the liberalizing of the club's anti-Semitic admission policies.

20. 92 S. Ct. at 1972. It was noted that "[t]he Pennsylvania courts have found that Local 107 is not a 'place of public accommodation' within the terms of the Pennsylvania Human Relations Act [PA. STAT. ANN. tit. 43, § 951 *et seq.* (1969)]." *Id.* at 1972 n.2. It was further noted that the parties stipulated that Moose Lodge No. 107 "is, in all respects, private in nature and does not appear to have any public characteristics." *Id.* at 1974 n.1.

21. See note 11 *supra*.

22. PA. STAT. ANN. tit. 47, § 4-461 (Supp. 1970) provides that each municipality has a quota of one retail license for each 1500 inhabitants.

23. 92 S. Ct. at 1973.

24. *Id.*

25. PA. STAT. ANN. tit. 47, § 4-461 (Supp. 1970), expressly excepts licenses issued to hotels, municipal golf courses and airport restaurants from inclusion in the quota system.

26. 92 S. Ct. at 1973. This conclusion was rejected by Justice Douglas in his dissenting opinion. He pointed out: (1) that "the Harrisburg quota, where Moose Lodge No. 107 is located, has been full for many years;" (2) that no additional club licenses can be issued or obtained in Harrisburg; and (3) that private club licenses permit liquor to be served a total of seventeen (17) hours per week during which time other establishments [see note 25 *supra*] are prohibited from so doing. In view of these various factors, Justice Douglas concluded that access by blacks to places that serve liquor is limited, and that therefore "the State of Pennsylvania is putting the weight of its liquor license . . . behind racial discrimination." *Id.* at 1976.

27. *Id.* at 1973.

Board regulation which requires that "every club licensee shall adhere to all the provisions of its constitution and by-laws."²⁸ The federal district court²⁹ found the state to have been "far from neutral" since this regulation required Moose Lodge No. 107 to conform to the constitution of its national organization, which constitution includes the provision:

The membership of the lodge shall be composed of male persons of the Caucasian or White race above the age of twenty-one years, and not married to someone of other than the Caucasian or White race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being.³⁰

In applying the Liquor Board regulation to this constitutional provision, the Supreme Court noted that the effect would be to place state sanctions behind Moose Lodge's discriminatory membership rules. The Court, however, determined that the petitioner had no standing to challenge the membership rules³¹ and declined to make any ruling with respect to same.³²

In cases that it has previously considered, the Supreme Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been, and in whatever form it has taken.³³ In so doing, the Court has emphasized that "a State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act."³⁴ Further, this responsibility extends to encompass those instances wherein the discrimination is either compelled or encouraged by state policy,³⁵ local ordinance,³⁶ or state regulation.³⁷

It is the opinion of this writer that *Moose Lodge* represents a withdrawal from the Court's previous vigilant fidelity to the constitutional principle that no state shall encourage or sanction racial discrimination in any form. That the members of Moose Lodge have a right to associate among themselves in harmony with their private predilections, free from

28. Regulations of the Pennsylvania Liquor Control Board, § 113.09 (June, 1970 ed.). These regulations were adopted by the Board pursuant to PA. STAT. ANN. tit. 47, § 2-207(i) (1969).

29. *Irvis v. Scott*, 318 F. Supp. 1246, 1250 (M.D. Pa. 1970).

30. CONSTITUTION OF THE SUPREME LODGE, § 71-1.

31. 92 S. Ct. at 1974. For the purposes of this note, the discussion is limited to the Court's determination that state action did not exist. Part I of the Court's decision, holding that petitioner had standing to challenge Moose Lodge's guest practices, but not its membership rules, is located at 92 S. Ct. at 1968-70.

32. *Id.* at 1974. The Court did order that § 113.09 of the Regulations of the Pennsylvania Liquor Control Board be enjoined from being enforced as it pertained to discriminatory guest policies that were enacted subsequent to the district court's opinion.

33. See, e.g., *Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Evans v. Newton*, 382 U.S. 296 (1966); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

34. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 170 (1970).

35. *Id.*; accord *Lombard v. Louisiana*, 373 U.S. 267 (1963).

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

37. *Robinson v. Florida*, 378 U.S. 153 (1964); cf. *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952).

the presence and influence of blacks and members of other minority groups, is evident. This is a fundamental right granted by the United States Constitution.³⁸ However, it is also evident that by upholding the liquor license issued to Moose Lodge, the Supreme Court has permitted an admittedly discriminatory club to enjoy the benefits granted by the State of Pennsylvania, under its police power, to engage in the sale or distribution of intoxicating liquors.

STEVEN A. EDELSTEIN

IMPLIED WARRANTIES IN THE SALE OF REAL ESTATE

Plaintiffs were purchasers of new condominiums from the defendant, the builder and developer of a condominium project. Soon after the plaintiffs moved into the premises, the air-conditioning system began malfunctioning. After many unsuccessful attempts to remedy the defective condition, the plaintiffs contracted to have the system repaired at their own expense. They then brought an action to collect the cost of repairs. The builder's one-year express warranty on the equipment, materials, and workmanship had expired prior to the institution of the suit. The District Court of Appeal, Fourth District, affirmed the trial court's judgment in favor of plaintiffs.¹ On certiorari to the Supreme Court of Florida, *held*, affirmed: Implied warranties of fitness and merchantability extend to the sale of newly built houses and condominiums by builders. *Gable v. Silver*, 264 So.2d 418 (Fla. 1972).²

The history of the development of warranties in Florida and elsewhere has been traced in detail by many writers and need not be repeated here.³ Suffice it to say that Florida has progressed steadily away from *caveat emptor* and toward increased consumer protection. In the period between the Fourth District's ruling in *Gable* and the Supreme Court of Florida's decision affirming that ruling, three states⁴ have joined

38. U.S. CONST. amend. I.

1. *Gable v. Silver*, 258 So.2d 11 (Fla. 4th Dist. 1972).

2. The supreme court adopted the decision of the district court as its ruling.

3. See, e.g., Ausness, *From Caveat Emptor to Strict Liability: A Review of Products Liability in Florida*, 24 U. FLA. L. REV. 410 (1972); Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961); Haskell, *The Case of an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965); Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967); Note, 23 U. FLA. L. REV. 785 (1971); Note, 23 U. FLA. L. REV. 796 (1971); Note, 22 U. MIAMI L. REV. 433 (1967); Annot., 25 A.L.R.3d 383 (1969). The UNIFORM COMMERCIAL CODE (FLA. STAT. chs. 671-680 inclusive) was adopted in Florida effective January 1, 1967.

4. *Hanavan v. Dye*, 4 Ill. App. 3d 576, 281 N.E.2d 398 (1972); *Smith v. Old Warson Development Company*, 479 S.W.2d 795 (Mo. 1972); *Elderkin v. Gaster*, 447 Pa. 118, 288