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Jo Desha Lucas

*School of Law, University of Chicago*

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## COMMENT ON PROFESSOR LEWIS' PAPER

JO DESHA LUCAS\*

PROFESSOR Lewis points out that the general and marked preference of Americans for living, working, and going to school with others of their own stamp creates an hiatus in services for Negroes, for there are few places in which accommodations operated for Negroes alone can survive economically, and "The needs of the individual Negro can be provided for only if he is allowed to participate in the system which provides services across the nation for the public generally." It is the function of government to correct such a malfunctioning of the private enterprise system, he suggests, and since quite obviously no political majority could be mustered in support of action in the areas in which preferences of this sort have a high emotional charge, it should be corrected at the national level. It remains to parcel out the appointed tasks of the co-ordinate departments.

I doubt that anyone would deny that this problem exists, and there are those who would add arguments of "social policy" and ethics. As an argument for legislation, addressed to the state legislature, Professor Lewis' thesis is a relatively convincing one, and his proposal relatively modest. He suggests that where public accommodations receive direct, or what he refers to as "extraordinary," financial aid from the government, and the aid is given for the purpose of assuring that services are rendered to the public (as distinct from aid designed to improve the lot of the recipient, such as welfare payments and educational grants to individuals), those accommodations should be treated as public, at least to the extent that those who operate them should not be permitted to select their clientele on the basis of race or religion. Further, he suggests that when an individual makes a facility available to all except selected minority groups without inquiry as to particular attributes, where the public generally has the expectation that it will be received without question, the facility must be made available to minority members as well.

This proposal permits clannishness but not prejudice, and proceeds upon the assumption that a white who is willing to share facilities with other whites without first inquiring as to whether they are washed, educated, or in the least compatible, will not be heard to excuse exclusion of Negroes on the ground of selectivity of companions. Though I suspect that this line is harder to draw than Professor Lewis seems to think, it is a line which commends itself to common sense. It excludes the private club and Mrs. Murphy's celebrated boarding house.

So far, however, we have talked only about what is a sensible proposal for correction of what has been identified as an economic and in the opinion of some a social and ethical problem. The problem of implementation is another matter and depends, of course, upon the allocation of power under our Constitution.

First, as to publicly assisted accommodations. It is obvious that recent cases

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\* Professor of Law, School of Law, University of Chicago.

point in the direction of Professor Lewis' suggested line. As he points out, the problem of publicly assisted enterprise is one which adapts itself to solution under the provisions of the Equal Protection Clause, for in the giving of assistance the Court can find "state action" without doing violence to that concept. The only arguable objection to the trend of these cases, and to Professor Lewis' analysis, is the unfairness involved in the retroactive application of the principal to facilities provided largely by private capital which would not have been risked if the assisting governmental unit had required open use of the facilities. A case in point is *Dorsey v. Stuyvesant Town Corp.*,<sup>1</sup> which Professor Lewis criticises. Had the contract involved in that case been challenged in a taxpayer's action, the Equal Protection Clause question could have been settled directly before \$90,000,000 was invested. Even after the sale of the land, presumably the sale could be invalidated, the land reconveyed, and the investors reimbursed, leaving the project a purely public facility.

In the short run, of course, Professor Lewis' solution opens up a large housing facility to nonsegregated use without calling upon the city to buy it. It must be remembered, however, that in the long run it may result in no more such projects, at least if we take as true Commissioner Robert Moses' statement to the Governor and Board of Estimate that if any requirement was imposed which deprived the landlord of the right to select its tenants, no private venture would go into the business. Another case in point is *Simkins v. Moses H. Cone Memorial Hosp.*,<sup>2</sup> also criticised by Professor Lewis. In *Simkins* it was held that the fact that a private hospital had received substantial construction grants under the Hill-Burton Act<sup>3</sup> did not entitle Negro doctors and patients to equal treatment by the management. There is no doubt that the federal government could have conditioned the grant upon the operation of nonsegregated facilities, and little doubt that it did not do so because of a fear that with any such requirement, there would have been no Hill-Burton Act at all. And so it has been with other federal assistance programs. Proposals to condition them upon desegregation have been introduced, sometimes supported by persons opposed to the program because they thought the condition would result in the death of the bill on the floor and opposed by friends of the bill for the same reason. This problem is indeed a very old one. The Civil Rights Act of 1875<sup>4</sup> included schools within the list of facilities which must not discriminate and before it left the Congress this part of the Act was dropped with the consent of a leading Negro member from South Carolina because of a fear that its inclusion would abort the development of schools in the South.<sup>5</sup>

In the long run, therefore, a decision that government may not give

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1. 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

2. 211 F. Supp. 628 (M.D.N.C. 1962).

3. 60 Stat. 631, 42 U.S.C. § 291(e),(f) (1958).

4. 18 Stat. 335 (1875) (part 3).

5. See Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131, 161 (1950).

financial assistance to the creation of facilities unless the facilities are operated on a nonsegregated basis is not a decision that nonsegregated facilities will be provided, but rather a limitation upon the government's ability to encourage the creation of new facilities, otherwise desirable. Clannish taxpayers who receive nothing from the public spending programs in this area and are forced to create their own facilities with no assistance, may well become more resistant to purely public projects, such as public housing, from which Negroes derive a disproportionate benefit.

Of course Professor Lewis recognizes this possibility of reprivatization of facilities, and his second proposal is designed to deal with it, at least in the area of obviously public facilities. The motel in the redeveloped area,<sup>6</sup> and the recreational facilities in the public park,<sup>7</sup> he can approach through "state action," but the privately operated commercial hotels, motels, theatres, amusement parks, and personal service establishments like barber shops and beauty parlors cannot be called "state action" in any conventional sense. From the absence of "state action" two things have been said to flow. First, there is no constitutionally protected right to equal treatment,<sup>8</sup> and second, the Fourteenth Amendment does not empower Congress to afford such a right.<sup>9</sup> If this is so, national solution of the problem must proceed along other lines. For example, under the Commerce Clause and Acts of Congress the Court has banned segregation in facilities construed to be a part of public transportation, such as restaurants in bus stations.<sup>10</sup> And the Supreme Court has sufficiently vulcanized the Commerce Clause to lead some to believe that most, if not all, public facilities could be controlled under that provision.<sup>11</sup>

There are two reasons why this approach does not commend itself to desegregationists, at least as a total measure of the application of the national law to public facilities. The first is because it may impose some limitations on the reach of the law. The second, and perhaps more important, is that control under the Commerce Clause would almost certainly require Congressional action and current experience indicates that Congressional action is hard to get and subject to bargain. If it were held that private action were subject to the Fourteenth Amendment, or that the action of otherwise private entrepreneurs in providing public facilities is "state action," then the federal courts could proceed to force desegregation in such facilities by declaration, injunction, and conceivably criminal penalties under existing civil rights legislation.

A number of suggestions have been made recently as to what the Supreme Court should say when it moves in this direction. Justice Douglas says, for example, that wherever the state licenses an establishment, that establishment

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6. See *Smith v. Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M.D. Tenn. 1963); Professor Lewis' discussion at 409-10.

7. See Professor Lewis' discussion at 406.

8. *Bowman v. Chicago & Northwestern Ry.*, 115 U.S. 611 (1885).

9. *Civil Rights Cases*, 109 U.S. 3 (1883).

10. Without benefit of anything expressed in the legislation.

11. Witness proposals presently before the Congress.

becomes subject to the Amendment.<sup>12</sup> This approach has quite obvious problems, for licenses are nothing more than devices for the policing of some underlying regulations, and private parties are subject to such regulation. The law may require me to have a toilet in my house and enforce it by requiring that I get a building permit yet certainly my home is not by that fact open to all and sundry. It may require me to obtain a driver's license and a license for my car, but surely that does not make me obliged to drive my neighbors to work. Where licenses are used to enforce revenue provisions, every conceivable activity may be licensed.

Others have approached the problem through a definition of "state action" which includes "inaction." In short, the state may not permit a discrimination it is empowered to prohibit.<sup>13</sup> This approach, in light of the fact that the Amendment nowhere limits itself to racial discrimination, is certainly a reverse twist on the adage, "thank God we do not get all the government we pay for."

Professor Lewis rejects these solutions as excessive and suggests that the Court extend the protections of the Amendment in the following fashion. Step one—where the law forbids selection of clientele according to whim, and gives redress to a white man excluded for an irrational reason, failure to afford the Negro this protection is violative of the requirement of "Equal Protection." Step two—where the white community has a general expectation that its members will be served without any inquiry into their worth or social graces, by a "kind of common law," this expectation should be treated as equivalent to a legal right, and the Amendment should be construed to prohibit exclusion of Negroes.

There is only a small gap, says Professor Lewis, between this generally fulfilled expectation and a legal right, and the Court has filled little gaps before and should do so now. As examples of this process he mentions the *Shelley*,<sup>14</sup> *Marsh*<sup>15</sup> and *Allwright*<sup>16</sup> cases. Though there are undoubtedly some analogies which can be drawn between these cases and the problem of segregated public accommodations, I suggest that these analogies are not very strong. In each of these cases the Court was faced with a widespread device designed to limit individual choice or generally to subvert rights concededly protected by the Constitution. There is no doubt, for instance, that a Negro has a right to buy and sell property, and a system of covenants which limit the power of the owner to sell to Negroes can be likened to other systems of compulsion where the whole plan depends upon the state courts for its workability. It is a widespread restriction upon freedom aimed at preservation of segregated housing, and dependant upon enforcement by the state courts. In *Allright*, too, the right allegedly infringed was the right to vote in elections which as a practical matter always

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12. See opinion of Douglas, J., in *Garner v. Louisiana*, 368 U.S. 157, 183 (1961).

13. Professor Lewis discusses the Henkin analysis at 414-19.

14. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

15. *Marsh v. Alabama*, 326 U.S. 501 (1946).

16. *Smith v. Allwright*, 321 U.S. 649 (1944).

decided the question of who would serve as public officers exercising powers over whites and Negroes alike, and the Court could take the position that the exercise of the franchise is a matter which cannot be private. In *Marsh*, as well, the activities of the company in making rules for public behavior enforced by state criminal penalties in a town to all intents and purposes like any other town, were governmental enough to justify the Court in treating the enforcement as limited by the First and Fourteenth Amendment protections of freedom of speech.

In the public accommodations area it has recently been noted that systems which apply pressure to enforce segregation in public accommodations may not enjoy state enforcement, at least where the pressure is applied by state activities.<sup>17</sup> Under the principles of *Shelley*, *Allwright* and *Marsh*, it would not be surprising to find that private enforcement of such pressures could not be implemented through civil actions.

Where there is a perfectly free choice, however, on the part of each property owner (in the *Shelley* context) to sell to a Negro or not, certainly nothing in that opinion suggests that the federal courts would order specific performance in favor of a Negro on a contract which he didn't have. Nor is there anything in *Marsh* to suggest that an individual tavern operator could not ban a prospective drinker because of his views on the chances of the New York Mets.

Professor Lewis is no doubt aware of the difficulty of establishing the right to be protected by the Court in the public accommodations cases. He glances wistfully at the Privileges and Immunities Clause but concedes that as interpreted in the *Slaughter-House Cases*<sup>18</sup> there is not much comfort there. In this connection it might be said that had the minority had its way in those cases, there would not have been much comfort anyway, for it must be remembered that two of the dissenters, Justices Bradley and Field, joined the majority in the *Civil Rights Cases*,<sup>19</sup> Justice Bradley writing the opinion. Later, in *O'Neil v. Vermont*,<sup>20</sup> Justice Field indicated that he was of the opinion that the term "privileges and immunities of citizens of the United States" meant those guaranteed in the Constitution in the first eight amendments, and elsewhere in the Constitution. Justice Harlan concurred in this view but expressed it "These rights are, principally, enumerated in the earlier Amendments of the Constitution." This leaves open the possibility that he was of the opinion that other privileges and immunities might be involved. It seems, however, that even he did not think that the common law duties of equal service required of carriers were privileges and immunities, for he joined in a unanimous opinion to that effect in *Bowman v. Chicago & Northwestern Ry.*<sup>21</sup>

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

18. 83 U.S. (16 Wall.) 36 (1872).

19. 109 U.S. 3 (1883).

20. 144 U.S. 323 (1892).

21. 115 U.S. 611 (1885).

Professor Lewis' reference to such cases as *Corfield v. Coryell*<sup>22</sup> and the "kind of common law" referred to by Justice M'Lean in *United States v. Macdaniel*<sup>23</sup> add little if anything to his argument. In *Corfield*, there was state action aplenty. Public officers boarded the plaintiff's boat, took it by force of arms, and sold it as a prize. It had been used in dredging oysters in violation of the New Jersey oyster law. The contention was made that the law violated the Privileges and Immunities Clause of the Fourth Article of the Constitution because the state permitted its own citizens to take the oysters but prohibited outsiders from doing so. Mr. Justice Bushrod Washington on circuit said the property of the oysters was in the citizens of the state and therefore they could keep them for themselves, *limiting* the constitutional provision to rights more "fundamental." Certainly it is a long jump to proceed from that to the suggestion that the term embraces the innkeeper's doctrine and such extensions of it as the Court might in its wisdom decide upon. The "kind of common law" of which Mr. Justice M'Lean spoke was custom *within the government* of allowing commissions on disbursements made by Navy-agents. He was simply holding that such customs, as interpretations of legislation made by one secretary and long acquiesced in, could not be repudiated by another to deprive people of commissions to which they had already become entitled. What relevance this has to the public accommodations problem is obscure, unless perhaps it can be read against Professor Lewis' statement, "because of location or other factors, some individuals who have invested heavily of their time and energies (and, it might be added, their money) to create a small business (and, forsooth, perhaps a large one) may be seriously injured in that business. But there is no feasible way to account for this in a regulatory statute. A serious quirk in the system of private enterprise exists and it cannot be allowed to feed upon itself, to serve as its own continuing justification, so to speak; it must be remedied by uniform regulations."

In summary, were Professor Lewis arbitrator in a dispute between the Chamber of Commerce of Hot Coffee, Mississippi, and the representatives of a group of sitters-in, I could only commend him upon a sensible and restrained suggestion for compromise, though personally I doubt that it would commend itself to either side. Were he merely suggesting a compromise between legislative factions facing a close vote in a forum admittedly empowered to act, I could only commend him upon his low key and gentlemanly persuasiveness. As an interpretation of the relevant portions of the Constitution of the United States, I find Professor Lewis' major thesis wanting. I realize that it is developed as a self-limiting principle as an alternative to the Douglas position on regulatory licensing as carrying with it a "state action" label and to the Henkin suggestion that government should be deemed to govern to the extent of its powers. I see in it, however, an outright cession to the Supreme Court of the function of de-

22. 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

23. 32 U.S. (7 Pet.) 1, 15 (1833).

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velopment of the common law of rights as among individuals, and if rights are to be predicted upon the analogy upon which Professor Lewis' rights to service rests, which I find as thin as Oliver's gruel, I see no limitation at all. I realize that on occasion courts, including the Supreme Court, have drawn analogies no stronger, but I do not think that they should be encouraged to reason in this sort of way.