IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1961

No. 91

ROBERT MACK BELL, LOVELLEN P. BROWN, ARIMENTHA D. BULLOCK, ROSETTA GAINEY, ANNETTE GREEN, ROBERT M. JOHNSON, RICHARD McKOY, ALICETEEN E. MANGUM, JOHN R. QUARLES, SR., MURIEL B. QUARLES, LAWRENCE M. PARKER and BARBARA F. WHITTAKER,

Appellants,

—v.—

MARYLAND,

Appellee.

APPEALS FROM THE CRIMINAL COURT OF BALTIMORE (JOSEPH R. BYRNES, JUDGE) AND ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF OF APPELLANTS

JUANITA JACKSON MITCHELL
1239 Druid Hill Avenue
Baltimore, Maryland

TUCKER R. DEARING
627 Aisquith Street
Baltimore, Maryland

JACK GREENBERG
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Appellants

CHARLES L. BLACK, JR.
LEROY D. CLARK
RONALD R. DAVENPORT
Of Counsel

INDEX

TABLE OF CASES

FEDERAL STATUTES

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS

PAGE

OTHER AUTHORITIES

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1961

No. 91

ROBERT MACK BELL, LOVELLEN P. BROWN, ARIMENTHA D. BULLOCK, ROSETTA GAINEY, ANNETTE GREEN, ROBERT M. JOHNSON, RICHARD McKOY, ALICETEEN E. MANGUM, JOHN R. QUARLES, SR., MURIEL B. QUARLES, LAWRENCE M. PARKER and BARBARA F. WHITTAKER,

Appellants,

—v.—

MARYLAND,

Appellee.

APPEALS FROM THE CRIMINAL COURT OF BALTIMORE (JOSEPH R. BYRNES, JUDGE) AND ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF OF APPELLANTS

Statement of the Case

On July 12, 1960, appellants, students attending local schools were indicted by the Baltimore City Grand Jury *for trespassing on the premises of Hooper's Restaurant at* the southwest corner of Fayette and Charles Streets in Baltimore City. They were tried before Judge Byrnes on November 10, 1960, and on March 24, 1961, were found guilty of violating Article 27, section 577 of the Maryland Code, 1957 Edition. Each appellant was given a suspended fine of $10.00 and was ordered to pay costs of Court. On

appeal, this Court affirmed those judgments. On writ of certiorari the Supreme Court of the United States vacated the judgments and remanded the cases for consideration by this Court.

Questions in Controversy

1. Whether the passage of public accommodations laws by the City of Baltimore and the State of Maryland, while the case at bar was on appeal, requires the reversal of appellants' convictions.

2. Whether the passage of the Federal Civil Rights Act of 1964 prior to the final termination of the proceedings of the instant case requires the reversal of appellants' convictions.

Statement of Facts

Hooper's Restaurant is a privately-owned conventional restaurant located at the southwest corner of Fayette and Charles Streets in the City of Baltimore. It is one of several restaurants owned and operated by G. Carroll Hooper. It, along with the other restaurants operated by Mr. Hooper, holds itself open to the public. It is not a private club and there are no signs restricting patronage to members of any particular group or class. Each appellant is a member of the Negro race and a student in Baltimore schools.

On or about June 17, 1960, appellants entered the restaurant while it was open for business and, in the customary fashion of white persons, requested the hostess, Ella Mae Dunlap, to assign them seats at tables for the purpose of being served. Miss Dunlap informed appellants that it was not the policy of the restaurant to serve Negroes, that she could not seat or serve any of the appellants, and asked

appellants to leave. She explained to them that she was following instructions of the owner. Appellants, despite the refusal to serve, persisted in their demands. They moved past Miss Dunlap and took seats at various tables on the main floor and in the basement. Appellants were not served and continued to sit at the tables.

The manager, Albert R. Warfel, and the owner, G. Carrol Hooper, were both called to the scene. They declared that the policy of the restaurant was not to serve any Negroes and requested that appellants leave. Appellants again refused to leave, protesting the discrimination policy of the restaurant, and persisted in their demand for food service. Police officers were called and appeared on the scene. The trespass statute, Article 27, Section 577, of the Maryland Code (1957 Edition) was read to appellants. They were told that they were trespassers, and were asked to leave. Appellants again refused to leave. Mr. Warfel was advised by the police that in order to have appellants ejected by the Baltimore City Police Department it would be necessary for him to obtain warrants for their arrest for trespassing. The police thereupon secured the appellants' names and addresses. Warrants for their arrests were obtained by Mr. Hooper.

The Magistrate at the Central Police Station issued warrants for their arrest and called Robert B. Watts, attorney for appellants in the court below, and advised him that warrants had been issued for their arrest. An agreement was made to produce the appellants in Court several days later. Appellants appeared in Magistrate's Court at the appointed time. Preliminary hearings were waived. Appellants in due course were indicted by the Grand Jury of Baltimore City. Each appellant posted bail bond of $100.00 and by the customary and regular procedure each appellant was brought to trial before Judge Byrnes in the Criminal Court of Baltimore.

Appellants, by Motions for a Directed Verdict, oral arguments and written briefs, raised defenses under the Fourteenth Amendment to the United States Constitution. The motions were overruled. All defenses were denied. Judge Byrnes found that the defendants were "not law breaking people and their action was one of principle rather than any intentional attempt to violate the law." Nevertheless, he found each of the appellants guilty of violating Section 577 of Article 27 of the Maryland Code (1957 Edition).

Appellants' convictions were affirmed by this Court. On June 8, 1962, a petition for writ of certiorari was filed with the Supreme Court of the United States. Also on June 8, 1962, the City of Baltimore enacted Ordinance No. 1249, adding §10A to Art. 14A of the Baltimore City Code (1950 Ed.). On March 29, 1963 the state adopted 49B Md. Code §11 (1963 Supp.), which went into effect on June 1, 1963. Each of the Statutes prohibits a restaurateur from denying service because of race. The Supreme Court granted certiorari and the case was argued. On June 22, 1964, the Supreme Court reversed and remanded the case to this Court. On July 2, 1964, the President signed the Civil Rights Act of 1964, which similarly prohibits the type of discrimination practiced in these cases.

I.

The Conviction of the Appellants for Trespass Cannot Be Sustained Because Their Conduct No Longer Constitutes a Crime Under Present State and Local Law.

Appellants were arrested and convicted of violating Maryland's criminal trespass law, §577 of Article 27 of the Maryland Code, 1957 Edition, which makes it a misdemeanor to "enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent

not to do so." Although this statute remains in effect in Maryland, it is no longer applicable to the conduct for which the appellants were convicted. Therefore in keeping with previous decisions of this Court the convictions of appellants must be reversed.

It is undisputed that the sole reason for the arrest of the appellants is that they were Negroes attempting to eat at a "white" restaurant. The hostess at Hooper's, Edna Mae Dunlap, admitted that appellants were properly dressed, that they were not disorderly, and that had they been white she would have allowed them to enter. Albert R. Warfel, the manager of Hooper's stated that they were refused service solely on the basis of their color. G. Carroll Hooper the president of Hooper Food, Inc., stated that it was the preference of his customers that determined his policy not to serve Negroes. He admitted that appellants were peaceful and that they had a right to peaceful protest.

Since the arrest of the appellants the City of Baltimore has enacted ordinance No. 1249, adding section 10A to Article 14A of the Baltimore City Code (1950 edition). This ordinance prohibits owners and operators of Baltimore places of public accommodation, including restaurants, from denying their service or facilities to any person because of race. A similar public accommodations law was enacted by the State on March 29, 1963.[1] The State law, although not applicable to all counties, is applicable

[1] "Another public accommodations law was enacted by the Maryland Legislature on March 14, 1964, and signed by the Governor on April 7, 1964. This statute re-enacts the quoted provision from the 1963 enactment and gives it statewide application, eliminating the county exclusions. The new statute was scheduled to go into effect on June 1, 1964, but its operation has apparently been suspended by the filing of petitions seeking a referendum. See Md. Const., Art. XVI; Baltimore Sun, May 31, 1964, p. 22, col. 1. However, the Baltimore City ordinance and the 1963 state law, both of which are applicable to Baltimore City, where Hooper's restaurant is located, remain in effect." *Bell* v. *Maryland,* 378 U. S. 226, ——, 12 L. Ed. 2d 822, 825, n. 1.

to Baltimore City and Baltimore County. This statute provides:

> It is unlawful for an owner or operator of a place of public accommodation or agent or employee of said owner or operator because of the race, creed, color, or national origin of any person, to refuse, withhold from, or deny to such person any of the accommodations, advantages, facilities and privileges of such place of public accommodations. For the purpose of this sub title, a place of public accommodation means any hotel, restaurant, inn, motel, or an establishment commonly known or recognized as regularly engaged in the business of providing sleeping accommodations, or serving food, or both, for a consideration and which is open to the general public . . . (49B Md. Code Sec. 11 (1963 Suppl.)).[2]

It is clear that the above ordinance and statute remove the criminal taint from appellants' activities. Thus if the appellants were now to go to Hooper's and were to be denied service solely on the basis of race, not only would they not be subject to criminal sanctions, but the restaurant itself would be in clear violation of both local and State law. Therefore, the question is whether appellants' convictions may stand when, during the process of appeal, the conduct previously labeled criminal is unequivocally made lawful.

The decisions of this Court have historically followed the common law rule "that after a statute creating a crime has been repealed, no punishment can be imposed for any violation of it committed while it was in force." *State* v. *Clifton,* 177 Md. 572, 574, 10 Atl. 2d 703, 704 (1940). In *Keller*

---

[2] This statute went into effect on June 1, 1963, as provided by Sec. 4 of the Act, Acts 1963 c. 227.

v. *State,* 12 Md. 322 (1858) the defendant was indicted and convicted and filed an appeal. After the case was argued before the Court of Appeals the legislature passed an act repealing the act under which the indictment was framed. Although, the former law was not brought to notice of the court until after the defendant's conviction was affirmed, this Court held:

> It is well settled, that a party can not be convicted, after the law under which he may be prosecuted has been repealed, although the offence may have been committed before the repeal. The same principle applies where the law is repealed, or expires pending an appeal on a writ of error from the judgment of an inferior court.

In *Beard* v. *State,* 74 Md. 130, 24 Atl. 700 (1891), the defendant was convicted of keeping a disorderly house. The defendant filed an appeal and the conviction was affirmed. He fled to avoid sentencing. During the period between his fleeing and his capture the legislature passed an act increasing the common law penalty for keeping a disorderly house. Defendant argued that this amendment of the act created a "new" crime thereby barring continuance of his conviction had under the Act prior to this revision. The court rejected the contention holding:

> It will be observed that the act of 1890 does not create, define, enlarge, or diminish, or in any way alter or change, the common law offense. It leaves the offense precisely as it found it and deals only with the punishment, it is confined exclusively to the future, and expressly declared that any person who shall keep—that is to say, who shall after the passage of that act keep—a disorderly house shall be liable to the penalties pro-

> vided by the act. The obvious intention of the legislature in passing it was not to interfere with past offenses, but merely to fix a penalty for future ones. The language employed plainly indicates that the general assembly had references to prospective, and not to consummated offenses; and it is not to be assumed that the legislature purposely enacted the law with a view to release from all punishment a convicted offender, who was at that very time a fugitive from justice. (*Id.* at 133, 701.)

If merely, the penalty had been altered (or increased) as in *Beard,* appellants might have been deprived of a claim that the "crime" no longer existed, but here the substantive crime has been abolished. Thus, the common law rule follows that "the judgment will be reversed, because the decision must be in accordance with the law at the time of final judgment." *Keller* v. *State,* 12 Md. 322, 326, *Smith* v. *Maryland,* 45 Md. 49 (1876).

Maryland has a savings clause "which in certain circumstances 'saves' state convictions from the common law effect of supervening enactments." *Bell* v. *Maryland,* 378 U. S. 226, 12 L. ed. 2d 822, 827. This statute provides:

> The repeal, or the repeal and re-enactment, or the revision, amendment or consolidation of any statute, or of any section or part of a section of any statute, civil or criminal, shall not have the effect to release, extinguish, alter, modify or change, in whole or in part, any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such stat-

> ute, section or part thereof, unless the repealing, repealing and re-enacting, revising, amending or consolidating act shall expressly so provide; and such statute, section or part thereof, so repealed, repealed and re-enacted, revised, amended or consolidated, shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings or prosecutions, civil or criminal, for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings, or prosecutions imposing, inflicting or declaring such penalty, forfeiture or liability (1 Md. Code Sec. 3 (1957)).

The Supreme Court of the United States, in remanding to this Court stated that the above statute is not necessarily applicable to appellants' convictions:

> The Maryland case law under the saving clause is meager and sheds little if any light on the present question. The clause has been construed only twice since its enactment in 1912, and neither case seems directly relevant here. *State* v. *Clifton,* 177 Md. 572, 10 A. 2d 703 (1940); *State* v. *Kennerly,* 204 Md. 412, 104 A. 2d 632 (1955). In two other cases, the clause was ignored. *State* v. *American Bonding Co.,* 128 Md. 268, 97 A. 529 (1916); *Green* v. *State,* 170 Md. 134, 183 A. 526 (1936). The failure to apply the clause in these cases was explained by the Court of Appeals in the *Clifton* case, *supra,* 177 Md., at 576-577, 10 A. 2d at 705, on the basis that "in neither of those proceedings did it appear that any penalty, forfeiting or liability had actually been incurred." This may indicate a narrow construction of

> the clause, since the language of the clause would seem to have applied to both cases. Also indicative of a narrow construction is the statement of the Court of Appeals in the *Kennerly* case, *supra,* that the saving clause is "merely an aid to interpretation, stating the general rule against repeals by implication in more specific form." 204 Md., at 417, 104 A. 2d, at 634. Thus, if the case law has any pertinence, it supports a narrow construction of the saving clause and hence a conclusion that the clause is inapplicable here. *Bell* v. *Maryland, supra,* 378 U. S. 226, 12 L. ed. 2d 822, 828.

The savings clause does not apply to appellants' convictions because it is concerned with "the repeal, or the repeal and re-enactment, or the revision, amendment or consolidation of any statute or any section or part of a section of any statute." This language does not cover the case at bar for the following reasons. First, in remanding, Justice Brennan noted that as the enactment of the statute was a "unique phenomenon" in legislation, "it would consequently seem unlikely that the legislature intended the saving clause to apply in this situation, where the results of its application would be the conviction and punishment of persons whose 'crime' has been not only erased from the statute books but officially vindicated by the new enactments." *Bell* v. *Maryland, supra,* 12 L. ed. 2d at 829.

Secondly, barring the owner of a place of public accommodation from discriminating racially obviously does not constitute a "repeal" of the trespass statute, nor does it constitute an amendment, as that term is normally used. The acts in no way refer to the trespass statute "as is characteristically done when a prior statute is being repealed or

amended." *Bell* v. *Maryland, supra,* 12 L. ed. 2d 827, 828. The trespass statute is still in effect, although it cannot be applied to enforce racial discrimination in places of public accommodation. In any event, the terms of the statute never required racial segregation, and therefore the public accommodations law does not "repeal" or "amend" those terms.

Even assuming the applicability of the saving statute, that statute makes it possible for a legislature to "provide" that pending prosecutions shall be voided. Justice Brennan noted that the wording of the Maryland public accommodations law was in the present tense (as opposed to most criminal statutes which use the future tense). In light of Maryland law, this indicates an intent to have the statute apply to past as well as to future conduct. *Bell* v. *Maryland, supra; Beard* v. *State,* 74 Md. 130, 21 Atl. 700.

Further evidence that the public accommodations laws were intended to apply to past as well as future conduct is the social context in which these laws were enacted. The legislatures were attempting to deal justiciably with widespread protest in many Negro communities in the state. Moreover appellants' conduct was not made non-criminal because of a judgment that it could not or should not be controlled by criminal sanctions (*e.g.,* removing criminal penalties from a failure to pay debt), rather, the legislatures were attempting to correct a social evil and bring back harmony in race relations. Surely the healing of racial conflict would best be served by a negation of all prior convictions.

For the many reasons above, the Maryland common law rule of abatement voids these convictions, and the "savings clause" is inapplicable in this case.

II

By the Passage of the Civil Rights Act of 1964, Congress Has Removed the Taint of Criminality from Petitioners' Conduct, and Federal Law Now Requires the Abatement of These Prosecutions.

On July 2, 1964, subsequent to petitioners' convictions and to the remand by the United States Supreme Court of these convictions to this Court, the President signed the Civil Rights Act of 1964. That Act, paramount in authority, has removed the taint of criminality from actions formerly offenses. Title II of the Civil Rights Act provides:

> Sec. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action: . . .
>
> * * * * *
>
> (2) any restaurant . . .
>
> * * * * *
>
> (c) The operations of an establishment affect commerce within the meaning of this title if . . . (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; . . .

> (d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof. 78 Stat. 243.

The terms of the Act and its legislative history clearly establish that a defendant can assert the Act as a defense in a criminal trespass action of the type herein prosecuted. Section 203, 78 Stat. 244 specifically provides that:

> No person shall . . . (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

Senator Humphrey, floor manager for the Senate, read into the record a Justice Department statement explaining §203(c).

> This [§203(c)] plainly means that a defendant in a criminal trespass, breach of the peace, or other similar case can assert the rights created by 201 and 202 and that state courts must entertain defenses grounded upon these provisions. Cong. Record, 88th Cong., 1st Sess. 9162-3 (May 1, 1964).

Appellants submit that the Civil Rights Act of 1964, particularly §203(c), as set in the tradition of federal common law expounded in *Bell* v. *Maryland,* 378 U. S. 226, 12 L. ed. 2d 822, abates these prosecutions. The text of the Act and all its implications are part of federal law, overriding contradictory state law. *Gibbons* v. *Ogden,* 22 U. S. (9 Wheaton) 1; *Hauenstein* v. *Lynham,* 100 U. S. 483; *Sola Elec. Co.* v. *Jefferson Elec. Co.,* 317 U. S. 173; *Sperry* v.

Florida, 373 U. S. 379. The encompassing nature of the Civil Rights Act of 1964 requires that the problems of these cases be decided under the framework of the federal common-law. It would be inconsistent with the pervasive national policies of this Act to allow the continuation of these types of prosecutions depend upon differing policies of separate states. In the *Sola* case, the Supreme Court said, at p. 176:

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 296; *Prudence Corp.* v. *Geist,* 316 U. S. 89, 95; *Board of Comm's* v. *United States,* 308 U. S. 343, 349-50; cf. *O'Brien* v. *Western Union Telegraph Co.,* 113 F. 2d 539, 541. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2; *Awolin* v. *Atlas Exchange Bank,* 295 U. S. 209; *Deitrick* v. *Greaney,* 309 U. S. 190, 200-01.

In *Bell* v. *Maryland, supra,* the Supreme Court stated that the universal common-law rule is

> . . . that when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct. *Bell* v. *Maryland, supra,* at 12 L. ed. 2d 826.

Justice Brennan clearly noted the consistent application of this rule to federal enactments.

> The rule has also been consistently recognized and applied by this Court. Thus in *United States* v. *Schooner Peggy,* 1 Cranch 103, 110, 2 L. ed. 49, 51, Chief Justice Marshall held:
>
> > "It is [in] the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."
>
> See also *Yeaton* v. *United States,* 5 Cranch 281, 283, 3 L. ed. 101, 102; *Maryland* v. *Baltimore & O. R. Co.,* 3 How. 534, 442, 11 L. ed. 714, 722; *United States* v. *Tynen,* 11 Wall. 88, 95, 20 L. ed. 153, 155; *United States* v. *Reisinger,* 128 U. S. 398, 401, 32 L. ed. 480, 481, 9

S. Ct. 99; *United States* v. *Chambers,* 291 U. S. 217, 222-223; 78 L. ed. 763, 765, 54 S. Ct. 434, 89 ALR 1510; *Massey* v. *United States,* 291 U. S. 608, 78 L. ed. 1019, 54 S. Ct. 532. (*Bell* v. *Maryland, supra,* 12 L. ed. 2d at 826-27, n. 2.)

A case involving the exact question of the abating effect of a federal statute upon a state proceeding has apparently never arisen, but since national authority is paramount, the rule cannot be different from that in a federal prosecution. The Civil Rights Act, specifically aimed at state proceedings, renders lawful in the name of the national authority that which was at one time unlawful under the state authority and renders unlawful the actions and claims of the proprietors, whose interests were protected by the state's prosecution, cf. *Bell* v. *Maryland, supra,* at 12 L. ed. 2d at 825. The effect of the Civil Rights Act of 1964, therefore, absent any saving clause, must be to abate these prosecutions.

The only relevant statutory provision is the first sentence of the Act of February 25, 1871, R. S. 13, now codified in 1 U. S. C. §109, in the following terms:

> §109. *Repeal of statutes as affecting existing liabilities.*
>
> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

This statute is inapplicable to the present case. More narrowly drawn than the Maryland saving clause, it is to be distinguished for the same reasons, see *supra,* pp. 10, 11; *Bell* v. *Maryland, supra,* 12 L. ed. 2d 828-829.

Secondly, 1 U. S. C. §109 is inapplicable in the present context because that enactment has never referred to the saving of a state proceeding. The context of the 1871 enactment was one dealing with the repeal of federal statutes only. See Cong. Globe, 41st Cong., 2d Sess. 2464 (1870); *id.,* 3rd Sess. 775 (1871); Million, *Expiration Or Repeal of a Federal or Oregon Statute as a Bar to Prosecution for Violations Thereunder,* 24 Ore. L. Rev. 25, 31, 32 (1944). Properly construed, therefore, the word "statute" as it appears in 1 U. S. C. §109 does not refer to a state enactment.

Finally, the saving clause is inapplicable because the Civil Rights Act contains an express mandate against continued prosecution. Section 203(c), discussed *supra,* p. 13, prohibits punishing or attempting to punish any person "for exercising or attempting to exercise any right or privilege *secured* by section 201 or 202." [Emphasis added.] The word "secure," in light of its ordinary dictionary meaning and the legislative context of the Act, is an apt synonym for "making safe that which already independently exists." See, House Judiciary Committee Report on the Civil Rights Act, H. R. Report No. 914, 88th Cong., 1st Sess. 18, 20 (1963); 110 Cong. Rec. 12999 (daily ed. June 11, 1964). The "existence" of these rights prior to July 2, 1964, as understood by the framers of the Act, results in the literal applicability of §203(c) to these prosecutions.

That §203(c) is properly construed to apply to these cases is also shown by the constitutional underpinnings of the Civil Rights Act. First, in §201(a) and (b), the Act proscribes racial discrimination directly required by "state action," which has long been construed as prohibited by the Fourteenth Amendment. A "right" against such state action was clearly present before July 2, 1964. The Act does not distinguish between this traditional concept of racially discriminatory "state action" (*e.g.* segregation statute)

and those situations in which a private person has invoked a state trespass law. Congress certainly did not wish to present every court disposing of a residual prosecution with the task of disentangling those "rights" which antedated the Act in some strict sense from all the rights secured by §203(c).

Similarly, in the Civil Rights Act of 1964, Congress has made judgments concerning "interstate commerce." Section 201(c)(2) defines certain establishments covered by the Act as those which "affect commerce." The average public restaurant which "offers to serve interstate travelers" has an undesirable effect on commerce when refusing to serve Negroes. This judgment by Congress that the refusal of service to Negroes is an undesirable burden on interstate travel must have been found to be the case before as after the passage of the bill. These constitutional considerations support the conclusion that Congress "secured" rights which antedated July 2, 1964.

These tightly drawn considerations are necessary when considering criminal liabilities. The arguments are quite sound and their rejection would result in the affirmance of convictions in these cases and numerous others of persons for peacefully claiming rights which Congress has now, overwhelmingly, in one of the great legislative enactments of our history, declared it to be in the national interest to "secure" against invasion.

Although the identical case in federal-state relationships has not been found, there are several rulings in federal courts in analogous situations. In *Louisville and Nashville R.R. Co.* v. *Mottley,* 211 U. S. 149, contract rights, perfect under state law and arising out of transactions long antedating the federal enactment, were held not en-

forcible where the enforcement contravened the new federal statute.

In a series of cases under the Wagner-Connery Act, employers have been held guilty of unfair labor practices for refusing to reinstate workers who had been discharged prior to the effective date of the Act. *Phelps Dodge* v. *NLRB,* 113 F. 2d 202 (2d Cir. 1940), *modified and remanded on other grounds,* 313 U. S. 177 (1941); *NLRB* v. *Carlisle Lumber,* 94 F. 2d 138 (9th Cir. 1937), cert. den. 304 U. S. 575 (1938), cert. den. 306 U. S. 646 (1939). In effect, these cases held that the Wagner-Connery Act required the resumption of the relationship terminated because of activities occurring prior to the passage of the Act but favored and fostered subsequently by the Act. The Act achieved this result by language less decisive than that contained in the Civil Rights Act, particularly in §203(c). In the Wagner Act, employers were forbidden to "interfere with, restrain, or coerce employees in the exercise of rights *guaranteed* in Section 7 . . . " and " . . . by discrimination in regard to hire and tenure . . . to encourage or discourage membership in any labor organization." National Labor Relations Act (Wagner-Connery Act) §8(a)(1) and (a)(3), 49 Stat. 452 (1935), 29 U. S. C. §158(a)(1) and (a)(3). (Emphasis added.) The language of §203(c) of the Federal Civil Rights Act makes these cases striking parallels to the case at bar.

Finally, all state and private interests in the continued processing of these convictions are absent. The deterrence of petitioners, and others, from insisting on service, and the protection of the wishes of restaurateurs to practice racial discrimination are now illegitimate, directly contravening law and policy at federal, state, and city levels. On the other side of the balance, petitioners now have the affirmative right to that conduct upon which these convic-

tions were grounded. In light of this unique reversal of rights and duties, the Civil Rights Act of 1964, as construed in the federal common law tradition, requires the dismissal of these proceedings. See *Bell* v. *Maryland, supra,* at 12 L. Ed. 2d 828, 829.

CONCLUSION

WHEREFORE, for the foregoing reasons, the appellants pray that their convictions be reversed. Appellants also pray reconsideration of their arguments under the federal constitution presented on direct appeal before this Court.

JUANITA JACKSON MITCHELL
1239 Druid Hill Avenue
Baltimore, Maryland

TUCKER R. DEARING
627 Aisquith Street
Baltimore, Maryland

JACK GREENBERG
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Appellants

CHARLES L. BLACK, JR.
LEROY D. CLARK
RONALD R. DAVENPORT
Of Counsel