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# BOYNTON V. VIRGINIA AND THE ANXIETIES OF THE MODERN AFRICAN-AMERICAN CUSTOMER

Amber Baylor\*

## I. INTRODUCTION

In 1958, a young Howard law student named Bruce Boynton walked into a diner at a bus terminal in Richmond, Virginia, and sat down to order.<sup>1</sup> Boynton's bus from Washington, D.C., to Montgomery, Alabama, was parked at the terminal for a brief break, allowing the passengers to grab food for dinner.<sup>2</sup> Boynton found a stool at the diner counter a few feet from a "Whites Only" sign.<sup>3</sup> He was not served.<sup>4</sup> The waitress and manager told Boynton that he would not be served in the diner, pursuant to its "Whites Only" sign and service policy.<sup>5</sup> Boynton refused to leave, and the manager called the police.<sup>6</sup> The Richmond police arrived, collected Boynton's luggage from the bus, and placed him under arrest.<sup>7</sup> The police took Boynton to the city jail, and the State charged him with trespass.<sup>8</sup>

Boynton was tried on the trespass charge a few weeks later in a police court.<sup>9</sup> The judge found Boynton guilty of trespass and sentenced him to a ten-dollar fine.<sup>10</sup> Boynton appealed to the United States Supreme Court, which overturned his conviction in the Warren Court

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\* © 2020, Amber Baylor. All rights reserved. Associate Professor of Law, Texas A&M School of Law and Director, Criminal Defense Clinic. I would like to thank my co-participants on the SEALS Criminal Justice Roundtable, especially Cynthia Alkon, Catherine Hancock, and Cara Drinan. I am also grateful to Jason Williamson for his generosity and expertise, Rachel Germany and Doris Baylor for their invaluable insights, and the editors of *Stetson Law Review* for their thoughtful contributions.

1. *Boynton v. Virginia*, 364 U.S. 454, 455 (1960).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 456.
9. *Id.*
10. *Id.*

decision *Boynton v. Virginia*.<sup>11</sup> In *Boynton*, the Court found that the bus terminal diner's segregationist policy violated the Interstate Commerce Act.<sup>12</sup> Boynton's refusal to submit to the segregationist policy and the subsequent decision in *Boynton* both served as the impetus for the Freedom Rides.<sup>13</sup>

Boynton's story of trespass enforcement and racial exclusion in commercial establishments is not limited to that era of U.S. history. In 2018, Boynton might walk into a busy coffee shop in Philadelphia. While awaiting a friend, he walks over to ask a cashier if he might use the restroom. The cashier's private biases lead her to see his presence as problematic. Without being asked to leave, and before he has the option to purchase something or go, the cashier calls the police to remove him. Boynton in 2018 is arrested, taken to jail by city police, and charged with trespass.<sup>14</sup>

In 2016, Boynton might be on a wine tour with friends, enjoying the train ride through Napa Valley. He and his friends talk colloquially and laugh loudly during the ride. A tour manager marches over to Boynton to inform him that, through his laughter, he has violated an unspoken behavioral code, and Boynton is ordered to leave the tour. The city police are present at the next train stop in case he refuses. He complies and exits the train because if he refuses, he will be arrested and charged with trespass.<sup>15</sup>

Today, Boynton has the benefit of being able to enter and be served at any commercial establishment he likes. He must, however, constantly guard against a potentially discriminatory request to leave. Boynton might make sure not to draw attention to himself as a minority on a wine tour through Napa. He might decide to not invite so many friends of his ethnicity, or quiet them if they speak in a different language or use culturally-coded language and jokes. He could, like many people of color, purchase a quantity of unwanted goods from a café to feel confident

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11. *Id.* at 464.

12. *Id.* at 463–64.

13. During the Freedom Rides, masses of civil rights supporters traveled to bus terminals across the south to test the decisions' anti-segregation mandate. The Martin Luther King, Jr. Research and Education Institution, *Freedom Rides*, STANFORD UNIVERSITY, <https://kinginstitute.stanford.edu/encyclopedia/freedom-rides> (last visited Oct. 26, 2019).

14. See, e.g., Nathaniel Meyersohn, *Men Say They Were Arrested Within Minutes After Arriving at Philadelphia Starbucks*, CNN BUSINESS (Apr. 19, 2018, 7:55 AM EDT), <https://money.cnn.com/2018/04/19/news/companies/starbucks-arrests-philadelphia/index.html>.

15. Mary Bowerman, *Black Women Kicked off Napa Valley Wine Train Settle*, USA TODAY (Apr. 20, 2016, 12:42 PM EDT), <https://www.usatoday.com/story/money/nation-now/2016/04/20/black-women-kicked-off-napa-valley-wine-train-settle-racial-discrimination-case/83280120/>.

enough to *just ask* if he might be able to use a restroom. Boynton might have, upon exiting the bus that night in 1958, followed the rest of the bus' African-American riders to the café designated "Colored" and thus evaded Richmond city jail. Boynton may actively avoid going on a tour, to a store, or to a café usually frequented by people that do not look like him for fear of eventual exclusion.<sup>16</sup>

## II. STATE ENFORCEMENT OF DISCRIMINATORY TRESPASS CLAIMS IN COMMERCIAL ESTABLISHMENTS

My consideration of *Boynton v. Virginia* focuses specifically on the impact of police enforcement of discriminatory trespass claims in commercial establishments. Trespass is defined in the Cambridge Dictionary as "to go onto someone's land or entering their building without permission."<sup>17</sup> Visitors to commercial establishments usually have a general invitation to enter the establishment, but that license can be revoked.<sup>18</sup> A visitor's refusal to leave might then trigger a trespass charge.<sup>19</sup> For instance, in *Boynton*, the complaint stated that Boynton "[u]nlawfully did remain on the premises of the Bus Terminal Restaurant of Richmond, Inc., after having been forbidden to do so' by the Assistant Manager."<sup>20</sup> Boynton's decision to enter the diner and to stay after learning of its racist service policy was a clear violation of explicit social codes.<sup>21</sup> The aim of the codes was to limit and control African-Americans' access to establishments otherwise open to the general public.<sup>22</sup> This aim remains a present, though unspoken, component of enforcement of trespass laws today.<sup>23</sup> Segregationist signs are no longer widely posted in diners, but private, discriminatory claims of trespass, enforced by government agents, operate to similar ends.<sup>24</sup> The threat of discriminatory trespass allegations is one that looms over

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16. Though I focus on commercial establishments here, this could affect his access to parks for a barbecue, an apartment lobby to visit a friend, or a community pool to swim.

17. *Trespass*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/trespass> (last visited Nov. 22, 2019).

18. *Licensee by Invitation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

19. *Trespass*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A trespass in which the trespasser remains on the property after being ordered off by a person authorized to do so.").

20. *Boynton v. Virginia*, 364 U.S. 454, 456 (1960).

21. Louis Pollak, *The Supreme Court and the States: Reflections on Boynton v. Virginia*, 49 CALIF. L. REV. 15, 18–19 (1961).

22. *Id.* at 39.

23. Katherine Beckett & Steve Herbert, *Dealing with Disorder: Social Control in the Post-Industrial City*, 12 THEORETICAL PHILOSOPHY 5, 10 (2008).

24. *Id.* at 10–11.

many African-Americans while they are out in restaurants and stores.<sup>25</sup> The fear of exclusion, especially exclusion involving police intervention, causes repression of African-Americans' individual expression, movement, association, and privacy.<sup>26</sup> Further, these damaging stressors operate against marginalized people in commercial establishments even when police are never called.<sup>27</sup>

It is critical that we understand Boynton's case and the individual experience of trespass enforcement in order to grasp the depth of harm it causes individuals and communities. In these next paragraphs, I focus on what happened to Boynton and his response to it.

### III. BOYNTON'S PERSONAL HISTORY

As a law student at Howard University School of Law, Boynton was perhaps more prepared than most to challenge the discriminatory policy.<sup>28</sup> In testimony, he described the "Colored" diner, which was crowded and relegated to a space in the facility that did not appear sanitary.<sup>29</sup> The diner for white patrons, conversely, was pristine.<sup>30</sup> This contrast alone may have convinced a hungry diner to try the empty, all-white diner. Boynton also had the force of a community and family heavily engaged in civil rights weighing in his decision to try the other diner.<sup>31</sup> When Boynton was not served, he clearly stated his belief in his constitutional right to remain and eat in a non-segregated diner.<sup>32</sup> This background helps explain how Boynton perceived his wrongful conviction claim. Boynton was poised to (1) challenge the restaurant's segregationist policy and (2) litigate the trespass prosecution against him.<sup>33</sup>

Boynton was the son of a family that struggled hard to demand humane and equal treatment from society.<sup>34</sup> His mother, Amelia

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25. Chas Danner, *The Starbucks Arrests and the Toll of Routine Bias*, N.Y. MAGAZINE (Apr. 16, 2018), <http://nymag.com/daily/intelligencer/2018/04/the-starbucks-arrests-and-the-toll-of-routine-bias.html>.

26. *Id.*

27. *Id.*

28. Pollak, *supra* note 21, at 17.

29. *Id.* at 18.

30. *Id.*

31. Associated Press, *He Wanted a Cheeseburger, But He Changed History: Bruce Boynton Is Unsung Civil Rights Hero*, [https://www.al.com/news/2018/05/he\\_wanted\\_a\\_cheeseburger\\_but\\_h.html](https://www.al.com/news/2018/05/he_wanted_a_cheeseburger_but_h.html) (last updated Mar. 7, 2019).

32. *Boynton v. Virginia*, 364 U.S. 454, 455 (1960).

33. *Id.* at 456–57.

34. Associated Press, *supra* note 31.

Boynton-Robinson, led voter registration drives within the African-American community in Selma, Alabama, in the 1940s.<sup>35</sup> His mother famously stated, “[p]eople ask me what race I am, but there is no such thing. . . . ‘I’m a member of the human race.’”<sup>36</sup> His mother later became the first African-American and first woman to run as a Democrat for Congress in Alabama.<sup>37</sup> She coordinated the Selma March with Martin Luther King Jr.<sup>38</sup> Accordingly, her son was well-apprieved of the unnatural cruelty of segregation and comfortable articulating his right to be free from demeaning machinations of inferior accommodations. Boynton’s stance in the diner reflected these crucial lessons of equal worth and expectation of equal treatment.

Boynton was also in a position to challenge his arrest and prosecution. His family was well-connected within the community of African-Americans demanding civil rights.<sup>39</sup> His middle name was derived from his godfather, George Washington Carver.<sup>40</sup> Attorneys supported Boynton from the beginning of his court trial until his appeal to the Supreme Court.<sup>41</sup> His attorneys, like Boynton, were particularly attuned to the potential importance of Boynton’s claims.<sup>42</sup> Thurgood Marshall, in his last case as a lawyer, represented Boynton before the Court in his successful reversal of his trespass conviction.<sup>43</sup>

Prior to Boynton’s claim making its way to the Supreme Court, important decisions challenging discriminatory trespass claims had made their way to the Court.<sup>44</sup> These cases helped establish a trajectory for challenging his treatment. Boynton’s case appeared before the Supreme Court with three potential claims for delegitimizing his trespass conviction.<sup>45</sup> The Court had previously addressed

35. *Amelia Boynton Biography*, BIOGRAPHY, <https://www.biography.com/activist/amelia-boynton> (last updated Apr. 12, 2019).

36. Jane Ridley, *103-Year-Old Activist: I Was Almost Killed Fighting for Freedom*, NEW YORK POST (Dec. 1, 2014), <https://nypost.com/2014/12/01/103-year-old-activist-i-was-almost-killed-fighting-for-freedom/>.

37. *Amelia Boynton Biography*, *supra* note 35.

38. *Id.*

39. *See id.* (discussing Amelia Boynton’s leading role with multiple civil right movements).

40. *Betty and Bruce Boynton’s Boynton Family Board Members*, THE SELMA CENTER FOR NONVIOLENCE TRUTH AND RECONCILIATION, <https://www.selmacenterfornonviolence.org/copy-of-sanders-toure-1> (last visited Sept. 26, 2019) [hereinafter *Boynton’s Boynton Family Board Members*].

41. Pollak, *supra* note 21, at 15.

42. *Id.*

43. *Boynton’s Boynton Family Board Members*, *supra* note 40.

44. *See* Pollak, *supra* note 21, at 41 (pointing to *Marsh v. Alabama*, 326 U.S. 501 (1946) as a previous decision by the Court involving a state’s trespass doctrine).

45. *Boynton v. Virginia*, 364 U.S. 454, 456–57 (1960).

discrimination in public accommodations through all three: (1) the Interstate Commerce Act; (2) the Commerce Clause; and (3) the Equal Protection Clause.<sup>46</sup>

The Interstate Commerce Act prohibited companies that were open to the public and engaged in interstate commerce from discriminatory or unequal treatment of customers.<sup>47</sup> This statute applied, for instance, to bus companies traveling between states.<sup>48</sup> In *Boynton's* case, any discriminatory behavior on the bus that he traveled on from Washington, D.C., to Alabama would have been in violation of this Act.<sup>49</sup> The Act, however, was not confined to interstate activities of the bus, but applied to the entire company and its subsidiaries.<sup>50</sup> Thus, a bus station owned or controlled by the bus company also could not segregate.<sup>51</sup>

The Commerce Clause, prohibiting states from interfering with interstate commerce, had also been argued as a basis for challenging segregation in public establishments.<sup>52</sup> In the instance of state laws mandating segregation in commercial establishments, the Court found that this form of state action was in violation of the Commerce Clause.<sup>53</sup> For instance, the Court had previously found that state segregationist policies, as applied to interstate buses, "burdened" interstate commerce in violation the Commerce Clause.<sup>54</sup> In fact, in 1946, the Court found an interstate bus company's dining facility also violated of the Commerce Clause because the establishment applied segregationist state policies.<sup>55</sup>

Finally, *Boynton's* most potent constitutional claim was that commercial establishment discriminatory policies violated Equal Protection under the Fourteenth Amendment.<sup>56</sup> The Amendment prevents states from engaging in racial discrimination.<sup>57</sup> In fact, the Amendment was directly created in response to the limitations on

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46. Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action & Private Property*, 5 TEX. A&M L. REV. 439, 451, 455 (2018).

47. Interstate Commerce Act, Pub. L. No. 49-41, § 11, 24 Stat. 379, 379 (1887). The ICC was replaced in 1995 by the Surface Transportation Board. See SURFACE TRANSPORTATION BOARD, 1996/1997 ANNUAL REPORT 1 (1998).

48. *Boynton*, 364 U.S. at 459-60.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 456-57.

53. *Id.* at 463-64.

54. *Morgan v. Virginia*, 328 U.S. 373, 385-86 (1946).

55. *Id.* at 380.

56. *Boynton*, 364 U.S. at 456-57.

57. Hugh S. Johnston, *The Use of Trespass Laws to Enforce Private Policies of Discrimination*, 16 HASTINGS L.J. 445, 446-47 (1965).

African-Americans imposed by the Black Codes.<sup>58</sup> The Fourteenth Amendment requires state action.<sup>59</sup> The Court, prior to hearing *Boynton*, established that the required “state action” could be found in the state court’s enforcement of the segregationist policy.<sup>60</sup> In *Shelley v. Kraemer*, the Court found that the state enforcement of a racially restrictive covenant was in violation of the Fourteenth Amendment.<sup>61</sup> As in *Kraemer*, this type of discrimination can even occur with private property.<sup>62</sup>

The Court was dismantling segregationist policies cautiously.<sup>63</sup> Those within the ambit of interstate commerce, or clear state action, were found to be in violation of constitutional protections.<sup>64</sup> But the Court was less likely to find constitutional violations in state management and enforcement of discrimination.<sup>65</sup> Finally, the Court seemed to shy away from finding Fourteenth Amendment violations in private actors’ policies on their own property—even where the property was open to the public and where the police were called upon to enact the policy through arrests based on trespass law.<sup>66</sup> In fact, after *Boynton*, the Court explicitly clarified that it did not find state action in police enforcement of trespass claims—even if the claims were based upon discriminatory policies.<sup>67</sup>

#### IV. BOYNTON’S TRESPASS TRIAL

Boynton was arrested that night in 1958 and quickly returned to the police court to face trial in the first weeks of 1959.<sup>68</sup> At a late night proceeding the day of his arrest, the young man pled not guilty.<sup>69</sup> The

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58. *Id.* at 449.

59. U.S. CONST. amend. XIX.

60. *Shelley v. Kraemer*, 334 U.S. 1, 20–21 (1948).

61. *Id.* at 20.

62. *Id.*

63. See Pollak, *supra* note 21, at 16–17 (1961) (reflecting that the Supreme Court has many legal avenues for evaluating segregation but often restricted segregation on the narrowest grounds).

64. See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725–26 (1961) (finding state action where the state leased to a café that had private segregationist policies).

65. Saidel-Goley & Singer, *supra* note 46, at 445–47.

66. *Id.* at 450–51.

67. Saidel-Goley and Singer argue that the Court has inappropriately conflated the two requirements for an Equal Protection Violation. *Id.* at 477. The Court found no violation where the state action was not based on discrimination. Instead, the individual components of (1) state action, and (2) denial of equal protection under the law should be analyzed separately. *Id.*

68. Pollak, *supra* note 21, at 18–19 (1961).

69. See generally *Boynton v. Virginia*, 364 U.S. 454, 456 (1960). It can be inferred that he pled not guilty based on the later appeal of his conviction.



judge set a trial for Boynton in Richmond Police Court a few weeks later.<sup>70</sup> The police court judge in the case was Harold Maurice.<sup>71</sup> He was infamous for his prejudicial, anti-black disposition.<sup>72</sup> For years, locals complained that Judge Maurice refused to address Black people in court by anything other than their first name and was known to use racial epithets in reference to African-Americans.<sup>73</sup>

Boynton testified during the quick trial, and the court also heard testimony from the arresting officer and the restaurant manager.<sup>74</sup> During the trial, Boynton preserved two constitutional arguments that would later be important to the Court's consideration of his case: (1) that the State violated his right to equal protection pursuant to the Fourteenth Amendment; and (2) that the segregationist policies of the bus terminal diner violated the Commerce Clause.<sup>75</sup> On appeal, he also argued that the diner's policy violated the Interstate Commerce Act, which prohibits racial discrimination by interstate common carriers.<sup>76</sup> Judge Maurice denied Boynton's motions to dismiss and convicted Boynton of trespass.<sup>77</sup> The Virginia trespass statute permitted no more than thirty days in jail, and Boynton was eventually sentenced to a fine and no jail time at all.<sup>78</sup> Boynton appealed to the state courts on the constitutional claims, but his appeal was hastily rejected.<sup>79</sup> The Supreme Court of the United States would later overturn Bruce Boynton's trespass conviction on the third statutory issue, a violation of the Interstate Commerce Act, which was inadequately fleshed out in lower appellate courts.<sup>80</sup>

The potential parties involved or liable for the diner's policy included the diner, the Trailways Bus Station, and the Trailways Bus Company.<sup>81</sup> The lower court's record indicated little to no relationship between the diner and the bus company.<sup>82</sup> However, in order to subject

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70. Pollak, *supra* note 21, at 19.

71. *Id.* The judge, Harold Maurice, was later disciplined and removed from the Richmond General District Court in 1977. *Harold C. Maurice v. Board of Directors*, 450 F. Supp. 755, 756 (E.D. Va. 1977).

72. *Black Lawyer Files Suit to Oust Richmond Judge*, JET MAGAZINE, June 25, 1970, at 10.

73. *Id.*

74. Pollak, *supra* note 21, at 19.

75. *Boynton v. Virginia*, 364 U.S. 454, 456 (1960).

76. Pollak, *supra* note 21, at 19.

77. Brief for Petitioner at 4-5, *Boynton v. Virginia*, 364 U.S. 454 (Aug. 25, 1960) (No. 7) [hereinafter Br. for Pet'r].

78. Pollak, *supra* note 21, at 19.

79. *Id.*

80. *Boynton*, 364 U.S. at 457.

81. *Id.* at 460.

82. *Id.*

it to the Interstate Commerce Act, a court would need to find the bus company exercised some control over the diner.<sup>83</sup> At trial, the restaurant's attorney denied such a relationship.<sup>84</sup> Despite that denial, the Court chose to solicit more information.<sup>85</sup> By the time the case was submitted to the Court, Boynton and *amici* had collected what the majority of the Court viewed to be sufficient proof that the bus company's relationship with the diner pulled it into the ambit of the Interstate Commerce Act.<sup>86</sup> The United States Government, as amicus to Boynton, was able to present evidence that the Trailways Bus Company owned a stake in the Trailways Bus Station.<sup>87</sup> The stake was as large as fifty percent, and the station was a critical component of the Bus Company's interstate travel services.<sup>88</sup> Though the Court did not have detailed information about the critical nature of the relationship, it determined that the relationship between the bus company and the bus station certainly made the bus station subject to the Interstate Commerce Act.<sup>89</sup>

From its inception, the Trailways Bus Terminal boasted that it would provide traveling visitors to the station with a "restaurant," among other amenities, as a part of the bus station services.<sup>90</sup> The Bus Station entered into a lease with the diner—agreeing that the restaurant would commit to provide the standard of service of a modern bus terminal.<sup>91</sup>

#### V. BOYNTON'S CLAIMS

Initially, Boynton brought an Equal Protection claim.<sup>92</sup> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>93</sup> As a part of his claim, he argued that he was subject to a discriminatory policy in a commercial institution.<sup>94</sup> Though the state had not mandated the discrimination that he was subject to in the restaurant,

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83. *Id.*

84. *Id.* at 461.

85. Pollak, *supra* note 21, at 21.

86. *Boynton*, 364 U.S. at 461–62.

87. Pollak, *supra* note 21, at 27.

88. *Id.*

89. *Boynton*, 364 U.S. at 462–63.

90. Pollak, *supra* note 21, at 27.

91. *Id.*

92. *Boynton*, 364 U.S. at 462–63.

93. U.S. CONST. amend. XIV, § 1.

94. *Boynton*, 364 U.S. at 456–57.

Boynton argued that state action existed.<sup>95</sup> The state action requirement, Boynton argued, was met through police enforcement and state prosecution of the restaurant manager's discriminatory trespass claim.<sup>96</sup>

Boynton also argued, as a separate constitutional claim, that the charges against him violated the Commerce Clause.<sup>97</sup> "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."<sup>98</sup> The Court can address matters that cause an "undue burden" on interstate commerce.<sup>99</sup> Over ten years prior, the Court had found that an interstate bus terminal's incorporation of discriminatory state segregationist rules was in violation of the Commerce Clause.<sup>100</sup> Boynton argued that the state, in enforcing the segregation policy at the Richmond bus station diner, similarly violated the Commerce Clause.<sup>101</sup> In this instance, it was not the state's discriminatory law, but its enforcement of the policy through trespass action, that constituted a "state action."<sup>102</sup> Boynton's argument was that this enforcement of the diner's rule created a burden on interstate commerce.<sup>103</sup>

Finally, in one instance in his immediate appeal to the Hastings Court, Boynton invoked the Interstate Commerce Act:

It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic, to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.<sup>104</sup>

The claim was rejected by the state appellate court, and Boynton produced no evidence that the interstate bus company had any control

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95. Pollak, *supra* note 21, at 20.

96. *Id.*

97. *Boynton*, 364 U.S. at 456-57.

98. U.S. CONST. art. I, § 8, cl. 3.

99. *Morgan v. Virginia*, 328 U.S. 373, 377-80 (1946).

100. *Id.* at 386.

101. *Boynton*, 364 U.S. at 456-57.

102. Pollak, *supra* note 21, at 20.

103. *Boynton*, 364 U.S. at 457.

104. Interstate Commerce Act, Pub. L. No. 785, § 22(d), 54 Stat. 898, 924 (1940).

over the diner.<sup>105</sup> The company did lease the property to the diner.<sup>106</sup> Yet, the only evidence that existed from the lower court's record was testimony denying a relationship between the diner and the bus company.<sup>107</sup> Despite the singular and uneventful invocation of the Act, this was the claim that the Court demonstrated the most interest in by the time it granted certiorari.<sup>108</sup>

## VI. BOYNTON'S CLAIMS BEFORE THE SUPREME COURT

The Court decided not to address the question of whether a violation had occurred under the Commerce Clause or the Fourteenth Amendment.<sup>109</sup> Instead it focused on whether the segregationist policy violated the Interstate Commerce Act.<sup>110</sup>

As Louis Pollak, a member of Boynton's legal team, reflected shortly after the decision, the Court seemed inclined from the start to decide the case based on the Act.<sup>111</sup> The statutory claim appeared to be the weakest, Pollack believed, since the Court itself had to find a relationship between the diner and bus company, such that the bus company regulated the diner's services.<sup>112</sup> The diner denied such a relationship, and the Virginia courts provided judicial notice that no documentation of such a relationship existed.<sup>113</sup> The Court did not reach either of the constitutional questions but instead rested its decision on the Interstate Commerce Act.<sup>114</sup> The Court accepted new evidence of the bus company's reliance on the diner for passengers and regulation of services to passengers.<sup>115</sup> With just the relationship between the bus company and the diner deemed enough to bring the diner under the purview of the Interstate Commerce Act, the Court then found that the

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105. *Boynton*, 364 U.S. at 460, 464.

106. *Id.* at 461.

107. *Id.*

108. Pollak, an attorney who assisted on the case, later wrote that the Court had no record of an ICA violation. Pollak, *supra* note 21, at 21. In fact, the Court specifically requested information from the State of Virginia to establish a connection between the diner and the bus company, and the state responded by providing judicial notice of no relationship. *Id.* at 21, 26.

109. *Boynton*, 364 U.S. at 457.

110. *Id.*

111. Pollak, *supra* note 21, at 21, 26.

112. *Id.* at 21, 24.

113. *Id.* at 26.

114. *Boynton*, 364 U.S. at 457.

115. *Id.* at 460–61.

restaurant's exclusion violated the Act.<sup>116</sup> It was impermissible for Boynton to be charged with trespass because it was illegal for the restaurant to be racially segregated, and Boynton's conviction was overturned.<sup>117</sup>

In his petition to the Court, Boynton made a compelling Equal Protection claim as well as arguments related to interstate commerce.<sup>118</sup> Had the Court decided to consider the Equal Protection claim, it would have had to find a "state action" in the police enforcement of and court conviction on trespass charges.<sup>119</sup> Boynton asserted that state action was the state enforcement of private, unlawful discrimination through his arrest and conviction.<sup>120</sup> In not addressing the Equal Protection claim, the Court explicitly left open the option that a restaurant outside of interstate commerce could discriminate as it pleased.<sup>121</sup> Police responses to the discriminatory decisions to exclude African-Americans and claim trespass would not then be deemed unconstitutional.<sup>122</sup>

## VII. DISCRETION AND DISCRIMINATION IN TRESPASS ENFORCEMENT

In the majority of jurisdictions, where basic trespass is a criminal offense, it is considered a low-level misdemeanor.<sup>123</sup> Even as a low-level misdemeanor, however, an arrest and conviction for a crime can lead to a host of collateral consequences for a defendant, including loss of employment, loss of child custody, immigration consequences, and required payment of court fines and fees.<sup>124</sup>

Boynton's case was heard in a city or "police" court.<sup>125</sup> Today, these courts are called municipal courts, typically handling less serious cases

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116. *Id.* at 463. If the Court rested its decision on the Commerce Clause, it would have to find discrimination related to interstate commerce and weigh the state interest in private discrimination against its burden on interstate commerce. *Id.* at 463–64.

117. *Id.* at 463.

118. Br. for Pet'r, *supra* note 77, at 5–6.

119. Pollak, *supra* note 21, at 40–41.

120. *Id.* at 20.

121. *Boynton*, 364 U.S. at 463–64.

122. Pollak, *supra* note 21, at 40–41.

123. *Misdemeanor Sentencing Trends*, NCSL: NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/misdemeanor-sentencing-trends.aspx> (last visited Nov. 18, 2019). However, it does not have to stay low-level; it can be used as an enhancement for other charges. *See, e.g.*, N.Y. PENAL LAW § 140.17 (McKinney 2019). Multiple prior trespass convictions may also increase the seriousness of the offense. *See also* TEX. PENAL CODE ANN. § 30.05 (West 2019).

124. Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 763–64 (2017); Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 171–74 (2017).

125. *Boynton*, 364 U.S. at 455–56.

or cases prosecuting municipal regulations.<sup>126</sup> While Boynton was able to retain an attorney for his court appearances, many people who are prosecuted in city courts do not have the benefit of counsel.<sup>127</sup> Often, cities will not assign counsel for individuals in these courts.<sup>128</sup> In some instances, cities may argue that they are not obligated to provide counsel.<sup>129</sup> Many jurisdictions interpret the Constitution to only require the state to provide counsel to indigent defendants where individuals are facing time in jail.<sup>130</sup> Since no—or less substantial—jail time follows municipal charges, cities often do not provide for counsel.<sup>131</sup> Even in jurisdictions where jail is *not* permitted for municipal court sentences, individuals may still face jail if they are unable to pay fines or fees, fail to attend every scheduled court appearance, or do not comply with conditions of no-jail sentences.<sup>132</sup> In some instances, municipal courts are permitted to impose jail sentences.<sup>133</sup> Even then, in many courts that handle low-level misdemeanors, states and cities do not relegate funds to indigent defense.<sup>134</sup>

Without an attorney, many people are pressured to plead guilty to the charges against them.<sup>135</sup> Otherwise, they are expected to conduct an entire trial on their own behalf.<sup>136</sup> Trials are often intensely complicated, requiring litigation skills unavailable to lay people.<sup>137</sup> Imagine then, a plaintiff in Boynton's position. A person may believe the trespass allegation is truly the result of illegitimate discrimination. Like Boynton, they might want to challenge the discriminatory nature of the trespass charge. Boynton was in law school, and his family was in close contact

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126. 20 AM. JUR. 2D COURTS § 12 (Westlaw through Nov. 2019).

127. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1101 (2013).

128. *Id.*

129. Roberts, *supra* note 124, at 186.

130. *Id.*

131. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101, 129 (2012).

132. See, e.g., *Pay or Stay: The High Cost of Jailing Texans for Fines and Fees*, TEXAS FAIR DEFENSE PROJECT (Feb. 2017), [https://www.texasappleseed.org/sites/default/files/PayorStay\\_Report\\_final\\_Feb2017.pdf](https://www.texasappleseed.org/sites/default/files/PayorStay_Report_final_Feb2017.pdf).

133. Robert J. Martin & Walter Kowalski, "A Matter of Simple Justice": *Enactment of New Jersey's Municipal Public Defender Act*, 51 RUTGERS L. REV. 637, 676 (1999) (noting that, in 1997, New Jersey passed the first act providing for counsel in municipal court).

134. Even where misdemeanor courts do assign counsel, often misdemeanor dockets are overloaded and provided to the least experienced attorneys. Robert C. Boruchowitz et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS (Apr. 2009), [https://www.opensocietyfoundations.org/uploads/9b7f8e10-a118-4c23-8e12-1abcc46404ae/misdemeanor\\_20090401.pdf](https://www.opensocietyfoundations.org/uploads/9b7f8e10-a118-4c23-8e12-1abcc46404ae/misdemeanor_20090401.pdf).

135. Natapoff, *supra* note 131, at 132–33.

136. See, e.g., TEXAS MUNICIPAL COURT EDUCATION CENTER, *THE MUNICIPAL JUDGES' BOOK* 92 (2017).

137. *Id.*

with pioneers of civil rights law.<sup>138</sup> Without a lawyer, a person charged would have to make arguments against the prejudicial claim. A person without a lawyer is at a distinct disadvantage in challenging the constitutionality of a criminal trespass arrest prosecution.<sup>139</sup>

Often, a person without an attorney is unaware of the many consequences that can follow a guilty plea or a conviction.<sup>140</sup> Judges must advise defendants of potential consequences and provide general warnings as to the nature of a charge.<sup>141</sup> These warnings, however, are much less effective than advice through an effective attorney.<sup>142</sup> For instance, a judge that is concerned about *pro se* defendants understanding the consequences of their pleas may attempt to provide an advisor during the plea colloquy.<sup>143</sup> Unfortunately, many people are unable to absorb the warnings at this stage.<sup>144</sup> Additionally, a general advisor cannot take into consideration the individual's vulnerability to collateral consequences.<sup>145</sup> Alternatively, an attorney may inquire of a client about employment, immigration, custody, or housing status—all factors that may be affected by a trespass conviction, or any criminal conviction, in specific ways.<sup>146</sup>

The consequences that may follow a trespass arrest and prosecution are similar to those that can follow any criminal conviction.<sup>147</sup> A trespass arrest, before prosecution, may bring its own consequences. If a person is arrested, that person may lose their job, not be present to care for children, or even be detained if they have an immigration status concern.<sup>148</sup> If a bond is set, individuals without money will remain in jail, even as they challenge their case.<sup>149</sup> A person in jail is more likely to face consequences the longer they are in custody.<sup>150</sup> They will remain in until they resolve the case—in some

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138. Pollak, *supra* note 21, at 17; *See generally* Margalit Fox, *Amelia Boynton Robinson, a Pivotal Figure at the Selma March, Dies at 104*, NEW YORK TIMES (Aug. 26, 2015), <https://www.nytimes.com/2015/08/27/us/amelia-boynton-robinson-a-pivotal-figure-at-the-selma-march-dies-at-104.html> (noting that Bruce Boynton's mother was considered the "matriarch of the voting rights movement").

139. THE MUNICIPAL JUDGES' BOOK, *supra* note 136, at 92.

140. Roberts, *supra* note 124, at 173, 179.

141. THE MUNICIPAL JUDGES' BOOK, *supra* note 136, at 92.

142. Roberts, *supra* note 124, at 183–84.

143. *Id.* at 185.

144. *Id.* at 179.

145. *Id.* at 175–76.

146. Natapoff, *supra* note 131, at 104–05.

147. Joe, *supra* note 124, at 763.

148. *Id.* at 739.

149. TEXAS FAIR DEFENSE PROJECT, *supra* note 132.

150. *Id.*

instances, without ever seeing a lawyer.<sup>151</sup> This makes challenging a discriminatory trespass claim even less likely for a person without financial resources.

A conviction has even more lasting consequences. A claim may be deemed a crime of moral turpitude, subjecting an individual to immigration removal.<sup>152</sup> Similarly, prohibitions on criminal record for employment or housing could impact an individual negatively.<sup>153</sup> One specific consequence of trespass actions, particularly those in restaurants and other establishments, is that they serve as a predicate to higher level charges.<sup>154</sup> For instance, if a person in a restaurant is evicted as a trespasser, they may be deemed to be on formal or informal notice that they are not welcome to enter the restaurant. Once a person is accused of entering unlawfully, the state can demonstrate trespass.<sup>155</sup> Similarly, any crime that requires trespass as an included element, such as burglary, will be demonstrated where the state can allege a knowingly undesired entry into the space.<sup>156</sup>

In Boynton's case, his petition stated that he recently passed the bar exam, but his admission into the Alabama Bar was affected by this minor charge.<sup>157</sup> His application to the bar was held up as "under investigation" due to his trespass conviction.<sup>158</sup> Had Boynton not won at the Supreme Court, he would have had a criminal record. His conviction could have impacted his ability to become a leading civil rights attorney, an accomplishment he achieved later in his long career.<sup>159</sup>

One additional consequence of trespass arrests has a reverberating impact on the lives of people arrested and the lives of others in their communities.<sup>160</sup> Though not often listed among impacts considered "collateral" to a criminal charge, the trauma and humiliation of a person's removal at the hands of city police may potentially have a long-

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151. *Id.* In certain places, individuals are unrepresented at bond hearings. Natapoff, *supra* note 131, at 129.

152. Natapoff, *supra* note 131, at 104.

153. Joe, *supra* note 124, at 763–64.

154. Jessica Gillespie, *Criminal Trespassing Law*, NOLO, <https://www.nolo.com/legal-encyclopedia/criminal-trespassing-law.html> (last visited Oct. 5, 2019).

155. *Id.*

156. *Id.*

157. Br. for Pet'r, *supra* note 77, at 5.

158. *Id.*; Associated Press, *supra* note 31 (pointing out that Boynton had to move to Tennessee to work until he was admitted to the Alabama Bar in 1966).

159. Associated Press, *supra* note 31.

160. Abigail A. Sewell & Kevin A. Jefferson, *Collateral Damage: The Health Effects of Invasive Police Encounters in New York City*, J. OF URBAN HEALTH 42, 43, Jan. 15, 2016, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4824697/>.



lasting negative effect on that person's life.<sup>161</sup> Enforcement of low-level offenses in particular provides police with the most discretion.<sup>162</sup> Police decide if an act is a violation and whether police intervention is necessary.<sup>163</sup> At this level, police certainly exercise a good deal of discretion about whether to make an arrest.<sup>164</sup> In considering low-level "quality of life" charges like trespass in a commercial establishment, courts may make decisions about sufficiency of complaints, whether they should be dismissed, and, in some instances, whether to convict.<sup>165</sup>

Experts have demonstrated that this discretion in enforcement of *malum prohibitum* crimes has a disproportionate impact on racial minorities and others acting outside of codes of race, gender, class hierarchies, and social codes.<sup>166</sup> Many trespass statutes suffer from vagueness, leaving people unable to conform to laws and police unable to gauge with accuracy when to apply the statute.<sup>167</sup> In practice, the state often applies trespass law in quasi-public spaces in a manner to control and contain marginalized groups.<sup>168</sup> Trespass enforcement can be used as a way to enforce spatial exclusion.<sup>169</sup> Exclusion is also a means for the state to provide reassurance and comfort to dominant, majority populations.<sup>170</sup> Such reassurances are seen as important, within urban centers especially, to drawing and maintaining affluent, white residents and businesses that will attract them.<sup>171</sup>

Trespass enforcement appears in different forms in commercial places.<sup>172</sup> General trespass signage is one method of discriminatory enforcement in commercial establishments.<sup>173</sup> Here, the assessments of trespass lie solely with the police.<sup>174</sup> In many places, as formerly

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161. *Id.*

162. *See* *Atwater v. Lago Vista*, 532 U.S. 318, 343 (2001).

163. *See id.* at 348–49.

164. *See id.* at 354.

165. Roberts, *supra* note 124, at 175, 195.

166. *See* Expert Report of Margo L. Frasier, J.D., at 58–60, *Collins v. Milwaukee*, (E.D. Wis. Feb. 20, 2018) (17-CV-00234-JPS) [hereinafter Expert Report of Frasier].

167. *See* Plaintiff's Complaint, ¶¶ 39–40, *Weber v. Grand Rapids* (W.D. Mich. May 1, 2013) (1:13-cv-00469) [hereinafter Pl.'s Compl.].

168. *See id.* ¶¶ 4–5.

169. Beckett & Herbert, *supra* note 23, at 15.

170. *Id.* at 17.

171. *See id.*

172. *See* Tracy Jan & Rachel Siegel, *Starbucks Arrests: Who Gets to Decide Whether You're a Patron or a Trespasser?*, WASH. POST. (Apr. 17, 2018), [https://www.washingtonpost.com/business/economy/starbucks-arrests-who-gets-to-decide-whether-youre-a-patron-or-a-trespasser/2018/04/17/f0aa99de-41ac-11e8-ad8f-27a8c409298b\\_story.html](https://www.washingtonpost.com/business/economy/starbucks-arrests-who-gets-to-decide-whether-youre-a-patron-or-a-trespasser/2018/04/17/f0aa99de-41ac-11e8-ad8f-27a8c409298b_story.html).

173. Saidel-Goley & Singer, *supra* note 46, at 450–51.

174. *See, e.g., supra* note 167 ¶ 5, *Weber v. Grand Rapids*, (W.D. Mich. May 1, 2013) (1:13-cv-00469).

practiced in Michigan, the stores have agreements—letters of intent to trespass, with the police department—that officers will themselves assess trespass claims by identifying unwanted people on the commercial premises.<sup>175</sup> Before the practice was challenged and reformed in Grand Rapids, officers would see people on property, or crossing property, and decide to stop them for suspicion of trespass.<sup>176</sup> There, proprietors outsourced consideration of what was desirable to police—who in turn were utilizing superficial methods to discern legitimate consumers.<sup>177</sup> When officers used their discretion to identify people they believed were not legitimately at the establishment, fifty-nine percent of those people were African-American.<sup>178</sup> This rate seems even more problematic considering only approximately eighteen percent of Grand Rapids's population is African-American.<sup>179</sup>

Discriminatory trespass claims in commercial establishments emerge in other forms as well. In some stores, operators will request that police or store security hand out “trespass notices” to individuals that they deem suspicious.<sup>180</sup> The notice serves as a warning that its recipient is not welcome in the store, and if the recipient were to step foot back into the establishment, they would be trespassing. The rationale behind the notices is that they serve to exclude people suspected of misbehavior, such as theft or disruption, but not caught or prosecuted for the behavior.<sup>181</sup> Thus, the managers initially assess which individuals they no longer want present in the establishment—and threaten them with trespass prosecution, even if there is not cause for exclusion.<sup>182</sup> In Dallas, a mother at a grocery store was shocked to see her teenage sons stopped and handed notices.<sup>183</sup> In confronting the manager, she was told that her sons were given notices that they could

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175. See *Id.* ¶ 4.

176. See *Id.* ¶¶ 46–47, 63–65.

177. *Id.* ¶¶ 4–5.

178. Though the city is only twenty-one percent African-American. Jan & Siegel, *supra* note 172.

179. *Grand Rapids, Michigan*, CITY-DATA, <http://www.city-data.com/city/Grand-Rapids-Michigan.html> (last visited Oct. 26, 2019).

180. See, e.g., Demond Fernandez, *Mesquite Family Accuses Kroger Manager of Racially Profiling Teenage Boys*, ABC News WFAA (Jan. 4, 2019), <https://www.wfaa.com/article/news/mesquite-family-accuses-kroger-manager-of-racially-profiling-teenage-boys/287-626251526>.

181. In some instances, the notice is provided to people who have been arrested for theft in the establishment. In these instances, the notice serves to establish trespass as a predicate for burglary should the person be caught in the store, with an alleged intent to steal, again. See Vanessa Brown, *Mesquite Teens Accused of Shoplifting at Kroger Say They Were Racially Profiled*, NBC News DFW (Jan. 5, 2019), <https://www.nbcdfw.com/news/local/Mesquite-Teens-Accuse-Kroger-of-Racial-Profiling-503959051.html>.

182. See *id.*

183. Fernandez, *supra* note 180.

not reenter the store without the reentry constituting trespass.<sup>184</sup> The store was one of the few grocers in their neighborhood.<sup>185</sup> In pursuing management's rationale, the mother was told that her sons "looked like they could be shoplifters."<sup>186</sup> If the children reentered the store, they would then be subject to trespass arrest, even without a specific complaint from the manager.<sup>187</sup>

Finally, there are cases like *Boynton*, where the proprietor uses discriminatory factors to "uninvite" a consumer from the establishment.<sup>188</sup> The police do not make the initial assessment of who is a trespasser but rely on the manager's complaint. The manager, in identifying the target as unwelcome in the store, thus makes out an element of trespass. Management's statements directing the target to leave (if any) support the store's allegation that the person knowingly remains on premises, though the license to remain has been withdrawn. This assists in providing a prima facie case for trespass. The real threat of police intervention is potent enough that it alone may compel people to concede to leaving an establishment where the exclusion is based on racist premises.

In each of these scenarios, the threat or reality of police enforcement of discriminatory trespass exists. Police enforcement of claims—"state action"—compounds the indignity of these discriminatory acts. It legitimizes societal prejudices about the value and humanity of African-Americans and other racial minorities. Each form relies on policing. In some cases, where general "no trespass" signage exists, police are the arbiters of determining who is a trespasser. In other instances, police can use previous complaints to make a trespass arrest without the manager present. Finally, police serve as responders to new and direct complaints of a commercial establishment's management.

Some may argue that the last example, a response to an immediate complaint, is where police have the least discretion. Those that would argue against holding the state accountable for these arrests might state that if there is probable cause that a person is undesired in a private space, even if open to the public, the police must take action.<sup>189</sup> In recent incidents, representatives from the police departments have even

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184. Brown, *supra* note 181.

185. The population of Mesquite was approximately 144,000 in 2017. *Mesquite, Texas*, CITY-DATA, <http://www.city-data.com/city/Mesquite-Texas.html>, (last visited Oct. 26, 2019).

186. Fernandez, *supra* note 180.

187. Brown, *supra* note 181.

188. See Fernandez, *supra* note 180.

189. See, e.g., Jan & Siegel, *supra* note 172.

expressed sympathy for targets of these claims and reprimanded stores.<sup>190</sup> Officers and departments are aware of the injustices, at times even apologizing to people as they arrest or remove them.<sup>191</sup> Yet agencies may avoid addressing the role of officers as enforcers of discriminatory trespass claims.<sup>192</sup> In *Boynton v. Virginia*, the Petitioner's Brief points out that the state's application of a criminal trespass statute would not be deemed acceptable in most commonwealth countries, with the exception of apartheid South Africa.<sup>193</sup> There, "a statute, directed against Natives makes criminal deeds like petitioner's."<sup>194</sup>

The harm of allowing this type of policing of trespass in private establishments is vast, and often ineffable. Through trespass law, African-American enjoyment of service establishments is under constant regulation—the experience of being in spaces typically open to the public carries with it a constant risk of police interaction.<sup>195</sup> People live with the fear that the general invitation to enter an establishment could be withdrawn at any time and without notice.<sup>196</sup> It causes people to walk through department stores with their hands open (theft-free) and visible, hesitate to stop into stores to ask to use the facilities, and guard against public displays of affection from partners.<sup>197</sup> Despite behavioral accommodations, many people still experience exclusion and the threat of its enforcement by the state.<sup>198</sup>

#### VIII. COMMUNITY HEALTH RAMIFICATIONS OF STATE-ENFORCED DISCRIMINATORY TRESPASS CLAIMS

The impact is not as mundane as over-vigilance in public. Discriminatory behavior and police enforcement have physical and mental health ramifications.<sup>199</sup> Public health researchers have found connections between the burden of social discrimination, overly

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190. See, e.g., Joe Hernandez, *Philly Police Chief's Apology Over Starbucks Arrests Met with Demands to Fix What Went Wrong*, WHYY (Apr. 19, 2018), <https://whyy.org/segments/ppd-chief-says-he-failed-miserably-in-addressing-starbucks-arrests/>.

191. *Id.*

192. Expert Report of Frasier, *supra* note 166, at 12.

193. Br. for Pet'r, *supra* note 77, at 6.

194. *Id.* at 26.

195. Danner, *supra* note 25.

196. *Id.*

197. *Id.*

198. Jan & Siegal, *supra* note 172.

199. Sirry Alang et al., *Police Brutality and Black Health: Setting the Agenda for Public Health Scholars*, 107 AM. J. PUB. HEALTH 662, 662–63 (2017).

invasive policing, and the health of minority communities.<sup>200</sup> This burden affects mental health, often leading to depression, trauma, and anxiety.<sup>201</sup>

Stressors related to these discriminatory experiences also affect hormone production, impacting heart rate and other organs and systems in the body.<sup>202</sup> The “allostatic load,” meaning enhanced wear and tear on the body, causes organ deterioration and disease, and eventually impacts mortality rates for African-Americans generally experiencing discrimination and those susceptible to policing.<sup>203</sup> The risk of police-enforced exclusion in an establishment is one factor that still looms over and has tremendous health impacts on many minority groups.<sup>204</sup>

Perhaps the *Boynton* Court did not extrapolate from all of these additional impacts at the intersection of social discrimination and invasive policing. However, the decision comes after *Brown v. Bd. of Educ.*, where studies on the psychological impact of segregation made a heavy impact on the Court.<sup>205</sup> Nonetheless, the *Boynton* Court does argue: “Any weighing of reasonable alternative action that might have been taken by petitioner . . . shows that his only choice was to remain hungry or submit to racial segregation, inconvenience, and humiliation.”<sup>206</sup>

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200. *Id.* at 663. Stating:

But when the threat becomes reoccurring and persistent—as is the case with police brutality—the survival process becomes dangerous and causes rapid wear and tear on body organs and elevated allostatic load. Deterioration of organs and systems caused by increased allostatic load occurs more frequently in Black populations and can lead to conditions such as diabetes, stroke, ulcers, cognitive impairment, autoimmune disorders, accelerated aging, and death.

*Id.*

201. Sewell & Jefferson, *supra* note 160, at 543.

202. Arline T. Geronimus et al., “Weathering” and Age Patterns of Allostatic Load Scores Among Blacks and Whites in the United States, 96 AM. J. PUB. HEALTH 826, 826 (2006); O. Kenrick Duru et al., *Allostatic Load Burden and Racial Disparities in Mortality*, 104 J. NAT’L MED. ASS’N 89, 89 (2012).

203. See also Damon Young, *Black Women Are People. Expecting Them to Be Our Saviors and Superheroes Is Killing Them*, THE ROOT (July 5, 2018, 5:11 PM), <https://verysmartbrothas.theroot.com/black-women-are-people-expecting-them-to-be-our-savior-1827372317>.

204. Sewell & Jefferson, *supra* note 160, at 543; Geronimus et al., *supra* note 202, at 832.

205. “The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954) (citing to Dr. K. B. Clark’s study: “Effect of Prejudice and Discrimination on Personality Development” (Mid-century White House Conference on Children and Youth (1950))).

206. Br. for Pet’r, *supra* note 77, at 25.

The Court did not offer any reflection upon the impact of enforcement of segregation on health and psychological well-being. Could the country have avoided the harassment of African-Americans in establishments today if the Court had contemplated trespass enforcement as an Equal Protection violation? Some, like Boynton's attorneys, guess that if the Court were limited to the Equal Protection claim, the Court never would have decided in Boynton's favor.<sup>207</sup>

#### IX. BOYNTON V. VIRGINIA'S IMPACT ON SOCIAL CHANGE

I see *Boynton v. Virginia* as a clear link between the blatant segregation policies of commercial establishments of the past and state regulation of trespass among people of color and other targeted minorities today. Businesses today may be required to allow African-Americans in the door, but employees can ask them to leave if their presence there triggers the biases of those that run the establishments. Marginalized communities may not be relegated to a different diner—but their access and ability to enjoy a facility without risk makes it a “different diner” than that of patrons racially designated “white.”<sup>208</sup>

Traditionally, mistreated African-Americans could do little, beyond boycotting institutions, to guarantee relief from discriminatory treatment in commercial establishments.<sup>209</sup> What are other options for alleviating the harm of these discriminatory trespass allegations? A few options might mitigate the depths of the harm caused. Cities could consider decriminalizing basic trespass claims in commercial establishments; ensuring police use greater discretion before acting on trespass claims in commercial establishments; or offering incentives to businesses that self-regulate against discriminatory exclusion of patrons.

Decriminalization would partially address some of the concerns of consumers in places open to the public. The process would require local legislators to either remove this type of trespass from the penal code or create policies preventing local agencies from making arrests for this form of trespass. With the multitude of non-violent misdemeanors on the books, courts are often overloaded with low-level cases.<sup>210</sup> In

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207. Pollak, *supra* note 21, at 44.

208. Jan & Siegal, *supra* note 172.

209. Regina Austin, “A Nation of Thieves”: Securing Black People's Right to Shop and Sell in White America, 1994 UTAH L. REV. 147, 166–67.

210. Natapoff, *supra* note 131, at 104.

addition, low-level, public order misdemeanors are ripe for abuses of discretion—particularly where police are gauging malfeasance. On one hand, decriminalization may not result in fewer police interactions at first (the consequences would simply be civil rather than criminal). Stores may still attempt to exclude patrons in ways that are humiliating and demeaning. On the other hand, the depth of harm caused by a criminal arrest and conviction may be avoided, or at least mitigated.

As an alternative, police may consider applying more discretion in addressing these concerns. In essence, state action by police enforcement (and the courts) gives heft to the private discrimination. At times, officers may decline action or attempt to mediate a dispute between a business owner and a person accused of trespassing.<sup>211</sup> However, this type of one-off discretion provides no guidance as to when consumers should expect police intervention.<sup>212</sup> Some law enforcement agencies have reconsidered blind action.<sup>213</sup> Instead, before considering action, office policy indicates the steps officers must take that are specific to establishments open to the public (rather than trespass within the home).<sup>214</sup> Steps may include clarifying communication or ensuring that the target is aware of the exclusion.<sup>215</sup> While these steps are necessary to slowing down the process and potentially avoiding arrests, they may miss two vital components of the problem. First, the humiliation of police intervention is still present.<sup>216</sup> Second, police are

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211. Michaela Winberg, *Philly Police Get New Rules for 'Defiant Trespass' After Starbucks Arrests*, BILLYPENN (June 8, 2018, 1:45 PM), <https://billypenn.com/2018/06/08/philly-police-get-new-rules-for-defiant-trespass-after-starbucks-arrests/>.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* Then, the policy lays out the sequence Philly police should follow:

1. Attempt to deescalate the situation
2. Involve a PPD officer trained in crisis intervention
3. Request a supervisor to respond to the location

*Id.* All the while, officers must ensure they've met five other criteria:

1. The individual must know and understand they're not allowed on the property;
2. Police must have notified the individual that they're not allowed on the property;
3. The individual has to have defied that order and refused to leave;
4. The individual must have explicitly communicated their refusal to leave to the police officer; and
5. The owner of the property (or another authorized person) must tell police that an order to leave the property was communicated and denied.

*Id.*

216. In lieu of police, the city could utilize professional mediators. The idea of mediators taking on low-level policing interactions is one that has been floated in communities that have historically had negative police interactions. Though usually applied in more neighborhood-based context—some advocates promote police substitutes to resolve conflicts. One example provided is The

not required to gauge the discriminatory nature of the complaint.<sup>217</sup> They still act on complaints if the other facts are met.<sup>218</sup> These types of policies would not have prevented the arrest, prosecution, and conviction of Boynton.

Finally, states may reward or offer incentives to companies that engage actively in destroying harmful biases amongst their management. Training in bias may help in identifying when managers, or customers, are reacting differently to African-American consumers based on crude stereotypes.<sup>219</sup> The history of racial exclusion and its harms can provide context for what may appear to be more innocuous (or intuitive) managerial decisions. An explicit emphasis on discriminatory exclusion may provide for safer spaces for African-American consumers. Training or other demonstrable results may be tied to city licensing or warrant other incentives from the locality.

The history of *Boynton v. Virginia* offers another insight. Within the narrow bounds of what the Court deemed impermissible discrimination, civil rights advocates took inspiration.<sup>220</sup> The decision in *Boynton v. Virginia* was narrow, but activists for civil rights around the country took advantage of the rights protected therein. Freedom Riders, people of different ethnicities, ate together in “White Only” sections of cafés, waited together in segregated terminals, and rode together on buses subject to the Interstate Commerce Act.<sup>221</sup> Freedom Riders like Diane Nash and John Lewis challenged state enforcement of discrimination at bus terminals as impermissible under *Boynton v. Virginia*.<sup>222</sup>

*Boynton* is a reminder that there may be limits to the protections advocates might expect from the courts alone. The hesitance to designate the enforcement of racist trespass claims as “state action” exists today, though the motor behind the harm is still the potential for

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Interruptions in Los Angeles. Jose Martin, *Policing Is a Dirty Job, But Nobody's Gotta Do It: 6 Ideas for a Cop-Free World*, ROLLINGSTONE (Dec. 16, 2014, 5:48 PM EST), <https://www.rollingstone.com/politics/politics-news/policing-is-a-dirty-job-but-nobodys-gotta-do-it-6-ideas-for-a-cop-free-world-199465/>.

217. Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 421 (2010) (noting “[t]he failure to consider the racial dimensions of space also obscures the role of space in producing race and the extent to which race itself is an expression of spatial power”).

218. Winberg, *supra* note 211.

219. Boddie, *supra* note 217, at 439 (noting “people perceive, process, and retain information about particular objects by grouping them into categories. [A] schema operates in the background of our conscious attitudes and thinking. As a result, we are predisposed to make certain racial assumptions without even knowing it.”).

220. *Freedom Rides*, *supra* note 13.

221. *Id.*

222. *Id.*



police intervention. In many instances, the use of state agents also deepens the negative health indicators from unwanted police interactions.<sup>223</sup> Certainly, courts could push facets of the legal systems to use their discretion and limit enforcement of discriminatory trespass claims. Perhaps courts can direct remediation from those that do attempt to exclude people. To demonstrate the true harm of discrimination, the Freedom Riders had to push the people of the country further than the Court's ruling.<sup>224</sup> The Riders occupied prohibited spaces and refused to align their identities with dominant social expectations.<sup>225</sup> They risked their lives and demonstrated on a global scale the quantum of harm that occurred to people through discriminatory treatment in public establishments.<sup>226</sup> *Boynton v. Virginia* was the spark, but it could not set aflame the country's segregation regime without the support of the people who believed in the legitimacy of Bruce Boynton's Equal Protection argument. It is an argument that is still pertinent to minorities under threat of trespass charges in public establishments today.

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223. Alang et al., *supra* note 199, at 662–63.

224. *Freedom Rides*, *supra* note 13.

225. *Id.*

226. *Id.*