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1963 WL 105774 (U.S.)

For opinion see 84 S.Ct. 1693, 84 S.Ct. 1697, 84 S.Ct. 1734, 84 S.Ct. 1770, 84 S.Ct. 1814, 84 S.Ct. 260, 84 S.Ct. 260, 84 S.Ct. 261, 84 S.Ct. 261, 84 S.Ct. 262, 84 S.Ct. 38, 84 S.Ct. 39, 84 S.Ct. 39, 84 S.Ct. 39

Briefs and Other Related Documents

Supreme Court of the United States.
William L. GRIFFIN, et al., petitioners,
v.
STATE OF MARYLAND.
Charles F. BARR, et al., petitioners,
v.
CITY OF COLUMBIA.
Simon BOUIE, et al., petitioners,
v.
CITY OF COLUMBIA.
Robert Mack BELL, et al., petitioners,
v.
STATE OF MARYLAND.
James Russell ROBINSON, et al., appellants,
v.
STATE OF FLORIDA.
Nos. 6, 9, 10, 12, 60.
October Term, 1963.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA AND THE COURT OF APPEALS OF MARYLAND AND ON APPEAL FROM THE SUPREME COURT OF FLORIDA

Brief for the United States as Amicus Curiae

ARCHIBALD COX, Solicitor General BURKE MARSHALL, Assistant Attorney General, RALPH S. SPRITZER, LOUIS F. CLAIBORNE, Assistants to the Solicitor General, HAROLD H. GREEN, HOWARD A. GLICKSTEIN, Attorneys, Department of Justice, Washington, D.C., 20530

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***1** OPINIONS BELOW

The opinion of the Court of Appeals of Maryland ***2** in Griffin (G. 76- 83) [FN1] is reported at 225 Md. 422, 171 A. 2d 717. The opinion of the Circuit Court for Montgomery County (G. 72-75) is not reported.

> FN1. The records in Griffin v. Maryland, No. 6; Barr, v. Columbia, No. 9; Bouie v. Columbia No. 10; Bell v. Maryland, No. 12; and Robinson v. Florida, No. 60, are referred to as "G.," "B.A.," "BO.," "Bill.," and "R.," respectively.

The opinion of the Supreme Court of South Carolina in Barr (BA. 53-56) is reported at 239 S.C. 395, 123 S.E. 2d. 521. The opinions of the Richland County Court (BA. 46-51) and the Recorder's Court of the City of Columbia (BA. 41) are not reported.

The opinion of the Supreme Court of South Carolina in Boule (BO. 64-67) is reported at 239 S.C. 570, 124 S.E. 2d. 332. The opinions of the Richland County Court (BO. 57-62) and the Recorder's Court of the City of Columbia (BO. 50-51) are not reported.

The opinion of the Court of Appeals of Maryland in Bell (BE. 10-12) is reported at 227 Md. 302, 176 A. 2d 771. The opinion of the Criminal Court of the City of Baltimore (BE. 6-9) is not reported.

The opinions of the Supreme Court of Florida in Robinson (R. 40 44; 46 48) are reported at 132 So. 2d 3 and 144 So. 2d 811. The opinion of the District Court of Appeals of Florida (R. 44-45) is reported at 132 So. 2d 771. The judgment of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (R. 38) and the statement of the Criminal Court of Record of Dade County (R. 36-37) are not reported.

JURISDICTION

The judgment of the Court of Appeals of Maryland in Griffin was entered on June 8, 1961 (G. 76).

***3** The judgment of the Supreme Court of South Carolina in Barr (BA. 53) was entered on December 14, 1961, and a petition for rehearing was denied on January 8, 1962 (BA. 59).

The judgment of the Supreme Court of South Carolina in Boule (BO. 64) was entered on February 13, 1962, and a petition for rehearing was denied on March 7, 1-962 (BO.

69).

The judgment of the Court of Appeals of Maryland in Bell (BE. 10-12) was entered on January 9, 1962.

The judgment of the Supreme Court of Florida in Robinson (R. 46) was entered on September 19, 1962.

The petition for a writ of certiorari in Griffin was granted on June 25, 1962 (370 U.S. 935; G. 84). The case was argued on November 5 and 7, 1962, and on May 20, 1963 the case was restored to the calendar for reargument (373 U.S. 920).

On June 10, 1963, the petitions for writs of certiorari in Barr, Bowie and Bell were granted (373 U.S. 804-805; BA. 63; BO. 73; BE. 62) and probable jurisdiction was noted in Robinson (374 U.S. 803; R. 57).

The jurisdiction of the Court rests on 28 U.S.C. 1257 (2) and (3).

QUESTIONS PRESENTED

In Griffin, Barr, Bouie, and Bell, the question is whether a ,criminal trespass ,statute which, on its face, proscribes only entry onto private property after warning not to enter may constitutionally 'be applied ***4** to Negroes who entered upon business premises open to the general public without having been forbidden but refused to leave when requested to do so.

In Robinson, the question is whether a criminal statute which proscribes remaining on private property after a request to leave, but only when the management deems the presence of the guest detrimental to business (or the guest is guilty of obnoxious conduct), may constitutionally be ,applied to a mixed group of whites and Negroes who refused to leave a restaurant after being requested to do so but without being told, despite inquiry, why they were being evicted. [FN2]

FN2. Our statement of the questions is confined to those to which this brief is addressed.

INTEREST OF THE UNITED STATES

These cases are the third group of "sit-in" cases to reach this Court. They involve American citizens peacefully protesting the racially discriminatory practice of certain places of public accommodation. As in the previous cases, the petitioners claim that the State involvement in their arrests and convictions violates the equal protection clause of the Fourteenth Amendment. The respondents, on the other hand, invoke the State's power to preserve law and order and its duty to protect the rights of owners of private property. Since the ultimate resolution of these competing claims involves the interests of millions of citizens and the consideration of vital constitutional issues, ***5** these cases are of obvious importance to the country as a whole.

In presenting the government's views, we are mindful, at the same time, of the precept that this Court will not ordinarily, reach broad constitutional issues if the cases 'admit of disposition on narrower grounds. In our opinion, these cases may

properly be decided (as we argue infra) on the ,basis of relatively narrow and well settled principles of constitutional adjudication. Accordingly, it seems unnecessary and undesirable at this time to express an opinion upon the unsettled and far-reaching questions to which much of the parties' argument has been addressed. Should the Court disagree and desire ,an expression of the views of the United States upon reargument, we would be prepared to make a full statement.

STATEMENT

1. Griffin v. State of Maryland, No. 6

a. Statute Involved. - Petitioners were convicted of violating Article 27, Section 577, of the Maryland Code (1957) which provides:

Any person *** who shall enter upon or cross over the land, premises or private property of any person *** after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor *** provided [however] that nothing' in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only ***6** to prohibit any wanton trespass upon the private land of others.

b. The Facts. - This case involves a "sit-in" demonstration at Glen Echo Amusement Park in Montgomery County, Maryland. The Park advertised extensively. Its advertisements were directed to the general public and did not indicate that admission was in any way limited (G. 44-46).

On June 30, 1960, petitioners, young Negro students, entered the Park through the main gates (G. 6-7; 59). No tickets of admission were required for entry; tickets are purchased at individual concessions within the Park (G. 17). Petitioners, with valid tickets that had been purchased for them by white supporters, took seats on the carousel (G. 7-8; 17; 59-60). The carousel was not put in operation and petitioners were approached by one Francis J. Collins (G. 8-9; 61). Collins performed services for Glen Echo as a "special policeman" under arrangements with the National Detective Agency (G. 5; 14). At the request of the Park management, Collins had been deputized as a Special Deputy Sheriff of Montgomery County (G. 14-15; Montgomery County Code (1955) see. 2- 91). He was dressed in the uniform of the National Detective Agency and was wearing his Montgomery County Special Deputy Sheriff's badge (G. 14). Collins directed petitioners to leave the Park within five minutes, explaining that it was "the policy of the park not to have colored people on the rides, or in the park" (G. 7-8). Collins had not spoken with any of the petitioners prior to encountering them on the carousel (G. 28). Petitioners ***7** declined to obey Collins' direction and remained on the carousel for which they tendered tickets of admission (G. 8, 17). Collins then arrested petitioners for trespass, under Article 27, Section 577, of the Maryland Code (G. 12).

Collins took this action under the instructions of his employer, lie had been told by one of the combiners that the Park "didn't allow negroes" (G. 39). On the occasion in suit, Collins acted after consulting the Park Manager who "instructed [him] to notify [the students] that they were not welcome in the park, and we didn't want them there, and to ask them to leave, and if they refused to leave, within a reason-

able length of time, then they were to be arrested for trespass" (G. 54. See also, G. 7).

At the Montgomery County Police precinct house, where petitioners were taken after their arrest, Collins preferred sworn charges for trespass against petitioners by executing an "Application for Warrant by Police Officer" (G. A, 12). Upon Collins' charge, a "State Warrant" was issued by the Justice of the Peace. [FN3] Petitioners were tried in the Circuit Court of Montgomery County on September 12, 1960.

> FN3. The original State Warrant, filed on August 4, 1960 (G.B.) alleged that each of the petitioners "[d]id enter upon and pass over the land and premises of Glen Echo Park (KEBAR) after having been told by the Deputy Sheriff for Glen Echo Park, to leave the Property, and after giving him a reasonable time to comply, he did not leave ***." (Emphasis added), This was replaced by an amended State Warrant of September 12, 1960 (G.C.) which alleged that petitioners "did unlawfully and wantonly enter upon and cross over the land *** after having been duly notified by an Agent of Kebar, Inc., not to do so ***."

***8** They were convicted of wanton trespass and ordered to pay a fine (G. F, 72-75). The convictions were affirmed by the Maryland Court of Appeals, which rejected petitioners' argument that, because of the absence of adequate warning, the Maryland statute was inapplicable (G. 79-80). It held that:

Having been duly notified to leave, these appellants had no right to remain on the premises and their refusal to withdraw was a clear violation of the statute under the circumstances even though the original entry and crossing over the premises had not been unlawful. ***

2. Barr v. City of Columbia, No. 9

a. Statute Involved. - The petitioners were convicted of violating Section 16- 386, as amended, and Section 15-909 of the Code of Laws of South Carolina, which provide:

16-386. Entry on lands of another after notice prohibiting same.

Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against ***9** the person making entry as aforesaid for the purpose of trespassing.

15-909. Disorderly Conduct, etc.

The mayor or intendant and any alderman, councilman or warden of any city or town in this State may in person arrest or may authorize and require any marshall or constable especially appointed for that purpose to arrest any person who, within the corporate limits of such city or town, may be engaged in a breach of the peace, any riotous or disorderly conduct, open obscenity, public drunkenness, or any other conduct grossly indecent or dangerous to the citizens of such city or town or any of

them. Upon conviction before the mayor or intendant or city or town council such person may be committed to the guardhouse which, the mayor or intendant or city or town council is authorized to establish or to the county jail or to the county chain gang for a tern not exceeding thirty days and if such conviction be for disorderly conduct such person may also be fined not exceeding one hundred dollars; provided, that this section shall not be construed to prevent trial by jury.

b. The Facts. - This case involves a sit-in demonstration at the Taylor Street Pharmacy in Columbia, South Carolina (BA. 3; 25). The pharmacy served Negroes on the same basis as whites at all places in the store except the lunch counter (BA, 17-19). At the lunch counter, Negroes could buy food to remove from the store but could not consume it on the premises (BA. 19).

Petitioners, five Negro students at Benedict. College, entered the Taylor Street Pharmacy on March 15, 1960 ***10** (BA. 25; 30-31). After some of them had made purchases in the front portion of the store, they seated themselves at the lunch counter in the rear (BA. 3; 7; 31). [FN4] There was a sign indicating that the manager reserved the right to refuse service, but no sign specifically barring use of the counter by Negroes (BA. 20; 37). As petitioners sat down, some of the white patrons at the counter stood up (BA. 4; 11-12). Mr. Terry, the store manager, came to the counter and informed petitioners that they should leave because they would not be stowed (BA. 3-4; 17). [FN5] Petitioners did not leave at this request (BA. 4). Police Officer Stokes then directed the manager to request again that petitioners leave, which he did (BA. 4; 14 15; 17). [FN6] The manager left the luncheon area after Ms announcement to the petitioners, and the police officer arrested petitioners without a direct request from the manager (BA. 5; 16-17).

FN4. Petitioner Carter gave his reason for seeking service (BA. 25): "Being a part of the general public we felt we had a right there, and we still feel we have a right there."

FN5. Petitioner Carter testified that he was approached only by the luncheonette manager - not Mr. Terry, the store manager - and told: "You might as well leave because I ain't going to serve you" (BA. 26). Petitioner Counts testified similarly (BA. 39-34).

FN6. Petitioners Carter and Counts denied that the store manager or Officer Stokes ever asked them to leave (BA. 26; 29; 35). Carter also claimed that one of the white customers at the counter stood up at the time petitioners sat down because the customer was asked to do so by the store manager or cashier (BA. 25-20). Until this request, Carter testified (BA. 26): "She sat there and began eating just as if I was a human being sitting beside her, which I was."

***11** The petitioners were well dressed and orderly, and they caused no interference with other customers (BA. 7; 21-22). The co-owner of the restaurant indicated that there was no difference between the dress and demeanor of the petitioners and other customers "other than the color of their skin" (BA. 22). There was no violence during the sit-in, nor any open threat of violence. The only untoward occurrence was the departure of some white patrons from the counter as petitioners sat down (BA.

13-14). [FN7]

FN7. Mr. Terry, the store manager, however, referred to the sit-in as a "disturbance" (R. 22). When asked: "Other than the fact that they came in and sat at the lunch counter, they created no disturbance did they?" he replied: "When they sat down they created a disturbance, yes. You could have heard a pin drop in there, especially two weeks before that or whatever time before that, a large number came in, it just completely stopped everything" (BA. 23-24).

The police had advance knowledge that the sit-in was going to occur (BA. 3). They so advised the store manager and three policemen were present at the store when the petitioners arrived (BA. 5; 9, 21). The collaboration between the store and the local police is made clear by the manager in his answer to a question whose "idea" it was to arrest petitioners (BA. 24):

A. I'll put it that it was the both of us' idea, that if they were requested to leave and failed to leave, and given time to leave, that they would be arrested.

Petitioners were sentenced by the Recorder's Court of the City of Columbia to pay a fine of $1.00.00 on ***12** each charge or to serve thirty days on each charge, $24.50 of the fines being suspended (BA. 42; 53). The convictions were upheld by the Richland County Court (BA. 46-51). That court ruled that a restaurant proprietor can choose his customers on the basis of color without violating the Constitution, that petitioners had no right to remain in the store after the manager asked them to leave, and that the manager could call upon the police to eject petitioners. The court said (BA. 51):

Since Defendants had notice that neither store would serve Negroes at their lunch counters, they were trespassers ab initio. Aside from this however, the law is that even though a person enters property of another by invitation, he becomes a trespasser after he has been asked to leave. Shramek v. Walker, supra [152 S.C. 88, 149 S.E. 331].

The Supreme Court of South Carolina affirmed (BA. 53-56), relying principally on its decision in City of Greenville v. Peterson, 239 S.C. 298, 122 S.E. 2d 826, reversed, 373 U.S. 244.

3. Bouie v. City of Columbia, No. 10

a. Statute Involved. - The petitioners were convicted of violating Section 16-386, Code of Laws of South Carolina, which is set forth, supra, p. 8, in connection with the Barr case. [FN8]

FN8. Both petitioners were also charged with breach of the peace in violation of Section 15-909, but they were not convicted of this offense. (BO. 1). In addition, petitioner Boule was charged with and convicted of resisting arrest but his conviction on this charge was reversed by the South Carolina Supreme Court (BO. 1; 66-67).

***13** b. The Facts. - This case involves a sit-in demonstration at the Eckerd's Drug Store in Columbia, South Carolina (BO. 3). Eckerd's, one of Columbia's larger variety stores, is part of a regional chair-with numerous stores located throughout the South (BO. 24). In addition to the lunch counter, Eckerd's maintains several other

departments, including one for retail drugs, another for cosmetics and one for prescriptions (BO. 24). Negroes and whites are invited to purchase and are served alike in all departments of the store with the single exception of the food department which is reserved for whites (BO. 24). The store manager explained that Negroes are not served in the food department because "*** all the stores do the same thing" (BO. 26). There was no evidence that any signs or notices were posted indicating that Negroes would not be served at the lunch counter.

On March 14, 1960, the petitioners, two Negro college students, seated themselves at a booth in the lunch room at Eckerd's and sought service (BO. 3; 27; 40). [FN9] No one spoke to petitioners or approached them to take their orders for food (BO. 26; 32). Shortly after they were seated, an employee of the ***14** store put up a chain with a "no tresspassing" sign attached to it (BO. 29). Petitioners remained seated for about fifteen or twenty minutes; each sat with an open book before him and one worked on a puzzle (BO. 6; 31; 40). During this time, white persons were seated in the lunch room and were being served (BO. 30).

> FN9. Petitioner Neal explained why he went to Eckerd's (BO. 27): "Well, I entered Eckerd's under the impression to be served, and I felt that I was within my rights to be served food there, inasmuch as it was open to the public, I consider myself as a part of the public and I felt it was my right to be served." Petitioner Bouie stated (BO. 45): "I was served previously in all of the other departments of Eckerd's and I felt that I had a legitimate right to be served in the lunch room."

The Columbia police, called by Eckerd's manager, approached petitioners and, in the presence of the police, the store manager told petitioners to leave "*** because we aren't going to serve you" (BO. 3; 9; 26). Petitioners remained seated and the Chief of Police then asked them to leave (BO. 3-4). Bouie asked the Chief of Police "For what," and he replied (BO. 4): "Because it's a breach of the peace ***." Bouie again asked the Chief of Police "for what" (BO. 4). The Chief then "reached and got him by the arm *** and *** had to pull him out of the seat" (BO. 4). He then seized him by the belt, gave him a "preliminary frisk", and marched him out of the store (BO. 4). Bouie testified that he offered no resistance and told the Chief, "That's all right, Sheriff, I'll come on" (BO. 42).

The arresting officer described the conditions surrounding the arrest of petitioners as follows (BO. 8; 11):

Q. When you observed these two defendants, was either of them engaged in any riotous or disorderly conduct?.

A. Well certainly there was no riotous. If it was disorderly conduct, it was because of the fact that the Manager had asked them to ***15** move, in my presence, and they refused to move.

Q. Other than that there was nothing which you would say was any disorderly conduct.

A. No.

Petitioners were tried in the Recorder's Court of the City of Columbia without a

jury and were convicted of trespass and sentenced to pay fines of $100.00 or serve thirty days in jail, $24.50 of the fines being suspended (BO. 51). Petitioner Bouie was convicted of resisting arrest and fined $100.00 or thirty days, $24.50 of the fine being suspended (BO. 51). Bouie's sentences were to run consecutively (BO. 51).

Petitioners appealed to the Richland County Court which sustained the judgments and sentences of the Recorder's Court in the same opinion upholding the judgments in the Barr case (BO. 57-62).

On February 13, 1962, the Supreme Court of South Carolina affirmed the convictions for trespass, but reversed the conviction of petitioner Bouie for resisting arrest (BO. 64-67). The Court relied principally on its decisions in the Peterson and Barr cases (BO. 66).

4. Bell v. State of Maryland, No. 12

a. Statute Involved. - The petitioners were convicted of violating Article 27, Section 577, of the Maryland Code (1957) which has already been set forth in connection with the Griffin case (supra, p. 5).

b. The Facts. - This case involves a sit-in demonstration in Hooper's Restaurant in Baltimore, Maryland (***16** BE. 3). The restaurant is owned by the Hooper Food Company, Inc., which has several other restaurants in the city (BE. 30).

Petitioners, twelve Negro students, were part of a group of fifteen to twenty Negro students who entered Hooper's Restaurant on June 17, 1960 (BE. 3). In the lobby of the restaurant, the hostess, acting on orders of Mr. Hooper, the owner, told them: "I'm sorry, but we haven't integrated as yet" (BE. 23-24). She testified that the group was properly dressed, and that, had they been white persons, they would have been seated (BE. 26).

Some of the students succeeded in by-passing the hostess and manager and took seats in the main dining room and in a lower level grill (BE. 24-25; 43). At the time the students entered the service area of the restaurant, the manager was explaining to the leader of the group that the restaurant's policy prohibited service to Negroes (BE. 27-28). While many of the group sat one at a table, this action did not, nor was it intended to, interfere with the service of other customers (BE. 44; 46). [FN10]

> FN10. Petitioner Quarles testified that he told Mr. Hooper that (BE. 44): *** we were not there to interrupt his business and we were not there to distort or destroy his business. We were simply there seeking service as humans and also as citizens of the United States of America."

The manager, at Mr. Hooper's request, called the police (BE. 28; 33). The State trespass statute was read to the group by the manager and some of them left the premises (BE. 28-29; 33). [FN11] The remaining ***17** students were then asked to identify themselves and Mr. Hooper went to a police station to obtain warrants for their arrest (BE. 29; 39). [FN12] The petitioners were served with the warrants and their trials followed.

FN11. Petitioner Quarles explained that he remained, knowing that he would be arrested "[b]ecause I think arrest is a small price to pay for your freedom as a human being" (BE. 49).

FN12. During the sit-in, other students picketed outside of the restaurant (BE. 44). None in this group were arrested.

Petitioners waived preliminary hearings in the Magistrates' court and were indicted by the Grand Jury of Baltimore City (BE. 6-7). The indictment was in two counts and charged (BE. 14-15) that petitioners

[1] *** unlawfully did enter upon and cross over the land, premises and private property of a certain corporation in this State, to wit, Hooper Food Co., Inc., a corporation, after having been duly notified by Albert Warfel, who was then and there the servant and agent for Hooper Food Co., Inc., a corporation, not to do so; ***

[2] *** unlawfully did enter and trespass on certain property of Hooper Food Co., Inc., a corporation, which said property was then and there posted against trespassers in a conspicuous manner; ***

Each petitioner, after trial without jury in the Criminal Court of Baltimore, was found guilty on the first count and not guilty on the second count (BE. 6- 9). Fines of $10.00 were imposed but the fines were suspended on the finding of the trial court that "*** these people are not law-breaking people; that their ***18*** action was one of principle rather than any intentional attempt to violate the law" (BE. 9).

On January 9, 1962, the Maryland Court of Appeals affirmed petitioners' convictions (BE. 10-12). The court relied principally on its decision in the Griffin case (BE. 11).

5. Robinson v. State of Florida, No. 60

a. Statute Involved. - Appellants were found guilty of violating Section 509.141 of the Florida Statutes which provides:

(1) The manager, assistant manager, desk clerk or other person in charge or in authority in any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall have the right to remove, cause to be removed, or eject from such hotel or apartment house, tourist camp, motor court, restaurant, rooming house or trailer court in the manner hereinafter provided, any guest of said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, who, while in said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, premises is intoxicated, immoral, profane, lewd, brawling, or who shall indulge in any language or conduct either such as to disturb the peace and comfort of other guests of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court or such as to injure the reputation or dignity or standing of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, or who, in the opinion of the ***19*** management, is a person whom it Would be detrimental to such hotel, apartment house, tourist camp, motor court, restaurant, rooming house, or trailer court for it any longer to entertain.

(2) The manager, assistant manager, desk clerk or other person in charge or in au-

thority in such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall first orally notify such guest that the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court no longer desires to entertain him or her and request that such guest immediately depart from the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court. If such guest has paid in advance the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall, at the time oral or written request to depart is made, tender to said guest the unused or unconsumed portion of any such advance payment. Said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court may, if its management so desires, deliver to such guest written notice in form as follows:

"You are hereby notified that this establishment no longer desires to entertain you as its guest and you are requested to leave ,at once and to remain after receipt of this notice is a misdemeanor under the laws of this state."

(3) Any guest who shall remain or attempt to remain in such hotel, apartment house, tourist camp, motor court, restaurant, rooming house ***20** or trailer court after being requested, as aforesaid, to depart therefrom, shall be guilty of a misdemeanor, and shall be deemed to be illegally upon such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises. [FN13]

> FN13. The statute further provides:
> "(4) In case any such guest, or former guest, of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, or any other person, shall be illegally upon any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises, the management, or any employee of such hotel, apartment house, tourist camp, motor court restaurant, rooming house or trailer court, may call to its assistance any policeman, constable, deputy sheriff, sheriff or other law enforcement officer of this state, and it shall be the duty of each member of the aforesaid classes of officers, upon request of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court management, or hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court employee, forthwith and forcebly, if necessary, to immediately eject from such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, any such guest, or former guest, of other person, illegally upon such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises, as aforesaid."

b. The Facts. - This case involves a demonstration at the Shell City Restaurant in Miami, Florida. The restaurant is a part of a large store in which Negroes are served on the same basis as whites (R. 24; 29). The restaurant is separated from the rest of the store by a glass enclosure (R. 15).

Appellants, a mixed group of eighteen Negroes and whites, entered the restaurant on August 17, 1960, and seated themselves at five tames (R. 15-16). ***21** The manager of the store - Mr. McKelvey - saw appellants enter (R. 16). However, he did not approach them. Rather, he and three other store employees seated themselves at another

table and ordered coffee (R. 16). The manager observed the group for one half hour (R. 17). Shortly thereafter, appellant Perkins approached the manager. He complained that he had not been served and asked when he could expect service (R. 17). He was told by the manager that he and the others in his group would not be served (R. 17; 25). Perkins asked to speak further with McKelvey, but McKelvey told him he had nothing further to discuss with him (R. 17). Mr. McKelvey then spoke with another store executive, after which he called the police (R. 17). [FN14]

> FN14. There was testimony that a group of about One hundred persons had gathered outside of and within the restaurant (R. 23; 25). However, the arresting officer testified that there was only a small group of persons present when he arrived and that restaurant tables were occupied by persons other than appellants (R. 34-35).

The police arrived ten to twelve minutes after Mr. McKelvey's call (R. 17). At this time, Mr. McKelvey, accompanied by a police officer and another store employee, approached each table and told the persons sitting there that they would not be served and asked them to leave (R. 18; 28; 33). One of the appellants asked McKelvey why he was being asked to leave and McKelvey told him that he "had nothing further to state" (R. 19). Appellants were then asked to leave by the police officers but they persisted in their refusal to leave and they were arrested (R. 33).

***22** At appellants' trial, Mr. McKelvey explained that he refused service to Negroes "Because I feel, definitely, it is very detrimental to our business to do so" (R. 19). When asked: "Is it not a fact that Shell's City does not have the official opinion that it is detrimental to their business for Negroes to purchase products in other parts of their store?", he replied: "That is correct" (R. 24). Mr. Williams, a Vice President and Auditor of Shell, also testified that he believed service of Negroes in the resturant would be detrimental to his business (R. 29).

The appellants were tried in the Criminal Court of Record of Dade County, Florida, on August 26, 1960 (R. 3). The information filed against them charged that on August 17, 1960, they did, in Miami, Florida (R. 1-2):

> *** unlawfully remain or attempt to remain in a restaurant after being requested to depart therefrom in violation of Section 509.141(3), *** the manager, assistant manger, or other person in charge or in authority of the aforesaid restaurant, *** being then and there of the opinion that if the above-named defendants were entertained or stowed it would be detrimental to the said restaurant, ***.

Appellants were found guilty, but the imposition of sentence was stayed and they were placed on probation (R. 4-7; 36-37). After a "circuitious and devious route" through Florida appellate courts, the judgment of the trial court was affirmed by the Supreme Court of Florida on September 19, 1962 (R. 46-48). The latter court said (R. 48):

> ***23** We find it unnecessary to engage in any prolonged discussion of the merits of the case. The sole point presented is the matter of the validity vel non of Section 509.141, Florida Statutes. We have concluded, as did the trial judge, that the statute is nondiscriminatory and that it reflects a valid exercise of the legislative

power of the State of Florida. ***

ARGUMENT

INTRODUCTION AND SUMMARY

In each of these cases, a group of Negroes, sometimes accompanied by white sympathizers, unsuccessfully sought service at a privately owned business establishment generally open to the public. Three of the cases (Barr, No. 9, Bouie, No. 10, and Robinson, No. 60) involve lunch counters or restaurants operated in connection with retail stores which welcomed the Negro trade in all other portions of the establishment. The two Maryland cases involved facilities - an amusement park (Griffin, No. 26) and a restaurant (Bell, No. 12) - which, at the time, refused Negro-customers. In each case, petitioners were denied the service, directed to leave the premises, and, upon refusing, were arrested by State officers. In no instance, however, were they warned, by sign or word, before entering, that their presence was forbidden. Yet, in four of the cases (Nos. 6, 9, 10 and 12) the petitioners were convicted of trespass under statutes (Md. Code, Art. 27, Sec. 577, supra, p. 5; S.C. Code, Sec. 16-386, supra, p. 8) which, on their face, condemn only entry after notice not to enter. While the statute in the remaining ***24** case (No. 60) proscribes remaining after notice to leave, it does so only when the entrant is personally obnoxious, either because of specified conduct or because his continued presence is deemed detrimental to business. See Fla. Stat., Sec. 509.141, supra, p. 18. Yet, the appellants there were never told that their exclusion was required on one of the statutory grounds. Indeed, their express inquiry why they were requested to leave was left unanswered.

On these facts, we think it plain that petitioners were denied due process. They were not adequately warned that their conduct was unlawful. In four cases, nothing in the statute notified them that remaining after being requested to leave would subject them to criminal penalties. Though we must, of course, accept the State court's ruling that the local enactment in fact condemned such conduct, the failure of the law itself to say so makes it unconstitutionally vague as applied to these petitioners. Likewise, in the fifth case, the petitioners, on the face of the statute, were entitled to fair notice that their exclusion was justified on one or more of the specified grounds. If, as we are now told, the law requires no such explanation, then it is void for failure to give adequate warning that this is so.

It will be said that our argument depends upon a narrow reading of the local statutes involved and a strict application of the rule of vagueness. This is accurate. But there are compelling reasons for such a course in these cases. At the outset, we detail those considerations, applicable to all of the cases. As we show, the laws at the base of these prosecutions must ***25** be tested according to strict standards, not only because they impose criminal sanctions, but because they are here applied against peaceful conduct which is, if illegal, plainly not immoral. They proscribe acts which the State has a doubtful interest in condemning. Moreover, the statutes affect the exercise of First Amendment rights and must be judged for their inhibiting effect on the free expression of ideas.

Having defined and justified the general approach, we examine each particular stat-

ute and its application in each case. Noting the novel and unexpected construction necessary to fit the facts, we conclude in each instance that the statute is unconstitutionally vague as applied.

THE TRESPASS STATUTES UNDERLYING THE CONVICTIONS ARE UNCONSTITUTIONALLY VAGUE AS APPLIED TO THE CONDUCT REFLECTED BY THE RECORDS

A. GENERAL APPROACH

We have already said that we deem it proper to test the trespass statutes in suit, as applied in these cases, by somewhat stricter standards than would be appropriate in a different context. Since the reasons govern all the cases, it is convenient to discuss them first.

1. At the outset, it must be remembered that we deal here with criminal laws. Much has been said in these cases about the property interest of the storeowner and his right freely to choose his customers. But the rights of the proprietor axe not necessarily co-extensive with the scope of the criminal statutes which protect private property. There may be a right in the ***26** owner to evict an unwelcome guest although the latter has committed no crime, and commits none in refusing to leave. One may be, or become, a trespasser in the sense of the civil law and yet not be guilty of criminal trespass. These statutes are not rules of property, but criminal laws which presumably condemn only the more serious acts against property. Accordingly, the usual requirement of specificity common to all criminal enactments applies fully here. [FN15]

FN15. The exception in favor of common-law crimes with a "well-settled common law meaning" is inapplicable to these statutory offenses. See Connally v. General Construction Co., 269 U.S. 385, 391. On the contrary, these enactments, in derogation of the common law (3 Burdick, The Law of Crime, Sec. 720) must be strictly construed. See Brown v. Barry, 3 Dall. 365; 3 Sutherland, Statutes and Statutory Construction (3d ed.), chap. 62.

The general rule is plain: "Before a man can be punished, his case must be plainly and unmistakably within the statute." United States v. Brewer, 139 U.S. 278, 288. A vague criminal statute "violates the first essential of due process." Connally v. General Construction Co., 269 U.S. 385, 391. It is, like "the ancient laws of Caligula," "a trap for the innocent." United States v. Gardiff, 344 U.S. 174, 176. The duty of warning before punishing applies equally to the States. The Fourteenth Amendment "imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required." Gline v. Frink Dairy Co., 274 U.S. 445, 458. See, also, Wright v. Georgia, 373 U.S. 284; Cramp v. Board of Public Instruction, 368 U.S. 278; ***27**Winters v. New, York, 333 U.S. 507, 519; Musser v. Utah, 333 U.S. 95, 97; Lanzetta v. New Jersey, 306 U.S. 451, 453. [FN16]

FN16. The Maryland 'Court of Appeals has repeatedly recognized that fair notice is an element of due process. See, e.g, State v. Cherry, 224 Md. 144, 167 A. 2d 328 (1960); Police Commissioner of Baltimore v. Siegel Enterprise, Inc., 223 Md. 110, 162 A. 2d 727 (1959); Craig v. State, 220 Md. 590, 155 A. 2d 684

(1959); McGowan v. State, 220 Md. 117, 151 A. 2d 156 (1958); State v. Magaha, 182 Md. 122, 32 A. 2d 477 (1943). In State v. Magaha, supra, the court explained the requirement of certainty (189 Md. at 195): "*** It is an established doctrine of constitutional law that a penal statute creating a new offense must set forth a reasonably ascertainable standard of guilt and must be sufficiently explicit to enable a person of ordinary intelligence to ascertain with a fair degree of precision what acts it intends to prohibit, and therefore what conduct on his part will render him liable to its penalties. A statute which either commands or forbids the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess at its meaning and differ as to its application violates the constitutional guarantee of due process of law."
The South Carolina courts also have recognized the fair notice requirement. See, e.g., Gaud v. Walker, 214 S.C. 451, 58 S.E. 2d 316 (1949); Byrd v. Lawrimore, County Treasurer, 212 S.C. 281, 47 S.E. 2d. 728 (1948).

2. Another relevant consideration is the character of the conduct condemned in these cases. It cannot be said here that regardless of the law, petitioners must have known what they were doing was wrong, Compare Screws v. United States, 325 U.S. 91, 101-102; Williams v. United States, 341 U.S, 97, 101- 102. They were not acting with evil motive, nor were their acts so plainly injurious that notice was superfluous. At worst, their behavior was on the borderline of legality, and the morality of their purpose is hardly ***28** debatable. [FN17] Whether or not petitioners' conduct was a civil trespass or a tort is irrelevant to the question of adequate notice for the purposes of criminal liability. Cf. Pierce v. United States, 314 U.S. 306. The statutes themselves, as interpreted and applied here, required no finding of bad faith or intent to injure and the adjudication of guilt implies no such finding. Compare Gorin v. United States, 312 U.S. 19, 27-28; United States v. Ragen, 314 U.S. 513, 524; Communications Assn. v. Douds, 339 U.S. 382, 412-413; 413; Dennis v. United States, 341 U.S. 494, 515-516; United States v. National Dairy Corp., 372 U.S. 29, 35. There is accordingly every reason to demand clear forewarning here before the sanctions of the criminal law are brought to bear.

FN17. Professor Freund has noted, "[i]n applying the rule against vagueness or overbroadness something, however, should depend on the moral quality of the conduct." See Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533. 540 (1951). See also Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67, 87, n. 98 (1960).

Nor is this all. Not only was the conduct held criminal here not malum in se, but petitioners may well have conceived that their actions were protected against State interference by the Federal Constitution. Indeed, in the absence of violence, disorder or other disturbance of the peace, it is, at the least, debatable whether the State had any legitimate public objective to serve in lending its policeman, its prosecutor and its magistrate to support the storeowner's "private" policy of racial discrimination, cf. Shelley v. Kraemer, 334 U.S. 1; ***29**Barrows v. Jackson, 346 U.S. 249, or his decision to ban from his "private" premises the exercise of First Amendment rights. See Thornhill v. Alabama, 310 U.S. 88; Marsh v. Alabama, 326 U.S. 501.

Treading so close to the constitutional line, it was incumbent on the State to give most specific warning of the conduct sought to be prohibited and to define the offense with particularity.

3. Constitutional doubts about the validity of the statutes aside, the First Amendment context of these cases is of independent significance. What Mr. Justice Harlan wrote in Garner v. Louisiana, 368 U.S. 157, 201, is applicable here:

There was more to the conduct of those petitioners than a bare desire to remain at the "white" lunch counter and their refusal of a police request to move from the counter. We would surely have to be blind not to recognize that petitioners were sitting at these counters, Where they knew they would not be served in order to demonstrate that their race was being segregated in dining facilities in this part of the country.

Such a demonstration, in the circumstances of these two cases, is as much a part of the "free trade in ideas," Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting), as is verbal expression, more commonly thought of as "speech." It, like speech, appeals to good sense and to "the power of reason as applied through public discussion," Whitney v. California, 274 U.S. 357, 375 (Brandeis, J., concurring), just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This Court has never limited the right to speak, ***30** a protected "liberty" under the Fourteenth Amendment, Gitlow v. New York, 268 U.S. 652, 666, to mere verbal expression. Stromberg v. California, 283 U.S. 359; Thornhill v. Alabama, 310 U.8.88; West Virginia State Board of Education v. Barnette, 319 U.S. 624, 633-634. ***

Here, also, petitioners were plainly protesting against unjust discrimination. Their evident purpose was to demonstrate the existence of the condition, protest against it, and solicit public sympathy for theft cause or indignation at the treatment they were made to endure. In short, their object was to prick the conscience of the community and of the Nation. They chose a peaceful course. No violence resulted, no disturbance of the peace ensued. In the circumstances, "stricter standards of permissible statutory vagueness may be applied." Smith v. California, 361 U.S. 147, 151. See, also, N.A.A.C.P. v. Button, 371 U.S. 415, 432; Winters v. New York, 333 U.S. 507, 509-510; 517-518; Herndon v. Lowry, 301 U.S. 242; Stromberg v. California, 283 U.S. 359.

The reasons are plain. Pervasive or loosely drawn statutes affecting the exercise of First Amendment rights tend to encroach on the area of constitutionally protected conduct. "[A] man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." Smith v. California, supra. There are taro dangers. The first results from the inhibiting effect of permitting vague enactments to be enforced or specific words to be given an unlikely interpretation. If he cannot be sure what is included within the ban of the statute, the citizen may timidly forfeit his right to express ***31** himself in a manner which the law does not, or cannot, forbid. Equally dangerous is the absence of a clear guide for the policeman who must initially administer the law. However clearly the indictment may later describe the charge, or the judge ultimately define the scope of the offense for the jury's benefit, the vice of the vague statute is that it leaves the peace officer at

sea. With the best intentions, he may encroach on conduct which, it turns out, the law does. not condemn as criminal (whether or not it might provide basis for a civil suit). For the less scrupulous policeman, the statute is a license for abuse of power or for discriminatory enforcement, especially in an area, as here, where the pressures of local prejudice invite misuse of authority. "[A] vague and broad statute lends itself to selective enforcement against unpopular causes." N.A.A.G.P. v. Button, supra, at 435. In either event, the arrest, or the order to disperse under threat of arrest, effectively denies the exercise of First Amendment rights, whatever the ultimate disposition of the matter.

These reasons, we submit, justify a close examination of the statutes in suit. Barring other constitutional objections - which we think it unnecessary to discuss [FN18] - they can be sustained in this special context ***32** only if they gave clear forewarning that the conduct charged was prohibited.

> FN18. So saying, we do not abandon the argument advanced last Term in Griffin v. Maryland - that, having clothed the employee of Glen Echo with its police powers, the State became so inextricably involved in the discrimination practiced by the park that it could not, consistently with the Fourteenth Amendment, arrest, prosecute and convict the victims of that discrimination. Indeed, the decisions in Peterson v. Greenville, 373 U.S. 244, and Lombard v. Louisiana, 373 U.S. 267, seem to lend support to that contention. Rather than repeat the argument here, however, we respectfully refer the Court to the brief for the United States as amicus curiae in No. 26, October Term, 1962.

B. THE MARYLAND AND SOUTH CAROLINA CASES

The petitioners in Barr and Boule entered retail stores in Columbia, South Carolina, which cater to Negroes and whites on the same basis except where food is served. There were no signs barring Negroes from the food departments. Indeed, in Barr, Negroes could buy food at the lunch counter to "take out," but could not consume it on the premises. In Griffin, the petitioners entered the Glen Echo Amusement Park through its main gates, No one directed them not to enter, [FN19] and tickets of admission were not required. Petitioners took seats on a carousel. They were approached by Officer Collins and asked to leave the Park within five minutes. They were arrested when they declined to obey Collins' direction and remained on the carousel. In Bell, petitioners entered Hooper's Restaurant in Baltimore, Maryland. There was no sign posted outside of the building barring admission to Negroes. In the restaurant lobby, petitioners were confronted by a hostess who told them: "I'm sorry, but we haven't integrated as yet." Nevertheless, petitioners took seats and were eventually arrested.

> FN19. Glen Echo co-owner Abram Baker testified that Officer Collins had been instructed to stop Negroes at the main gate and tell them that they could not enter (G. 36), but that procedure was not followed in this case.

Thus, in each case, it is clear that petitioners entered ***33** without notice that entry was forbidden. Nor is it charged that their initial entry violated the law. The trespass alleged is the refusal to leave after request. Yet, at the time, there

was no indication in the local law that such a refusal was subject to criminal sanctions. The South Carolina and Maryland statutes did not say so. And, so far as we are able to determine, no court in either State had so held.

1. The South Carolina statute (p. 8) punishes, in terms, only "Every entry *** after notice from the owner or tenant prohibiting such entry." There is nothing in the statute to suggest that it also applies to a person who is on the land without having received any notice. [FN20] Nor have we found any South Carolina case decided prior to the events in Barr and ***34** Bouie that interprets Section 16-386 as covering persons who enter upon property without being forbidden to do so but subsequently axe asked to leave. The only decision relied upon by the South Carolina courts in these cases - Shramek v. Walker, 152 S.C. 88, 149 S.E. 331 (1929) - is plainly inapplicable. That case involved civil trespass, and it is elementary that the test of civil and criminal liability is not always the same. [FN21]

> FN20. When the South Carolina courts have been called upon to interpret Section 16-386, they have applied strict standards and have proceeded on the theory that where a person wishes to assert his right to exclude individuals from his property and have the backing of the criminal law, it is not too much to ask him to give clear notice. Thus, the cases decided under Section 16-886 place special emphasis on the requirement that clear notice be given before the person charged with trespass enters upon the property. For example, in State v. Mays, 24 S.C. 190, 195 (1886), the court referred to "giving notice to the defendant not to trespass upon the land" as "so essential a matter." And, in State v. Green, 35 S.C. 266, 14 S.E. 619 (1892), the court said: "*** under the view we take of this provision of our laws [G.S. 2507, a predecessor to 16-386], when the owner or tenant in possession of land forbids entry thereon, any person with notice who afterwards enters such premises is liable to punishment." (Emphasis added).
> See also, State v. Cockfield, 15 Rich. 53 (1867); State v. Tenny, 58 S.C. 215, 36 S.E. 555 (1900); State. v. Olasov, 133 S.C. 139, 130 S.E. 514 (1925).
>
> FN21. See Bishop, Criminal Law (9th Ed., 1923), Vol. 1, Sec. 2118:
> "In civil jurisprudence, when a man does a thing IV permission and not by license, and, after proceeding lawfully part way, abuses the liberty the law has given him, he shall be deemed a trespasser from the beginning by reason of his subsequent abuse. But this doctrine does not prevail in our criminal jurisprudence; for no man is punishable criminally for what was not criminal when done, even though he afterwards adds either the act or the intent, yet not the two together."

To be the, the South Carolina Supreme Court decided in the instant; cases that the statute applies to petitioners' conduct. But it is well settled that the requirement of adequate forewarning is not satisfied by judicial construction of the statute in the very case in which it is challenged as too broad and indefinite: [FN22] Such a retrospective interpretation "is at war with a fundamental concept of the common law." Pierce v. United States, 314 U.S. 306. [FN23] In ***35**Lanzetta v. New Jersey, 306 U.S. 451, 456, the Court said:

FN22. For that reason, too, Charleston v. Mitchell, 239 S.C. 376, 123 S.E. 2d 519 (1961) - now pending before this Court on certiorari; No. 8, this term - fails to cure the defect here, for it was decided subsequent to the events which led to petitioners' arrests and convictions.

FN23. Pierce involved a statute malting it criminal to pretend to be an "officer *** acting under the authority of the United States, or any Department, or any officer of the Government thereof." It was held. material error to refuse to instruct that pretending to be an officer of the TVA, a government corporation, would not be within the statutory prohibition. This Court declared (314 U.S. at 311): "*** [J]udicial enlargement of a criminal Act by interpretation is at war with fundamental concept of the common law that crimes must be defined with appropriate definiteness."

It would be hard to hold that, in advance of judicial utterance upon the subject, [defendants] *** were bound to understand the challenged provision according to the language later used by the court.
See also, Smith v. Cahoon, 283 U.S. 553, 563-565.

As Professor Freund summarized: [FN24]

FN24. See Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 541 (1951). See also, Note, Due Process Requirement of Definiteness in Statutes, 62 Harv. L. Rev., 77, 82 (1948).

The objection to vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss.

To be sure, ,as it is written, the statute at issue does not seem "vague," at least in the layman's sense. Yet, as construed in these cases, the language is unconstitutionally vague because the words do not convey the full import of what the statute is now said to prohibit. At best, the text left it uncertain whether petitioners' conduct was made criminal, Nor is this a case where the problem of interpretation, with its attendant possibility of different constructions, was apparent from the statute itself. The statute wholly ***36** failed to warn those to whom it was addressed that it might be interpreted as here. The constitutional principle applies equally whether lack of adequate notice results from a loose text or a loose reading of a text that is apparently limited.

It is noteworthy that even the South Carolina legislature seems to have entertained doubts about the application of Section 16-386 in these cases. [FN25] Shortly after the events in Barr and Bowie - on May 16, 1960 - Section 18-888 was added to the South Carolina Code. See Acts and Joint Resolutions of South Carolina, 1960, pp. 1729-1780. This new provision expressly applicable to those who have permissibly entered a privately owned "place of business," in terms condemns failing and refusing "to leave immediately upon being ordered or requested to do so." [FN26] The in-

ference ***37** is plain that the legislature realized that the earlier statute might not reach this conduct. [FN27] Cf. Garner v. Louisiana, 368 U.S. 157, 168.

FN25. Another difficulty with Section 16-386 is its apparently exclusive concern with trespass on open land. As amended in 1952, it proscribes "Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock in pastured, or an other lands of another ***." It is certainly questionable whether this language provided adequate forewarning that trespass on business premises was punishable. Applying the rule of ejusdem generis - recognized in South Carolina, Vassey v. Spalce, 83 S.C. 566, 65 S.E. 805 (1909) - a a reasonable construction of Section 16-386 is that it applies only to farm or pasture lands.

FN26. Section 16-888 was involved in Peterson v. City of Greenville, 373 U.S. 244. It provides:
"Entering premises after warning not to do so or failing to leave after requested.
"Any person:
"(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the promises of another person, after having been warned, within six months preceding, not to do so or
"(2) Who, having entered into the dwelling, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,
"Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days."

FN27. The petitioners in Barr were also convicted of breaching the peace. But there was no evidence that petitioners' demeanor in any way differed from that of other customers. There was no violence during the sit-in and the only possible indication that a disturbance might occur was when white patrons left the counter as petitioners sat down. While the store manager did consider petitioners' mere presence at the counter a "disturbance," he testified only that when they sat down "you could have heard a pin drop ***." Clearly, on the basis of this record, there is no evidence to support a conviction for breach of the peace. See Wright v. Georgia, 373 U.S. 284, 293; Taylor v. Louisiana, 370 IJ.S. 154; Garner v. Louisiana, 368 U.S. 157; Thompson v. Louisville, 362 U.S. 199. Nor can the possibility of disorder by others justify an arrest for breach of the peace. Wright v. Georgia, supra; Edwards v. South Carolina, 372 U.S. 229.

2. The absence of forewarning in the statute underlying the convictions in Griffin and Bell is equally apparent. On its face, Article 27, Sec. 577, of the Maryland Code punishes only those who "enter" on private property "after having been duly notified ***" Petitioners in Griffin were not notified "by the owner or his agent" of the Glen Echo Amusement Park that they could not enter. They did in fact ***38** enter

free from any interference. [FN28] Nor were petitioners in Bell afforded proper notification before they entered Hooper's Restaurant. In both cases petitioners had no way of knowing that their refusal to leave could subject them to criminal prosecution.

> FN28. It is noteworthy that the original State Warrants alleged that petitioners "[d]id enter upon and pass over the land *** after having been told *** to leave *** and after giving *** a reasonable time to comply *** did not leave." The amended warrant corrected this patently absurd charge. See note 3, supra.

Here, also, the statutory language stood alone. There was then no "judicial gloss" which suggested the applicability of the statute to the conduct now held within its reach. The conclusion of the Maryland Court of Appeals in Griffin that "[h]aving been duly notified to leave, these appellants had no right to remain on the premises and their refusal to withdraw was a clear violation of the statute under the circumstances even though the original entry and crossing over the premises had not been unlawful" (G. 80), is unsupported by any citation of Maryland authority. Even the foreign decisions relied upon are of doubtful relevance.

Thus, the Maryland court cited State v. Fox, 254 N.C. 97, 118 S.E. 2d 58, a case (now pending before this Court, No. 5, this Term), in which the North Carolina Supreme Court affirmed convictions for trespass by relying on its decision in Avent v. North Carolina, 253 N.C. 580, 118 S.E. 2d 47, judgment vacated and remanded, 373 U.S. 375, which in tram, invoked an earlier decision apparently supporting application of the North Carolina statute to rite type of conduct in ***39** suit. [FN29] But, assuming the North Carolina Supreme. Court had sufficiently clarified its own trespass statute to give fair warning of a broad reading, it does not follow that the petitioners here were sufficiently forewarned by the statute of Maryland. Reliance on Commonwealth v. Richardson, 313 Mass. 632, 48 N.E. 2d 678, is obviously misplaced since the statute there involved proscribed both entering and remaining after having been forbidden to do so. Moreover, as we show later (infra, p. 46) the court vacated the convictions in that case on the ground that the defendants were improperly charged with entry after warning, while they had, in fact, been requested to leave only after penetrating the building. Finally, the Maryland court's assertion that such words as "enter upon" or "Cross over" are synonymous with "trespass" is, at best, debatable; there is contrary authority. See, e.g., State v. Hallback, 40 S.C. 298, 305, 18 S.E. 919: "*** it is clear that trespass is a more comprehensive tern than 'entry,' and, indeed, includes it ***"

> FN29. The decision relied on in Avent, State v. Clyburn, 247 N.C. 455, 101 S.E. 2d 295, involved a "sit-in" at an ice cream parlor where signs announced the discriminatory practice of the establishment. That decision, in turn, rests on earlier cases construing a wholly separate statute which, on its face, prohibits remaining on private property after committing acts which will likely result in a breach of the peace.

In Bell - which involved events occurring prior to the Griffin decision on appeal - the court concluded that the petitioners' conduct was covered by Article 27, Sec.

577, merely by relying on its decision in Griffin. None of the Maryland cases arising prior to Griffin and Bell and interpreting ***40**Article 27, Sec. 577, involves a comparable situation. [FN30] The Maryland court, like the South Carolina court, broadly construed its statute for the first time in the cases involving these petitioners.

FN30. Bishop v. Frants, 125 Md. 183, 93 A. 412 (1915) involved a malicious prosecution charge arising out of an arrest for trespass. It is clear from this case, however, that the alleged trespasser had been given clear notice not to enter on the property. Krauss v. State, 216 Md. 369, 140 A. 2d 653 (1958) reversed a conviction under Article 27, Sec. 577, on the grounds that the notice not to enter was inadequate. Cf. Griffin v. Collins, 187 F. Supp. 149, 153 (D. Md.).

3. The conclusion that the South Carolina and Maryland courts have, in these cases, given a novel and forced construction to their respective statutes which petitioners could not fairly be expected to anticipate is confirmed by the teaching of other jurisdictions.

At the outset, we note that other States intending to prohibit both entry after warning and remaining after a request to leave have experienced no difficulty in drafting appropriate statutes which clearly distinguish between the two situations. Indeed, South Carolina herself recently enacted Section 16- 388 (supra, p. 36) which covers both a person who "enters into the dwelling house [etc.] *** after having been warned *** not to do so ***" and one who "without having been warned *** fails and refuses *** to leave immediately upon being ordered or requested to do so. ***" Fourteen States and the District of Columbia have substantially similar statutes, [FN31] and in four other States the statute penalizes both entering ***41** after notice and remaining, but only in restricted circumstances. [FN32] Seven States have statutes which deal only with entering and use substantially the same language as the South Carolina and Maryland statutes involved in these cases, [FN33] while the statutes of six States, also restricted to entries, are more narrowly drawn. [FN34] Seven States have statutes that proscribe only the refusal to leave after being requested to do so, [FN35] and trespass statutes not distinguishing between entering ***42** and remaining or confined to limited situation exist in ten other States. [FN36] As one would expect, where State legislatures have desired to prohibit specified types of conduct, they have been able to find the necessary language.

FN31. Ala. Code, Tit. 14, sec. 426; 28 Conn. Gen Stat. Ann. 53-103; D.C. Code, Tit. 2'2-3102; Florida Stat. Ann. sec. 821.01; Rev. Laws of Hawaii, see. 312-1; Ill. Crim. Code of 1961, C. 38, sec. 21-3; Ind. Stat. Ann. sec. 10-4506; Mass Laws Ann. C. 266, sec. 120; Mich. Stat. Ann. se3. 28.820(1); L.S.A. - R.S. 14:63.3; Miss. Code Ann. C. 1, Tit. 11, sec. 241; Nev. Rev. Stat. sec. 207.200; Ohio Rev. Code Ann. sec. 2909.21.; 4 Code of Vir. 18.1-178; Rev. Code of Wash. Ann. sec. 9.83.060.

FN32. Cal. Penal Code, sec. 602.5 (applies to noncommercial premises); N. H. Rev. Stat. Ann. sec. 572.11 (applies to livestock); Wisc. Stat. Ann. sec.

943.13(1)(b) (applies where there is intent to remove product from land); Wyo. Seat. C. 10, Tit. 6, 6-226 (applies to enclosed lands).

FN33. Ga. Code Ann. 36-3002.; Me. Rev. Stat. C. 131, secs. 39-40; N.J. Anno. Stat. 4:17-2.; N.C. Gen. Stat. sec. 14-134; Okla. Stat. Ann., Tit. 21, sec. 1885 (restricted to entries into gardens, yards, enclosed fields and pecan groves); South Dakota Code, see. 25.0427 (restricted to entries for purpose of hunting); West Virginia Code Ann. sec. 5974 (confined to enclosed lands).

FN34. Colo. Rev. Stat. 40-18-13 (limited to entries to gardens, orchards and other improved lands); Ky. Rev. Stat. sec. 433.720 (land must be prominently posted); Mo. Stat. Ann. sec. 560.445 (limited to posted enclosed premises); Rev. Code of Mont. sec. 94-3309 (limited to hunting on enclosed lands); Penn Stat. Ann. sec. 4954 (lands must be prominently posted); General Laws of R.I., sec. 11-44-4 (restricted to entering posted land to hunt or fish).

FN35. Ark. Stat. Ann. sec. 71-1803 (limited to public places of business); Compiled Laws of Alaska, sec. 65-5-112; Minn. Stat. Ann. sec. 621.57; Neb. Rev. Stat. 28-589 (limited to enclosed and cultivated lands). Oreg. Rev. Stat. 164.460; 1 Texas Penal Code, Art. 479 (restricted to peddlers); Vermont Stat. Ann., Tit. 13, Sec. 3726 (restricted to fairgrounds).

FN36. Ariz. Rev. Stat. 13-711; Delaware Code, sec. 871-877; Idaho Code, sec. 18-7011; Iowa Code Ann. sec. 714.6, 714.25; Gen. Stat. of Kansas Ann. 32-139; N. Mex. Code, 40-47-2; N.Y. Penal Code, sec. 2036; N. Dak. Century Code, sec. 12-41-07; Tenn. Code Ann., 394510; Utah Code Ann., sec. 76-60-2.

Except for the South Carolina and Maryland decisions in these cases, and a few other cases involving sit-in demonstrations, [FN37] our research discloses no reported instance of a statute apparently confined to trespass after warning being held to include remaining after a request to leave. In fact, the only cases we have uncovered treat entering' after warning' and remaining after a request to leave as separate and distinct offenses that must be specifically proscribed.

FN37. Besides South Carolina and Maryland, North Carolina has interpreted its trespass after warning statute to cover remaining after being told to leave. See, e.g., State v. Clyburn, 247 N.C. 455, 101 S.E. 2d 295 (1958); Avent v. North Carolina, 253 N.C. 580, 118 S.E. 2d 47 (1961), remanded for reconsideration, 373 U.S. 375. Prior to the Clyburn case, the North Carolina law appears to have been otherwise. Thus, in State v. Baker, 231 N.C. 136, 140, 56 S.E. 2d 424 (1949), Judge (now Senator) Ervin enumerated the elements required for a conviction under G.S. 14-134 as follows: "To constitute trespass on the land of another after notice or wanting under this statute, three essential ingredients must coexist: (1) The land must be the land of the prosecutor in the sense that it is in either his actual or constructive possession; (2) the accused must enter upon the land intentionally; and (3) the accursed must do this after being forbidden to do so by the prosecutor." (Emphasis added). Cf. State v. Stinnett, 203 N.C. 829, 167 S.E. 63 (1933); State v. Tyndall, 192 N.C. 559, 135 S.E. 451 (1926).

***43** For example; Section 3874 of the Alabama Code of 1886 provided that:

Any person who, without legal cause or good excuse, enters into the dwelling house, or on the premises of another, after having been warned within six months preceding not to do so, is guilty of a misdemeanor.

In Goldsmith v. State, 86 Ala. 55, 5 So. 480 (1888) the court held that this statute did not apply to a person who was asked to leave after he bad entered the premises in question. The Alabama Supreme Court said (86 Ala. at 56-57):

The defendant was on the premises, the land, when he received the warning; and after he left the premises, there is no proof that he ever returned. ***

We think, the testimony, under any interpretation, failed to make a case within the statute. There must be a warning first, and an entry afterwards. One already in possession, even though a trespasser, or there by that implied permission which obtains in society, can not, by a warning then given, be converted into a violator of the statute We are construing, although he may violate some other law, civil or criminal. - Watson v. State, supra [63 Ala. 19].

Subsequently, the Alabama statute was changed to its present form. See Randle v. State, 155 Ala. 121, 124, 46 So. 759 (1908). But the amended statute was held to encompass two separate offenses. In Brunson v. State, 140 Ala. 201, 203, 37 So. 197 (1903), the indictment charged that the defendant "without legal cause or good excuse entered on the premises of Andrew ***44** Zimlich after having been warned, within six months preceding not to do so, against the peace. ***" The defendant claimed that he was already on the property when told to leave and, therefore, could not be convicted on this indictment. The Alabama Supreme Court agreed and said (140 Ala. 202-204; 205):

This statute [section 5606 of the Criminal Code of 1896] embraces two separate and distinct offenses under the common designation of trespass after warning; or, in other words, the offense of trespass after warning may be committed in two different and distinct ways. First, where the defendant "without legal cause or good excuse, enters into the dwelling house, or on the premises of another, after having been warned, within six months preceding, not to do so;" second, where the defendant, "having entered into the dwelling house or on the premises of another without having been warned within six months not to do so, and fails or refuses, without legal cause or good excuse, to immediately leave on being ordered or requested to do so by the person in possession, his agent or representative." This latter provision, contained above under the second head, was not embraced in section 3784 of fire Code of 1886 - that statute denouncing only the entering on the premises after warning given not to do so. This section was amended by an act approved December 3d, 1896 (Session Acts, 1896-97, p. 34), by incorporating in the statute the said second provision set out, and as thus amended was brought forward and adopted into the present Code as section 5606. Prior to this ***45** amendment, and under the statute as it stood in the Code of 1886, it was decided by this court that a prosecution could not be sustained for trespass after warning where the defendant had already entered upon the premises and was in possession before any warning given him not to do so. ***

*** Evidence of the refusal of the defendant after having entered on the premises and before notice or warning not to do so, to leave said premises, is insufficient under the above authorities to sustain the indictment. *** If the indictment had

been found under the second clause of the statute, a conviction might have been well supported on the undisputed evidence in the case. The amendment, which was introduced into the statute by the act of December 3, 1896, was doubtless intended to meet such conditions as are presented in the present case.

The New Jersey Supreme Court has also held that a statute which, on its face, prohibits only entry after warning cannot be used to punish one who remains on property after being told to leave. In Pennsylvania Railroad Co. v. Fucello, 91 N.J.L. 476, 477, 103 A. 988 (1918), taxicab drivers in the City of Trenton had been warned by the railroad not to park their automobiles on railroad property any longer than was required to discharge their passengers. Certain taxicab drivers were charged with having failed to obey this warning and the following statute was invoked against them:

That if any person or persons shall unlawfully enter upon any lands not his own, after having ***46** been forbidden so to do by the owner or legal possessor of such lands, he shall forfeit and pay for each offence to the owner of said lands or his or her tenant in possession, the sum of three dollars, ***

The New Jersey Supreme Court ruled the statute inapplicable (91 N.J.L. at 477-478):

This act, it will be observed, deals with an actual trespass ab initio, and not with a constructive trespass created by an act of entry originally lawful, but made unlawful by a tortious act committed after entry. Garcin v. Roberts, 69 N.J.L. 572.

*****

The statute clearly applies to an original entry, which can be denominated in the first instance a trespass. Garcin v. Roberts, supra. The statute being penal in its nature and consequences must, under the familiar rule applicable to such legislation, be strictly construed, and will not be held to include any other offence by intendment.

The act constituting the alleged offence must be within both the letter and the spirit of the statate. Lair v. Kilmer, 25 N.J.L. 522.

The result is that the entry of the various defendants having been within the privilege accorded them, their subsequent dereliction in failing to obey the command of the railroad company, cannot be construed into an original trespass, and will not operate to charge them as trespassers, within the meaning of the statute.

And the Supreme Judicial Court of Massachusetts, in Commonwealth v. Richardson, 313 Mass. 632, 48 N.E. 2d 678 (1943), like the Alabama Court, has concluded ***47** that, under a statute that proscribes both entering and remaining, an indictment charging only that the defendant entered after warning cannot sustain a conviction on evidence that the defendant entered before warning but remained when told to leave. In Richardson, the defendants were confronted by the landlord and told to leave after they had entered the vestibule of an apartment house, but before they passed the inside door leading into the corridors where the various apartments were located. The court said (313 Mass. at 637-638):

We have already observed that the defendants were charged in the complaints not with remaining in or upon the premises in question after having been forbidden so to do, but only with having "knowingly, without right *** [entered] upon the dwelling house of John Assies [the landlord], after having been directly forbidden so to do by John Assies, he having the legal control of the premises." The two acts thus for-

bidden by the statute are expressed in the disjunctive, and violation of either is a crime. One may be guilty of one, or the other, or of both, but one may not be found guilty of one that is not the subject of the complaint against him. ***

We are of the opinion that the evidence would not warrant a finding that the defendants entered the vestibule of the building after having been forbidden by Aysies "so to do." They were already in the vestibule when confronted by Aysies. They had entered by the open outer door of the vestibule. *** [FN38]

FN38. See also Steele v. State, 191 Ind. 350, 132 N.E. 739 (1921). Cf. People v. Lawson, 238 N.Y.S. 2d 839 (Crim. Ct. 1963).

***48** These decisions of the highest comes of Alabama, New Jersey and Massachusetts demonstrate how strained was the construction given the local statutes in the cases at bar.

Summing up all the elements of the South Carolina and Maryland cases it becomes plain that the criminal trespass laws under which petitioners were convicted are unconstitutionally vague as applied to petitioners' conduct. At best, it was uncertain whether the statutes were applicable. The statutes spoke of entry after being notified not to enter. There was nothing to warn of a more expansive interpretation. Petitioners are not charged with unlawful entry but only with refusal to leave. The most that can be said about a warming is that they might have known that theft refusal was a civil trespass. Until the demonstrations against public segregation in restaurants and lunch counters, the statutes had never been authoritatively applied to refusals to leave. The only judical interpretation of parallel laws in other States refused to extend the prohibition. Under these circumstances there is the greatest danger that the decisions to arrest and to prosecute were influenced by public prejudice or emotion, or by opposition to the demonstrations, rather than even-handed application of a standard of conduct the legislature had plainly declared. To permit such statutes thus to be applied to citizens engaged in peaceful public demonstrations against a grievous affront would be a deterrent to other exercises of freedom of expression. Petitioners' exercise of that freedom may have conflicted with the property fights of those who engaged in the affront, ***49** but petitioners' knowledge of that conflict and the possible right of the property owner to recover in trespass is not the equivalent of notice that the conduct constituted a criminal offense. Every consideration of policy that condemns unconstitutionally vague criminal law applies with full force to petitioners' conviction here for conduct not clearly defined as criminal.

C. THE FLORIDA CASE

Section 509.141 of the Florida Statutes (supra, pp. 18-20) establishes a procedure for ejecting certain classes of patrons from hotels, restaurants, rooming houses and like establishments. Subparagraph (3) of the Section provides that "any guest who shall remain *** after being requested, as aforesaid, to depart therefrom, shall be guilty of a misdemeanor ***" Subparagraph (2) deals with the form of request to leave and requires the agent of the establishment to "first orally notify such guest that the hotel, [etc.] *** no longer desires to entertain him or her and request that such guest immediately depart from the hotel ***" or to deliver a written no-

tice in the form prescribed. [FN39] Subparagraphs (2) and (3) relate back to subparagraph (1) [FN40], which describes with particularity ***50** the circumstances in which the statute is operative. Four classes of persons (and presumably no others) may be ejected under the statute. They are described as follows:

> FN39. "Said hotel, [etc.] *** may, if the management so desires, deliver to such guest written notice in form as follows: 'You are hereby notified that this establishment no longer desires to entertain you as its guest and you are requested to leave at once and to remain after receipt of this notice is a misdemeanor under the laws of this state."
>
> FN40. Subparagraph (2) refers to "such guest", i.e, a guest engaged in the type of conduct described in subparagraph (1). Similarly, subparagraph (3) speaks of guests who have been requested to leave "as aforesaid."

*** any guest. *** who *** [1] is intoxicated, immoral, profane, lewd, brawling or [2] who shall indulge in any language or conduct either such as to disturb the peace and comfort of other guests *** [3] or such as to injure the reputation or dignity or standing of such *** restaurant *** [4] or who, in the opinion of the management, is a person whom it would be detrimental to such *** restaurant *** for it any longer to entertain.

Appellants were charged with committing an offense which came within the fourth category. [FN41] That provision is significantly different from the others. The first three categories deal with specific overt conduct which is objectively discernible and which the offender himself can appreciate and presumably control. Of course, a guest might disagree that his conduct,***51** for example, was lewd, but, normally, he will know what conduct the management thinks objectionable. At least, he is not at the mercy of the subjective, uncommunicated thoughts of management, which no self-examination can reveal. When these objective circumstances are present, it might be unnecessary to advise the guest specifically why he is being asked to leave. The statute itself warns him that certain acts will subject him to ejection. The offense is complete without further action on the part of the management. A person arrested under these circumstances can avoid conviction if he can demonstrate at his trial that he, in fact, had not engaged in the proscribed conduct. It is presumably with reference to such outwardly offensive conduct that the statute prescribes a form of written notice which does not offer explanations (supra, p. 49). The reason, plainly, is that none are necessary when the guest's behavior is susceptible of objective proof by the testimony of witnesses.

> FN41. The information filed against appellants alleged (R. 2): "**** that the above-named defendants did then and there seat themselves as guests at tables in the aforesaid restaurant; and that said above-named defendants did then and there unlawfully remain or attempt to remain in the aforesaid restaurant after said above-named defendants had been requested to depart therefrom by the manager, assistant manager, or other person in charge or in authority of the aforesaid restaurant, said manager, assistant manager, or other person in charge or in authority of the aforesaid restaurant being then and there of the

> opinion that if the above-named defendants were entertained or served it would be detrimental to the said restaurant, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida."

The charge here, however, does not relate, to any acts committed by the unwelcome guest. The only standard set out is the subjective opinion of management. Thus, an essential element of appellants' offense is the opinion of others. In our view, it is a violation of due process to convict persons under this statute unless, prior to their arrest, they are advised of that opinion. Of. Lambert v. California, 335 U.S. 225, 228.

It is important to emphasize that these appellants were not prosecuted if indeed they could have ***52** been - [FN42] merely for refusing to leave after being told to do so. They were prosecuted for refusing to leave when "in the opinion of management" it would have been detrimental to further entertain them. Otherwise wholly passive and innocent conduct became criminal under the statute only because the restaurant management subjectively determined that appellants' continued presence would be detrimental to business. Moreover, they expressly inquired why they were refused service. In this context, appellants being guilty of no conduct which could possibly "disturb the peace and comfort of other guests" or "injure the reputation ***53** or dignity or standing" of the establishment, their question amounted to asking: "Is our mere presence detrimental to business?" Since criminal liability depended wholly on an affirmative answer, it seems plain appellants were entitled to a response. Met with the manager's stubborn refusal to answer, they were justified in concluding that a statutory basis for exclusion was lacking. At least, they could not be required to interpret the silence which greeted their. inquiry as a statement that the color of their skins (or, in the case of the white students, their association with Negroes) alone inflicted economic injury on the establishment.

> FN42. Section 821.01 of the Florida Statutes provides:
> Trespass after warning
> "Whoever willfully enters into the enclosed land and premises of another, or into any private residence, house, building or labor camp of another, which is occupied by the owner or his employees, being forbidden so to enter, or not being previously forbidden, is warned to depart therefrom and refuses to do so, or having departed re-enters without the previous consent of the owner, or having departed remains about in the vicinity, using profane or indecent language, shall be punished by imprisonment not exceeding six months, or by a fine not exceeding one hundred dollars."
> It is doubtful whether this provision would have been applicable in the present context. On its face, the statute does not expressly cover the "public" portion of a restaurant, during hours when the establishment is generally open for business. Moreover, the more recent enactment, Section 509.141, explicitly dealing with places of public accommodation, seems to supersede the general trespass statute with respect to this subject matter. In any event, of course, appellants were not charged under the quoted provision, and, as this Court said in Cole v. Arkansas, 333 U.S. 196, 201 - and reiterated in Garner

> v. Louisiana, 368 U.S. 157, 164: "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

Fundamental fairness, we submit, required communication of management's private opinion, on which criminality depended, before criminal liability Could attach. But, at the very least, the principle of fair notice demanded that persons in appellants' position be unequivocally warned that the statute would condone their ejection as "detrimental" merely because they were Negroes (or associated with Negroes); and that they must expect no disclosure of the subjective reason for their exclusion. [FN43] It is going too far to require a class of citizens (who have been served elsewhere in the establishment) to presume that their ***54** mere presence will, because of their color, be deemed harmful to the store. On the contrary, an American of any race or creed should be entitled to presume that he will not be treated discriminatorily in an establishment open to the public. Moreover, experience teaches, as Mr. Justice Frankfurter noted in Garner v. Louisiana, 368 U.S. 157, 176, that "[i]t is not fanciful speculation *** that a proprietor who invites trade in most parts of his establishment and restricts in another may change his policy when non-violently challenged."

> FN43. Cf. Garner v. Louisiana, 368 U.S. 157, 170, 172, where the Court noted that "[i]n none of the cases was there any testimony that the petitioners were told that their mere presence was causing, or was likely to cause, a disturbance of the peace" and "there is no evidence that tiffs alleged fear [that a disturbance would occur] was ever communicated to the arresting officers, either at the time the manager made the initial call to police headquarters or when the police arrived at the store."

Assuming that appellants were fully aware of the provisions of Section 509.141, they could have believed, with complete good faith, that none of the events which transpired at Shell City Restaurant was sufficient to make out a violation of the statute under which they were ultimately convicted. They knew that they were not intoxicated, immoral, profane, lewd or brawling. They knew that by peacefully sitting at restaurant tables they were not indulging in language or conduct which would disturb the peace and comfort of guests or which would injure the reputation or dignity of the restaurant. [FN44] They had no reason to assume ***55** that their mere presence was detrimental to Shell City's business. Shell City solicits Negro patronage in all of its departments but one. Appellants well could have believed that if the store secured their arrests, this action would be more detrimental to the company's business than merely permitting them to sit ha the restaurant. The request to appellants that they leave put them on notice that Shell City's management did not wish to serve them. But it did not forewarn them that their ejectment was justified on any basis recognized by the statute. Until properly advised, appellants might reasonably have thought themselves entitled to ignore the request to leave, for, so far as they knew, the request was premised on a reason which the statute does not recognize, such as racial prejudice on the part of the proprietor.

> FN44. Appellants sat at tables for one half hour without being approached by

> any store official. All during this time, the manager and three other store employees were seated in the restaurant having coffee. In this respect, this case resembles Garner v. Louisiana, 368 U.S. 157, where, although the store manager testified that he "feared that some disturbance might occur" because of petitioners' mere presence at a white lunch counter, he "continued eating his lunch in an apparently leisurely manner at the same counter at which tim petitioners were sitting before calling the police" (368 U.S. at 171).

Since the statute did not give warning that an explanation would be unnecessary (indeed, it implies the contrary) and since none was given (though demand was made), the State of Florida is in the position of arguing that appellants were required to assume that they were committing a crime even though they had no way of ascertaining whether the management purported to be relying upon a reason for exclusion recognized by Florida law. This cannot be squared with the constitutional requirement of fair notice.

CONCLUSION

Discrimination is alien to our law and its practice forbidden to both State and Nation. An affront to the dignity of the victim, it is, by the same token, ***56** demeaning to him who engages in the practice and destructive of the fiber of a democratic society. If it be true that this Court cannot right every moral failing, it is also true, we believe, that it must hold every exercise of governmental power to the strictest standards of legal accountability when the failure to do so may encourage or abet a fundamental human wrong. So viewed, we submit, these convictions should not stand.

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Briefs and Other Related Documents **(Back to top)**

- 1963 WL 106042 (Appellate Brief) Appellants' Reply Brief (Oct. 11, 1963)
- 1963 WL 105775 (Appellate Brief) Brief of Respondent (Sep. 25, 1963)
- 1963 WL 105783 (Appellate Brief) Brief of Respondent (Sep. 25, 1963)
- 1963 WL 106041 (Appellate Brief) Brief of the Appellee (Sep. 12, 1963)
- 1963 WL 105778 (Appellate Brief) Brief for Petitioners (Aug. 26, 1963)
- 1963 WL 105773 (Appellate Brief) Brief for Petitioners (Aug. 23, 1963)
- 1963 WL 106040 (Appellate Brief) Brief for the Appellants (Aug. 22, 1963)
- 1963 WL 106039 (Appellate Brief) Brief in Opposition to Appellee's Motion to Dismiss or Affirm in Response to Appellants' Jurisdictional Statement (Apr. 17, 1963)
- 1963 WL 106038 (Appellate Brief) Jurisdictional Statement (Jan. 16, 1963)
- 1962 WL 115281 (Appellate Brief) Brief of Respondent (Oct. 22, 1962)

• 1962 WL 115637 (Appellate Brief) Brief for the United States as Amicus Curiae (Oct. 15, 1962)

• 1962 WL 115280 (Appellate Brief) Brief for Petitioners (Sep. 19, 1962)

• 1962 WL 115282 (Appellate Brief) Brief Opposing Petition for Writ of Certiorari (May 8, 1962)

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