



C O N T E N T S

	<u>ORAL ARGUMENT OF:</u>	<u>P</u> <u>A</u> <u>G</u> <u>E</u>
1		
2	Eleanor Jackson Piel, Esq., on behalf	
3	of Petitioner	2
4		
5	Sanford M. Litvack, Esq., on behalf	
6	of Respondent	19
7		
8		
9	****	
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

IN THE SUPREME COURT OF THE UNITED STATES

October

TERM 1969

-----

	)	
SANDRA ADICKES,	)	
	)	
Petitioner	)	
	)	
vs	)	No. 79
	)	
S. H. KRESS & COMPANY,	)	
	)	
Respondent	)	
	)	Washington, D. C.
-----		November 12, 1969

The above-entitled matter came on for argument at 10:12 o'clock a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

ELEANOR JACKSON PIEL, ESQ.  
 36 West 44th Street  
 New York, N. Y. 10036  
 Counsel for Petitioner

SANFORD M. LITVACK, ESQ.  
 Two Wall Street  
 New York, N. Y. 10005  
 Counsel for Respondent

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



1 under instructions from the manager?

2 A The record does so show.

3 Q It does show?

4 A In fact, there are two parts of the record.  
5 One is a deposition record which becomes relevant on the second  
6 issue which I'm just about to describe, and then the other is  
7 the record of the trial which only goes as far as the Plain-  
8 tiff's case, because at the end of the Plaintiff's case the  
9 District Court granted a directed verdict.

10 Now, the second important issue is whether or not  
11 the Trial Court was justified in granting a summary judgment  
12 against a cause of action charging that the Respondent con-  
13 spired with the Hattiesburg Police Department in this action,  
14 depriving the Petitioner of service and then later securing the  
15 arrest of the Petitioner for vagrancy and on the instant she  
16 left the Kress store.

17 Now, previous to the Petitioner and the six children  
18 going into the Kress store in Hattiesburg in 1964, they had all  
19 been to the Hattiesburg Public Library and there they asked to  
20 use the services of the library and they were told that they  
21 were not permitted to use those services; the Chief of Police  
22 was called; they were asked to leave the library and the library  
23 was closed.

24 The third issue before Your Honors this morning is  
25 whether or not the Civil Rights Act of 1875, declared

1 unconstitutional by this Court in 1883 by the civil rights  
2 cases, should not be revived and whether, under these circum-  
3 stances, the Petitioner had a right to ask for \$500 statutory  
4 damages for her deprivation of the full enjoyment of the  
5 privileges of an inn or another place of public amusement.

6 Those are the three questions which I propose to  
7 discuss this morning.

8 Now, as to the first issue, Judge Bousal, the  
9 District Court Judge, in a preliminary ruling, hobbled the  
10 entire case by the ruling as follows: He said that the  
11 Petitioner in this case would have to prove at trial that there  
12 was a custom in Mississippi of not serving white persons when  
13 serving Negroes. He then said that that custom would have to  
14 be shown at trial to be enforced by the state and he said,  
15 pursuant to the provisions of the Mississippi Code, Sec. 2056.5,  
16 which was passed in 1957, two years after the Brown decision,  
17 which said that a proprietor may choose the customers he wishes  
18 and that if the customer, having been asked to leave and not  
19 having chosen to, refuses to leave, a trespass -- a criminal  
20 action for trespass would lie against him.

21 Now, he also said that this is not too relevant here,  
22 that we would have to show that the proprietor knew of this  
23 section of the law in order to make out a case.

24 Now, this ruling ignored the clear state of  
25 Mississippi law at that time. It ignored the fact that

1 following the Brown decision, Mississippi passed a number of  
2 laws. It had a "resolution of interposition" which it called  
3 upon all of the agencies of the government to regard the law  
4 stated by this Court in the Brown decisions of 1954 to be  
5 inapplicable to the State of Mississippi.

6 In 1954 it passed a conspiracy law which said that  
7 it would be a crime to violate the segregation laws of the  
8 State of Mississippi. In 1956 it also passed a law; forty-four  
9 thousand and something which required the Executive Branch of  
10 the Government to enforce the segregation laws of the State of  
11 Mississippi. It also passed at that time the trespass law I  
12 have just described.

13 But Judge Bonsal did not think that this expression  
14 of the state legislative policy of Mississippi was relevant to  
15 this case, nor did the Court below, which dismissed all the  
16 other legislative actions of the State of Mississippi as having  
17 to do with school desegregation, despite the clear language of  
18 the Mississippi statutes which speak of segregation in all  
19 public places to be the policy of the state of Mississippi.

20 The other aspect of Judge Bonsal's error was that he  
21 read into the language of 1983 which clearly states in the  
22 alternative that every person who denies a person the privileges  
23 and immunities of citizenship, under color of statute, regula-  
24 tion, ordinance, custom or usage, is liable to that person for  
25 damages, or other appropriate relief.

1           Judge Bonsal said that the custom or usage has to be  
2 enforced by the state. Now, in this case, we submit that there  
3 was both; there was both the state action and there was the  
4 custom and usage. But the custom was not the custom of not  
5 serving white persons when you consented to serve Negroes, but  
6 it was a custom against the mixing of the races in public  
7 places. And to look at it any other way, almost makes an  
8 absurdity.

9           As pointed out quite eloquently in Judge Waterman's  
10 dissent, it would be impossible to show a long-standing policy  
11 of serving Negroes and not serving the whites that accompanied  
12 them, in a state that did not serve Negroes, except separately,  
13 starting back with the decision of this Court in Plessy against  
14 Ferguson. We have the statement of that custom as acceptable  
15 as the law of the land and that this Court stated it; the South  
16 and sometimes the North have followed that custom for many  
17 years; and it was only in 1954 when this Court spoke out and  
18 said that that custom is no longer acceptable, that changes  
19 commenced. I shouldn't say that changes commenced -- changes  
20 have always been going on, but we really had the law of the land  
21 changed.

22           The custom was testified to by the Plaintiff at the  
23 trial. There was evidence in the trial record that the custom  
24 of the mixing of the races was not acceptable in Hattiesburg,  
25 Mississippi. Moreover, this custom was vividly described by the



1 Fifth Circuit in a case called the United States against The  
2 City of Jackson, one year before this incident, when the Court  
3 said: "We again take judicial notice that the State of  
4 Mississippi has a steel bar, inflexible, undeviating, official  
5 policy of segregation. The policy is stated in its laws; it  
6 is rooted in custom. The Jackson police add muscle, bone and  
7 sinew."

8 Q What's that quotation?

9 A That's from a case called the United States  
10 against City of Jackson, decided by the Fifth Circuit in 1963  
11 and it's not mentioned in my brief.

12 Q What is the citation?

13 A I'm glad you asked that; one minute. 318 F 2d,  
14 Page 1.

15 Q Page what?

16 A One. And I believe you will find that quotation  
17 on Pages 5 and 6.

18 Q What kind of a case was that, a restaurant case?

19 A It was a case where the United States sued to  
20 enjoin segregated signs in bus centers. I think it was at a  
21 bus station and I left out some language, that the signs in the  
22 bus stations established the policy and then it was the police  
23 action in enforcing it that --

24 Q What happened after the episode in the restaur-  
25 ant, her refusal to serve this lady?

1           A     All right. They have come from the library  
2 where the library has been closed and they have been thrown  
3 out. They go to Woolworth's first and then they go into Kress  
4 and then it happens, and the minute that she came out of the  
5 Kress store, a policeman who had been in the Kress store,  
6 arrested her for vagrancy.

7           Q     You say they came to Kress's from Woolworth's?

8           A     Well, the group had gone in the lunch counter  
9 -- they had left the library; they had walked down the street  
10 of Hattiesburg and they had gone into Woolworth's. Both of  
11 these stores had --

12          Q     Did they eat at Woolworth's?

13          A     No, it was crowded and they left Woolworth's  
14 and went into Kress. Both of these stores were supposed to be  
15 following the Civil Rights Act of 1954 and they thought they  
16 would get service at the lunch counter.

17                The Woolworth store was crowded so they went to the  
18 Kress store. She was arrested immediately afterwards.

19          Q     Does the record show anything as to the prac-  
20 tice or policy of the Kress stores in other sections of the  
21 country?

22          A     There is nothing in the record as to that,  
23 except that there is a policy statement in the affidavit presen-  
24 ted on the motion for summary judgment; there is a policy  
25 statement of Kress which you will find in the Appendix, which,

1 interestingly enough, says that as of July 15th, already 13  
2 days after the Civil Rights Act went into effect, and it says:  
3 "You will no longer segregate your facilities" and then it says  
4 "and you must stop having segregated washrooms and segregated  
5 drinking fountains; and you must look and take down any signs  
6 that are still there," with regard to the segregation of the  
7 races.

8           However, and this is a footnote: One of the things  
9 that we sought in our preliminary discovery proceedings, was  
10 whether or not on August 14, 1964 there were segregated  
11 facilities in the store and the District Court held this was  
12 irrelevant and we were never permitted to -- that you will find  
13 in the Appendix to my reply brief, quoting that it was irre-  
14 levant whether the facilities were segregated on August 14th,  
15 1964. Does that answer your question?

16           Q     I can't find that page in this brief. Will you  
17 give me the pages again?

18           A     The Mississippi case of the Fifth Circuit?

19           Q     Yes.

20           A     It isn't in my brief; I just cited it.

21           Q     Oh, I see.

22           A     But, the citation is 318 F 2d, Page 1.

23           Now, the second point of error was the granting of  
24 a summary judgment against the Plaintiff before trial on the  
25 grounds that there was no just issue; that is, no triable issue

1 on the conspiracy charge.

2 Now, as to that I have to be a little more technical.  
3 Justice Marshall, in a recent case has set down that when a  
4 summary judgment is appropriate -- and I believe that this case  
5 is an outstanding example of when summary judgment is not  
6 appropriate. The charge in the Plaintiff's Complaint was that  
7 there was a conspiracy between the officials of the Police  
8 Department of the City of Hattiesburg and Kress. In support of  
9 the motion for summary judgment, the Respondent brought in  
10 certain affidavits; brought in one by the police commissioner  
11 which reminds me of the old law school saying of what is a  
12 negative pregnant, because it does not deny that the police had  
13 nothing to do with Kress's conduct. He says quite specifically  
14 that he talked to Mr. Powell, the Manager, about Miss Adickes'  
15 arrest.

16 Mr. Powell furnished evidence in his deposition,  
17 which I think suggests that conspiracy; in fact, suggests the  
18 whole line of thought. He says that after the passage of the  
19 Civil Rights Bill and the things that were going on in  
20 Hattiesburg he thought a lot about people coming into Kress in  
21 mixed groups and he decided he was going to have a policy and  
22 that policy was going to be that under certain circumstances  
23 not to serve white persons in the group.

24 Now, I submit that this policy could well be one that  
25 was discussed and worked out with the Police Department of the

1 City of Hattiesburg.

2 Q You say, "could well be."

3 A Yes.

4 Q Of course, that's a difficult standard on which  
5 to find facts; isn't it?

6 A Yes, but we are not finding; we are talking  
7 about whether or not this Respondent presented us with enough  
8 facts for a prima facie case.

9 Q Whether we have a genuine issue of fact, that's  
10 the test; isn't it?

11 A Yes. And the genuine issue of fact arises here  
12 out of the circumstances just as they are set forth. The police  
13 had an active role in this library refusal; the police arrested  
14 her immediately after she has been deprived of service in this  
15 restaurant; the policeman goes into the restaurant; the manager  
16 explains that he communicates with people by eye signals. The  
17 signal that he gave this time to stop the service of the  
18 Petitioner was an eye signal. There is testimony that the  
19 policeman went into the store and there was an eye signal  
20 between him and one of the waitresses.

21 Now, you can say that's not conclusive proof but we  
22 have a right to go to trial on these issues; we have a right to  
23 draw whatever comfort that we can from the inferences that come  
24 out of this situation.

25 And finally -- there are two things: we have a

1 Fifth Circuit finding. Now, this is another point: this case  
2 went up to the Fifth Circuit, a case involving the same facts.  
3 It went up on a removal petition of this Petitioner and four  
4 other Petitioners who were arrested for vagrancy in the library  
5 on the following Monday, August 17th, and these cases were re-  
6 moved -- criminal cases, the vagrancy cases were removed to the  
7 Federal Court under Judiciary Code Sec. 1443. The District  
8 Court remanded these cases to the State Court and they were  
9 appealed to the Fifth Circuit and the Fifth Circuit made a  
10 finding of fact that Miss Adickes was arrested for attempting to  
11 enjoy equal public accommodations in the Hattiesburg Public  
12 Library and arrested in a nationally-known Kress store. That  
13 was a finding of fact.

14 Q Had the District Court found that fact first?

15 A The District Court did not find that fact. The  
16 Fifth Circuit found it as a matter of law as regards the state  
17 of the record, as it arrived before it. The District Court  
18 permitted the finding of a series of affidavits which were not  
19 controverted in regard to the conduct of the Petitioner.

20 The Circuit Court found, as a matter of fact, that  
21 there was proof and you will find that decision in 393 F 2nd;  
22 that is in my brief.

23 Q What was the page on that, again? Well, we'll  
24 come to it if it's in your brief. You won't need to get it for  
25 us now; you may go right on with your argument.

1           A     Then, finally, and I don't think this is an  
2 unimportant aspect of the conspiracy case, I submit to Your  
3 Honors that the custom of segregation shared and supported by  
4 the police; the custom in Hattiesburg, where it was supported  
5 by private persons representing a conspiracy between the law  
6 enforcement officer and the private person, embracing the  
7 doctrine of segregation. And the facts here show that that  
8 was what was happening and that's what occurred in this case.  
9 That you have a -- besides an expressed conspiracy, you have a  
10 silent conspiracy, which you can look for the support to of the  
11 events as they occurred.

12           Q     Of course, if you prevail on the first branch  
13 of your case, the conspiracy matter is quite unimportant to  
14 you; isn't it?

15           A     Did you say it was unimportant to me?

16           Q     Yes, if you prevail on the first branch of your  
17 case; if this was done, absent conspiracy, under color of law;  
18 under color of custom; don't you prevail in this case?

19           A     Surely; surely.

20           Q     Irrespective of the conspiracy charge.

21           A     Yes, but if I had a stronger case with the  
22 conspiracy. You see, in bringing this case before a jury and  
23 in bringing all the facts before a jury, one is foreclosed from  
24 bringing out the facts of the arrest and one is -- we weren't  
25 foreclosed from bringing out the facts of the incident in the

1 library, but it becomes a much stronger, a much more compelling  
2 case for a jury if one can show the whole story. Actually, a  
3 jury wouldn't get the whole story.

4 Q I understand that. That just makes your case  
5 stronger after you get back there. You don't need that second  
6 layer of strength here, do you, prevail, as Justice Marshall --  
7 Justice Harlan suggested.

8 A I need it only in the sense you need everything  
9 you want. I need it because if I go back I want the strongest  
10 case I can get. It's true, I would win if it were just  
11 scoring; but I'm saying for an effective presentation of the  
12 Plaintiff's case it is necessary to have the conspiracy count.

13 Q Well, really the essence of your position is  
14 that Judge Bonsal took too narrow a view and the majority took  
15 too narrow a view of what had to be shown as custom, under  
16 color of custom. You say it's enough to show a policy of  
17 segregation as distinguished from pinpointing a custom of  
18 refusing to serve whites in the company of blacks? That's the  
19 essence of your first position; isn't it?

20 A Yes; exactly. Exactly, Mr. Justice.

21 Q Would the proprietor have violated any  
22 Mississippi law if he had served whites and Negroes together?

23 A Well, if he had talked about it before he would  
24 have violated the misdemeanor section which is 2056, Subdivision  
25 7, of conspiring to overthrow the segregation laws of the state.



1 Q What if he had refused to -- or had just gone  
2 ahead and served this group at this table?

3 A Well, he was under orders by the Federal Civil  
4 Rights Act to so that and he didn't.

5 Q Well, that isn't my question. I asked would  
6 he violate any Mississippi law.

7 A I say, that conspiracy law. If he talks about  
8 it with someone else.

9 Q Well, if he didn't -- what if he didn't?

10 A If he didn't talk about it with anyone else,  
11 I suppose --

12 Q What if he had talked about it?

13 A If he had talked about it with someone else he  
14 would have --

15 Q Well, what law would he have been conspiring to  
16 overthrow?

17 A The segregation laws. Because that's violating  
18 the segregation law to --

19 Q Well, is there a segregation law in Mississippi  
20 forbidding the serving of the two races in a restaurant?

21 A Well, that's the way the statute 2056(7) says.

22 Q That's the trespass law?

23 A No; that's another one. 2046.5.

24 Q What does the segregation law say for  
25 restaurants?

1           A     It's not for restaurants; it's a general law.  
2     It's 2056(7): "If two or more persons conspire to overthrow or  
3     violate the segregation laws of this state through force,  
4     violence, threat, intimidation or otherwise" --

5           Q     Well, yes, conspired to overthrow the segrega-  
6     tion laws, but what segregation laws?

7           A     I suppose --

8           Q     Is there a segregation law against serving  
9     whites and Negroes together in a restaurant, or even serving  
10    Negroes in a restaurant?

11          A     Well, I can only refer you to what the Fifth  
12    Circuit says, that there is such a law in Mississippi and it's  
13    enforced by law; and it's enforced by custom.

14          Q     Well, can you find it in the statute?

15          A     Yes, and I have.

16          Q     Well, you just say the law says you can't con-  
17    spire to overthrow the segregation laws. And I just want to  
18    know what the segregation laws are that you are conspiring to  
19    overthrow.

20          A     Well, I think perhaps part of the vagueness of  
21    it has to do with the Mississippi position on it. Everybody  
22    in Mississippi knows what they are.

23          Q     Well, I gather there is no Mississippi statute  
24    that says it's unlawful to serve whites and Negroes together in  
25    a restaurant?

1           A     There's none that I know of that says just  
2 that, but I think that the sum total of the laws that I cited  
3 suggest that there is law which disapproves of that kind of  
4 conduct. Now, we also get into the Wrightman against Mulkey  
5 situation or Hunter against Erickson, where you have no law in  
6 the state before the Brown decision. You're supposed to have  
7 the common law. Then, after the Brown decision the trespass  
8 statutes were passed which says that a proprietor may choose  
9 his customers and refuses service to anyone he chooses. And if  
10 the person to whom he's refused service refuses to leave he  
11 can be charged with trespass.

12           Now, there you have -- still in answer to your  
13 question, because there you have affirmative state action, at  
14 least cutting down on what would otherwise be the common law  
15 rule and I am now going to take issue with the Williams-Hot  
16 Shop statement of what the common law was in Virginia, and  
17 state that my understanding of the common law in the southern  
18 states at the time of the passage of the 14th Amendment is that  
19 an inn or other victualer, which means a restaurant, has an  
20 obligation to serve all persons who come in. And that is an  
21 interpretation that is found in the old common law and which  
22 former Justice Goldberg, in a concurring opinion in Bell against  
23 Maryland -- also cited in my brief, says: "must have been the  
24 understanding of the framers of the 14th Amendment and of the  
25 framers of the Reconstruction Statutes when they were passed."

1 MR. CHIEF JUSTICE BURGER: Mrs. Piel, you are  
2 impinging on your rebuttal time if you want to save any. You  
3 are almost out of time.

4 MRS. PIEL: Well, I will --

5 MR. CHIEF JUSTICE BURGER: You have only one minute  
6 left, if you want to save it for rebuttal.

7 MRS. PIEL: All right. I may not.

8 I want to talk a bit about the 1875 statute and about  
9 breathing life into the old Civil Rights Statute, in line with  
10 the same thing I was talking about.

11 It seems to me that in Jones against Mayer, this  
12 Court and Mr. Justice Stewart, set the basis for a new line of  
13 thinking, and that is finding support and authority for the  
14 implementation of Federal Law in the discrimination as to  
15 private rights in the Thirteenth Amendment. And it seems to me  
16 that the 13th Amendment, plus the Commerce Clause, very clearly  
17 reactivates and revives the Act of 1875.

18 Now, I am going to ask Your Honors -- and I'm  
19 through -- I'm going to ask Your Honors to consider this in the  
20 line of what Mr. Justice Stewart said there with regard to the  
21 distinctions made by the Respondent in the Courts below: "that  
22 there is no place in the jurisprudence of a nation of this kind  
23 of thinking, where we are striving to join the human race."

24 MR. CHIEF JUSTICE BURGER: Mr. Litvack.

25 ORAL ARGUMENT OF SANFORD M. LITVACK, ESQ.

ON BEHALF OF RESPONDENT

1  
2 MR. LITVACK: Mr. Chief Justice, and may it please  
3 the Court: This, as the Court knows, was a civil action  
4 brought against S. H. Kress and Company in the Southern Dis-  
5 trict of New York, seeking damages against Kress in excess of  
6 a half million dollars for an alleged violation of Section  
7 1983, Title 42.

8 Kress prevailed in the District Court and was  
9 affirmed in the Court of Appeals in the Second Circuit. The  
10 facts are very simple and in the main, are not in dispute.

11 On August 14, 1964 the Plaintiff, a white New York  
12 City school teacher, was in Hattiesburg, Mississippi; came into  
13 Hattiesburg with a group of six Negro students in an effort to  
14 integrate the library. Having been refused the library ser-  
15 vices the students in the group left, went to Woolworth's,  
16 which they found to be crowded; came to Kress, where a waitress  
17 acting under the direction of the store manager, offered to  
18 take the orders of the Negro students, but declined to take  
19 that of Plaintiff. The group, thereupon, got up and left and  
20 subsequent to that the Plaintiff was arrested on the streets of  
21 Hattiesburg.

22 Petitioner alleged a conspiracy in the District  
23 Court below, charging that Kress had conspired with the police to  
24 do three things: One: to deny the library services; two: to  
25 have her arrested, and three: to have her refused service.

1           After the Complaint was filed, Your Honors, a year  
2 of discovery took place; depositions were had on both sides;  
3 interrogatories were served by both sides; documents were  
4 produced by the Plaintiff to the Defendant and by the Defendant  
5 to the Plaintiff. After a year a note of issue was filed,  
6 telling the Court that all discovery was completed; both sides  
7 were satisfied, and the case was, in all respects, ready for  
8 trial. Then, and only then, did Kress move for summary judg-  
9 ment.

10           Kress moved for summary judgment on a conspiracy  
11 claim on the grounds that the record clearly shows that there  
12 were no genuine material issues of fact for trial. Plaintiff,  
13 in rebutting or attempting to rebut that claim, sought to rely,  
14 and still does, according to her briefs, on the mere sequence  
15 of events as alleged in the Complaint. We contend that the  
16 record made it clear that whatever conjecture may have existed  
17 at the time of the Complaint, it had been dispelled by dis-  
18 covery.

19           The library incident, for example, is probably the  
20 most far-fetched of the three. The Plaintiff testified that  
21 she and the Negro students came into town on August 14, 1964,  
22 having told no one that they were coming. No one at Kress  
23 certainly knew. They went to the library, where a librarian  
24 whose name is not known to them and not known to Kress, called  
25 the police, it seems, and refused them service. We questioned

1 the Plaintiff and we said, "Was there any mention of Kress at  
2 this time? This is not a suit against the police or the  
3 library." And the answer was "no."

4 And we said, "Well, do you have any proof, any  
5 rumor, any hearsay; anything that ties Kress to the library?"  
6 And the answer was "no." And we took the deposition -- or  
7 rather the Plaintiff did, of Mr. Powell, our store manager and  
8 said: "Did you ever talk to anyone about the library incident?"  
9 He said, "no." And they asked him: "When did you first find out  
10 about it?" And he said, "When I went home that night and read  
11 about it in the newspapers."

12 Now, the group left the library; the police closed  
13 it, and they walked to the Woolworth store. They decided to go  
14 get lunch. Obviously, no one knew that either, but the  
15 Plaintiff testified that the police followed her; that she saw  
16 police all around her. Now, Kress couldn't have called those  
17 police, and didn't even know she was in town. She went to the  
18 Woolworth store, which was crowded; came out and saw a police-  
19 man in front of the store, in front of Woolworth's. They de-  
20 cided on the spur of the moment to go to Kress. And why did  
21 they decide to go to Kress? They decided to go to Kress because  
22 Kress had integrated facilities. It had one set of facilities  
23 at which both blacks and whites were served. This is clear in  
24 the record. Plaintiff's own witnesses testified to this. There  
25 can be no dispute about that; the very witnesses she called upon

1 at trial, had eaten at these facilities at the same time white  
2 people at at them. There was only one set of facilities.

3 Now, as they came to the Kress store they noticed a  
4 police car parked out in front. Again, the same police --  
5 whatever the police may have done, Kress didn't call them;  
6 Kress didn't even know they were there. She sat down in the  
7 booth and it is true -- we admit that the store manager deter-  
8 mined not to serve Miss Adickes while offering service to the  
9 Negroes in the group. He candidly stated on deposition when  
10 asked why he did that, that Kress had a policy -- and I don't  
11 think it's a policy which is printed, and it says: "It is now  
12 the law and company policy to serve everyone without regard to  
13 race, color or creed." And he said, "I had served Negroes at  
14 my facility along with whites; I had served them when they came  
15 in together, jointly; I served them, indeed, on the day in  
16 question, and every day since then." He said, "I declined to  
17 serve Miss Adickes for one reason and one reason only: when she  
18 came in and I looked outside and I saw the crowd that was out  
19 there and I heard the milling that was in my store, I feared  
20 there was going to be a riot; I feared that there would have  
21 been violence directed to her which would have led to a situation  
22 where we could have never served again. We would have closed  
23 the lunchcounter for good. And that, I didn't think, would  
24 accomplish anything."

25 Now, the Plaintiff got up and left the store;



1 wasn't asked to, but did, having been declined service. There-  
2 after, it appears she was arrested by the police. Now, we  
3 again asked the Plaintiff: "Did the police ever mention Kress  
4 to you; do you have any facts you rely upon?" The answer was  
5 "no." We said, "well, is there anything you can point to?"  
6 Her answer was "no." We took the deposition of Mr. Powell;  
7 the Plaintiff did. And he categorically stated -- categori-  
8 cally, that he had no communication with any police official at  
9 any time about Miss Adickes or any Civil Rights worker.

10 Q What were the grounds for the arrest?

11 A It appears the grounds for the arrest is  
12 vagrancy, a charge of loitering on the public streets of  
13 Hattiesburg. Now, however valid or invalid or trumped up that  
14 charge may have been, it had nothing to do with Kress. Mr.  
15 Powell testified he didn't know about it until he read it in  
16 the papers in the --

17 Q How long after the Petitioner left your client's  
18 store, was she arrested?

19 A It appears minutes after; that the police car  
20 that she had seen across the street when she came out, swung  
21 across and arrested here Now, Mr. Powell said: "I never com-  
22 municated with the police. I didn't even know about it until  
23 that night."

24 Q Did that arrest lead to a trial and conviction?

25 A No, Your Honor. As I understand it, what

1 happened was that the Plaintiff filed a petition for removal  
2 as to the Federal Court. That's the Achtenberg case that came  
3 up at the Court of Appeals. And I quickly told the Court that  
4 for this Petitioner to rely upon that case as some support in  
5 this case, is really unwarranted.

6 The facts are twofold: One, that in the Achtenberg  
7 case the Court of Appeals knows, there was no trial; it was an  
8 uncontested issue. Plaintiff put in an affidavit; the police  
9 never showed up, it appears; never rebutted it and it went up  
10 on an uncontested record and the City of Hattiesburg didn't  
11 even bother to file a brief in the Court of Appeals. Moreover,  
12 of course, Kress was not a party to that case; we didn't even  
13 know about it; we didn't go in and cross-examine or find out.

14 You see, the Court there said that the arrest was  
15 related to her activities in Kress; which may be true. Maybe  
16 that's why the police did arrest her, but that doesn't mean  
17 that Kress had anything to do with the arrest. That doesn't  
18 tie Kress into it; and that's --

19 Q Now, that's the United States Court of Appeals  
20 that said that?

21 A Yes, sir.

22 Q I just want to get the factual answers to my  
23 question, if I may. She was arrested a few moments after  
24 leaving the store, on a charge of vagrancy. When this charge  
25 was brought in the State Court the petition for removal to the

1 United States District Court was filed and not opposed; as I  
2 understand it?

3 A Well, as I understand it, Mr. Justice Stewart,  
4 the Defendant petition ~~to~~ remand to the State Court after the  
5 removal.

6 Q And that was denied?

7 A No. I believe that was granted by the District  
8 Court. Then Plaintiff appealed and they reversed that and said  
9 it was properly removed and the case should be dismissed.

10 Q And then the case was then dismissed?

11 A Yes. I believe so.

12 Q In the Lower Court?

13 A Yes; that is correct.

14 Q Well, does the record show there was any  
15 commotion or disturbance outside the store when she was  
16 arrested?

17 A There is testimony to that effect; yes, sir.  
18 The store manager testified to that.

19 Q I know, but what is the fact. He testified to  
20 it, but was there any evidence of a disturbance?

21 A Well, I think it is fair to say that is the only  
22 evidence in the record on it; yes.

23 Q That's what I was asking you.

24 A Yes, that is the only evidence on the point.

25 Now, we think that when we came forward with these

1 affidavits -- I might quickly say that we also had affidavits  
2 from the police, which said that they had never communicated  
3 with anyone in Kress concerning this arrest and it was an  
4 arrest that they made on their own discretion on the streets  
5 of Hattiesburg.

6 We believe that when we came forward with this kind  
7 of proof, it was incumbent, as this Court has held in the  
8 Cities Service case, upon the Petitioner to come forth with  
9 something -- something which would show an inference of con-  
10 spiracy.

11 Q There is a little difference between Cities  
12 Service and this case, Cities Service was 10 or 12 years.

13 A Yes, Your Honor.

14 Q This is one year.

15 A Except for the fact, Your Honor, that all  
16 discovery was completed. The Plaintiff confessed she desired  
17 no more and never requested any more in the District Court.

18 Q I don't see why you need Cities Service for  
19 that.

20 A Well, what I was really trying to say is that  
21 in Cities Service where the party had come forth with the  
22 evidence which the other party didn't rebut. In Cities Service,  
23 as Your Honor recalls, the other party, that is the Plaintiff,  
24 had sought additional discovery and one of the issues was  
25 whether the District Court properly denied it. Here there

1 wasn't any such request.

2 Q The additional discovery they wanted was from  
3 a dead man. I mean, I just think this case stands for its own.

4 A I understand, Your Honor --

5 Q But what worries me is: is there any allegation  
6 at all that this Petitioner was broke?

7 A I'm sorry?

8 Q Was there any evidence that this teacher was  
9 anything like a vagrant?

10 A No; I don't think there is. I think the  
11 problem --

12 Q Is there anything in the record to show that  
13 the one thing she was arrested for was when she came out of  
14 Kress's?

15 A No; other than the sequence of events.

16 Q That's all, but --

17 A That's right; that's right.

18 Q They weren't arrested in the library?

19 A No.

20 Q They weren't arrested in Woolworth's?

21 A No.

22 Q The police were following them all the time?

23 A That's correct.

24 Q And then when they came out of Kress they were  
25 arrested; so that sequence is agreed upon?

1           A     The sequence is agreed upon but the Court of  
2 Appeals noted that the arrest was for the activity at the  
3 library and went back to that. And for her activity at Kress.  
4 So, we think the essential element is: whyever the police  
5 arrested her is that Kress had nothing to do with it; and  
6 that's been denied under oath, time and time again and the  
7 Plaintiff comes forward with nothing.

8           The Court of Appeals unanimously agreed in this  
9 case that the summary judgment on a conspiracy count was proper,  
10 saying that the chances of success on a trial of this issue  
11 were nil.

12           Q     Mr. Litvack, do you consider that the charge of  
13 conspiracy was essential in the case? That it had to be  
14 established?

15           A     It was a separate claim, Your Honor. It was a  
16 separate claim. I am now going to come to her other claims,  
17 which stands apart from the conspiracy claim -- or stands or  
18 falls apart on it.

19           And that is the question as to whether or not Kress  
20 is liable under Section 1983 for the refusal to serve her in  
21 their store on August 14, 1964. We contend that it is not  
22 liable under that statute, because there was, in fact, no state  
23 action; that all we have here, at most, is a private refusal  
24 by a private restaurateur to serve. This is not a case under  
25 the 1964 Act, which Plaintiff possibly could have brought and

1 need only have proven interstate commerce and a refusal for  
2 racial grounds; and could have gotten an injunction. But,  
3 Plaintiff didn't do that; she brought a case under 1983, seeking  
4 more than half a million dollars in damages; and that requires  
5 state action, as all the Courts below have unanimously held.

6 Now, Petitioner, in order to satisfy that element,  
7 has attempted to point to certain Mississippi statutes and an  
8 alleged custom. Now, two of the statutes in the concurrent  
9 resolution to which she points, related to this Court's decision  
10 in the Brown school integration cases and have nothing whatso-  
11 ever to do with restaurants or anything relating to Kress.

12 Q What about the 4065.3, Mr. Litvack, where the  
13 Legislature ordered the Executive Branch -- I'm reading here  
14 from Page 65 of the Appendix to Petitioner's brief -- "To  
15 prohibit by any lawful, peaceful and constitutional means, the  
16 causing and mixing of integration of white and Negro races in  
17 public schools, public parks, public waiting rooms, public  
18 places of amusement, recreation or assembly in this State."

19 A Well, I think, Mr. Justice White, there are two  
20 points I would like to make on that.

21 Q Let's assume we were talking about a public  
22 waiting room. Would this be a law which might indicate to  
23 people that mixing of the races in waiting rooms was illegal in  
24 Mississippi?

25 A I think it might so indicate. I think the

1 statute, as Your Honor knows, calls upon the State Officers to  
2 prevent integration by the Federal Government in these speci-  
3 fied places, and it's limited to that. Integration by the  
4 Federal Government in these specified places. Of course, this  
5 doesn't involve the Federal Government and doesn't involve any  
6 of these places.

7 More importantly, Your Honor, if I may suggest,  
8 this resolution and this statute -- and this presents a very  
9 basic question -- was passed in 1956 by the Legislature of the  
10 State of Mississippi. We are not dealing as the Court has with  
11 so many cases with the constitutionality of a prosecution by  
12 the state for a criminal trespassing and the Court points to  
13 that statute and says, "Yes, but the existence of that statute  
14 should bar the state from prosecuting." We are talking about  
15 holding a private citizen liable for monetary damages. What

16 What we have here is a resolution or an act passed  
17 eight years prior to the event in question. This doesn't relate  
18 to restaurants such as Kress; there is no proof -- indeed, the  
19 proof is to the contrary that Kress even knew of it. It  
20 clearly didn't participate in the passage of it and to seek to  
21 brand Kress with liability on the mere existence of the statute,  
22 which is what Petitioner alleges, would set up a rule of law  
23 whereby liability would depend, not upon what you did, but where  
24 you did it. Because, if the state had, sometime in the past  
25 passed some legislation or had a history a hundred years ago,



1 then you then would be saddled with that.

2 Now, here we have a store, and it is conceded in the  
3 record, that having a policy of attempting to integrate its  
4 facilities, and had, in fact, done so.

5 Q But it didn't do it here; did it?

6 A I think -- well, there is no doubt that it  
7 did not serve Miss Adickes. The testimony is that on the day  
8 in question --

9 Q Suppose all you say is correct.

10 A Yes, sir.

11 Q What do you say about the reasons against  
12 summary judgments on cases like this? What do our cases hold  
13 about summary judgments?

14 A Well, summary judgment, Mr. Justice Black, was  
15 granted only on the conspiracy claim. Summary judgment was not  
16 granted on the state action claim. We had moved for it and it  
17 was denied.

18 Q What happened there?

19 A It was denied by the District Court. It was  
20 denied on the grounds that Petitioner could show -- or might  
21 show or be permitted to show a state-enforced custom which, if  
22 Kress acted pursuant to it, Kress would be liable under  
23 Section 1983.

24 Q You mean summary judgment was denied on that,  
25 then?

1           A     Yes, sir. Summary judgment was then denied  
2 and that's what the District Court held. We then --

3           Q     Wasn't it denied on all of it?

4           A     No. Summary judgment was granted on the con-  
5 spiracy claim.

6           Q     It was granted.

7           A     On conspiracy.

8           Q     All right. Now, what about the others; what  
9 kind of judgment was entered on the others?

10          A     That the Plaintiff put on her case at trial.  
11 At the close of Plaintiff's case, Defendant moved, pursuant to  
12 Rule 58 of the Federal Rules of Civil Procedure, for a directed  
13 verdict. That motion was granted.

14          Q     Oh, it's the directed verdict part that you  
15 argue?

16          A     That is correct, Your Honor. That is correct.  
17 Plaintiff has put in her case and we alleged that she had not  
18 made out a case.

19                 The trial judge said and it's printed in our brief  
20 -- he said, "Well, you are trying to prove a custom of a --  
21 against mixing of the races to hold Kress liable." And I  
22 think he properly noted: "However, you must somehow involve the  
23 state matter; there must be a state custom. What do you rely  
24 upon?" And Petitioner said, "I rely upon the mere existence of  
25 these statutes." And he said, "Without more; without somehow

1 trying Kress in; without somehow tying the state in?" And the  
2 answer is "yes."

3 Q May I ask you: is that the sole ground that  
4 you say the directed judgment is justified; your argument on  
5 custom?

6 A On custom I say it is justified because the  
7 Petitioner fails to prove a relevant custom which was enforced  
8 and required by the state so as to render Kress liable.

9 Q And do you have any other argument as to why  
10 the directed verdict was wrong?

11 A Was proper.

12 Q Did they fail to prove something else?

13 A Yes, sir.

14 Q Well, what?

15 A Yes. I think they failed to prove -- totally  
16 speaking -- the state action by failing to prove the custom  
17 which I just said; failing to prove the enforcement of it;  
18 failing to prove Kress's action pursuant to that custom. And  
19 failing to prove any state law; any state law which was a  
20 positive provision of law giving rise to liability and on that  
21 we rely on the Williams case.

22 Q Now, suppose there had been a custom; would you  
23 still claim that the directed verdict was wrong?

24 A If there had been a state-enforced custom?  
25 State-required custom? Yes, in that there was no proof --

1 Q Now, why?

2 A In that there was no proof whatsoever tying  
3 Kress to that custom. The facts were to the contrary. In  
4 other words, the evidence from Petitioner's own witnesses was  
5 that Kress had integrated its facilities and had done so since  
6 at least July 2 when the 1964 Act was passed. Having done  
7 that openly and notoriously in the town, having served blacks  
8 and whites together at one facility, I think that Plaintiff had  
9 to prove some knowledge or some action by Kress pursuant to  
10 that statute.

11 Q Well, they proved that they were not permitted  
12 to eat there?

13 A That the Plaintiff was not; yes, Your Honor.

14 Q Now, suppose you had to get away from the  
15 customs. What defense would you have for the directed verdict?

16 A Well, if we had to get away from the custom, I  
17 would say further that she had proven no state statute that we  
18 acted pursuant to.

19 Q No state what?

20 A Statute.

21 In other words, on the color of law there was  
22 no statute or law.

23 Q Well, now suppose that was out. What I'm  
24 getting at is: do you have the ordinary grounds to support an  
25 argument that the directed verdict was wrong plainly on the

1 issue there was no evidence to prove her case?

2 A Beyond the grounds I stated, Mr. Justice  
3 Black, no; I think she just failed to prove the case because  
4 she failed to prove all of those elements.

5 Q And one of them was the custom?

6 A State custom, Kress's knowledge and action  
7 pursuant to it; yes, sir.

8 Q Frequently there would be a question as to  
9 whether they ordered her out. You don't refute that?

10 A Oh, they did not order her out. They don't  
11 contend that we did order her out.

12 Q Well, they just wouldn't feed her?

13 A They did deny the service and that is not  
14 disputed.

15 Q So, as far as that is concerned, if that is a  
16 crucial issue, then you would be wrong; wouldn't you?

17 A Well, if I may say, Mr. Justice Black --

18 Q I mean your argument would not hold.

19 A Well, no. We did refuse her service; there's  
20 no doubt about that. However, we vigorously contend and have  
21 contended below that it was not for the reasons that she  
22 suggested and it was not because of her race or color and it  
23 was not pursuant to any state custom or ordinance.

24 Q Well, what do you claim the record shows about  
25 that as to why it was done?

1           A     Well, I think that I would have to concede  
2 that the only testimony since Plaintiff's case has gone in,  
3 was the statement that Plaintiff proffered that we refused her  
4 service because of the fact that she was a white person in the  
5 company of Negro children; and that is her testimony.

6           Q     Mr. Litvack, do you see any state action in the  
7 fact that as soon as she left Kress's she was arrested by the  
8 police for a charge that they themselves, didn't feel inclined  
9 to defend?

10          A     Not state action, Mr. Justice Marshall,  
11 sufficient to hold Kress liable if we didn't call the police,  
12 and had nothing to do with the police.

13          Q     Well, you talk about state action. You said  
14 that the reason it falls was because there was no state action.

15          A     Well, yes, Your Honor.

16          Q     Well, the police are state officers and arrest  
17 under a state statute by a policeman could possibly be state  
18 action.

19          A     I think -- I may be confused on the law; but  
20 my understanding of it is: yes, there would be an act by the  
21 state for which the state may have acted properly or improperly.  
22 But that the issue under Section 1983 is that Kress acted under  
23 color of law.

24          Q     Well, don't you think it was a jury question to  
25 find out whether or not Kress did have anything to do with it?

1           A     No, Your Honor, because the fact that all  
2 the proof -- in other words, the affidavits -- the police,  
3 Kress, the Plaintiff, everyone admitted that Kress had nothing  
4 to do with the arrest.

5           Q     The Plaintiff admitted that Kress had nothing  
6 to do with the arrest?

7           A     She admitted she had no evidence, no hearsay,  
8 no rumor; nothing to tie Kress to that arrest.

9           Q     Except that as soon as Kress said, "We won't  
10 serve you," they were arrested. Would that be enough for the  
11 jury to find against Kress?

12          A     I do not believe so, sir. I do not believe so,  
13 at all.

14          Q     You don't believe it's a jury question?

15          A     I do not believe so. I think that if that case  
16 can go to a jury on that question, then all Plaintiff need do is  
17 just file a Complaint, make some allegations of sequences of  
18 events, rest and have the case go to the jury. If that is true,  
19 summary judgment --

20          Q     You left out a year of depositions.

21          A     We had a year of depositions; yes, Your Honor.

22          Q     But you left that out in your statement just now.  
23 So, there is a little more than that.

24          A     I apologize. I didn't mean to do that.

25          Q     Well, I mean at that stage you still say it is

1 not enough. That's your whole point: it is not enough to go  
2 to the jury.

3 A On the conspiracy; yes, Your Honor; really.

4 Q What about the --

5 A Well, the other wasn't enough to go to the  
6 jury, either; yes. That is true; that is true.

7 Q Well, do you stand on the points -- do you  
8 rest on the point that there is no evidence in this record  
9 after all the evidence was in, that the state has acted in con-  
10 cert with the Kress employees or that the Kress employees had  
11 acted in concert in any way with the police. Is that the gap  
12 that you see in this?

13 A I see two gaps, Mr. Chief Justice. First, the  
14 gap that you mentioned. Yes, there is no evidence, and indeed,  
15 everything is to the contrary that Kress had any nexus with the  
16 police or any of its actions.

17 And second, and once that is accepted, then the  
18 mere existence of the statutes to which Plaintiff pointed, are  
19 not sufficient here, just as they were not sufficient in the  
20 Williams case, to constitute state action so as to make Kress  
21 liable.

22 And those are the two points on which we rested  
23 for that proposition.

24 MR. CHIEF JUSTICE BURGER: So, your position is that  
25 under Section 1983 the burden of proof is on the Plaintiff to



1 show that the action -- the state action in question and the  
2 private action were interrelated and the result of cooperation  
3 of some kind or exchange of information?

4 A Yes, I say in order for a private person to be  
5 liable there must be some nexus with the state. The existence  
6 of the statutes, by themselves, do not give rise to liability,  
7 and therefore, they must show some conspiracy or interaction  
8 between them, sufficient to hold us liable under Section 1983.

9 I would like to comment briefly, if I may, on the  
10 1875 Act. That is a point which Petitioner raised in the  
11 District Court on a cross-motion when we moved for summary  
12 judgment. She moved to be permitted to amend her Complaint  
13 to add a claim under the Civil Rights Act of 1875, which of  
14 course, this Court had previously declared unconstitutional.  
15 That motion was denied in motion part by the District Judge.  
16 Thereafter, the point was never raised again in the District  
17 Court; never raised in the Trial Court; and never raised in the  
18 Court of Appeals.

19 We, therefore, suggest respectfully to this Court  
20 that that issue was not properly before it and should not be  
21 considered.

22 Moreover, the fact is that on the face of the  
23 statute, it would have no application to a restaurant such as  
24 Kress, anyway and as the authority upon which Plaintiff herself  
25 relies, namely: the Nimmer Columbia Law Review, it itself notes

1 that the restaurants such as Kress would most likely not be  
2 covered. This is particularly true, because the decision of  
3 unconstitutionality of this Act was made in 1883 and the  
4 Congress has not seen fit to reenact it or revive it, and has  
5 since passed the 1964 Act which was broader in its application  
6 in many ways.

7 I think, therefore, under all the circumstances,  
8 this Court should not now seek to reenact or revive legislation  
9 for which the Congress has not done so.

10 Q Mr. Litvak, could I ask you: Let's assume that  
11 a local custom had been true -- I don't know what you think a  
12 custom is, but could one have been proved -- no statute at all;  
13 just the custom. Well, 1983 talks about customs; doesn't it?

14 A I think it talks about State customs, Mr.  
15 Justice White. State customs -- in other words, my reading the  
16 statute is as a state statute, law ordinance, or state custom.  
17 And when custom was defined in the 1964 Act Congress defined  
18 custom as something which is required and enforced by the state  
19 and I think that, as we say in our brief, is a restatement of  
20 the Congressional intent behind the Act when it was first  
21 passed.

22 Q Well, couldn't it be said that you --

23 Q Would you say that if you are wrong on that  
24 interpretation of 1983 you lose this case?

25 A No, Your Honor; I would not.



1 asked to prove that everybody in Mississippi knew that the  
2 police wouldn't allow -- the state officers -- wouldn't allow  
3 white and colored to eat at the same table -- what would you  
4 say about that?

5 A I'd say if all they proved is that everyone  
6 knew it or everyone did it, they hadn't proved enough. If they  
7 proved --

8 Q Well, if everyone knew there was such a  
9 custom --

10 A Well, that's a custom of the people and the  
11 Courts have held --

12 Q Not a custom of the people to refrain from  
13 enforcing the laws, is it?

14 A No. If you can bring the state into it through  
15 its enforcement mechanisms, I agree you would probably have  
16 a state-enforced custom. But customs of the people, as the  
17 Court said in Williams against Hot Shop and Williams against  
18 Howard Johnson, the customs of the people is not state action.  
19 They do not constitute state action. That is our position.

20 Q What do you do when the police uniformly  
21 enforce the custom by vagrancy statute?

22 A Yes. I think the proof here is that was not  
23 so. In other words, Kress had served Negroes and whites at  
24 lunch counter facilities from July 2nd up until the day in  
25 question. If it had been an enforced custom they couldn't have

1 done so.

2 Q But they didn't do it here.

3 A No, but that one incident doesn't prove that  
4 there was a state custom. The custom is to the contrary. We  
5 had always done it.

6 Q Well, what are you going to do with this  
7 statement of Judge Latham in this Jackson, Mississippi case?  
8 that the police give it muscle?

9 A Well, he was not referring to restaurants.  
10 It was a decision of 1963, prior to passage of the 1964 Act.  
11 I don't think that this Court should or would presume that the  
12 Kress and the others that where the proof was to the contrary,  
13 would continue, even if it had in the past, not integrated its  
14 facilities in obedience to that law. That's referring to a  
15 situation that took place two or three years prior to the passage  
16 of the Federal Law.

17 Q Well, don't you think Judge Latham, a native of  
18 Louisiana, knows more about the Mississippi customs than we do?

19 A I think he certainly probably should and  
20 probably did in that case, but I don't think that should be  
21 binding on Kress.

22 Q "The Jackson police add muscle, bone and sinew  
23 to the signs." Could we say that the Hattiesburg police added  
24 muscle, bone and sinew to the custom?

25 A I'm sorry, I don't know that they do.

1 Q Is there a fair inference in the record that if  
2 Miss Adickes had seated herself at another table she would  
3 have been served?

4 A No, Your Honor; none whatsoever.

5 Q I beg your pardon?

6 A No, sir; there is not at all a fair inference.

7 Q She wouldn't have been served anyway?

8 A Well; if you accept the testimony which we have  
9 proffered, namely that she was refused service because of the  
10 riotous situation of the potentially-riotous situation, she  
11 was just not going to be served on that day. A Negro and a  
12 white came in later on/the day and they were served. And  
13 that's in the record; they were served and they have been served  
14 before and they were served after.

15 Q Well, what does the record indicate is the basis  
16 for that assertion that she was afraid of Miss Adickes being  
17 molested?

18 A Well, the record -- it is the testimony of Mr.  
19 Powell, the store manager, to that effect.

20 Q And what's that predicated on?

21 A Well, that's predicated upon the situation in  
22 the store as it existed at the time.

23 Q Well, I mean if she had walked in without these  
24 Negro children, seated herself at another table, would she or  
25 would she not have been served?

1           A     Oh, I'm sorry.  If she had come in -- I did  
2 not understand the question -- if she had come in alone and in  
3 an entirely different background where there wasn't a chance of  
4 a riot; certainly she would have been served.  It was probably  
5 the fact that she had --

6           Q     That she was in the company of these Negroes.

7           A     No, sir; the fact that she had done the other  
8 things which had created the potentially dangerous situation.  
9 And by avoiding violence on that day --

10          Q     Which other things?

11          A     Well, she had been to the library and had the  
12 police following her.  We hadn't called them, but the fact is  
13 that the people in the store and the people outside amassed  
14 about and the store manager, in an effort to save it that day,  
15 did decline her service, although we served her before and  
16 after and other groups on the same day.

17                 And as I see it, does that one incident make it a  
18 custom for the state or make it a state-enforced custom where  
19 the proof is there was no other incidence.  And we may --

20          Q     Let me put this question to you:  Supposing  
21 the definition of the relevant custom that Judge Bonsal  
22 adopted, is rejected -- namely that it's enough to show a cus-  
23 tom of segregation.  Now, would you then say there was a case  
24 for the jury?

25          A     No, Your Honor, because the Trial Judge has

1 assume that. In other words, the trial judge, as you will note  
2 from our briefs, assumed they brought out a custom against the  
3 mixing of the races. He said, "Even if I assume that, there is  
4 no proof in the record of this case which I can send to the  
5 jury. That is not to say -- he went on to say -- that it  
6 wouldn't have been proven; there just wasn't any. There was no  
7 proof involved in the state he found, and so he accepted the  
8 broader proposition and the broader custom and did not apply  
9 Judge Bonsal's custom.

10 Thank you, Your Honors.

11 MR. CHIEF JUSTICE BURGER: Thank you; the case is  
12 submitted. We thank you for your submission.

13 (Whereupon, at 11:17 o'clock a.m. the argument in  
14 the above-entitled matter was concluded)