

## PUBLIC ACCOMMODATIONS LAW PASSAGE IS CALLED "MISTAKE"

(By William H. Rehnquist)

Editor, The Arizona Republic: I believe that the passage by the Phoenix City Council of the so-called public accommodations ordinance is a mistake.

The ordinance is called a civil rights law, and yet it is quite different from other laws and court decisions which go under the same name. Few would disagree with the principle that federal, state, or local government should treat all of its citizens equally without regard to race or creed. All of us alike pay taxes to support the operation of government, and all should be treated alike by it, whether in the area of voting rights, use of government-owned facilities, or other activities.

The public accommodations ordinance, however, is directed not at the conduct of government, but at the conduct of the proprietors of privately owned businesses. The ordinance summarily does away with the historic right of the owner of a drug store, lunch counter, or theater to choose his own customers. By a wave of the legislative wand, hitherto-private businesses are made public facilities, which are open to all persons regardless of the owner's wishes. Such a drastic restriction on the property owner is quite a different matter from orthodox zoning, health, and safety regulations which are also limitations on property rights.

If in fact discrimination against minorities in Phoenix eating-places were well nigh universal, the question would be posed as to whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places at all. The arguments of the proponents of such a sacrifice are well known; those of the opponents are less well known.

The founders of this nation thought of it as the "land of the free" just as surely as they thought of it as the "land of the equal." Freedom means the right to manage one's own affairs, not only in a manner that is pleasing to all, but in a manner which may displease the majority. To the extent that we substitute, for the decision of each businessman as to how he shall select his customers, the command of the government telling him how he must select them, we give up a measure of our traditional freedom.

Such would be the issues in a city where discrimination was well nigh universal. But statements to the council during its hearings indicated that only a small minority of public facilities in the city did discriminate. The purpose of the ordinance, then, is not to make available a broad range of integrated facilities, but to whip into line the relatively few recalcitrants. The ordinance, of course, does not and cannot remove the basic indignity to the Negro which results from refusing to serve him; that indignity stems from the state of mind of the proprietor who refuses to treat each potential customer on his own merits.

Abraham Lincoln, speaking of his plan for compensated emancipation, said: "In giving freedom to the slave, we assure freedom to the free—honorable alike in what we give and in what we preserve."

Precisely the reverse may be said of the public accommodations ordinance: Unable to correct the source of the indignity to the Negro, it redresses the situation by placing a separate indignity on the proprietor. It is as barren of accomplishment in what it gives to the Negro as in what it takes from the proprietor. The unwanted customer and the disliked proprietor are left glowering at one another across the lunch counter.

It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this.

Mr. RAUH. Mr. Rehnquist calls this a "drastic restriction" on the property owner. He talks about the freedom of the property owner being "sacrificed." He talks about the "indignity" to the proprietor, and ends—

It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this.

What was the purpose? To allow Negroes to enter a drug store.

What does Mr. Rehnquist say in answer when he was asked about this matter? At page 145 [of the typewritten transcript] of the record,

he said that he had changed his mind. When Senator Bayh gave him a chance at page 255 of the record to say whether he changed it before he was appointed to the Supreme Court, he didn't answer.

Senator BAYH. If I might interrupt there, will you recount why he said he changed his mind?

Mr. RAUH. Yes, Senator Bayh. He said two things: First, the ordinance had worked. That is a wonderful reason to change one's mind; apparently Negroes were so well behaved that no problem arose when they exercised their rights. Probably they were not rich enough to go to the places anyway. But the issue was one of principle, not whether the ordinance worked.

Then he said a remarkable thing. He said that he hadn't realized that minorities really cared about this. That is one of the strangest statements—that anybody would not realize in 1964 that minorities cared about their rights. One might have said that 25 years earlier. But how could he say he had not known that minorities cared after the NAACP had been fighting for these things since the early 1900's, after Dr. King had dramatized these things, after people had died for these rights—and he said that he didn't know they cared.

Finally, I would respectfully suggest that Mr. Rehnquist should be cast with King Henry IV of France who said, "Paris is worth a mass." On that principle he was apparently prepared to change what he had said before—that he was against all civil rights legislation.

Senator HART. Mr. Rauh, I know you are paraphrasing, but if I am looking at the correct page of the transcript, what Mr. Rehnquist said to Senator Bayh was:

I think the ordinance really worked very well in Phoenix. It was readily accepted and I think I have come to realize since more than I did at the time the strong concern that minorities have for the recognition of these rights.

Mr. RAUH. Thank you, sir; that is the exact language I was referring to. I paraphrased it, I think, accurately, sir.

Senator HART. I don't quarrel with your paraphrase, but I thought it was appropriate that we put it in the exact language, too.

Mr. RAUH. Thank you, sir.

The third point on civil rights is the Arizona legislation.

Mr. Tunney said at page 161 of the transcript, "There was no State legislation?" Mr. Rehnquist said, "Right."

Well, I happen to have the statute here. For anybody who wants to look it up, the State legislation was passed on—in 1964 and signed in 1965; it is in Arizona Revised Statutes Annotated. I cannot understand how Mr. Rehnquist would have suggested that there was no such legislation. All the press reported that he had opposed it. Indeed, the statement that Mr. Mitchell has on the confrontation was at the time the legislation was being passed in the State legislature. Now,—

Senator Cook. Do you have the dates of the Arizona statute as to when it was passed and when it was signed into law?

Mr. RAUH. Adopted by laws 1965, chapter 27, section 3, Senator Cook. What I have here, of course, is the Arizona Revised Statutes, but, as I see here, it says, "Article 1 consisting of sections 41-1401 to 41-1403 added by laws 1965, chapter 27, section 3." It sets up an Arizona Civil Rights Commission and provides an Arizona public accommodations statute and an Arizona voting rights statute.

Senator Cook. 1965, not 1964?

Mr. RAUH. It is my understanding, sir, it was adopted in 1964 and signed in 1965. It was at the end of the year, sir, is my understanding, but it is easy enough to get it. I can supply it. What I have to do is get the original yearly statute book, rather than the compilation I have.

Senator COOK. I just was not aware of any State legislature that met through the fall and through Christmas and New Year's into the new year.

Mr. RAUH. I would like the privilege of getting the exact dates from the statute book, whereas what I have here is the compilation which indicates it was added by laws 1965.

Now, certainly this matter should be cleared up. We have now an affidavit that there was quite an altercation on the steps of the Capitol on this statute which Mr. Rehnquist said didn't ever occur. So that ought to be cleared up.

Fourth, the issue of desegregation. Here again we have a letter to the Arizona Republic, a voluntary intervention against desegregation of de facto school segregation.

To me, the most shocking quote is this:

We are no more dedicated to an "integrated" society than we are to a "segregated" society.

How could a man 13 years after *Brown*—for this letter was written in 1967 and I would like to offer it for the record——

Senator Hart. It will be received.

(The letter referred to follows.)

#### 'DE FACTO' SCHOOLS SEEN SERVING WELL

(By William H. REHNQUIST)

The combined effect of Harold Cousland's series of articles decrying "de facto segregation" in Phoenix schools, and The Republic's account of Superintendent Seymour's "integration program" for Phoenix high schools, is distressing to me.

As Mr. Cousland states in his concluding article, "whether school board members take these steps is up to them, and the people who elect them." My own guess is that the great majority of our citizens are well satisfied with the traditional neighborhood school system, and would not care to see it tinkered with at the behest of the authors of a report made to the federal Civil Rights Commission.

My further guess is that a similar majority would prefer to see Superintendent Seymour confine his activities to the carrying out of policy made by the Phoenix Union High School board, rather than taking the bit in his own teeth.

Mr. Seymour declares that we "are and must be concerned with achieving an integrated society." Once more, it would seem more appropriate for any such broad declarations to come from policy-making bodies who are directly responsible to the electorate, rather than from an appointed administrator. But I think many would take issue with his statement on the merits, and would feel that we are no more dedicated to an "integrated" society than we are to a "segregated" society; that we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities.

The neighborhood school concept, which has served us well for countless years, is quite consistent with this principle. Those who would abandon it concern themselves not with the great majority, for whom it has worked very well, but with a small majority for whom they claim it has not worked well. They assert a claim for special privileges for this minority, the members of which in many cases may not even want the privileges which the social theorists urge be extended to them.

The schools' job is to educate children. They should not be saddled with a task of fostering social change which may well lessen their ability to perform their primary job. The voters of Phoenix will do well to take a long second look at the sort of proposals urged by Messrs. Cousland and Seymour.