Adickes v. S. H. Kress & Company/Opinion of the Court

United States Supreme Court

398 U.S. 144

ADICKES v. S. H. KRESS & COMPANY

Argued: Nov. 12, 1969. --- Decided: June 1, 1970

Petitioner, Sandra Adickes, a white school teacher from New York, brought this suit in the United States District Court for the Southern District of New York against respondent S. H. Kress & Co. ('Kress') to recover damages under 42 U.S.C. § 1983 [1] for an alleged violation of her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. The suit arises out of Kress' refusal to serve lunch to Miss Adickes at its restaurant facilities in its Hattiesburg, Mississippi, store on August 14, 1964, and Miss Adickes' subsequent arrest upon her departure from the store by the Hattiesburg police on a charge of vagrancy. At the time of both the refusal to serve and the arrest, Miss Adickes was with six young people, all Negroes, who were her students in a Mississippi 'Freedom School' where she was teaching that summer. Unlike Miss Adickes, the students were offered service, and were not arrested.

Petitioner's complaint had two counts, [2] each bottomed on § 1983, and each alleging that Kress had deprived her of the right under the Equal Protection Clause of the Fourteenth Amendment not to be discriminated against on the basis of race. The first count charged that Miss Adickes had been refused service by Kress because she was a 'Caucasian in the company of Negroes.' Petitioner sought, inter alia, to prove that the refusal to serve her was pursuant to a 'custom of the community to segregate the races in public eating places.' However, in a pretrial decision, 252 F.Supp. 140 (1966), the District Court ruled that to recover under this court, Miss Adickes would have to prove that at the time she was refused service, there was a specific 'custom * * * of refusing service to whites in the company of Negroes' and that this custom was 'enforced by the State' under Mississippi's criminal trespass statute. [3] Because petitioner was unable to prove at the trial that there were other instances in Hattiesburg of a white person having been refused service while in the company of Negroes, the District Court directed a verdict in favor of respondent. A divided panel of the Court of Appeals affirmed on this ground, also holding that § 1983 'requires that the discriminatory custom or usage be proved to exist in the locale where the discrimination took place, and in the State generally,' and that petitioner's 'proof on both points was deficient,' 409 F.2d 121, 124 (1968).

The second count of her complaint, alleging that both the refusal of service and her subsequent arrest were the product of a conspiracy between Kress and the Hattiesburg police, was dismissed before trial on a motion for summary judgment. The District Court ruled that petitioner had 'failed to allege any facts from which a conspiracy might be inferred.' 252 F.Supp., at 144. This determination was unanimously affirmed by the Court of Appeals, 409 F.2d, at 126−127.

Miss Adickes, in seeking review here, claims that the District Court erred both in directing a verdict on the substantive count, and in granting summary judgment on the conspiracy count. Last Term we granted certiorari, 394 U.S. 1011, 89 S.Ct. 1635, 23 L.Ed.2d 38 (1969), and we now reverse and remand for further proceedings on each of the two counts.

As explained in Part I, because the respondent failed to show the absence of any disputed material fact, we think the District Court erred in granting summary judgment. With respect to the substantive count, for reasons explained in Part II, we think petitioner will have made out a claim under § 1983 for violation of her equal protection rights if she proves that she was refused service by Kress because of a state-enforced custom requiring racial segregation in Hattiesburg restaurants. We think the courts below erred (1) in assuming that the only proof relevant to showing that a custom was state-enforced related to the Mississippi criminal trespass statute; (2) in defining the relevant state-enforced custom as requiring proof of a practice both in Hattiesburg and throughout Mississippi, of refusing to serve white persons in the company of Negroes rather than simply proof of state-enforced segregation of the races in Hattiesburg restaurants.

* Briefly stated, the conspiracy count of petitioner's complaint made the following allegations: While serving as a volunteer teacher at a 'Freedom School' for Negro children in Hattiesburg, Mississippi, petitioner went with six of her students to the Hattiesburg Public Library at about noon on August 14, 1964. The librarian refused to allow the Negro students to use the library, and asked them to leave. Because they did not leave, the librarian called the Hattiesburg chief of police who told petitioner and her students that the library was closed, and ordered them to leave. From the library, petitioner and the students proceeded to respondent's store where they wished to eat

lunch. According to the complaint, after the group sat down to eat, a policeman came into the store 'and observed (Miss Adickes) in the company of the Negro students.' A waitress then came to the booth where petitioner was sitting, took the orders of the Negro students, but refused to serve petitioner because she was a white person 'in the company of Negroes.' The complaint goes on to allege that after this refusal of service, petitioner and her students left the Kress store. When the group reached the sidewalk outside the store, 'the Officer of the Law who had previously entered (the) store' arrested petitioner on a groundless charge of vagrancy and took her into custody.

On the basis of these underlying facts petitioner alleged that Kress and the Hattiesburg police had conspired (1) 'to deprive (her) of her right to enjoy equal treatment and service in a place of public accommodation'; and (2) to cause her arrest 'on the false charge of vagrancy.'

A. CONSPIRACIES BETWEEN PUBLIC OFFICIALS AND PRIVATE PERSONS GOVERNING PRINCIPLES

The terms of § 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.' [4]

As noted earlier we read both counts of petitioner's complaint to allege discrimination based on race in violation of petitioner's equal protection rights. [5] Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage racial segregation. [6] Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in The Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes.

The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); see United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941); Screws v. United States, 325 U.S. 91, 107-111, 65 S.Ct. 1031, 1038-1040, 89 L.Ed. 1495 (1945); Williams v. United States, 341 U.S. 97, 99-100, 71 S.Ct. 576, 578-579, 95 L.Ed. 774 (1951). Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. 'Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,' United States v. Price, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157 (1966). [7]

We now proceed to consider whether the District Court erred in granting summary judgment on the conspiracy count. In granting respondent's motion, the District Court simply stated that there was 'no evidence in the complaint or in the affidavits and other papers from which a 'reasonably-minded person' might draw an inference of conspiracy,' 252 F.Supp., at 144, aff'd, 409 F.2d, at 126−127. Our own scrutiny of the factual allegations of petitioner's complaint, as well as the material found in the affidavits and depositions presented by Kress to the District Court, however, convinces us that summary judgment was improper here, for we think respondent failed to carry its burden of showing the absence of any genuine issue of fact. Before explaining why this is so, it is useful to state the factual arguments, made by the parties concerning summary judgment, and the reasoning of the courts below.

In moving for summary judgment, Kress argued that 'uncontested facts' established that no conspiracy existed between any Kress employee and the police. To support this assertion, Kress pointed first to the statements in the deposition of the store manager (Mr. Powell) that (a) he had not communicated with the police, [8] and that (b) he had, by a prearranged tacit signal, [9] ordered the food counter supervisor to see that Miss Adickes was refused service only because he was fearful of a riot in the store by customers angered at seeing a 'mixed group' of whites and blacks eating together. [10] Kress also relied on affidavits from the Hattiesburg chief of police, [11] and the two arresting officers, [12] to the effect that store manager Powell had not requested that petitioner be arrested. Finally, Kress pointed to the statements in petitioner's own deposition that she had no knowledge of any communication between any Kress employee and any member of the Hattiesburg police, and was relying on circumstantial evidence to support her contention that there was an arrangement between Kress and the police.

Petitioner, in opposing summary judgment, pointed out that respondent had failed in its moving papers to dispute the allegation in petitioner's complaint, a statement at her deposition, [13] and an unsworn statement by a Kress employee, [14] all to the effect that there was a policeman in the store at the time of the refusal to serve her, and that this was the policeman who subsequently arrested her. Petitioner argued that although she had no knowl-

edge of an agreement between Kress and the police, the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial, especially given the fact that the noncircumstantial evidence of the conspiracy could only come from adverse witnesses. Further, she submitted an affidavit specifically disputing the manager's assertion that the situation in the store at the time of the refusal was 'explosive,' thus creating an issue of fact as to what his motives might have been in ordering the refusal of service.

We think that on the basis of this record, it was error to grant summary judgment. As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party. [15] Respondent here did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some Kress employee that petitioner not be served.

It is true that Mr. Powell, the store manager, claimed in his deposition that he had not seen or communicated with a policeman prior to his tacit signal to Miss Baggett, the supervisor of the food counter. But respondent did not submit any affidavits from Miss Baggett, [16] or from Miss Freeman, [17] the waitress who actually refused petitioner service, either of whom might well have seen and communicated with a policeman in the store. Further, we find it particularly noteworthy that the two officers involved in the arrest each failed in his affidavit to foreclose the possibility (1) that he was in the store while petitioner was there; and (2) that, upon seeing petitioner with Negroes, he communicated his disapproval to a Kress employee, thereby influencing the decision not to serve petitioner.

Given these unexplained gaps in the materials submitted by respondent, we conclude that respondent failed to fulfill its initial burden of demonstrating what is a critical element in this aspect of the case-that there was no policeman in the store. If a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service. Because '(o)n summary judgment the inferences to be drawn from the underlying facts contained in (the moving party's) materials must be viewed in the light most favorable to the party opposing the motion,' United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, (1962), we think respondent's failure to show there was no policeman in the store requires reversal.

Pointing to Rule 56(e), as amended in 1963, [18] respondent argues that it was incumbent on petitioner to come forward with an affidavit properly asserting the presence of the policeman in the store, if she were to rely on that fact to avoid summary judgment. Respondent notes in this regard that none of the materials upon which petitioner relied met the requirements of Rule 56(e). [19]

This argument does not withstand scrutiny, however, for both the commentary on and background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact. [20] The Advisory Committee note on the amendment states that the changes were not designed to 'affect the ordinary standards applicable to the summary judgment.' And, in a comment directed specifically to a contention like respondent's, the Committee stated that '(w)here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.' [21] Because respondent did not meet its initial burden of establishing the absence of a policeman in the store, petitioner here was not required to come forward with suitable opposing affidavits. [22]

If respondent had met its initial burden by, for example, submitting affidavits from the policemen denying their presence in the store at the time in question, Rule 56(e) would then have required petitioner to have done more than simply rely on the contrary allegation in her complaint. To have avoided conceding this fact for purposes of summary judgment, petitioner would have had to come forward with either (1) the affidavit of someone who saw the policeman in the store or (2) an affidavit under Rule 56(f) explaining why at that time it was impractical to do so. Even though not essential here to defeat respondent's motion, the submission of such an affidavit would have been the preferable course for petitioner's counsel to have followed. As one commentator has said:

'It has always been perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56(f) affidavit. And the peril rightly continues (after the amendment to Rule 56(e)). Yet the party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required.' 6 J.Moore, Federal Practice 56.22(2), pp. 2824-2825 (2d ed. 1966).

There remains to be discussed the substantive count of petitioner's complaint, and the showing necessary for petitioner to prove that respondent refused her service 'under color of any * * * custom, or usage, of (the) State' in violation of her rights under the Equal Protection Clause of the Fourteenth Amendment. [23]

We are first confronted with the issue of whether a 'custom' for purposes of § 1983 must have the force of law, or whether, as argued in dissent, no state involvement is required. Although this Court has never explicitly decided this question, we do not interpret the statute against an

amorphous backdrop.

What is now 42 U.S.C. § 1983 came into existence as § 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13. The Chairman of the House Select Committee which drafted this legislation described [24] § 1 as modeled after § 2 of the Civil Rights Act of 1866-a criminal provision that also contained language that forbade certain acts by any person 'under color of any law, statute, ordinance, regulation, or custom,' 14 Stat. 27. In the Civil Rights Cases, 109 U.S. 3, 16, 3 S.Ct. 18, 25, 27 L.Ed. 835 (1883), the Court said of this 1866 statute: 'This law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified.' (Emphasis added.) Moreover, after an exhaustive examination of the legislative history of the 1866 Act, both the majority and dissenting opinions [25] in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), concluded that § 2 of the 1866 Civil Rights Act was intended to be limited to 'deprivations perpetrated 'under color of law." [26] (Emphasis added.)

Quite apart from this Court's construction of the identical 'under color of' provision of § 2 of the 1866 Act, the legislative history of § 1 of the 1871 Act, the lineal ancestor of § 1983, also indicates that the provision in question here was intended to encompass only conduct supported by state action. That such a limitation was intended for § 1 can be seen from an examination of the statements and actions of both the supporters and opponents of the Ku Klux Klan Act.

In first reporting the Committee's recommendations to the House, Representative Shellabarger, the Chairman of the House Select Committee which drafted the Ku Klux Klan Act, said that § 1 was 'in its terms carefully confined to giving a civil action for such wrongs against citizenship as are done under color of State laws which abridge these rights.' [27] (Emphasis added.) Senator Edmunds, Chairman of the Senate Committee on the Judiciary, and also a supporter of the bill, said of this provision: 'The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, which have since become a part of the Constitution.' [28] (Emphasis added.) Thus, in each House, the leader of those favoring the bill expressly stated his understanding that § 1 was limited to deprivations of rights done under color of law.

That Congress intended to limit the scope of § 1 to actions taken under color of law is further seen by contrasting its legislative history with that of other sections of the same Act. On the one hand, there was comparatively little debate over § 1 of the Ku Klux Klan Act, and it was eventually enacted in form identical to that in which it was introduced in the House. [29] Its history thus stands in sharp contrast to that of other sections of the Act. [30] For example, § 2 of the 1871 Act, [31] a provision aimed at private conspiracies with no 'under color of law' requirement, created a great storm of controversy, in part because it was thought to encompass private conduct. Senator Thurman, for example, one of the leaders of the opposition to the Act, although objecting to § 1 on other grounds, admitted its constitutionality [32] and characterized it as 'refer(ring) to a deprivation under color of law, either statute law or 'custom or usage' which has become common law.' [33] (Emphasis added.) This same Senator insisted vociferously on the absence of congressional power under § 5 of the Fourteenth Amendment to penalize a conspiracy of private individuals to violate state law. [34] The comparative lack of controversy concerning § 1, in the context of the heated debate over the other provisions, suggests that the opponents of the Act, with minor exceptions, like its proponents understood § 1 to be limited to conduct under color of law.

In addition to the legislative history, there exists an unbroken line of decisions, extending back many years, in which this Court has declared that action 'under color of law' is a predicate for a cause of action under § 1983, [35] or its criminal counterpart, 18 U.S.C. § 242. [36] Moreover, with the possible exception of an exceedingly opaque district court opinion, [37] every lower court opinion of which we are aware that has considered the issue, has concluded that a 'custom or usage' for purposes of § 1983 requires state involvement and is not simply a practice that reflects longstanding social habits, generally observed by the people in a locality. [38] Finally, the language of the statute itself points in the same direction for it expressly requires that the 'custom, or usage' be that 'of any State,' not simply of the people living in a state. In sum, against this background, we think it clear that a 'custom or usage, of (a) State' for purposes of § 1983 must have the force of law by virtue of the persistent practices of state officials.

Congress included customs and usages within its definition of law in § 1983 because of the persistent and widespread discriminatory practices of state officials in some areas of the post-bellum South. As Representative Garifield said: '(E)ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.' [39] Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law.

This interpretation of custom recognizes that settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements. If authority be needed for this truism, it can be found in Nashville, C. & St. L.R. Co. v. Browning, 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254 (1940),

where the Court held that although a statutory provision suggested a different note, the 'law' in Tennessee as established by longstanding practice of state officials was that railroads and public utilities were taxed at full cash value. What Justice Frankfurter wrote there seems equally apt here:

'It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice * * * can establish what is state law. The equal protection clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text.' Id., at 369, 60 S.Ct., at 972.

And in circumstances more closely analogous to the case at hand, the statements of the chief of police and mayor of New Orleans, as interpreted by the Court in Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338 (1963), could well have been taken by restaurant proprietors as articulating a custom having the force of law. Cf. Garner v. Louisiana, 368 U.S. 157, 176-185, 82 S.Ct. 248, 258-263, 7 L.Ed.2d 207 (Douglas, J., concurring) (1961); Wright v. Georgia, 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963); Baldwin v. Morgan, 287 F.2d 750, 754 (C.A.5th Cir. 1961).

For petitioner to recover under the substantive count of her complaint, she must show a deprivation of a right guaranteed to her by the Equal Protection Clause of the Fourteenth Amendment. Since the 'action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States,' Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948), we must decide, for purposes of this case, the following 'state action' issue: Is there sufficient state action to prove a violation of petitioner's Fourteenth Amendment rights if she shows that Kress refused her service because of a state-enforced custom compelling segregation of the races in Hattiesburg restaurants?

In analyzing this problem, it is useful to state two polar propositions, each of which is easily identified and resolved. On the one hand, the Fourteenth Amendment plainly prohibits a State itself from discriminating because of race. On the other hand, § 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections. As was said in Shelley v. Kraemer, supra, § 1 of '(t)hat Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' 334 U.S., at 13, 68 S.Ct., at 842.

At what point between these two extremes a State's involvement in the refusal becomes sufficient to make the private refusal to serve a violation of the Fourteenth Amendment, is far from clear under our case law. If a State had a law requiring a private person to refuse service because of race, it is clear beyond dispute that the law would violate the Fourteenth Amendment and could be declared invalid and enjoined from enforcement. Nor can a State enforce such a law requiring discrimination through either convictions of proprietors who refuse to discriminate, or trespass prosecutions of patrons who, after being denied service pursuant to such a law, refuse to honor a request to leave the premises. [40]

The question most relevant for this case, however, is a slightly different one. It is whether the decision of an owner of a restaurant to discriminate on the basis of race under the compulsion of state law offends the Fourteenth Amendment. Although this Court has not explicitly decided the Fourteenth Amendment state action issue implicit in this question, underlying the Court's decisions in the sit-in cases is the notion that a State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act. As the Court said in Peterson v. City of Greenville, 373 U.S. 244, 248, 83 S.Ct. 1119, 1121 (1963): 'When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it.' Moreover, there is much support in lower court opinions for the conclusion that discriminatory acts by private parties done under the compulsion of state law offend the Fourteenth Amendment. In Baldwin v. Morgan, supra, the Fifth Circuit held that '(t)he very act of posting and maintaining separate (waiting room) facilities when done by the (railroad) Terminal as commanded by these state orders is action by the state.' The Court then went on to say: 'As we have pointed out above the State may not use race or color as the basis for distinction. It may not do so by direct action or through the medium of others who are under State compulsion to do so.' Id., 287 F.2d at 755-756 (emphasis added). We think the same principle governs here.

For state action purposes it makes no difference of course whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law-in either case it is the State that has commanded the result by its law. Without deciding whether less substantial involvement of a State might satisfy the state action requirement of the Fourteenth Amendment, we conclude that petitioner would show an abridgement of her equal protection right, if she proves that Kress refused her service because of a state-enforced custom of segregating the races in public restaurants.

For purposes of remand, we consider it appropriate to make three additional points.

First, the District Court's pretrial opinion seems to suggest that the exclusive means available to petitioner for demonstrating that state enforcement of the custom rel-

evant here would be by showing that the State used its criminal trespass statute for this purpose. We disagree with the District Court's implicit assumption that a custom can have the force of law only if it is enforced by a state statute. [41] Any such limitation is too restrictive, for a state official might act to give a custom the force of law in a variety of ways, at least two examples of which are suggested by the record here. For one thing, petitioner may be able to show that the police subjected her to false arrest for vagrancy for the purpose of harassing and punishing her for attempting to eat with black people. [42] Alternatively, it might be shown on remand that the Hattiesburg police would intentionally tolerate violence or threats of violence directed toward those who violated the practice of segregating the races at restaurants. [43]

Second, we think the District Court was wrong in ruling that the only proof relevant to showing a custom in this case was that demonstrating a specific practice of not serving white persons who were in the company of black persons in public restaurants. As Judge Waterman pointed out in his dissent below, petitioner could not possibly prove a 'long and unvarying' habit of serving only the black persons in a 'mixed' party of whites and blacks for the simple reason that 'it was only after the Civil Rights Act of 1964 became law that Afro-Americans had an opportunity to be served in Mississippi 'white' restaurants' at all, 409 F.2d, at 128. Like Judge Waterman, we think the District Court viewed the matter too narrowly, for under petitioner's complaint the relevant inquiry is whether at the time of the episode in question there was a longstanding and still prevailing state-enforced custom of segregating the races in public eating places. Such a custom, of course, would perforce encompass the particular kind of refusal to serve challenged in this case.

Third, both the District Court and the majority opinion in the Court of Appeals suggested that petitioner would have to show that the relevant custom existed throughout the State, and that proof that it had the force of law in Hattiesburg-a political subdivision of the State-was insufficient. This too we think was error. In the same way that a law whose source is a town ordinance can offend the Fourteenth Amendment even though it has less than state-wide application, so too can a custom with the force of law in a political subdivision of a State offend the Fourteenth Amendment even though it lacks state-wide application.

In summary, if petitioner can show (1) the existence of a state-enforced custom of segregating the races in public eating places in Hattiesburg at the time of the incident in question; and (2) that Kress' refusal to serve her was motivated by that state-enforced custom, she will have made out a claim under § 1983. [44]

For the foregoing reasons we think petitioner is entitled to a new trial on the substantive count of her complaint.

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice MARSHALL took no part in the decision of this case.

1 Notes

^1 Rev.Stat. § 1979, 42 U.S.C. § 1983 provides:

'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of 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 The District Court denied petitioner's request to amend her complaint to include a third count seeking liquidated damages under §§ 1 and 2 of the Civil Rights Act of 1875, 18 Stat. 335. Although in her certiorari petition, petitioner challenged this ruling, and asked this Court to revive this statute by overruling the holding in the Civil Rights Cases, 109 U.S. 3 (1883), examination of the record shows that petitioner never raised any issue concerning the 1875 statute before the Court of Appeals. Accordingly, the Second Circuit did not rule on these contentions. Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. Lawn v. United States, 355 U.S. 339, 362-363, 78 S.Ct. 311, 324-325, 2 L.Ed.2d 321, n. 16 (1958); Husty v. United States, 282 U.S. 694, 701-702, 51 S.Ct. 240, 241-242, 75 L.Ed. 629 (1931); Duignan v. United States, 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996 (1927). We decline to do so here.

^3 The statute, Miss.Code Ann. § 2046.5 (1956), inter alia, gives the owners, managers, or employees of business establishments the right to choose customers by refusing service.

^4 See, e.g., Monroe v. Pape, 365 U.S. 167, 184, 187, 81 S.Ct. 473, 482, 484, 5 L.Ed.2d 492 (1961); United States v. Price, 383 U.S. 787, 793, 794, 86 S.Ct. 1152, 1156, 1157, 16 L.Ed.2d 267 (1966).

^5 The first count of petitioner's complaint alleges that Kress' refusal to serve petitioner 'deprived (her) of the privilege of equal enjoyment of a place of public accommodation by reason of her association with Negroes and (she) was thereby discriminated against because of race in violation of the Constitution of the United States and of Title 42 United States Code, Section 1983.' (App. 4.) (Emphasis added.) The conspiracy count alleges, inter alia, that Kress and the Hattiesburg police 'conspired together to deprive plaintiff of her right to enjoy equal treatment and service in a place of public accommodation.'

The language of the complaint might, if read generously, support the contention that petitioner was alleging a violation of Title II, the Public Accommodations provisions, of the 1964 Civil Rights Act, 78 Stat. 243, 42 U.S.C. § 2000a et seq. It is clear, and respondent seemingly concedes, that its refusal to serve petitioner was a violation of § 201 of the 1964 Act, 42 U.S.C. § 2000a. It is very doubtful, however, that Kress' violation of Miss Adickes' rights under the Public Accommodations Title could properly serve as a basis for recovery under § 1983. Congress deliberately provided no damages

remedy in the Public Accommodations Act itself, and § 207(b) provides that the injunction remedy of § 206 was the 'exclusive means of enforcing the rights based on this title.' Moreover, the legislative history makes quite plain that Congress did not intend that violations of the Public Accommodations Title be enforced through the damages provisions of § 1983. See 110 Cong.Rec. 9767 (remark of floor manager that the language of 207(b) 'is necessary because otherwise it * * * would result * * * in civil liability for damages under 42 U.S.C. § 1983'); see also 110 Cong.Rec. 7384, 7405.

In United States v. Johnson, 390 U.S. 563, 88 S.Ct. 1231, 20 L.Ed.2d 132 (1968), the Court held that violations of § 203(b) of the Public Accommodations Title could serve as the basis for criminal prosecution under 18 U.S.C. § 241 (another civil rights statute) against 'outsiders,' having no relation to owners and proprietors of places of public accommodations, notwithstanding the 'exclusive' remedy provision of § 207(b). It is doubtful whether the Johnson reasoning would allow recovery under § 1983 for Kress' alleged violation of § 201, and indeed the petitioner does not otherwise contend. The Court, in Johnson, in holding that the § 207(b) limitation did not apply to violations of § 203, stated: '(T)he exclusive-remedy provision of § 207(b) was inserted only to make clear that the substantive rights to public accommodation defined in § 201 and § 202 are to be enforced exclusively by injunction.' 390 U.S., at 567, 88 S.Ct., at 1234.

In any event, we think it clear that there can be recovery under § 1983 for conduct that violates the Fourteenth Amendment, even though the same conduct might also violate the Public Accommodations Title which itself neither provides a damages remedy nor can be the basis of a § 1983 action. Section 207(b) of the Public Accommodations Title expressly provides that nothing in that title 'shall preclude any individual * * * from asserting any right based on any other Federal or State law not inconsistent with this title * * * or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.' Therefore, quite apart from whether § 207 precludes enforcement of one's rights under the Public Accommodations Title through a damages action under 42 U.S.C. § 1983, we think it evident that enforcement of one's constitutional rights under § 1983 is not 'inconsistent' with the Public Accommodations Act.

^6 E.g., Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); cf. Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

^7 Although Price concerned a criminal prosecution involving 18 U.S.C. § 242, we have previously held that 'under color of law' means the same thing for § 1983. Monroe v. Pape, supra, 365 U.S., at 185, 81 S.Ct., at 483 (majority opinion), 212, 81 S.Ct. at 497 (opinion of Frankfurter, J.); United States v. Price, supra, 383 U.S., at 794, 86 S.Ct., at 1157 n. 7.

^8 In his deposition, Powell admitted knowing Hugh Herring, chief of police of Hattiesburg, and said that he had seen and talked to him on two occasions in 1964 prior to the incident with Miss Adickes. (App. 123-126). When asked how often the arresting officer, Ralph Hillman, came into the store, Powell stated that he didn't know precisely but 'Maybe every day.' However, Powell said that on August 14 he didn't recall seeing any policemen either inside or outside the store (App. 136, and he denied (1) that he had called the police, (2) that he had agreed with any public official to deny Miss Adickes the use of the library, (3) that he had agreed with any public official to refuse Miss Adickes service in the Kress store on the day in question, or (4) that he had asked any public official to have Miss Adickes arrested. App. 154 155.

^9 The signal, according to Powell, was a nod of his head. Powell claimed that at a meeting about a month earlier with Miss Baggett, the food counter supervisor, he 'told her not to serve the white person in the group if I * * * shook my head no. But, if I didn't give her any sign, to go ahead and serve anybody.' App. 135.

Powell stated that he had prearranged this tacit signal with Miss Baggett because 'there was quite a lot of violence * * * in Hattiesburg' directed towards whites 'with colored people, in what you call a mixed group.' App. 131.

^10 Powell described the circumstances of his refusal as follows:

'On this particular day, just shortly after 12 o'clock, I estimate there was 75 to 100 people in the store, and the lunch counter was pretty-was pretty well to capacity there, full, and I was going up towards the front of the store in one of the aisles, and looking towards the front of the store, and there was a group of colored girls, and a white woman who came into the north door, which was next to the lunch counter.

'And the one thing that really stopped me and called my attention to this group, was the fact that they were dressed alike. They all had on, what looked like a light blue denim skirt. And the best I can remember is that they were-they were almost identical, all of them. And they came into the door, and people coming in stopped to look, and they went on to the booths. And there happened to be two empty there. And one group of them and the white woman sat down in one, and the rest of them sat in the second group.

'And, almost immediately there-I mean this, it didn't take just a few seconds from the time they came into the door to sit down, but, already the people began to mill around the store and started coming over towards the lunch counter. And, by that time I was up close to the candy counter, and I had a wide open view there. And the people had real sour looks on their faces, nobody was joking, or being corny, or carrying on. They looked like a frightened mob. They really did. I have seen mobs before. I was in Korea during the riots in 1954 and 1955. And I know what they are. And this actually got me.

'I looked out towards the front, and we have what they call see-through windows. There is no backs to them. You can look out of the store right into the street. And the north window, it looks right into the lunch counter. 25 or 30 people were standing there looking in, and across the street even, in a jewelry store, people were standing there, and it looked really bad to me. It looked like one person could have yelled 'Let's get them,' which has happened before, and cause this group to turn into a mob. And, so, quickly I just made up my mind to avoid the riot, and protect the people that were in the store, and my employees, as far as the people in the mob who were going to get hurt themselves. I just knew that something was going to break loose there.' App. 133-134.

^11 The affidavit of the chief of police, who it appears was not present at the arrest, states in relevant part:

'Mr. Powell had made no request of me to arrest Miss Sandra Adickes or any other person, in fact, I did not know Mr. Powell personally until the day of this statement. (But cf. Powell's statement at his deposition, n. 8, supra.) Mr. Powell and I had not discussed the arrest of this person until the day of this statement and we had never previously discussed her in any way.' (App. 107.)

^12 The affidavits of Sergeant Boone and Officer Hillman each state, in identical language:

'I was contacted on this date by Mr. John H. Williams, Jr., a representative of Genesco, owners of S. H. Kress and Company, who requested that I make a statement concerning alleged conspiracy in connection with the aforesaid arrest.

'This arrest was made on the public streets of Hattiesburg, Mississippi, and was an officers discretion arrest. I had not consulted with Mr. G. T. Powell, Manager of S. H. Kress and Company in Hattiesburg, and did not know his name until this date. No one at the Kress store asked that the arrest be made and I did not consult with anyone prior to the arrest.' (App. 110, 112.)

^13 When asked whether she saw any policeman in the store up to the time of the refusal of service, Miss Adickes answered: 'My back was to the door, but one of my students saw a policeman come in.' (App. 75.) She went on to identify the student as 'Carolyn.' At the trial, Carolyn Moncure, one of the students who was with petitioner, testified that 'about five minutes' after the group had sat down and while they were still waiting for service, she saw a policeman come in the store. She stated: '(H)e came in the store, my face was facing the front of the store, and he came in the store and he passed, and he stopped right at the end of our booth, and he stood up and he looked around and he smiled, and he went to the back of the store, he came right back and he left out.' (App. 302.) This testimony was corroborated by that of Dianne Moncure, Carolyn's sister, who was also part of the group. She testified that while the group was waiting for service, a policeman entered the store, stood 'for awhile' looking at the group, and then 'walked to the back of the store.' (App. 291.)

^14 During discovery, respondent gave to petitioner an unsworn statement by Miss Irene Sullivan, a check-out girl. In this statement Miss Sullivan said that she had seen Patrolman Hillman come into the store '(s)hortly after 12:00 noon,' while petitioner's group was in the store. She said that he had traded a 'hello greeting' with her, and then walked past her check-out counter toward the back of the store 'out of (her) line of vision.' She went on: 'A few minutes later Patrolman Hillman left our store by the northerly front door just slightly ahead of a group composed of several Negroes accompanied by a white woman. As Hillman stepped onto the sidewalk outside our store the police car pulled across the street and into an alley that is alongside our store. The police car stopped and Patrolman Hillman escorted the white woman away from the Negroes and into the police car.' (App. 178.)

^15 See, e.g., United States v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962); 6 V. Moore, Federal Practice 56.15(3) (2d ed. 1966).

^16 In a supplemental brief filed in this Court respondent lodged a copy of an unsworn statement by Miss Baggett denying any contact with the police on the day in question. Apart from the fact that the statement is unsworn, see Fed.Rule Civ.Proc. 56(e), the statement itself is not in the record of the proceedings below and therefore could not have been considered by the trial court. Manifestly, it cannot be properly considered by us in the disposition of the case.

During discovery, petitioner attempted to depose Miss Baggett. However, Kress successfully resisted this by convincing the District Court that Miss Baggett was not a 'managing agent,' and 'was without power to make managerial decisions.'

^17 The record does contain an unsworn statement by Miss Freeman in which she states that she 'did not contact the police or ask anyone else to contact the police to make the arrest which subsequently occurred.' (App. 177.) (Emphasis added.) This statement, being unsworn, does not meet the requirements of Fed.Rule Civ.Proc. 56(e), and was not relied on by respondent in moving for summary judgment. Moreover, it does not foreclose the possibility that Miss Freeman was influenced in her refusal to serve Miss Adickes by some contact with a po-

liceman present in the store.

^18 The amendment added the following to Rule 56(e):

'When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.'

^19 Petitioner's statement at her deposition, see n. 13, supra, was, of course, hearsay; and the statement of Miss Sullivan, see n. 14, supra, was unsworn. And, the rule specifies that reliance on allegations in the complaint is not sufficient. See Fed.Rule Civ.Proc. 56(e).

^20 The purpose of the 1963 amendment was to overturn a line of cases, primarily in the Third Circuit, that had held that a party opposing summary judgment could successfully create a dispute as to a material fact asserted in an affidavit by the moving party simply by relying on a contrary allegation in a well-pleaded complaint. E.g., Frederick Hart & Co. v. Recordgraph Corp., 169 F.2d 580 (1948); United States ex rel. Kolton v. Halpern, 260 F.2d 590 (1958). See Advisory Committee Note on 1963 Amendment to subdivision (e) of Rule 56.

^21 Ibid. (emphasis added).

^22 In First National Bank of Ariz. v. Cities Service, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), the petitioner claimed that the lower courts had misapplied Rule 56(e) to shift the burden imposed by Rule 56(c). In rejecting this contention, we said: 'Essentially all that the lower courts held in this case was that Rule 56(e) placed upon (petitioner) the burden of producing evidence of the conspiracy he alleged only after respondent * * * conclusively showed that the facts upon which he relied to support his allegation were not susceptible of the interpretation which he sought to give them.' Id., at 289, 88 S.Ct., at 1593. (Emphasis added.) In this case, on the other hand, we hold that respondent failed to show conclusively that a fact alleged by petitioner was 'not susceptible' of an interpretation that might give rise to an inference of conspiracy.

^23 Petitioner also appears to argue that, quite apart from custom, she was refused service under color of the state trespass statute, supra, n. 2. It should be noted, however, that this trespass statute by its terms does not compel segregation of the races. Although such a trespass statute might well have invalid applications if used to compel segregation of the races through state trespass convictions, see Robinson v. Florida, 378 U.S. 153, 84 S.Ct. 1693, 12 L.Ed.2d 771 (1964), the statute here was not so used in this case. Miss Adickes, although refused service, was not asked to leave the store, and was not arrested for a trespass arising from a refusal to leave pursuant to this statute. The majority below, because it thought the code provision merely restated the common law 'allowing (restaurateurs) to serve whomever they wished,' 409 F.2d, at 126, concluded that a private discrimination on the basis of race pursuant to this provision would not fulfill the 'state action' requirement necessary to show a violation of the Fourteenth Amendment. Judge Waterman, in dissent, argued that the statute changed the common law, and operated to encourage racial discrimination.

Because a factual predicate for statutory relief under § 1983 has not yet been established below, we think it inappropriate in the present posture of this case to decide the constitutional issue of whether or not proof that a private person knowingly discriminated on the basis of race pursuant to a state trespass statute like the one involved here would make out a violation of the Fourteenth Amendment. Whatever else may also be necessary to show that a person has acted 'under color of (a) statute' for purposes of § 1983, see n. 44, infra, we think it essential that he act with the knowledge of and pursuant to that statute. The courts below have made no factual determinations concerning whether or not the Kress refusal to serve Miss Adickes was the result of action by a Kress employee who had knowledge of the trespass statute, and who was acting pursuant to it.

^24 Cong.Globe, 42d Cong., 1st Sess., App. 68 (statement by Rep. Shellabarger).

^25 392 U.S., at 424—426, 88 S.Ct., at 2195-2196 (majority opinion); id., at 454-473, 88 S.Ct., at 2210-2220 (Harlan, J., dissenting).

^26 Id., at 426, 88 S.Ct., at 2196. In arguing that § 1 of the 1866 Act (the predecessor of what is now 42 U.S.C. § 1982) was meant to cover private as well as governmental interference with certain rights, the Court in Jones said:

'Indeed, if § 1 had been intended to grant nothing more than an immunity from governmental interference, then much of § 2 would have made no sense at all. For that section, which provided fines and prison terms for certain individuals who deprived others of rights 'secured or protected' by § 1, was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed. * * * Hence the structure of the 1866 Act, as well as its language, points to the conclusion * * * (that) only those deprivations perpetrated 'under color of law' were to be criminally punishable under § 2.' Id., 424-426, 88 S.Ct., at 2195. The Court in Jones cited the legislative history of § 2 to support its conclusion that the section 'was carefully drafted to exempt private violations' and punish only 'governmental interference.' Id., at 425, 88 S.Ct., at 2195 and n. 33.

^27 Cong.Globe, 42d Cong., 1st Sess., App. 68.

^28 Id., at 568 (emphasis added), quoted in Monroe v. Pape, supra, 365 U.S., at 171. 81 S.Ct., at 475; see also Cong.Globe, supra, at App. 79 (Rep. A. Perry) (§ 1 understood to remedy injuries done 'under color of State authority').

^29 Compare id., at App. 68 with 17 Stat. 13. See id., at 568; App. 153-154 (Rep. Garfield).

^30 Throughout the debates, for example, 'moderates' who expressed no opposition to § 1, objected to other proposals that they saw as allowing the Federal Government to take over the State's traditional role of punishing unlawful conduct of private parties. See, e.g., id., at 578-579 (Sen. Trumbull, the author of the 1866 Act); 514 (Rep. Poland); App. 153 (Rep. Garfield).

^31 Section 2 of the Ku Klux Klan Act is, as amended, 42 U.S.C. § 1985(3). In Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951), in order to avoid deciding whether there was congressional power to allow a civil remedy for purely private conspiracies, the Court in effect interpreted § 1985(3) to require action under color of law even though this element is not found in the express terms of the statute. In a dissent joined by Mr. Justice Black and Mr. Justice Douglas, Mr. Justice Burton said of § 1985(3): 'The language of the statute refutes the suggestion that action under color of state law is a necessary ingredient of the cause of action which it recognizes. * * * When Congress, at this period, did intend to limit comparable civil rights legislation to action under color of state law, it said so in unmistakable terms,' citing and quoting what is now § 1983. Id., at 663-664, 71 S.Ct., at 943. Without intimating any view concerning the correctness of the Court's interpretation of § 1985(3) in Collins, we agree with the dissenters in that case that Congress in enacting what is now § 1983 'said * * * in unmistakable terms' that action under color of law is necessary.

^32 Cong.Globe, supra, at App. 216.

^33 Id., at App. 217; see also id., at App. 268 (Rep. Sloss).

^34 Id., at App. 218.

^35 E.g., Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967); Monroe v. Pape, supra; Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944).

^36 United States v. Price, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157 n. 7 (1966); Williams v. United States, supra; Screws v. United States, supra, 325 U.S., at 109, 65 S.Ct., at 1039; United States v. Classic, supra, 313 U.S. at 326-329, 61 S.Ct., at 1043 1044. Section 242 of 18 U.S.C. is the direct descendant of § 2 of the 1866 Civil Rights Act. See n. 26, supra.

^37 In Gannon v. Action, 303 F.Supp. 1240 (D.C.E.D.Mo.1969), the opinion on the one hand said that 'Section 1983 * * * requires that the action for which redress is sought be under 'color' of state law.' It then went on to decide that the defendants under color of a 'custom of (sic) usage of the State of Missouri * * * (of) undisturbed worship by its citizens according to the dictates of their consciences' entered a St. Louis cathedral, disrupted a service and thus 'deprived plaintiffs of their constitutional rights of freedom of assembly, speech, and worship, and to use and enjoy their property, all in violation of section 1983,' id., at 1245. See 23 Vand.L.Rev. 413, 419-420 (1970).

^38 Williams v. Howard Johnson's, Inc., 323 F.2d 102 (C.A.4th Cir. 1963); Williams v. Hot Shoppes, Inc., 110 U.S.App.D.C. 358, 363, 293 F.2d 835, 840 (1961) ('As to the argument based upon the 'custom or usage' language of the statute, we join with the unanimous decision of the Fourth Circuit in support of the proposition that-'The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment,'' quoting from Williams v. Howard Johnson's Restaurant, 268 F.2d 845, 848 (C.A.4th Cir. 1959)), and 110 U.S.App.D.C., at 367-368, 293 F.2d, at 844−845 (Bazelon, J., dissenting); see Slack v. Atlantic White Tower System, 181 F.Supp. 124, 127-128, 130 (D.C.Md.), aff'd 284 F.2d 746 (C.A.4th Cir. 1960).

It should also be noted that the dissenting opinion below thought a 'custom or usage' had to have the force of law. 409 F.2d, at 128.

^39 Cong.Globe, 42d Cong., 1st Sess., App. 153. Mr. Justice Brennan, post, at 219, 230, infers from this statement that Rep. Garfield thought § 1983 was meant to provide a remedy in circumstances where the State had failed to take affirmative action to prevent widespread private discrimination. Such a reading of the statement is too broad, however. All Rep. Garfield said was that a State, through the practices of its officials, could deny a person equal protection of the laws by the 'systematic maladministration' of, or 'a neglect or refusal to enforce' written laws that were 'just and equal on their face.' Official inaction in the sense of neglecting to enforce laws already on the books is quite different from the inaction implicit in the failure to enact corrective legislation.

^40 E.g., Peterson v. City of Greenville, 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323 (1963); Robinson v. Florida, 378 U.S. 153, 84 S.Ct. 1693, 12 L.Ed.2d 771 (1964); see Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122 (1963); Shuttlesworth v. City of Birmingham, 373 U.S. 262, 83 S.Ct. 1130, 10 L.Ed.2d 335 (1963).

^41 Because it thought petitioner had failed to prove the existence of a custom, the majority of the Second Circuit explicitly refused to decide whether petitioner had to prove 'the custom or usage was enforced by a state statute,' 409 F.2d, at 125.

^42 Together with some other civil rights workers also being prosecuted on vagrancy charges, Miss Adickes, in a separate action, removed the state vagrancy prosecution against her to a federal court on the ground that the arrest and prosecution were in retaliation for her attempt to exercise her rights under the Public Accommodations Title of the 1964 Civil Rights Act. The District Court remanded the charge to the state courts, but the Fifth Circuit reversed, finding that '(t)he utter baselessness of any

conceivable contention that the vagrancy statutes prohibited any conduct in which these persons were engaged, merely buttresses the undisputed evidence before the trial court when the order of remand was entered that these protected acts (i.e., 'attempts to enjoy equal public accommodations in the Hattiesburg City Library, and a restaurant in the nationally known Kress store') constituted the conduct for which they were then and there being arrested.' Achtenberg v. Mississippi, 393 F.2d 468, 474 (C.A.5th Cir. 1968). Although one judge dissented on the ground that Miss Adickes' case was not properly removable under Georgia v. Rachel, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966), he too thought that the 'vagrancy charges against Miss Adickes were shown to be baseless and an unsophisticated subterfuge,' id., at 475.

^43 See n. 10, supra.

^44 Any notion that a private person is necessarily immune from liability under § 1983 because of the 'under color of' requirement of the statute was put to rest by our holding in United States v. Price, supra, see n. 7, supra. There, in the context of a conspiracy, the Court said: 'To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State. * * *,' id., 383 U.S., at 794, 86 S.Ct. at 1157. Because the core of congressional concern in enacting § 1983 was to provide a remedy for violations of the Equal Protection Clause arising from racial discrimination, we think that a private person who discriminates on the basis of race with the knowledge of and pursuant to a state-enforced custom requiring such discrimination, is a 'participant in joint activity with the State,' and is acting 'under color of' that custom for purposes of § 1983.

We intimate no views concerning the relief that might be appropriate if a violation is shown. See Williams v. Hot Shoppes, Inc., 110 U.S.App.D.C. 358, 370-371, 293 F.2d 835, 847-848 (1961) (Bazelon, J., dissenting). The parties have not briefed these remedial issues and if a violation is proved they are best explored in the first instance below in light of the new record that will be developed on remand. Nor do we mean to determine at this juncture whether there are any defenses available to defendants in § 1983 actions like the one at hand. Cf. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

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