Concerning the reunification of Europe. These proposals will almost certainly strike a responsive chord among many Germans and Central Europeans. It is difficult at present to guess what they will be; much will depend on the general international context. But broadly speaking there are two possibilities: if world tensions increase de Gaulle might make proposals which he knew were unacceptable to the USSR, but which he thought would win enthusiastic approval in West Germany and perhaps elsewhere. Alternatively, if the context is of detente, the French may advance moderate proposals designed to protect the present territorial integrity of Poland and even transitionally the existence of East Germany (to which de Gaulle once referred as "Saxony and Prussia"). These proposals might include realistic steps towards European reunification, such as economic and political ties, presumably of an intermediate and indirect nature, between East Europe, Russia, and Western Europe. Coming from de Gaulle such a proposal might be palatable to the West Germans, presumably by then embittered with American passivity. Whatever the nature of his proposals, the US would have no choice but to follow suit and to support his initiative. Anything less would be tantamount to supporting the division of Europe. The US clearly could not afford to do that. But supporting de Gaulle would mean the abdication of American leadership and vindication of President de Gaulle's policies since 1961.

Given this alternative, the US must design its own policy for reuniting Europe. Such a policy need not be provocative and should not ignore the Soviet stake in Central Europe. Indeed, its purpose should not be the splitting of individual East European states from the USSR, but rather encouraging the entire Soviet bloc into a closer relationship with the rest of Europe. In many respects all of these states share a common European heritage, a common religious past and a common sense of identification. Conflict with the Chinese has underlined this.

The US should, therefore, propose new relationships between the Common Market and the Communist states, preferably taking advantage of some symbolic moment to speak through President Kennedy. The aim should be to improve the standard of living and the way of life in the Communist states, in keeping with Western values and without the coercion and terror which still characterize Communist policies. The US should open an articulate dialogue with Communist societies and should address itself to the internal tensions and difficulties which these societies face. There should be greater effort to discuss constructively and openly the internal difficulties which the Communist states face and to suggest ways of overcoming these difficulties in a manner which encourages the evaluation of these societies into more acceptable forms. Above all, we must address ourselves more to the restless youth, particularly in the Soviet Union. They are thirsting for knowledge about the world and also about their own past. Books and materials about Stalinism, in Russian, are eagerly sought by a generation anxious to understand why it happened and determined never to let it happen again. We must keep open channels of communication with the Communist countries, and speak directly to the peoples now under Communist rule. Instead of merely hoping for the political leaders in these countries to bring them into the Western camp, we must persistently invite them to join in a constructive all-European undertaking, thereby stimulating popular pressure on the Communist leaders. If the test-ban agreement leads the US to such an affirmative and peaceful engagement in the future of all Europe, it will indeed be a landmark in the history of post-war international relations.

Civil Rights—A Challenge

by Robert Bork

Passions are running so high over racial discrimination that the various proposals to legislate its manifestations out of existence seem likely to become textbook examples of the maxim that great and urgent issues are rarely discussed in terms of the principles they necessarily involve. In this case, the danger is that justifiable abhorrence of racial discrimination will result in legislation by which the morals of the majority are self-righteously imposed upon a minority. That has happened before in the United States—Prohibition being the most notorious instance—but whenever it happens it is likely to be subversive of free institutions.

Instead of a discussion of the merits of legislation, of which the proposed Interstate Public Accommodations
Act outlawing discrimination in business facilities serving the public may be taken as the prototype, we are treated to debate whether it is more or less cynical to pass the law under the commerce power or the Fourteenth Amendment, and whether the Supreme Court is more likely to hold it Constitutional one way or the other. Heretical though it may sound to the constitutional sages, neither the Constitution nor the Supreme Court qualifies as a first principle. The discussion we ought to hear is of the cost in freedom that must be paid for such legislation, the morality of enforcing morals through law, and the likely consequences for law enforcement of trying to do so.

Few proponents of legislation such as the Interstate Public Accommodations Act seem willing to discuss either the cost in freedom which must accompany it or why this particular departure from freedom of the individual to choose with whom he will deal is justified. Attorney General Kennedy appears to recognize but to wish to avoid these questions, for, in speaking on behalf of the bill before a congressional committee, he went so far as to state that the law would create no precedent. That of course is nothing less than an admission that he does not care, to defend the bill on general principles.

There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate. In part the willingness to overlook that loss of freedom arises from the feeling that it is irrational to choose associates on the basis of racial characteristics. Behind that judgment, however, lies an unexpressed natural-law view that some personal preferences are rational, that others are irrational, and that a majority may impose upon a minority its scale of preferences. The fact that the coerced scale of preferences is said to be rooted in a moral order does not alter the impact upon freedom. In a society that purports to value freedom as an end in itself, the simple argument from morality to law can be a dangerous non sequitur. Professor Mark DeWolf Howe, in supporting the proposed legislation, describes southern opposition to “the nation’s objective” as an effort “to preserve ugly customs of a stubborn people.” So it is. Of the ugliness of racial discrimination there need be no argument (though there may be some presumption in identifying one’s own hotly controverted aims with the objective of the nation). But it is one thing when stubborn people express their racial antipathies in laws which, prevent individuals, whether white or Negro, from dealing with those who are willing to deal with them, and quite another to tell them that even as individuals they may not act on their racial preferences in particular areas of life. The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.

Freedom is a value of very high priority and the occasions upon which it is sacrificed ought to be kept to a minimum. It is necessary that the police protect a man from assault or theft but it is a long leap from that to protection from the insult implied by the refusal of another individual to associate or deal with him. The latter involves a principle whose logical reach is difficult to limit. If it is permissible to tell a barber or a rooming house owner that he must deal with all who come to him regardless of race or religion, then it is impossible to see why a doctor, lawyer, accountant, or any other professional or business man should have the right to discriminate. Indeed, it would be unfair discrimination to leave anybody engaged in any commercial activity with that right. Nor does it seem fair or rational, given the basic premise, to confine the principle to equal treatment of Negroes as customers. Why should the law not require not merely fair hiring of Negroes in subordinate positions but the choice of partners or associates in a variety of business and professional endeavors without regard to race or creed? Though such a law might presently be unenforceable, there is no distinction in principle between it and what is proposed. It is difficult to see an end to the principle of enforcing fair treatment by private individuals. It certainly need not be confined to racial or commercial matters. The best way to demonstrate the expansiveness of the principle behind the proposed legislation is to examine the arguments which are used to justify it.

Perhaps the most common popular justification of such a law is based on a crude notion of waivers: insistence that barbers, lunch counter operators, and similar businessmen serve all comers does not infringe their freedom because they “hold themselves out to serve the public.” The statement is so obviously a fiction that it scarcely survives articulation. The very reason for the proposed legislation is precisely that some individuals have made it as clear as they can that they do not hold themselves out to serve the public.

A second popular argument, usually heard in connection with laws proposed to be laid under the Fourteenth Amendment, is that the rationale which required the voiding of laws enforcing segregation also requires the prohibition of racial discrimination by business licensed by any governmental unit because “state action” is involved. The only legitimate thrust of the
"state action" characterization, however, is to enable courts to see through governmental use of private organizations to enforce an official policy of segregation. There is a fundamental difference between saying that the state cannot turn over its primary election process, which is actually the only election that matters, to the "private" and all-white Democratic Party and saying that a chiropodist cannot refuse a Negro patient because a state board has examined him and certified his competence. The "state action" concept must be confined to discerning state enforcement of policy through a nominally private agency or else it becomes possible to discern the hand of the state in every private action.

One of the shabbiest forms of "argument" is that endorsed by James Reston when he described the contest over the public accommodations bill as one between "human rights" and "property rights." Presumably no one of "liberal" views has any difficulty deciding the question when so concisely put. One wishes nonetheless, that Mr. Reston would explain just who has rights with respect to property other than humans. If A demands to deal with B and B insists that for reasons sufficient to himself he wants nothing to do with A, I suppose even Reston would agree that both are claiming "human rights," and that this is in no way changed if one of the humans is colored and the other white. How does the situation change if we stipulate that they are standing on opposite sides of a barber chair and that B owns it?

A number of people seem to draw a distinction between commercial relationships and all others. They feel justified, somehow, in compelling a rooming house owner or the proprietor of a lunch counter to deal with all comers without regard to race but would not legislate acceptance of Negroes into private clubs or homes. The rationale appears to be that one relationship is highly personal and the other is just business. Under any system which allows the individual to determine his own values that distinction is unsound. It is, moreover, patently fallacious as a description of reality. The very bitterness of the resistance to the demand for enforced integration arises because owners of many places of business do in fact care a great deal about whom they serve. The real meaning of the distinction is simply that some people do not think others ought to care that much about that particular aspect of their freedom.

One of the Kennedy administration's arguments for the bill is that it is necessary to provide legal redress in order to get the demonstrators out of the streets. That cannot be taken seriously as an independent argument. If southern white racists - or northern ones, for that matter - were thronging the streets, demanding complete segregation of commercial facilities, it is to be hoped that no responsible politician would suggest passing a law to enable them to enforce their demands in court. In this connection, it is possible to be somewhat less than enthusiastic about the part played by "moral leaders" in participating in demonstrations against private persons who discriminate in choice of their patrons. It feeds the danger of the violence which they are the first to deplore. That might nevertheless be tolerable if they were demonstrating against a law that coerced discrimination. They are actually part of a mob coercing and distributing other private individuals in the exercise of their freedom. Their moral position is about the same as Carrie Nation's when she and her followers invaded saloons.

Though the basic objection is to the law's impact upon individual liberty, it is also appropriate to question the practicality of enforcing a law which runs contrary to the customs, indeed the moral beliefs, of a large portion of the country. Of what value is a law which compels service to Negroes without close surveillance to make sure the service is on the same terms given to whites? It is not difficult to imagine many ways in which barbers, landlords, lunch counter operators, and the like can nominally comply with the law but effectively discourage Negro patrons. Must federal law enforcement agencies become in effect public utility commissions charged with the supervision of the nation's business establishments or will the law become an unenforceable symbol of hypocritical righteousness?

It is sad to have to defend the principle of freedom in this context, but the task ought not to be left to those
THE NEW REPUBLIC

southern politicians who only a short while ago were defending laws that enforced racial segregation. There seem to be few who favor racial equality who also perceive or are willing to give primacy to the value of freedom in this struggle. A short while back the majority of the nation's moral and intellectual leaders opposed all the manifestations of "McCarthyism" and quite correctly assured the nation that the issue was not whether communism was good or evil but whether men ought to be free to think and talk as they pleased. Those same leaders seem to be running with the other pack this time. Yet the issue is the same. It is not whether racial prejudice or preference is a good thing but whether individual men ought to be free to deal and associate with whom they please for whatever reasons appeal to them. This time "stubborn people" with "ugly customs" are under attack rather than intellectuals and academicians; but that sort of personal comparison surely ought not to make the difference.

The trouble with freedom is that it will be used in ways we abhor. It then takes great self-restraint to avoid sacrificing it, just this once, to another end. One may agree that it is immoral to treat a man according to his race or religion and yet question whether that moral preference deserves elevation to the level of the principle of individual freedom and self-determination. If every time an intensely-felt moral principle is involved, we spend freedom, we will run short of it.

Civil Rights—A Reply

The New Republic's commentary on civil rights over the years should make it obvious that the editors disagree emphatically with Mr. Bork's thesis. Yet his fears about the proposed legislation are shared by many Americans, including many readers of the New Republic, so they deserve both a forum and an answer.

In discussing the law we share Justice Holmes' preference for appeals to experience rather than logic. In the light of recent American experience Mr. Bork's argument seems to have several defects.

First, Mr. Bork speaks about the "freedom of the individual," as if the owners of hotels, motels, restaurants and other public accommodations were today legally free to serve whomsoever they please. This, as everyone knows, is seldom the case. For centuries English common law obligated innkeepers to accommodate any well-behaved traveller, and his horses. Most states have today embodied this tradition in public accommodation statutes. In the North, these statutes generally require a restaurant, hotel or motel to accept all sober and orderly guests, regardless of race. In the South, Jim Crow legislation enacted at the end of the nineteenth century until recently required the owners of public establishments to 'segregate' their facilities. The Supreme Court has now declared the Jim Crow statutes unconstitutional, but even today the owner who wants to serve both Negroes and whites is likely to have difficulty exercising his newly acquired "right" in many areas. Mr. Bork would presumably deplore the whole tradition that "public accommodations" must provide public service as well as private profit. But he cannot maintain that new legislation in this field would mean a sudden increase of government intervention in private affairs. The Administration's civil rights bill would simply extend to the national level principles and practices long employed locally.

Experience also argues against Bork's equation between the distress caused by having to serve a Negro and the distress caused by refusing to serve him. Both exist, and both deserve consideration, but no amount of rhetoric about freedom can give them equal weight. Despite what Mr. Bork says, the "loss of freedom" caused by having to serve Negroes is in most cases pecuniary, not personal. If personal freedom were to be protected we would need legislation allowing individual waitresses, hotel clerks and charwomen to decide whom they would serve and whom they would not. The fact is, however, that such people must serve whomsoever their employer tells them to serve, and refuse whomsoever he tells them to refuse. The right to segregate is, as everyone but Mr. Bork admits, a right deriving solely from title to property. It is not the same, but unless sacrosanct than other economic privileges. It can be regulated in the same way that the right to build a restaurant on one's residential property is regulated.

There are, of course, some owners of public establishments who have personal contact with the clients—the much debated case of Mrs. Murphy's boarding house. Perhaps such establishments should be exempt from the proposed public accommodations law. But even here the claims of private freedom must be weighed against the claims of public convenience.

Government without principle ends in shipwreck; but government according to any single principle, to the exclusion of all other, ends in madness. Mr. Bork's principle of private liberty is important, and his distrust of public authority often justified. But to apply this principle in disregard of all others would today require the repeal of the industrial revolution. Perhaps, however, that is what Mr. Bork wants.

THE EDITORS
Way of Death

Sirs:

James Ridgeway, reviewing Jessica Mitford's *The American Way of Death* (August 31) wonders what the undertaker studies in his professional school. The University of Minnesota-Fall Quarter Class Schedule lists the following courses: Introduction to Embalming and Mortuary Science; The Underworld and Behavior; and Psychology of Funeral Service.

Evidently prospective practitioners learn in the latter that a costly wake requiring some sacrifice "permits the survivors to store for any real or fancied neglect of the deceased..." That this bit of psychology is probably valid says more about our society than about the funeral racket.

C. C. Elliott

Minneapolis

Civil Rights - A Challenge

Sirs:

Although your editorial reply was a refreshing response to Robert Bork's thesis ("Civil Rights - A Challenge," August 31) certain of his points could be met closer to their visceral base: 1) By writing off legislation which abolishes racial discrimination in public accommodations as mere "moral preference," Mr. Bork overstates the dichotomy between morals and law. "Law," said Mr. Justice Cardozo, "is an expression of customary morality which develops silently and unconsciously from one age to another. But law is also a conscious or purposed growth, for the expression of customary morality will be false unless the mind of the judge (and legislator) is directed to the attainment of the moral end and its embodiment in legal forms." What, indeed, is "law" if it cannot reflect the community's sense of right and wrong?

2) Mr. Bork pinches at the prospect and necessity of defining and delimiting the expression of this "morality" in the form of law, so he draws the line to preclude any expression of it whatsoever by invoking a Lockeian reverence for "property rights." As dissipated as "property rights" have become since Locke first defended them three centuries ago, does anti-discrimination legislation purport to flush them out of existence? The answer is, No. Of course there is some encroachment on "property rights" in this regard. But that is nothing new. There is no "absolute" right to deal with one's property any more than there is an "absolute" freedom of speech, or an "absolute" right of privacy - all cherished rights under our system of law. The issue again is reduced to a balance of interests: the rights of the individual weighing against the interests of the minority as a whole. It is distressing to note that Mr. Bork wishes to tip the scale wholly in favor of an individual "property right" - a narrow preference quite out of line with our historical and moral context.

Evan Y. Semerjian

Belmont, Mass.

September 14, 1965

Typographical Agony

Sirs:

I have been glancing at your issue of August 31 for two days now, studying typographical errors which will no doubt appear in tisbit form in *The New Yorker* soon. Erich Wulff's comments on South Viet Nam appear to have been rushed into print. .. Stanley Kauffmann's review of Mary McCarthy's *The Group,* however, has been butchered in a more interesting fashion...

Victor Dupont
Byram, Connecticut

in reply:

In Kauffmann's review of *The Group,* a misplaced line of type marred the sentence: "Besides the many factual blockbusters, there is a constant peppering with pellets: recipes, fashions, furnishings." The last sentence should have read: "But *The Group* seems to be Miss McCarthy's testimony that she is no longer interested in writing novels. These and other dismal lapses in that issue charge me to the dog days of August and our temporally shrunked staff.

The Editors

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whole series of absurdities, the Bauhaus notes with interest that "autumn of our time; its greatness is affirmed not in the perception of Nature."

"leaves" arc almost wholly an American phenomenon. Political groups and nations in the old days when classical logic was taught as a preparation for Aristotelian philosophy, there was stock in trade of the apprentice logician going home to dazzle his younger siblings with the baffling behavior of the logical paradox. More than any artist or any teacher, Josef Albers has explored that command to teach color. The apprentices are dazzling the youngsters with the tools the master has made.

Despite its farcical reductions to a series of absurdities, the Bauhaus remains one of the great achievements of our time; its greatness is affirmed not by the lakeside apartments in Chicago, but by one's sudden exposure to such a mind as that of Albers. The old academic title, Doctor of Humane Letters, often misused, retains still something of the aspiration of those who devised it. In that sense Josef Albers has been a doctor of humane colors. As with many of his colleagues, we have been enriched by the disaster that brought him to us.

FRANK GETLEIN

Correspondence

Civil Rights - A Rejoinder

Sirs:

Your editorial reply to my article on the public accommodations bill ("Civil Rights - A Challenge," August 51) does not reveal whether you perceive in this case a principle which takes precedence over that of individual liberty, what it is, or why it should prevail. I gather that you feel strongly, but that is not enough. Until one is shown a competing principle, he may be excused his reluctance to sacrifice freedom.

A principle is required because a society which values freedom as well as democracy must face the task of defining its aspects of life in which the majority may properly coerce the individual through law and those in which it may not. Though your reply would indicate it, I find it hard to believe that you are really among those who require no license for coercion other than their own, preference (read "intense moral convictions," if you like). That would make numbers and strength of passion the sole principles of legislation. I think some better standard is both required and attainable. Its precise statement may be beyond our present capabilities, but I suggest that the proposed legislation, which would coerce one man to associate with another on the ground that his personal preferences are not respectable, represents such an extraordinary incursion into individual freedom, and opens up so many possibilities of governmental coercion on similar principles, that it ought to fall within the area where law is regarded as improper.

Your reply on the basis of "experience" also seems deficient. The historical existence of common law duties and local statutes paralleling the proposed federal law does not in any way demonstrate their wisdom or that their principle ought to be extended. Even wider of the mark is your suggestion that personal freedom is not really involved because if it were "we would need legislation allowing individual waitresses, hotel clerks and charwomen to decide whom they would serve and whom they would not." In fact, such persons have precisely that freedom. Your suggestion that they do not can only be supported by equating the individual employer, for whom the waitress need not work, with the government, which no citizen can escape. To employ such an equation is to confess inability to see the difference between a contract and a statute. Insistence that title to property is involved in the right to discriminate with respect to its use advances the argument not one whit. One must certainly own a barber chair in order to refuse to let another man sit in it. But the discovery of something called "property" in the situation does not of itself render the desires of the titleholder inferior to those of every person lacking title. A question of personal freedom is inescapably involved and cannot be excoriated by calling it an "economic privilege" - not even if you say it three times.

Robert H. Bork
Yale Law School

Dropouts and the Draft

Sirs:

On August 17 you published a note, "Dropouts and the Draft." Let me start by analyzing some of the more dubious statements therein:

"Unlike schools, the Army is organized on the assumption that its recruits are dimwits."

Well, I don't know how long it has been since whoever dreamed that sentence up has been subjected to Army training but as of now the Army is organized for training on the basis that its average recruit has the intellectual level of a median high school sophomore or junior. Now while those are admittedly not Olympian heights, they are somewhat