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IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1961

No. 91

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

Appellants,

v.

STATE OF MARYLAND,

Appellee.

APPEALS FROM THE CRIMINAL COURT OF BALTIMORE
(JOSEPH R. BYRNES, Judge)

BRIEF AND APPENDIX OF APPELLANTS

JUANITA JACKSON MITCHELL,
TUCKER R. DEARING,
THURGOOD MARSHALL,
JACK GREENBERG,
Attorneys for Appellants.

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APPEALS FROM THE CRIMINAL COURT OF BALTIMORE
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BRIEF OF APPELLANTS

STATEMENT OF THE CASE

On July 12, 1960 Appellants, students attending local schools were indicted by the Baltimore City Grand Jury for trespassing on the premises of Hooper's Restaurant at the southwest corner of Fayette and Charles Streets in Baltimore City. They were tried before Judge Byrnes on November 10, 1960, and on March 24, 1961 were found guilty

of violating Article 27, section 577 of the Maryland Code, 1957 Edition. Each Appellant was given a suspended fine of $10.00 and ordered to pay costs of Court. They have each appealed from this ruling to this Court.

QUESTIONS IN CONTROVERSY

1. Whether the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution prohibit the State from using its executive and judicial processes by application of the criminal trespass statute to enforce the racially discriminatory practices of a private owner who for profit has opened his property to the general public.

2. Whether the application of the criminal trespass statute in this case denies the Appellants the freedom of expression and assembly contrary to the First and Fourteenth Amendments to the Constitution of the United States.

3. Whether the evidence is sufficient to sustain the convictions of the Appellants under the state's criminal trespass statute.

STATEMENT OF FACTS

Hooper's Restaurant is a privately-owned conventional restaurant located at the southwest corner of Fayette and Charles Streets in the City of Baltimore. It is not a private club and there are no signs restricting patronage to members of any particular group or class. Each Appellant is a member of the Negro race and a student in Baltimore schools.

On or about June 17, 1960, Appellants entered the restaurant while it was open for business and, in the customary fashion of white persons, requested the hostess, Ella Mae

Dunlap, to assign them seats at tables for the purpose of being served. Miss Dunlap informed Appellants that it was not the policy of the restaurant to serve Negroes, that she could not seat or serve any of the Appellants, and asked Appellants to leave. She explained to them that she was following instructions of the owner. Appellants, despite the refusal to serve, persisted in their demands. They moved past Miss Dunlap and took seats at various tables on the main floor and in the basement. Appellants were not served and continued to sit at the tables.

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

The Magistrate at the Central Police Station issued warrants for their arrest and called Robert B. Watts, attorney for Appellants in the court below, and advised him that warrants had been issued for their arrest. An agreement was made to produce the Appellants in Court several days later. On the date and at the time scheduled Appel-

lants each appeared in Magistrate's Court. Preliminary hearings were waived. Appellants in due course were indicted by the Grand Jury of Baltimore City. Each Appellant posted bail bond of $100.00 and by the customary and regular procedure each Appellant was brought to trial before Judge Byrnes in the Criminal Court of Baltimore.

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

ARGUMENT

I.

THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBIT THE STATE FROM USING ITS EXECUTIVE AND JUDICIAL PROCESSES TO ENFORCE THE RACIALLY DISCRIMINATORY PRACTICES OF A PRIVATE OWNER WHO HAS FOR PROFIT OPENED HIS PROPERTY TO THE GENERAL PUBLIC.

Article 27, Section 577 of the Annotated Code of Maryland, a state statute providing for criminal trespass after warning, although constitutional on its face, has been unconstitutionally applied in the instant case. The language of the statute is as follows:

> "Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly *notified* by the *owner* or his agent *not to do so* shall be deemed guilty of a misdemeanor, and on con-

> viction thereof before some justice of the peace in the county or city where such trespass may have been committed be fined by said justice of the peace not less than one, nor more than one hundred dollars, and shall stand committed to the jail of county or city until such fine and costs are paid; provided, however, that the person or persons so convicted shall have the right to appeal from the judgment of said justice of the peace to the circuit court for the county or Criminal Court of Baltimore where such trespass was committed, at any time within ten days after such judgment was rendered; and, provided, further, 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 to prohibit any wanton trespass upon the private land of others."

The facts, stipulated by counsel for the state and the appellants, establish that the appellants were peacefully upon the premises of Hooper's Restaurant in the City of Baltimore, a business opened to the general public, where appellants had a right to be as business guests or invitees, and as members of the general public seeking the same food service as is offered to the general public. The appellants were not allowed to obtain said food service, solely because of their race and color. They were requested to leave. They quietly refused to leave until they had been served as were white members of the public being served. The police officers were called and the aforenamed criminal trespass statute was read to the appellants in the presence of the police officers. They were again ordered to leave. Appellants continued to sit quietly at the restaurant tables in protest of the discrimination, insisting on food service. The police officers secured the names and addresses of the appellants. The police magistrate issued warrants

upon application of the restaurant owner. The appellants were arrested, posted bail, and waived the hearing before the magistrate. The State's Attorney for Baltimore City presented the matter to the Grand Jury. The Grand Jury indicted the appellants. The appellants were tried and convicted by the Criminal Court of Baltimore for violating the aforesaid statute.

From the police officers' action to the final judgment of the court below, this was the state's cause.

The Court below held "that in the absence of appropriate legislation forbidding racial discrimination the operators of privately owned restaurants, even though generally open to the public, may discriminate against persons of another color or race, however unfair or unjust such policy may be deemed to be" (E. 7).

In denying the Motions for a Directed Verdict (E. 2) and by the conviction of the appellants (E. 8), the court below denied the contention of the appellants that the aforesaid executive and judicial action in arresting and convicting appellants under a criminal trespass statute enacted by the Maryland State Legislature was state action enforcing racial segregation in violation of the Fourteenth Amendment to the Federal Constitution.

The issue in this case is not the purely private and individual action of Mr. G. C. Hooper, the restaurant operator, his agents, servants and employees, which are in no respect enforced, implemented or supported by the government of Baltimore City and the State of Maryland. The facts do not present any question as to the "right of a home-owner to choose or to regulate the conduct of his guests" (*Marsh v. Alabama,* 326 U.S. 501, 506), for this restaurant was "built and operated primarily to benefit the public" (ibid) and is a private business invested with a

public interest. There was no invasion of a homeowner's personal privacy here.

Yet the Court considered the operator of a public restaurant to be in the same category as a private homeowner. Referring to the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States, the Court affirmed the contention of the state "that these clauses of the Fourteenth Amendment do not prohibit discriminatory action by private individuals, such as the proprietor of the restaurant here, nor do they inhibit state action in the form of arrest and conviction for trespass of persons who defy the proprietor's request to leave his property regardless of his reason for doing so" (E. 6).

The U.S. Supreme Court as early as *Munn v. Illinois,* 94 U.S. 113, 126 declared:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. . . ."

Again in *Marsh v. Alabama,* 326 U.S. 501, 506, the U.S. Supreme Court placed restrictions upon a proprietor of property open to the public and distinguished these rights from that of a homeowner:

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . ."

The issue here is clear and compelling: *whether the right of a proprietor, who has opened up his property for business*

use by the general public, to select his patrons solely on the basis of race or color, shall prevail over the appellants' constitutional right to be free from state enforcement of a policy of racial discrimination.

The Court below cites the per curiam opinion of the United States Court of Appeals for the Fourth Circuit, *Slack v. White Tower,* 284 F. 2d 746 (1960), which affirmed the decision of the Federal District Court of Maryland, "that a restaurant owner in refusing service to a Negro, violated no law nor did such refusal deprive the petitioner of any constitutional guarantees, *Slack v. White Tower,* 181 F. Supp. 124 (1960)" (E. 7).

The facts of the *Slack* case must be distinguished from the facts herein. In that case there was no arrest and conviction by any segment of state, county or municipal government. The purely private and individual discrimination of the White Tower Restaurant owner was in no respect enforced, implemented, or supported by governmental authority.

The case herein is not one in which the state "has merely abstained from action, leaving private individuals free to impose such discriminations as they see fit". *Shelley v. Kraemer,* 334 U.S. 1, 19.

Here the state exercised all of its powers, from the arrest to the conviction of the appellants, to sanction, effect and enforce the racially discriminatory practices of the restaurant owner, thereby making itself a party to the discrimination. If the state cannot judicially enforce by injunction the racially restrictive covenants of a private property owner, as the U.S. Supreme Court held in *Shelley v. Kraemer,* is not the action of the police officers, the magistrate, the State's Attorney, the Grand Jury and the Court, in applying the state's criminal trespass statute to these

appellants, "the full panoply of state power", *Shelley v. Kraemer,* supra at 19, used to deny to the appellants, solely on the basis of race, equal treatment in the use of a public accommodation open to the public generally.

Judicial acts of the state Courts are "state action" under the Fourteenth Amendment, *Shelley v. Kraemer,* supra, 1. The subject of judicial action as "State Action" is treated exhaustively in Part II of Chief Justice Vinson's opinion which concludes:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of State Courts and State judicial officials. Although in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of State action may be said to offend the Amendment's prohibiting provisions, it has never been suggested that State Court action is immunized from the operation of these provisions simply because the act is that of the judicial branch of the State government."

In addition to the many cases cited in *Shelley v. Kraemer,* see also, *Barrow v. Jackson,* 346 U.S. 249; *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 463.

It is also equally clear, the Amendment reaches conduct of the police. *C. F. Monroe v. Pope,* ...... U.S. ...... 5 L. Ed. 2d 492 (1961); *Screws v. United States,* 235 U.S. 91. See also *Baldwin v. Morgan,* ...... F. 2d ...... (5th Cir. No. 18280, decided February 17, 1961); *Bowman v. Birmingham Transit Co.,* 280 F. 2d 531, 533 (5th Cir. 1960); *Vallee v. Stengel,* 176 F. 2d 697 (3rd Cir. 1949), all of which condemn police enforcement of racial segregation in public places.

State action which enforces racial discrimination and segregation is condemned by the Fourteenth Amendment's equal protection clause. *Buchanan v. Warley,* 245 U.S. 60; *Brown v. Board of Education,* 347 U.S. 483; Shelley v. Kraemer, supra; *Gayle v. Browder,* 352 U.S. 903. Moreover, State inflicted racial discrimination, bearing no national relation to a permissible governmental purpose, offend the concept of due process. *Bolling v. Sharpe,* 347 U.S. 497; *Cooper v. Aaron,* 358 U.S. 1.

For the State to infest the administration of its criminal laws by using them to support restaurant segregation as an aspect of the "customs" of a segregation society, offends the salutary principle that criminal justice must be administered "without reference to consideration based upon race." *Gibson v. Mississippi,* 162 U.S. 565, 591.

Indeed, when the Criminal Court of Baltimore held in this case that the state judicial process can be used to enforce the legal right of racial discrimination of the owner it construed this legislative enactment, i.e. criminal trespass statute, as authorizing discriminatory classification based exclusively on color. Cf. Mr. Justice Steward concurring in *Burton v. Wilmington Parking Authority,* 29 U.S. Law Wk. 4317, 4320. And, as Mr. Justice Frankfurter wrote, dissenting in the *Burton* case, "for a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of equal protection of the laws, in violation of the Fourteenth Amendment". (Ibid.)

The Fourteenth Amendment from the beginning has reached and prohibited all racial discrimination save that "unsupported by State authority in the shape of laws, customs, or judicial or executive proceeding," and that which is not sanctioned in some way by the State, *Civil*

Rights Cases, 109 U.S. 3, 17. "State action of every kind . . . which denies . . . the equal protection of the laws" is prohibited by the Amendment. Id. at 11; Cf. *Burton v. Wilmington Parking Authority*, supra. The Fourteenth Amendment was "primarily designed" to protect Negroes against racial discrimination. *Strauder v. West Virginia*, 100 U.S. 303, 307. "The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race — the right to exemption from, . . . legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy . . .". (Ibid.)

In the case of *Boynton v. Virginia* (364 U.S. 454, 1960) the United States as amicus curiae urged the U.S. Supreme Court's reversal of a Virginia trespass conviction upon the grounds urged herein, that the Fourteenth Amendment prohibits state aid to enforce a policy of racial discrimination by a business opened to the general public. In the Government's brief before the Court [at p. 20] the Solicitor General emphasized that the prior judicial rulings of the Court demonstrate that "where the state enforces or supports racial discrimination in a place open for use of the general public . . . it infringes Fourteenth Amendment rights nothwithstanding the private origin of the discriminatory conduct." The Supreme Court decided the *Boynton case* on the independent interstate commerce point which was also urged by the Government.

The fact that a property interest is involved does not imply a contrary result. It is the State's power to enforce such interests that is in issue. For, as the Supreme Court said in *Shelley v. Kraemer*, p. 22:

> ". . . It would appear beyond question that the power of the State to create and enforce property interests

> must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. Marsh v. Alabama, 326 U.S. 501."

Indeed, as the Court said in *Marsh v. Alabama,* 326 U.S. 501, 505-506:

> "We do not agree, that the corporation's property interests settle the question. The state urges in effect that the corporation's right to control the inhabitants of Chickasan is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention."

Appellants contend that the States may not, under the Fourteenth Amendment, use their police, judiciary and legislative enactments to enforce racial discrimination for a business open to the public. Analyzing all of the circumstances, with regard for the nature of the property interests asserted, and the State's participation in their creation and enforcement, no property interest of such an enterprise warrants departing from the Fourteenth Amendment's clear prohibition against racial discrimination.

What is the "property right" involved here? Hooper Restaurant, Inc., does business in a building opened to the public as a whole for the business advantage of the owner. There was no practice of selecting customers or limiting the classes of persons who may enter the Restaurant. The restaurant was not, as some may be, limited to men, women, adults. There were no signs posting the property. No claim or interest in privacy was exercised by the owner in the use of this building.

The specific area in dispute, the dining tables, were open to members of the public to do business for profit with Hooper's Restaurant.

There is *no issue concerning protection of property from use alien to its normal intended function.* Appellants sought only *to* purchase food. Whatever their motives (a frankly acknowledged desire to seek an end to racial discrimination), their actions conformed to those of ordinary purchasers of food. Appellants were not disorderly or offensive. The manager's and owner's sole objection was that they were Negroes. The sole basis of exclusion, ejection, arrest and conviction was race, the manager and owner explicitly testified. The crime was being Negroes in Hooper's Restaurant. Had they been white, the trespass statute would never have been applied to them.

The Manager and Mr. Hooper testified that if they opened the Restaurant to colored people they were fearful of losing their white customers. Therefore, Hooper's policy here was dependent upon the customs of the community. Obviously then, the asserted right here is related to particicipation, in, or conformity with, a community custom of segregation, the maintenance of a segregated society.

Therefore, the asserted "property" right here, if any, is *simply the right to discriminate* solely on the basis of race, and according to the customs of the community, in a restaurant, otherwise open to the public.

But the Court below treated this right as if it were a sacred, natural, inherent, and inalienable property right at stake here.

The arbitrary quality of the "property right" supported by the State's trespass law here is emphasized by the fact that all of the department stores, and a considerable number of the eating establishments in Baltimore City are integrated.

A property interest may be taken away by the State without denying due process of law, *Western Turf Assoc. v. Greenberg,* 204 U.S. 359; Cf. *Bob-Lo Excursion Co. v. Michigan,* 333 U.S. 28; *Railway Mail Ass'n. v. Corsi.* Indeed mere reference to the common law duty of common carriers and innkeepers demonstrates that an owner's use of his property affects the nature of his dominion over it. Cf. *Civil Rights Cases,* 109 U.S. 3, 25. The Supreme Court of the United States has said on several occasions, "that dominion over property springing from ownership is not absolute and unqualified." *Buchanan v. Warley,* 245 U.S. 60, 74; *United States v. Willow River Power Co.,* 324 U.S. 499, 510; *Marsh v. Alabama,* 326 U.S. 501, 506; *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 417 (Justice Brandeis' dissenting opinion).

This case does not involve a claim that the State must affirmatively provide a legal remedy against "private racial discrimination." (Cf. *Burton v. Wilmington Parking Authority,* 29 U.S. Law Week 4317, April 17, 1961). *Rather Appellants assert only their immunity from criminal prosecution by the state.* Nor is there involved judicial enforcement of racial discrimination by trespass laws to protect an owner's interest in maintaining privacy in the use of his property, such as a home or private club. There is no claim that the Fourteenth Amendment bars enforcement of trespass laws generally.

Consequently, the case involves only this highly important issue: *Whether the State of Maryland may use its executive and judicial machinery (particularly its criminal laws) to enforce racial discrimination for a business company that by its own choice and for its own advantage has opened its commercial property to the public.* Appellants submit that decisions of the United States Supreme Court demonstrate that this question should be answered, No.

II.

THE APPLICATION OF THE CRIMINAL TRESPASS STATUTE IN THIS CASE DENIES THE APPELLANTS THE FREEDOM OF EXPRESSION AND ASSEMBLY CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The decision of the Judge below conflicts with decisions of the Supreme Court securing the Fourteenth Amendment right to freedom of expression.

Appellants were engaged in the exercise of free expression by means of verbal requests to the owner and management and the requests implicit in seating themselves at the tables for nonsegregated food services in a commercial property opened up to the public. Their expression, asking for service and seating themselves at tables to await service, was entirely appropriate to the time and place in which it occurred. They continued to sit in protest against the failure of the manager to serve them. Certainly the invitation to enter an establishment carries with it the right to discuss and even argue with the proprietor concerning terms and conditions of service so long as there is no disorder.

While trespass statutes are directed towards the avoidance of breaches of the peace, here the appellants' conduct was peaceable and orderly. If any threat to the peace might be involved, it would arise solely from the racial discrimination practised against them. Accordingly, if the state's legitimate interest in preventing breaches of the peace is made the basis of governmental intervention in such a situation, its intervention could be constitutionally justified here only if directed at the source of the threat to the peace, rather than at the persons who are being discriminated against. *Lonesome v. Maxwell*, 220 F. 2d 386, aff'd. 350 U.S. 877.

Courts of great authority including the United States Supreme Court on numerous occasions have held that the right of free speech is not circumscribed by the mere fact that it occurs on private property. The existence of a property interest is but one circumstance to be considered among many. In *Marsh v. Alabama, supra,* the United States Supreme Court overturned the trespass conviction of Jehovah's Witnesses who went upon the premises of a company town to proselytize, holding that such arrest and conviction violated the Fourteenth Amendment. In *Republic Aviation v. National Labor Relations Board,* 324 U.S. 793, the United States Supreme Court upheld the validity of the National Labor Relations Board's ruling that lacking special circumstances that might make such rules necessary, employer regulations forbidding all union solicitation on company property regardless of whether the workers were on their own or company time, constituted unfair labor practices.

See also *N.L.R.B. v. American Pearl Button Co.,* 149 F. 2d 258 (8th Cir. 1945); *United Steel Workers v. N.L.R.B.,* 243 F. 2d 593, 598 (D.C. Cir. 1956), (Reversed on other grounds) 357 U.S. 357. Our attention has not been called to any case under the Wagner Act or its successors in which it has been held that an employer can prohibit either solicitation or distribution of literature by employees simply because the premises are company property.

> "Employees are lawfully within the plant, and nonworking time is their own time. If Section 7 activities are to be prohibited, something more than mere ownership and control must be shown."

In *Martin v. Struthers,* 319 U.S. 141, the United States Supreme Court held unconstitutional an ordinance which made unlawful ringing door bells of residences for the

purpose of distributing handbills, upon considering the free speech values involved; "door to door distribution of circulars is essential to the poorly financed causes of little people," at p. 146 — and that the ordinance precluded individual private householders from deciding whether they desired to receive the message. But, effecting "an adjustment of constitutional rights in the light of the particular living conditions of the time and place," *Beard v. Alexandria,* 341 U.S. 622, 626, the Supreme Court, assessing a conviction for door-to-door commercial solicitation of magazines, contrary to a "Green River" ordinance, concluded that the community "speak (ing) for the citizens," 341 U.S. 644, might convict for crime in the nature of trespass after balancing the "conveniences between some householders' desire for privacy, and the publishers right to distribute publications in the precise way that those soliciting for him think brings the best results." 341 U.S. 644. Because, among other things, "(a) subscription may be made by anyone interested in receiving the magazines without the annoyances of house to house canvassing," ibid.; the judgment was affirmed.

Similarly, following an appraisal of the speech and property considerations involved, a Baltimore City Court, *State of Maryland v. Williams,* 44 Lab. Rel. Ref. Man. 2357, 2361 (1959), has on Fourteenth Amendment and Labor Management Relations Act grounds, decided that pickets may patrol property within a privately owned shopping center. See also *People v. Barisi,* 193 Mis. 934, 86 N.Y.S. 2d 277, 279 (1948), which held that picketing within Pennsylvania Station was not trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it"; *Freeman v. Retail Clerks Union, Washington Superior Court,* 45 Lab. Rel. Ref. Man. 2334 (1959), which denied relief to a shopping

center owner against picketers on his property, relying on the Fourteenth Amendment.

The liberty secured by the due process clause of the Fourteenth Amendment insofar as it protects free expression is not limited to verbal utterances, though Appellants here expressed themselves by speech. In the evolution of the legal precedents, the right comprehends picketing, *Thornhill v. Alabama,* 310 U.S. 88; free distribution of handbills, *Martin v. Struthers,* 319 U.S. 141; display of motion pictures, *Vurstyn v. Wilson,* 343 U.S. 895; joining of associations, *N.A.A.C.P. v. Alabama,* 357 U.S. 449; the display of a flag or symbol, *Stromberg v. California,* 283 U.S. 359. The Appellants here sat down at tables, awaiting service. They continued to "sit-in" in protest when refused service. What has become known as a "sit in" is a different but obviously well understood symbol, a meaningful method of communication and protest.

In the circumstances of this case, the only apparent state interest being preserved was that of maintaining the management's rights to exclude Negroes from public eating facilities. The management itself sought nothing more. But as Justice Holmes held in *Schenck v. United States,* 249 U.S. 47, 52, the question is "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil" that the state has a right to prevent.

The state has no interest in preserving such discrimination and certainly has no valid interest in suppressing speech, which is entirely appropriate to the time and place and does not interfere with privacy, when the speech urges an end to racial discrimination imposed in accordance with the customs of the community.

III.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTIONS OF THE APPELLANTS UNDER THE STATE'S CRIMINAL TRESPASS STATUTE.

The gist of the crime of trespass is that the defendant is "unlawfully" on the land of another when notified to depart therefrom. The statute explicitly excepts one who may be upon the property of another under a claim of right; he cannot be guilty of a criminal trespass, even though his claim may later be held unfounded.

If one is asserting the right to be upon the property of another under a claim of right due to his constitutional guaranties, he cannot be held guilty of a criminal trespass.

John R. Quarles, Sr., Morgan College Student, testifying in the court below, stated:

> "* * * Mr. Hooper came in and he proceeded to talk to me about this * * * I explained to him we were there to be served and also to let his customers become aware of the problem of segregation in Baltimore City and then he proceeded to say, give me his views on how he felt about it * * * I explained to him * * * 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.
>
> CROSS EXAMINATION
>
> By Mr. Murphy:
>
> Q. Well your actual purpose then was to demonstrate rather than to eat, isn't that correct? A. The actual purpose first of all was to eat. After being refused service, that was when the demonstration came about" (T. 45-46).

Thus, Appellants contend that they were lawfully on the premises of Hooper's Restaurant, seated at the dining tables, under a bonafide claim of right as members of the general public, seeking the food service which this business offers the public. That when they were refused the service which was being given to white members of the public, they "sat-in" as a protest against the racial discrimination, exercising their constitutional right to freedom of expression.

Since *Thornhill v. Alabama,* 310 U.S. 88, there has been no controversy but that picketing and the distribution of leaflets or the carrying of a sign constitute a communication with the public or a part thereof which is entitled to protection under the First and Fourteenth Amendments to the U. S. Constitution, and if property rights, no matter how invoked, tend to or do conflict with the right to the freedom of speech, then such property rights must give way to the other. "While both personal and property rights are necessarily cherished in this country, nevertheless, where there is a conflict the individual's Constitutional right must prevail. To hold otherwise would not only encourage but would soon promote an autocracy of property which is foreign to the precepts upon which this government was founded and is maintained." *People of the State of Illinois v. Mazo,* No. 59 L. 17.

John Quarles, Sr., Appellant, further testified:

> "Q. (Mr. Watts) Have you been on other demonstrations and sat like this and business continued? A. Yes, sir.
>
> Q. People sat and ate and were served, is that correct? You have also been in restaurants as you did on this particular occasion and been served? A. Yes, sir.

> Q. You were informed then that the policy had been changed? A. That's right, sir.
>
> Q. Did you have this in mind when you went to Mr. Hooper's? A. Yes sir. A number of places we went to seeking service, even maybe prior to entering the restaurant was segregated but after entering the manager has changed his policy and served us right then and there" (T. 57-58).

The statutory admonition is clear, 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 bonafide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of another."

Appellants submit that under language of the statute, there was insufficient evidence before the court to sustain their conviction.

CONCLUSION

For the aforegoing reasons, the Appellants respectfully pray that this Court will reverse their convictions by the Court below.

JUANITA JACKSON MITCHELL,

TUCKER R. DEARING,

THURGOOD MARSHALL,

JACK GREENBERG,

Attorneys for Appellants.

APPENDIX TO APPELLANTS' BRIEF NO. 91

DOCKET ENTRIES AND JUDGMENT

Docket 1960.

May Term.

Number 2523.

Charge: Trespassing, etc.

Prosecuting Witness—Gilbert C. Hooper, Sr.

Appearance of R. B. Watts, T. R. Dearing and J. J. Mitchell, Attorneys, as to each, filed.

June 20, 1960—Recognizance as to each filed.

June 24, 1960—Presentment as to each filed — e.d. — Capias Issued — Cepi, Bail as to each.

June 27, 1960—Recognizance taken as to each: Released on own Recognizance — $100.00.

July 12, 1960—Indictment filed.

November 10, 1960—Copy of Indictment Served — Receipt filed.

November 10, 1960—Arraigned and pleads as to each, Not Guilty.

November 10, 1960—Submits under plea as to each, Not Guilty and Issue before Byrnes, Judge.

November 10, 1960—Not concluded and resumed on 24 March, 1961.

March 24, 1961—Verdict: As to each, Guilty 1st Count, Not Guilty 2nd Count.

March 24, 1961—Judgment: As to each, Fined $10.00 and Costs. Fine suspended and to pay Court Costs.

March 24, 1961—As to Bell, et al., Costs $89.00 paid Sheriff.

March 24, 1961—Memorandum Opinion filed. Byrnes, Judge.

April 12, 1961—As to each: An Appeal to the Court of Appeals of Maryland, filed.

April 28, 1961—Order of Court that the time for filing the Transcript of Testimony be extended to and including 26 May, 1961, filed. Byrnes, Judge.

May 18, 1961—Transcript of Testimony filed. Transcript No. 1800.

May 22, 1961—Appearance of Robert B. Watts, Esq., stricken out.

INDICTMENT

State of Maryland, City of Baltimore, to wit:

The Jurors of the State of Maryland, for the body of the City of Baltimore do on their oath present that Robert Mack Bell, Lovellen P. Brown, Arimenth A. D. Bullock, Rosetta Gainey, Annette Green, Robert M. Johnson, Richard McKoy, Aliceteen E. Mangum, John R. Quarles, the elder, Muriel B. Quarles, Lawrence M. Parker, and Barbara F. Whittaker, that on the seventeenth day of June, in the year of our Lord nineteen hundred and sixty, at the City aforesaid, 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; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

* * * * * *

MOTION FOR DIRECTED VERDICT

Now come Defendants, by their Attorneys, Brown, Allen and Watts, Dearing and Toadvine, and Juanita Jackson Mitchell, and move the Court for a directed verdict in their favor and assign therefor the following reasons:

1. The restaurants which are the complaining witnesses in above styled cases are privately-owned places of public accommodation;

2. Defendants were business invitees, peacefully upon the premises of these public accommodations, and are not guilty of trespass;

3. Application of Article 27, Section 577 of the Annotated Code of Maryland 1957 Edition to these Defendants abridges the rights of the Defendants to freedom of speech and of association in violation of the State of Maryland and the Fourteenth Amendment of the Constitution of the United States;

4. Application of Article 27, Section 577 of the Annotated Code of Maryland 1957 Edition to these Defendants abridges the rights of the Defendants to freedom of assembly in contravention of the Fourteenth Amendment to the Constitution of the United States;

5. Defendants were upon the properties in question under a claim of right and their arrest and conviction would be in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States;

6. Conviction of the Defendants under the facts and circumstances of this case would deny to them due process contrary to the Fourteenth Amendment of the Constitution of the United States, in that the trespass statute as here applied authorizes their ejection, arrest, prosecution and conviction for being in a public place, solely on account of their race and color in violation of the liberty guaranteed by the Fourteenth Amendment of the Constitution of the United States;

7. Application of the statute of these Defendants violates their rights to equal protection of the law clause of the Fourteenth Amendment of the Constitution of the United States by singling them out for ejectment and arrest solely because of their race and color;

8. The statute as applied to these Defendants denied to these Defendants due process of law because it enforced a private rule or regulation of the restaurant owners requiring racial segregation and discrimination in the restaurants in violation of the Fourteenth Amendment of the Constitution of the United States;

9. The Trespass Statute, as applied to these Defendants, denied to them due process and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that it authorizes or requires the convictions of Defendants of a crime for failing or refusing to obey an order of a private person based solely upon the race or color of the Defendants;

10. Defendants were denied equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States when, after having been invited into the facilities in question, as members of the general public, they were ordered out and discriminated against by the restaurant owners on account of their race and color, and when the State of Maryland enforced such discrimination by the arrest and prosecution of these Defendants;

11. Application of the Trespass Statute under the facts and circumstances of this case violates the common law and statutory rights of these Defendants not to be excluded from the common market.

Wherefore, your Defendants pray that the Court direct a verdict in their favor.

Brown, Allen and Watts
Dearing and Toadvine
Juanita Jackson Mitchell

MEMORANDUM OPINION

Byrnes, J.

On July 12, 1960 the above named defendants, students attending local schools, were indicted by the Baltimore

City Grand Jury for trespassing on the premises of Hooper's Restaurant at the southwest corner of Fayette and Charles Streets in Baltimore City. The first count of the indictment charges that the defendants

> ". . . on the seventeenth day of June, in the year of our Lord nineteen hundred and sixty, at the City aforesaid, unlawfully did enter upon and cross over the land, premsies 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 [sic] Food Co., Inc., a corporation, not to do so; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State."

The second count charges that the defendants

> ". . . 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 [sic] in a conspicuous manner; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State."

Testimony at the trial disclosed that on June 17, 1960, the defendants entered the restaurant while it was open for business and requested the hostess, Ella Mae Dunlap, to assign them seats at tables for the purpose of being served. She informed them that it was not the policy of the restaurant to serve Negroes, and that she was sorry but she could not seat or serve any of the defendants. She explained to them that she was following the instructions of the owner of the restaurant.

Despite this refusal, defendants persisted in their demands and, brushing by the hostess, took seats at various tables on the main floor and at the counter in the basement. Not being served, which they apparently anticipated, some of the defendants began to read their school books.

The trespass statute, Article 27, section 577 of the Maryland Code, 1957 Ed. was read to the defendants and they were told by the manager, Albert R. Warfel, that they were trespassers, and they were then requested to leave. Upon their refusal to do so, police were summoned. Warfel was advised by the police that in order to have defendants ejected by the Baltimore City Police Department it would be necessary for him to obtain warrants for their arrest for trespassing. Warrants were obtained and the arrests followed. Defendants waived a hearing before the Magistrate at the Central Police Station and the case was referred to the Grand Jury.

Defendants contend that their ejection from the restaurant, and subsequent arrest were violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States. The position of the State and the Restaurant Association of Maryland, appearing as Amicus Curiae, is that these clauses of the Fourteenth Amendment do not prohibit discriminatory action by private individuals, such as the proprietor of the restaurant here, nor do they inhibit state action in the form of arrest and conviction for trespass of persons who defy the proprietor's request to leave his property regardless of his reason for doing so. No cases supporting defendants' contention were cited to or found by this Court; on the other hand the State's position is firmly rooted in authority.

At the trial of this case, defendants' counsel repeated arguments made before the Supreme Court of the United States in the highly-publicized case of *Boynton v. Virginia*, 364 U.S. 454 (1960) and requested this Court to withhold its decision pending the outcome of that case. Since then the *Boynton* case has been decided, but nothing in the Court's opinion gives solace to defendants. While it is true that Supreme Court reversed the Virginia Court's conviction of Boynton, an alleged trespasser in a privately owned restaurant, the Court avoided the Constitutional questions there presented (the same ones advanced here) and held that the restaurant at an interstate bus terminal,

although privately owned, was an "integral part of the bus carriers tranportation service for interstate passengers" and any racial discrimination in the restaurant violated provisions of the Interstate Commerce Act barring discriminations of all kinds.

It is significant, this Court believes, that in *Boynton, supra,* the Court was careful to point out that "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act."

Two recent decisions clearly in point are determinative of the principle that in the absence of appropriate legislation forbidding racial discrimination the operators of privately owned restaurants, even though generally open to the public, may discriminate against persons of another color or race, however unfair or unjust such policy may be deemed to be.

In a percuriam opinion the United States Court of Appeals for the Fourth Circuit, *Slack v. White Tower,* 284 F. 2d 746 (1960), affirmed Judge Roszel Thomsen's decision holding, after an excellent summation of the applicable law, that a restaurant owner in refusing service to a Negro, violated no law nor did such refusal deprive the Petitioner of any constitutional guarantees, *Slack v. White Tower,* 181 F. Supp. 124 (1960).

In the most recent case dealing with efforts of Negroes to force the owners of business premises to open their establishments to all comers through so-called "sit-in" tactics, our Court of Appeals in *Drews v. State,* ...... Md. ......, 167 A. 2d 341 (1961) affirmed Judge W. Albert Menchine's conviction of four persons charged with disorderly conduct for refusing to leave Gwynn Oak Amusement Park in Baltimore County after being ordered to do so. Speaking for the Court, Judge Hammond pointed out that the duty imposed by the early common law to serve the public without discrimination was later confirmed to exceptional callings where an urgent public need required its continuance,

such as innkeepers and common carriers. Continuing Judge Hammond stated that

> "* * * Operators of most enterprises including places of amusement, did not and do not have any such common law obligation, and in the absence of a statute forbidding discrimination, can pick and choose their patrons for any reason they decide upon, including the color of their skin."

For the reasons stated this Court must find each defendant guilty on the first count of the indictment, and not guilty on the second count.

Each defendant is fined $10.00 and cost, the fine is suspended, the costs must be paid.

PROCEEDINGS

March 24, 1961

(The Court) I appreciate the assistance counsel have given me. This was an extremely well-tried and interesting case.

I have written a short opinion based upon the law as I understand it to be, so I see nothing to be served by reading my opinion. I will have copies for all parties.

The verdict is guilty on the first count as to each defendant; not guilty on the second count as to each defendant.

(Statement by Mr. Watts in behalf of the defendants.)

(The Court) I appreciate that comment, Mr. Watts. I agree with you these people are not law-breaking people; that their action was one of principle rather than any intentional attempt to violate the law. Under the law as it stands they did violate this particular statutory section of our Code.

As to the disposition: A fine of Ten Dollars as to each defendant, and because of what you just said and the fact they did not intend to deliberately violate the law but were seeking to establish a principle, the court will suspend the fine, but the court directs that the costs be paid by the defendants.

FILED OCT 28 1961

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1961

No. 91

ROBERT M. BELL, ET AL.,

Appellants,

v.

STATE OF MARYLAND,

Appellee.

APPEAL FROM THE CRIMINAL COURT OF BALTIMORE
(JOSEPH R. BYRNES, Judge)

BRIEF OF APPELLEE

THOMAS B. FINAN,
Attorney General,

LAWRENCE F. RODOWSKY,
Asst. Attorney General,

SAUL A. HARRIS,
State's Attorney of
Baltimore City,

JAMES W. MURPHY,
Asst. State's Attorney of
Baltimore City,

For Appellee.

The Daily Record Co., Baltimore 3, Md.

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(JOSEPH R. BYRNES, Judge)

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The Appellee accepts the Statement of the case set forth in Appellants' brief.

QUESTIONS PRESENTED

I. Is the Enforcement, by the Police and the Judiciary, of Maryland's Non-Discriminatory Trespass-After-Warning Statute, Against Appellants, Who Have Trespassed on Private Property, Unconstitutional State Action Proscribed by the Fourteenth Amendment to the Constitution of the

United States, Because the Owner of the Private Property, by Personal Choice Based upon the Appellants' Race, Has Refused Them Permission to be Upon the Property?

II. Do the "Freedom of Speech" Provisions of The First and Fourteenth Amendments to the Constitution of the United States Guarantee to Appellants Any Right to Trespass on the Private Property of Hooper's Restaurant in the Form of a "Sit-In" Demonstration?

III. Is the Appellants' Assertion of a Claimed Constitutional Right to "Sit-In" Private Property, a Bona fide Claim of Right or Ownership of the Private Property, Which Would Render Appellants' Conduct Non-Criminal Under the Provisions of Code (1957 Ed.), Article 27, Section 577?

STATEMENT OF FACTS

The Appellee accepts the Statement of Facts set forth in Appellants' brief.

ARGUMENT

I. THE ARREST AND CONVICTION OF APPELLANTS FOR TRESPASS INVOLVED NO DISCRIMINATORY STATE ACTION. THE REFUSAL OF HOOPER'S RESTAURANT TO GRANT APPELLANTS' PERMISSION TO BE UPON ITS PROPERTY BECAUSE OF APPELLANTS' RACE WAS NOT STATE ACTION.

It is certainly clear that the facts in the case at bar make out a violation of Code (1957 Ed.), Article 27, Section 577. Appellants, however, assert that their arrest and conviction constituted action by the State in violation of the Fourteenth Amendment. The right of Hooper's Restaurant to maintain a policy of racial segregation on its premises is not questioned by Appellants, but they assert that a trespass resulting from the owner's denial of permission to Appellants, based on that policy, cannot be punished as

other criminal conduct. Fundamentally, Appellants ask this Court to extend the holding in *Shelley v. Kraemer*, 334 U.S. 1, 92 L. Ed. 1161 (1948). That case held that the States could not deny to an owner of property, because of his race, the right to own and occupy the property, through the enforcement of a racial restrictive covenant. Appellants assert that this means they may enter upon and cross over the private property of Hooper's Restaurant, in which they have no right or interest, and that, after clear warning that their presence is without permission from the owner, they may continue the trespass fully immune from prosecution.

This Court has recently rejected this argument in two cases. In *Drews v. State*, 224 Md. 186, 167 A. 2d 341 (1961) the appellants contended that their arrest for disorderly conduct at Gwynn Oak Amusement Park constituted prohibited State action in enforcement of the policy of racial segregation at the park. At page 194 of 224 Md., this Court stated:

> "The Supreme Court said in the racial covenant case of *Shelley v. Kraemer*, 334 U.S. 1, 13, 92 L. Ed. 1161, 1180: '[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' The Park had a legal right to maintain a business policy of excluding Negroes. This was a private policy which the State neither required nor assisted by legislation or administrative practice. The arrest of appellants was not because the State desired or intended to maintain the Park as a segregated place of amusement; it was because the appellants were inciting the crowd by refusing to obey valid commands to move from a place where they had no lawful right to be. . . .

> ". . . As Judge Thomsen said in *Griffin v. Collins,* 187 F. Supp. 149, 153, in denying a preliminary injunction and a summary judgment in a suit brought to end the segregation policy of Glen Echo Amusement Park near Washington: 'Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights.' "

The second case was *Griffin & Greene v. State,* 225 Md. 422, 171 A. 2d 717 (1961). There the Griffin appellants had been convicted of trespass under Article 27, Section 577, when they refused to leave Glen Echo Amusement Park after warning, as part of a protest of the park's policy of racial segregation. In affirming the convictions, this Court held the *Drews* case, *supra,* to be controlling, and stated at page 431 of 225 Md. as follows:

> "As we see it, the arrest and conviction of these appellants for a criminal trespass as a result of the enforcement by the operator of the park of its lawful policy of segregation, did not constitute such action as may fairly be said to be that of the State. The action in this case, as in *Drews,* was also 'one step removed from State enforcement of a policy of segregation and violated no constitutional right of appellants.' "

The same argument advanced by the instant Appellants has also been rejected in *Randolph v. Commonwealth,* 202

Va. 661, 119 S.E. 2d 817 (1961); *State v. Avent,* 253 N.C. 580, 118 S.E. 2d 47 (1961); *State v. Fox,* 254 N.C. 97, 118 S.E. 2d 58 (1961) and *State v. Williams,* 253 N.C. 804, 117 S.E. 2d 824 (1961).

Since there is no controlling authority to the contrary, it is respectfully submitted that the arrest and conviction of Appellants for trespass, resulting from Hooper's Restaurant enforcing its private, lawful policy of segregation, was at least one step removed from State enforcement of a policy of segregation and violated no constitutional right of Appellants.

II. THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DID NOT GUARANTEE TO APPELLANTS ANY RIGHT TO TRESPASS ON THE PRIVATE PROPERTY OF HOOPER'S RESTAURANT IN THE FORM OF A "SIT-IN" DEMONSTRATION.

Appellee respectfully suggests that Appellants' second argument is a paraphrase of the oversimplified formula which Mr. Justice Frankfurter branded as "sterile argumentation" in his concurring opinion in *Kovacs v. Cooper,* 336 U.S. 77, 96, 93 L. Ed. 513, 527 (1949) (sustaining the constitutionality of the regulation of sound trucks). Appellants' argument is essentially that freedom of speech means the right to communicate, a "sit-in" is one form of communication, and *ergo,* that form is entitled to the same protection as any other means of communication, whether by tongue or pen.

It is certainly open to doubt whether the act of sitting is a form of communication. Dependent upon the circumstances, the act may indicate only comfort, rest, indolence or vagrancy. The critical circumstance that imparts the comunication of an idea to the act of sitting in the case at bar is that the sitting takes place on the private property

of Hooper's Restaurant, contrary to the will and permission of the owner. Thus it is essentially Appellants' contention that their conduct, which is otherwise in violation of the criminal law, is nevertheless protected under the First and Fourteenth Amendments, because their conduct carries a connotation of protest to private racial discrimination only by virtue of its being done in an unlawful or criminal way. Appellee respectfully submits that such constitutional absolutism has never received judicial recognition.

Appellants appear to rely principally upon the decision in *Marsh v. Alabama,* 326 U.S. 501, 90 L. Ed. 265 (1946). That case involved the community of Chickasaw, Alabama, a "company town", wholly owned by the Gulf Shipbuilding Corporation. The corporation absolutely forbade any street or house solicitation without its permission. A Jehovah's Witness was convicted of trespass for distributing religious tracts on the sidewalk of the business district of the town. In reversing the conviction on First Amendment grounds, a majority of the Supreme Court first noted that the town and its business district were accessible to and freely used by the public in general and that there was nothing to distinguish them from any other town and shopping center except for the technical legal title. After noting that the conduct of the appellant in that case would have been constitutionally protected had it occurred on a municipally owned sidewalk, the majority of the court held at 507 of 326 U.S., 269 of 90 L. Ed., as follows:

> "We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a 'business block' in the town and a street and sidewalk on that business block. Cf. Barney v. Keokuk, 94 U.S. 324, 340, 24 L. Ed. 224, 228. Whether

a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution."

It is respectfully submitted that the *Marsh* decision is not applicable to the facts of the case at bar and is by no means a holding that private property rights must in all cases yield to a mere assertion of free speech. Indeed, the United States Supreme Court has expressly approved the rejection of attempts to extend the *Marsh* holding beyond its limited facts.

A good indication of what the Supreme Court considers the scope of *Marsh* to be is set forth in *Tucker v. Texas,* 326 U.S. 517, 90 L. Ed. 274 (1946), a case decided the same day as *Marsh*. The *Tucker* case reversed the conviction of a Jehovah's Witness who refused to leave the Hondo Navigation Village, which was owned by the United States, after being directed to do so by the federal village manager. Mr. Justice Black, who wrote the majority opinion in *Marsh,* stated for the majority in *Tucker,* that the companion case had decided "that managers of a company-owned town could not bar all distribution of religious litera-

ture within the town, or condition distribution upon a permit issued at the discretion of its management." 326 U.S. at 519-520, 90 L. Ed. at 277. It therefore appears that the Supreme Court considered *Marsh* as applicable to a complete restraint, which was a prior restraint, and which applied throughout an entire town.

A few months after the *Marsh* decision, a band of 700 Jehovah's Witnesses in New York apparently considered that that decision had granted them the same type of license which Appellants assert here. The group descended on Parkchester, a housing development in the Bronx which was owned by the Metropolitan Insurance Company. The community covered 129 acres, improved by 171 apartment houses of 12,000 family units inhabited by 35,000 people. It was traversed by two public highways, and contained a number of private streets in addition to shops, offices and gas stations leased to tenants. When the landlord refused the Jehovah's Witnesses permission to go through the halls and passages of the apartment buildings, to knock on doors and ring doorbells, except when the consent of the tenant to be called upon had been obtained, the Jehovah's Witnesses brought suit and asserted that their constitutional rights had been infringed. In *Watchtower Bible & Tract Society v. Metropolitan Life Ins. Co.*, 297 N.Y. 339, 79 N.E. 2d 433 (1948), the highest court of New York rejected this contention, based on the *Marsh* case, with the following reasoning:

> "Our purpose in thus briefly analyzing those decisions is to show that they do not (nor do any others of which we know) go nearly so far as appellants would have us go here. Parkchester, like Chickasaw, Alabama, and the Federal housing community in Texas, is privately owned, but there the similarity as to facts ends. It is undisputed that this defendant has never sought in any way to limit the Witnesses' activities on

> the streets or sidewalks of Parkchester, some of which are privately, and some publicly, owned. The distribution which this defendant's regulation inhibits was not on streets, sidewalks or other public or quasi-public places, but inside of, and into, the several floors and inner hallways of multiple dwellings. Moreover, defendant's regulation did not absolutely debar these ministers from their visits in the buildings and their persuasions therein, since it allowed them, whenever a tenant so desired, and expressed his desire. We think the Bohnke case, supra, is still the law and leaves valid the regulation of door-to-door calls along public streets. But, regardless of the Bohnke ruling, no case we know of extends the reach of the Bill of Rights so far as to proscribe the reasonable regulation, by an owner, of conduct inside his multiple dwelling. So holding, we need not examine the larger question of whether the pertinent clauses of the Constitutions have anything to do with rules made by any dwelling proprietors, governing conduct inside their edifices."

Certiorari was denied by the United States Supreme Court, 335 U.S. 886, 93 L. Ed. 425 (1948) and rehearing was likewise denied. 335 U.S. 912, 93 L. Ed. 445 (1949).

The approach of constitutional absolutism based on the assertion that *Marsh* overrode property rights was likewise rejected in *Hall v. Commonwealth,* 188 Va. 72, 49 S.E. 2d 369 (1948). There a Jehovah's Witness was convicted of trespass after having been warned by the owner of an apartment house against soliciting at the doors of the individual apartments. In affirming the conviction, the Virginia court relied heavily on the *Metropolitan* case, *supra,* and quoted extensively from it. Appeal to the United States Supreme Court was dismissed. 335 U.S. 875, 93 L. Ed. 418 (1948).

The limited extent of the *Marsh* case is most forcefully demonstrated by *Breard v. City of Alexandria,* 341 U.S. 622, 95 L. Ed. 1233 (1951). That case sustained the validity of the "Green River" ordinance of Alexandria, Louisana, against a challenge on First Amendment grounds. Speaking for the majority of six, Mr. Justice Reed stated at 341 U.S. 643-644, 95 L. Ed. 1248-1249, as follows:

> "In the Marsh Case it was a private corporation, in the Tucker Case the United States, that owned the property used as permissive passways in company and government-owned towns. *In neither case was there dedication to public use but it seems fair to say that the permissive use of the ways was considered equal to such dedication.* Such protection was not extended to colporteurs offending against similar state trespass laws by distributing, after notice to desist, like publications to the tenants in a private apartment house. Hall v. Commonwealth, 188 Va. 72, 49 S.E. 2d 369. Appeal, after conviction, on the grounds of denial of First Amendment rights, dismissed on motion of appellee to dismiss because of lack of substance in the question. 335 U.S. 875, 912, 93 L. Ed. 418, 445, 69 S. Ct. 240, 480; see note 2, supra.
>
> "Since it is not private individuals but the local and federal governments that are prohibited by the First and Fourteenth Amendments from abridging free speech or press, Hall v. Virginia does not rule a conviction for trespass after notice by ordinance. However, if as we have shown above, p. 1247, a city council may speak for the citizens on matters subject to the police power, we would have in the present prosecution the time-honored offense of trespass on private grounds after notice. Thus the Marsh and Tucker cases are not applicable here." (Emphasis supplied.)

The majority of the Court would thereby seem to have adopted the view of the *Marsh* case expressed by Mr. Justice

Reed in his dissent in *N.L.R.B. v. Stowe Spinning Co.*, 336 U.S. 226, 242, 93 L. Ed. 638, 649 (1949) when he stated that case "goes no further than to say that the public has the same rights of discussion on the sidewalks of company towns that it has on the sidewalks of municipalities."

The instant Appellants also rely on certain cases which involve labor relations. *Republic Aviation v. N.L.R.B.*, 324 U.S. 793, 89 L. Ed. 1372 (1945) sustained a board order requiring the employer to permit union membership solicitation on its property by its employees during their lunch periods. The decision is based solely on obligations imposed upon employers under the National Labor Relations Act and is not premised on the First Amendment, so that it would seem to be of no effect in the case at bar.

Appellants also cite certain *nisi prius* and magistrate's cases in which, under the particular facts, union picketing of an employer was permitted on property of the employer's landlord. *State of Maryland v. Williams*, 44 L.R.R.M. 2357 (1959) allowed the picketing of a drugstore on the mall and sidewalks of Mondawmin, a regional shopping center in Baltimore. *People v. Barisi*, 193 Misc., 934, 86 N.Y.S. 2d 277 (1948) permitted the picketing of a newsstand in the grand concourse of the New York City Pennsylvania Station along the imaginary extension of the sidewalks of 32nd Street. *Freeman v. Retail Clerks Union*, 45 L.R.R.M. 2334 (Wash. Sup. Ct., 1959) involved picketing on the sidewalk of a shopping center containing 80 stores. Whether the three foregoing cases have been properly decided is not material here. Factually, those cases involved property which was so far open to the public as to be practically indistinguishable from a public sidewalk. The cases certainly are not authority for the substantial invasion of property rights involved in the case at bar.

Even if an accommodation of interests approach were to be considered in the case at bar, it is respectfully submitted that Appellants' contention should be rejected. The Appellants assert that they are privileged to come in a large group, across the threshold, and occupy the private property of Hooper's Restaurant against the will of the owner. It would certainly seem clear that no infringement of Appellants' constitutional right occurs if they are not permitted to appropriate property without compensation but are left free to communicate their ideas in a lawful manner on the public sidewalk.

In addition to the *Breard, Metropolitan Life* and *Hall* cases, *supra,* a contention similar to that advanced by the instant Appellants has also been rejected in the following cases:

Commonwealth v. Palms, 141 Pa. Super. 467, 15 A. 2d 481 (1940) (intrusion into home);

Buxbom v. City of Riverside, 29 F. Supp. 3 (S.D. Calif., 1939) (throwing tract on grounds of private residence);

People v. Vaughan, 65 Calif. App. 2d 844, 150 P. 2d 964 (1944) (halls of hotel);

State v. Martin, 199 La. 39, 5 So. 2d 377 (1941) (tenant homes on plantation); and

Good v. Dow Chemical Co., 247 S.W. 2d 608 (Tex. Civ. App., 1952) (private picnic area for company employees), app. dism'd. and *cert.* denied. 344 U.S. 805, 97 L. Ed. 627 (1952).

As stated by Judge Yankwich in the *Buxbom* case, *supra,* at page 6, "The right to speak freely *does not imply* the right to force one's speech on another's private premises." (Emphasis Court's).

III. APPELLANTS WERE NOT ON THE PRIVATE PROPERTY OF HOOPER'S RESTAURANT UNDER ANY BONA FIDE CLAIM OF RIGHT.

The refusal of Appellants to leave the premises of Hooper's Restaurant, where they had no right to remain after warning, would seem to be a clear violation of the statute. *Griffin & Greene v. State, supra,* at page 429. Appellants assert, however, that they trespassed under a bona fide claim of right, which excepts their conduct from the application of the statute. The asserted right is their claim of free speech. The subject statute, however, is a trespass to property statute. The exception applies "when such entry or crossing is done under a bona fide claim of right or *ownership.*" (Emphasis supplied.) It would appear clear that the exception relates to some interest of the alleged trespasser in the property, which is either a claim of ownership of the property, or of some right in it short of ownership. Thus, in the *Griffin* case, *supra,* the surreptitious purchase of carrousel tickets did not give the appellants there any license to use the subject property and no bona fide claim of right to take seats on the carrousel. Here the Appellants can assert no claim of right in the property of Hooper's Restaurant, particularly after they had received clear notice. It is respectfully submitted that Appellants' assertion of a personal right in themselves to use an owner's property contrary to his will, is not a bona fide claim of right or ownership within the meaning of the statutory exception.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the Court below should be affirmed.

Respectfully submitted,

THOMAS B. FINAN,
Attorney General,

LAWRENCE F. RODOWSKY,
Asst. Attorney General,

SAUL A. HARRIS,
State's Attorney of
Baltimore City,

JAMES W. MURPHY,
Asst. State's Attorney of
Baltimore City,

For Appellee.