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1963 WL 105775 (U.S.)

For opinion see 84 S.Ct. 1770, 84 S.Ct. 260, 84 S.Ct. 38

Briefs and Other Related Documents

Supreme Court of the United States.
William L. GRIFFIN, et al., Petitioners,
v.
STATE OF MARYLAND, Respondent.
No. 6.
October Term, 1963.
September 25, 1963.
On Writ of Certiorari to the Court of Appeals of the State of Maryland

Brief of Respondent

Thomas B. Finan, Attorney General of Maryland,

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INDEX

TABLE OF CONTENTS

***ii** TABLE OF CITATIONS

Cases

***iv** Statutes

Section 2-91 ... 3, 20

Section 4-120 (Ordinance) ... 9

United States Constitution:

Fourteenth Amendment ... 2, 7, 8, 9, 12, 13, 14, 16, 18, 19

***1** OPINIONS BELOW

The opinion of the Court of Appeals of Maryland appears at R. 76-83 and is reported at 225 Md. 422, 171 A. 2d 717. The opinion of the Circuit Court for Montgomery County appears at R. 72-75, but is otherwise not reported.

Attention is also invited to Griffin v. Collins, 187 F. Supp. 149, a civil case arising out of substantially the same factual situation as is now before this Honorable Court.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on June 8, 1961. The Petition for Writ of Certiorari ***2** was granted on June 25, 1962. The case was argued before this Court on November 5th and 7th, 1962. Reargument was ordered on May 20, 1963 (373 U.S. 920).

QUESTIONS PRESENTED

Whether, consistent with the Fourteenth Amendment, the State of Maryland, under its general statute prohibiting trespass on private property, and acting on the complaint of the owner of a privately-owned and operated amusement park, may convict persons who enter upon such amusement park and who, after demand by the agent of the owner of such private facility, refused to leave such amusement park?

The United States, in its amicus curiae brief, raises the further question:

Whether Maryland's criminal trespass statute, which on its face proscribes entry onto or crossing over private property after warning, may constitutionally be applied to Negro defendants, who entered upon unposted business premises open to the general public, but who refused to leave when requested to do so by the owner?

STATUTES INVOLVED

The Petitioners were convicted of violating Chapter 66 of the Laws of Maryland of 1900, codified as Section 577 of Article 27 of the Annotated Code of Maryland (1957 Ed.), which provides:

"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 conviction 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 ***3** 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 Crimin-

al 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." [FN1]

FN1. This statute was amended by Chapter 616 of the Laws of Maryland of 1961 (effective June 1, 1961). The amendment eliminated "or city" following "county" in two places and eliminated "or Criminal Court of Baltimore" immediately preceding the words "where such trespass". By Chapter 453 of the Laws of Maryland of 1963, effective June 1, 1963, the Section was again amended to provide that nothing therein should be construed as being in conflict with the right of Baltimore City to enact a Public Accommodations Ordinance.

The direction to Petitioners to leave the premises was issued on behalf of the owner by one of its agents, a uniformed guard in the employ of a private detective agency under contract to the private owner. The guard, Lieutenant Francis J. Collins, also held an appointment as a Special Deputy Sheriff under the provisions of Chapter 491 of the Laws of Maryland of 1939 (a Public Local Law relating solely to Montgomery County), codified as Section 2-91 of the Montgomery County Code (1955 Ed.), which reads as follows:

"The sheriff of the county, on application of any corporation or individual, may appoint special deputy sheriffs for duty in connection with the property of, ***4** or under the charge of, such corporation or individual; such special deputy sheriffs to be paid wholly by the corporation or person on whose account their appointments are made. Such special deputy sheriffs shall hold office at the pleasure of the sheriff and shall have the same power and authority as deputy sheriffs possess within the area to which they are appointed and in no other area." [FN2]

FN2. The office of Sheriff in Maryland still carriers with it the common law powers of a conservator of the peace, Deputy Sheriffs have such authority as the Sheriff himself could exercise. Hence, the powers of the "Special Deputy Sheriff" under this statute would appear to include the power of arrest. See Turner v. Holtzman, 54 Md. 148.

STATEMENT

The facts of the case were fairly and adequately summarized by the court below, as follows (R. 76-77):

"***William L. Griffin, Marvous Saunders, Michael Proctor, Cecil T. Washington, Jr., and Gwendolyn Green (hereinafter called 'the Griffin appellants' or 'the Griffins') all of whom are Negroes, were arrested and charged with criminal trespass on June 30, 1960, on property owned by Rekab, Inc., and operated by Kebar, Inc., as the Glen Echo Amusement Park (Glen Echo or park).

"The Griffins were a part of a group of thirty-five to forty young colored students who gathered at the entrance to Glen Echo to protest 'the segregation policy that we thought might exist out there.' The students were equipped with signs indicating their disapproval of the admission policy of the park operator, and a picket

line was formed to further implement the protest. After about an hour of picketing, the five Griffins left the larger group, entered the park and crossed over it to the carousel. These appellants had tickets (previously purchased for them by a white person) which the park attendant refused to honor. At the time of this incident, Rekab and Kebar had a 'protection' contract with the National Detective Agency ***5** (agency), one of whose employees, Lt. Francis J. Collins (park officer), who is also a special deputy sheriff for Montgomery County, told the Griffins that they were not welcome in the park and asked them to leave. They refused, and after an interval during which the park officer conferred with Leonard Woronoff (park manager), the appellants were advised by the park officer that they were under arrest. They were taken to an office on the park grounds and then to Bethesda, where the trespass warrants were sworn out. At the time the arrests were made, the park officer had on the uniform of the agency, and he testified that he arrested the appellants under the established policy of Kebar of not allowing Negroes in the park. There was no testimony to indicate that any of the Griffins were disorderly in any manner, and it seems to be conceded that the park officer gave them ample time to heed the warning to leave the park had they wanted to do so."

Upon these facts, the Court considered and rejected the Petitioners' contention that the requisite prior notice required by the Maryland criminal trespass statute was not given to them by the owner or its agent. Specifically, the Court said (R. 79-80):

"*** Since there was evidence that these appellants had gathered at the entrance of Glen Echo to protest the segregation policy they thought existed there, it would not be unreasonable to infer that they had received actual notice not to trespass on the park premises even though it had not been given by the operator of the park or its agent. But, even if we assume that the Griffins had not previously had the notice contemplated by the statute which was required to make their entry and crossing unlawful, the record is clear that after they had seated themselves on the carousel, these appellants were not only told they were unwelcome, but were then and there clearly notified by the agent of the operator of the ***6** park to leave and deliberately chose to stay. That notice was due notice to these appellants to depart from the park premises forthwith, and their refusal to do so when requested constituted an unlawful trespass under the statute. 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. State v. Fox, 118 S.E. 2d 58 (N.C. 1961). Cf. Commonwealth v. Richardson, 48 N.E. 2d 678 (Mass. 1943). Words such as 'enter upon' or 'cross over' as used in § 577, supra, have been held to be synonymous with the word 'trespass.' See State v. Avent, 118 S.E. 2d 47 (N.C. 1961)."

The Court then proceeded to consider the remaining question advanced by the Petitioners, viz., whether their arrest and conviction "constituted an unconstitutional exercise of State power to enforce racial segregation" (R. 81). In concluding that there was no such unconstitutional exercise of State power, and in affirming the judgments of conviction, the Court below said (R. 81-82):

"*** It is true, of course, that the park officer - in addition to being an em-

ployee of the detective agency then under contract to protect and enforce, among other things, the lawful racial segregation policy of the operator of the amusement park - was also a special deputy sheriff, but that dual capacity did not alter his status as an agent or employee of the operator of the park. As a special deputy sheriff, though he was appointed by the county sheriff on the application of the operator of the park 'for duty in connection with the property' of such operator, he was paid wholly by the person on whose account the appointment was made and his power and authority as a special deputy was limited to the area of the amusement park. See Montgomery County Code (1955), § 2-91. As we see it, our decision in ***7**Drews v. State, 224 Md. 186, 167 A. 2d 341 (1961), is controlling here. The appellants in that case - in the course of participating in a protest against the racial segregation policy of the owner of an amusement park - were arrested for disorderly conduct committed in the presence of regular Baltimore County police who had been called to eject them from the park. Under similar circumstances, the appellants in this case - in the progress of an invasion of another amusement park as a protest against the lawful segregation policy of the operator of the park - were arrested for criminal trespass committed in the presence of a special deputy sheriff of Montgomery County (who was also the agent of the park operator) after they had been duly notified to leave but refused to do so. It follows - since the offense for which these appellants were arrested was a misdemeanor committed in the presence of the park officer who had a right to arrest them, either in his private capacity as an agent or employee of the operator of the park or in his limited capacity as a special deputy sheriff in the amusement park (see Kauffman, The Law of Arrest in Maryland, 5 Md. L. Rev. 125, 149) the arrest of these appellants for a criminal trespass in this manner was no more than if a regular police officer had been called upon to make the arrest for a crime committed in his presence, as was done in the Drews case. 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.' "

SUMMARY OF ARGUMENT

The action inhibited by the Fourteenth Amendment is only such action as may fairly be said to be that of the states. The Amendment erects no shield against merely ***8** private conduct, however discriminatory or wrongful. Individual invasion of individual rights is not the subject matter of the Amendment. Shelley v. Kraemer, 334 U.S. 1, 13; Civil Rights Cases, 109 U.S. 3, 11.

A private property owner, such as the operator of a private amusement park, may, consistent with the Fourteenth Amendment, arbitrarily discriminate as to invitees. He has the right, even though he operates his private facility under license from the State, to select his clientele and to make such selection based on color, if he so desires. Williams v. Howard Johnson's Restaurant, 268 F. 2d 845 (4th Cir.); Slack v. Atlantic White Tower Systems, Inc., 181 F. Supp. 124, aft. 284 F. 2d 746.

Individuals have no constitutional right to enter or remain upon private property

contrary to the will of the owner. The private owner, on the other hand, is entitled to equal protection of law in maintaining b-is peaceful possession. Briggs v. State, 367 S.W. 2d 750 (Ark., 1963). This Court, in Martin v. Struthers, 319 U.S. 141, 147, referring to state criminal trespass laws, observed:

"Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. ***".

The State's general laws must be applied to all with equal force, regardless of their race, and violation thereof cannot be shielded from state action on account of race. Bernstein v. Real Estate Commission of Maryland, 221 Md. 221, 156 A. 2d 657, app. dismissed 363 U.S. 419. The non-discriminatory application and enforcement of Maryland's criminal trespass law in the present case cannot be considered a type of state action proscribed by the Fourteenth ***9** Amendment, even though the private owner's sole reason for excluding Negroes from the amusement park may have been because they were Negroes. Griffin v. Collins, 187 F. Supp. 149. The Park's business policy of excluding Negroes was neither induced, dictated or required by any State or local law, policy, executive proclamation or announcement, or custom; nor was it in any way aided by any action that could fairly be said, wittingly or unwittingly, to be that of the State. Petitioners' arrest and conviction for criminal trespass was not due to or because the State of Maryland desired or intended to maintain this facility as a segregated place of amusement. It was not only the right, but the duty of the State of Maryland, upon complaint being made to it by the private owner, to act thereon to protect and provide against unlawful trespass. In so doing, the State was merely allowing the use of its legal remedies as a substitute for force in a civilized community; it was not inducing others to discriminate, nor substituting its judgment for the judgment of the individual proprietor. [FN3] Cf. Petersen v. City of Greenville, 373 U.S. 244; and Lombard v. Louisiana, 373 U.S. 267.

> FN3. The private owner abandoned its policy of not serving Negroes shortly after the conclusion of this case in the lower court. It should also be noted that subsequently thereto the Montgomery County Council enacted an equal accommodations law for Montgomery County. Ordinance 4-120, effective January 16, 1902.

The State of Maryland is not responsible for the park's racially discriminatory practices merely because the individual who effected Petitioners' arrest, Lieutenant Francis Collins, an employee of the park's private guard service, also held a Special Deputy Sheriff's commission from the Sheriff of Montgomery County, Maryland. Collins' presence at the park had no coercive effect compelling the park to discriminate, nor was Collins' status of Special Deputy Sheriff and his subsequent employment at the ***10** park the result of any collusion on the part of State and park officials, so as to more effectively enforce and perpetuate the park's racially discriminatory practices. The engagement by private enterprises of individuals clothed with the powers of police officers is a common occurrence, and whether in any given situation such individuals are exercising their State authority as police officers, or

are acting within the ambit of personal or non-official pursuits on behalf of their employer, and in the scope of their employment, is necessarily a question of fact. In effecting the arrests in this case, Collins was not exercising any State authority, but, even if he were, his action in so doing would not be constitutionally different than had the owner of the park called upon a regular police officer to enforce his rights.

Petitioners' convictions were for violation of Maryland's criminal trespass statute, which proscribes entry upon, or crossing over, land, premises or private property of another after having been duly notified by the owner or his agent not to do so. There was evidence that Petitioners had actual notification not to enter the park premises, and being so notified, their conduct in doing so fans clearly within the terms of the statute. Assuming they received no such notification, nevertheless, the Maryland statute is sufficiently broad as to include a refusal to leave the premises, even though the original entry was lawful. Such a construction of the Maryland statute is clearly merited, and the statute is not, as applied to Petitioners' conduct, unconstitutionally vague as failing to give fair warning of the proscribed conduct.

***11** ARGUMENT

I.

CONVICTION OF PETITIONERS UNDER MARYLAND'S GENERAL STATUTE PROHIBITING WANTON TRESPASS ON PRIVATE PROPERTY DID NOT CONTRAVENE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

A.

A private Amusement Park, though licensed by the State, may constitutionally refuse service to Negroes solely because of their Race.

At common law, a person engaged in a public calling, such as inn-keeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. Equally well settled, on the other hand, is the proposition that operators of other private enterprises, including places of amusement, are under no such common law obligation; and in the absence of a statute forbidding discrimination, may select their clientele based on color, if they so desire. That such private enterprises may be required to secure a license from the State in order to operate does not, of itself, prohibit discrimination by the private owner, nor does the requirement of such license convert the private facility into a public one. Williams v. Howard Johnson's Restaurant, 268 F. 2d 845 (4th Cir.); Slack v. Atlantic White Tower Systems, Inc., 181 F. Supp. 124, aft. 284 F. 2d 746; Watkins v. Oaklawn Jockey Club, 86 F. Supp. 1006, aff. 183 F. 2d 440 (8th Cir.); Griffin v. Collins, 187 F. Supp. 149; Briggs v. State, 367 S.W. 2d 750 (Ark.); Tamelleo v. New Hampshire Jockey Club, Inc., 163 A. 2d 10 (N.H.); McKibbin v. Michigan Corp. & Securities Commission, 119 N.W. 2d 557 (Mich.); Madden v. Queens County Jockey Club, 72 N.E. 2d 697 (New York), cert. denied, 332 U.S. 761; ***12**Terrell Wells Swimming Pool v. Rodriquez, 182 S.W. 2d 824 (Texas); Younger v. Judah, 19 S.W. 1109 (Missouri); Goff v. Savage, 210 P. 374 (Washington); De La Ysla v. Publix Theatres Corporation, 26 P. 2d 818 (Utah); Horn v. Illinois Central Railroad, 64 N.E. 2d 574 (Illinois); Coleman v. Middlestaff, 305 P. 2d 1020 (California); Fletcher v. Coney Island, 136 N.E. 2d 344 (Ohio); Alpaugh v. Wolverton, 36 S.E. 2d 906

(Virginia); Greenfeld v. Maryland Jockey Club, 190 Md. 96, 57 A. 2d 335; Good Citizens Assoc. v. Board, 217 Md. 129, 141 A. 2d 744; Drews v. State, 224 Md. 186, 167 A. 2d 341; Garfine v. Monmouth Park Jockey Club, 148 A. 2d 1 (N.J.); State v. Clyburn, 101 S.E. 2d 295 (N.C.); State v. Avent, 118 S.E. 2d 47 (N.C.), vacated and remanded on other grounds, 373 U.S. 375.

This Court, in Boynton v. Virginia, 364 U.S. 454, clearly recognized the validity of the foregoing principles when it said that every time a bus stops at a wholly independent roadside restaurant, the Interstate Commerce Act does not require that restaurant service be supplied in harmony with the provisions of that Act. In fact, this Court has refused to hold that where a privately-owned restaurant is involved, in the absence of the general taxpaying public's ownership of the facility, or interstate commerce, that it will extend federal protection against racial discrimination on the basis of the Fourteenth Amendment. Burton v. Wilmington Parking Authority, 365 U.S. 715; Boynton v. Virginia, supra. These recent pronouncements indicate reaffirmance of the long established law that the owner of private property may be arbitrary and capricious in his choice of invitees, notwithstanding the Fourteenth Amendment; and that that Amendment "erects no shield against merely private conduct, however discriminatory or wrongful". Shelley v. Kraemer, supra, at page 13. As Justice ***13** Holmes, speaking for the Court in Terminal Taxicab Co. v. Kutz, 241 U.S. 252, 256, observed:

"It is true that all business, and, for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But, however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes. ***" (Emphasis supplied.)

It being established by the Civil Rights Cases, 109 U.S. 3, that the Congress is without power to legislate against such private discrimination as was involved in the present case, this Court cannot (without overruling its prior precedents) accomplish the same result by now holding that the Fourteenth Amendment created a new limitation on the use of private property, as developed in the common law. It has, of course, long been recognized that the Fourteenth Amendment created no new privileges. It merely prohibited the abridgement of existing privileges by state action and secured to all citizens equal protection of the laws. In other words, positive rights and privileges are secured by the Fourteenth Amendment by way of prohibition against state laws and proceedings affecting those rights and privileges. The Amendment is essentially a guarantee of protection against the exercise of arbitrary and tyrannical power on the part of the government and legislature of the state, not a guarantee against the commission of individual offenses. It does not add anything to the rights of one citizen as against another. United States v. Harris, 106 U.S. 129; Virginia v. Rives, 100 U.S. 313; United States v. Cruikshank, 92 U.S. 542. In light of these wellsettled ***14** principles, it cannot be, as contended by Petitioners, that the Fourteenth Amendment affirmatively requires a state to stop such private discrimination as was involved in the present case; nor does failure of a state to do so constitute adoption of those discriminatory practices as its own. As so suc-

cinctly summarized by the three-judge court in Briggs v. Elliott, 132 F. Supp. 776, 777:

"*** the Constitution *** does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by a state or state agencies, not a limitation upon the freedom of individuals." [FN4]

FN4. Chapters 227 and 228 of the Laws of Maryland of 1963, codified as Sections 11-15 of Article 49B of the Annotated Code of Maryland (1963 Supp.), effective June 1, 1963, a Statewide public accommodations law was enacted by the Maryland General Assembly proscribing racial discrimination in hotels, restaurants, inns, motels and like establishments. While a number of counties were exempted from the provisions of the law, it is noteworthy that the geographical area covered comprises 90% of the State's total population. Baltimore City, in addition to being subject to the State-wide Act, also enacted its own equal accommodations ordinance in and for Baltimore City (Ordinance No. 1249, effective June 8, 1952).

B.

The arrest and conviction of Petitioners did not, under the particular circumstances of this case, constitute an unconstitutional exertion of State power to enforce racial segregation in the private amusement park.

Petitioners contend that even if the private proprietor had a right to exclude them from the premises solely on account of their race, the State of Maryland crossed the line of forbidden conduct marked by the Fourteenth Amendment by arresting, prosecuting and convicting them ***15** under its criminal trespass statute. Virtually the same argument was advanced and rejected in Griffin v. Collins, supra, the court there holding:

"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 bus may not call on a peace officer to enforce his rights." (Emphasis supplied.)

To the same effect, see the McKibbin, Avent and Briggs cases, supra.

Shelley v. Kraemer, supra, relied upon by the Petitioners, is distinguishable. There, the use of judicial power to enforce private agreements of a discriminatory character was held' unconstitutional. More specifically, the court held that restrictive covenants prohibiting the sale of homes to Negroes could not be enforced in the courts, stating:

"These are not cases, as has been suggested, in which the States have merely ab-

stained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between ***16** being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing."

Unlike Shelley, where an affirmative, constitutionally- protected property right was involved, the Petitioners in the instant case can assert no right, constitutionally-protected or otherwise, to enter private property against the will of the owner, so that the State, in imposing criminal sanctions under a non-discriminatory trespass statute, is simply providing a means whereby the owner of property may be protected in his use and possession thereof, without having to resort to force and violence. Briggs v. State, supra; State v. Clyburn, supra.

Though readily conceding that state imposed or mandated racial segregation in the field of recreational activity is absolutely proscribed by the Fourteenth Amendment, it is submitted that "state power" is not being coercively - and hence unconstitutionally - applied to enforce and abet racial discrimination simply by its non-discriminatory and neutral exercise to arrest, prosecute and convict under the circumstances of this case. It is submitted, rather, that the search for unconstitutional state action in this area should be made against the following background, as ably set forth by the United States in its amicus curiae brief filed in cases Nos. 11, 58, 66, 67 and 71, 1962 Term, at pages 42 and 45:

"*** a State cannot constitutionally prohibit association between Negroes and whites, be it in a public restaurant or elsewhere. On the other hand, to cite an example, if a private landowner should invite all of b-is neighbors to use his swimming pool at will and then request one of the invitees to leave because of his race, creed or color, the decision would be private and, however unpraiseworthy, not unconstitutional. Furthermore, ***17** we take it that there would be no denial of equal protection if the State made its police and legal remedies available to the owner of the swimming pool against any person who came or remained upon his property over his objection. For, in a civilized community, where legal remedies have been substituted for force, private choice necessarily depends upon the support of sovereign sanctions. In such a case, the law would be color-blind and it could not be fairly said, we think, that the State had denied anyone the equal protection of its laws. (Emphasis supplied.)

"It is one thing for the State to enforce, through the laws of trespass, exclusionary practices which rest simply upon individual preference, caprice or prejudice. It is quite another for the State, exercising as it does immeasurable influence over individual behavior, to induce racial segregation and then proceed to implement the acts of exclusion which it has brought about. If the State, by its laws, actions, and policies, causes individual acts of discrimination in the conduct of a business open to the public at large, the same State, we believe, cannot be heard to say that it is merely enforcing, in even-handed fashion, the private and unfettered

decisions of the citizen."

As otherwise stated in Burton v. Wilmington Parking Authority, supra, private conduct abridging individual rights does no violence to the equal protection clause unless "to some significant extent" the State "in any of its manifestations" has become involved in it. This Court there recognized that to fashion and apply a precise formula for recognition of State responsibility under the equal protection clause would be an "impossible task"; and that only by "sifting facts" and "weighing circumstances" could the involvement of a state in private discriminatory conduct, if such existed, be attributed its true significance. Thus, ***18** in that case, this Court found the Fourteenth Amendment violated by racial discrimination by a restaurant, privately operated for private profit, and located in a public authority's off-street automobile parking building, in which the restaurant leased space and facilities from the public authority. This Court noted that the parking building was publicly owned and financed under the authority of a state statute; that the leased premises were planned for such use as an integral part of the parking facility; that the availability of public parking enhanced the business of the restaurant and the restaurant's customers likewise patronized the public parking facility. These and other facts appeared to this Court to have been such as placed the state in a "position of interdependence" with the private restaurant, so that it became a "joint participant in the challenged activity", which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment".

It is not seriously contended in the present case that the discriminatory practices of the amusement park were performed in obedience to any positive provision of state or local law, or, induced, caused, required or dictated by any state policy, executive proclamation or custom. On the contrary, all of the evidence in the case indicated that the practice of segregation in the park was solely the result of the business choice of the private proprietor, catering to the desires and prejudices of his customers. Neither is there any evidence of state involvement or participation, financially or otherwise, in the management and operation of the park; and there is nothing in the record to indicate that the State exercised any control over the affairs and management of the National Detective Agency, or of its employee, Lieutenant Collins.

***19** It is, nevertheless, urged by Petitioners that because Lieutenant Collins was in the private employ of the park, held a commission as a Special Deputy Sheriff, and was the individual who initiated their arrests (albeit upon request of the park management), the State of Maryland has thereby, without more, become so inextricably involved in the discriminatory practice by the park that it cannot, consistent with the Fourteenth Amendment, arrest, prosecute and convict the victims of that discrimination. Reliance in support of such proposition is placed on Peterson v. City of Greenville, 373 U.S. 244; and Lombard v. Louisiana, 373 U.S. 267. In each of those cases, however, there was state action, either in the form of a law or executive pronouncement, compelling the discriminatory practice, so that, clearly, the state's involvement was there such that it was responsible for the discrimination. Here, Collins was not responsible for the park's discriminatory business policy of exclud-

ing Negroes. The park had been segregated for fifty-one years prior to the arrests of Petitioners, solely as a business policy of the owner (R. 49). Neither is there any evidence in the record even remotely suggesting that Collins' presence had any coercive effect compelling the park to discriminate. Indeed, Collins was employed at the park for only a few months prior to Petitioners' arrest (R. 5).

Nor, is there any evidence of collusion between state and park officials, which enabled Collins to be deputized, so as to more effectively enforce and perpetuate the park's racially discriminatory practices. Indeed, it is not shown when Collins was deputized or upon whose application. Consistent with the provisions of the enabling statute, he could have been deputized at his own request, or at the ***20** request of the park management, or at the request of Collins' employer, National Detective Agency. [FN5]

> FN5. Private detective agencies have no police authority whatsoever under Maryland law. See Sections 75-92 of Article 56, Annotated Code of Maryland (1957 Ed.) regulating the business of private detective agencies. Section 2-91 of the Montgomery County Code (1955 Ed.), authorizing the appointment of special deputy Sheriffs, and bestowing upon them the powers of peace officers, is sufficiently broad as to permit any individual or corporation having "charge of" property to be appointed a special deputy sheriff therefor. It is not unlikely, therefore, that Collins, as a private detective, may have been deputized at his own instance or upon application of his employer, National Detective Agency.

To constitute "state action", even in a general sense, it would in the first instance be necessary to find that Collins arrested Petitioners, not in his private, non-official capacity as a mere agent of the park, but in his official capacity as a Special Deputy Sheriff. Standing alone, the mere fact that Collins was clothed with a degree of state power does not mean that all acts done by him are public and in furtherance of the state authority reposed in him. As noted by this Court in National Labor Relations Board v. Jones & Laughlin Steel Corp., 331 U.S. 416, at page 429, it is a common and entirely legitimate practice in this country for private watchmen or guards to be vested with powers of policemen, sheriffs, or peace officers to protect the property of their private employers; but it has not thereby been assumed that such deputized guards cease to be employees of the company concerned, or that they become municipal employees for all purposes. The question as to whether in a particular case the doer of the act complained of was at the time acting in his official capacity, or privately within the scope of his employment as a servant or employee, is ordinarily a question of fact. WiLLiams v. United States, 341 U.S. 97; Neallus v. Hutchinson Amusement Co., 139 A. 671 (Me., 1927); ***21**Deck v. B. & O. R.R. Co., 100 Md. 168, 59 A. 650 (1905); B. & O. R.R. Co. v. Deck, 102 Md. 669, 62 A. 958 (1906). [FN6]

> FN6. By Sections 342-348 of Article 23 of the Maryland Code (1957 Ed.), provision is made for the appointment of special police officers by the Governor of Maryland, upon application being made therefor by certain classes of corporations in Maryland. When appointed by the Governor, such individuals are vested

> with all the authority and powers of peace officers. A similar provision relating to Baltimore City is contained in Section 558 of the Charter and Public Local Laws of Baltimore City (1949 Ed.), with the exception that the Police Commissioner of Baltimore City, instead of the Governor, is the authorized appointing authority.

As shown by the evidence, Collins was an employee of the National Detective Agency, a private organization incorporated under the laws of the District of Columbia, and authorized to provide guard service to its clients. He had been assigned under the guard contract between his employer and the amusement park to be the senior guard with the title of Lieutenant. That Collins deemed his employer to be the Detective Agency and not the State of Maryland, or the park, is abundantly plain from a review of the record. Collins was not paid by the park, but was paid solely by his employer, National Detective Agency (R. 14). He received no pay from the park or from anyone else for being a Special Deputy Sheriff (R. 15). He wore the white-coat uniform of the Detective Agency during his employment at the park, and not a uniform of the State of Maryland (R. 14). In effecting Petitioners' arrest, Collins pursued the same procedures as any ordinary citizen in applying for an arrest warrant from a magistrate, indicating that he was not exercising the powers of Special Deputy Sheriff vested in him. [FN7] The mere ***22** fact that Collins was given an application for warrant, entitled "Application for Warrant by Police Officer", should not convert otherwise private actions into those of a public official. Substance, and not mere form, should determine in which capacity Collins was acting. Certainly, every act done by one who is in fact an officer of the law is not an official act, or an act done under color of or by virtue of his authority as such an officer. Screws v. United States, 325 U.S. 91; Watkins v. Oaklawn Jockey Club, 86 F. Supp. 1006, aff'd 183 F. 2d 440 (8th Cir.).

> FN7. Maryland confers on its peace officers the right to arrest without warrant for any misdemeanor committed in the officer's presence, but confines private persons in similar cases to misdemeanors amounting to a breach of the peace. B. & O. R.R. Co. v. Cain, 81 Md. 87, 31 Atl. 801.

The latter case was an action for damages alleging malicious false arrest and imprisonment of the plaintiff by the defendant Jockey Club and defendant Sheriff and Deputy Sheriff of Garland County, respectively, pursuant to an alleged conspiracy to deprive plaintiff of his civil rights. The plaintiff, a Caucasian, had been ejected from the defendant club's race track by the Deputy Sheriff, acting on orders of the Sheriff, who, in turn, had received the direction to eject plaintiff direct from the Jockey Club. To establish his cause of action, it was essential that plaintiff prove that the Sheriff and Deputy Sheriff, in ejecting him from the track, were acting under color of state statute, and not merely as individuals or as agents only of the Jockey Club. The evidence indicated that both the Sheriff and Deputy Sheriff were assigned to the race track during the racing meet, and were paid by the Jockey Club; that in ejecting plaintiff from the track, they did no more than forcibly escort him to the track gate; that while they had guns they did not use them, nor did they actually "arrest" the plaintiff and take him to jail. The court concluded from this evidence that the officers had done nothing in any way inconsistent with what any

agent of the club would have done when carrying out orders to eject a person from the premises; and that under such ***23** facts and circumstances whatever evidentiary force the mere showing of the act, that is, the ejection by one who was in fact an officer, may have had in establishing the act as an official one, was by such other evidence conclusively and completely refuted.

It is submitted that upon a fair review of the record in this case the only rational conclusion to be drawn is that Lieutenant Collins was not executing any state authority by virtue of his status as a Special Deputy Sheriff, but was acting solely as the agent of the park in directing Petitioners to leave the park premises. Assuming, however, that Collins was at the time acting in his official capacity, it is nevertheless clear that his actions were not different from those that would have obtained had a regular police officer been called to the scene. Like any police officer called to such scene, Collins received from the owner, and relayed to Petitioners, the owner's demand that Petitioners leave the premises. The contention that Collins, because of his relationship with the park, was permitted no free exercise of police judgment, but was required by the owner to act precisely in accord with the owner's directions, is rank speculation. Indeed, there is nothing in the record to show that Collins did not, in fact, reflect upon the necessity or desirability of arresting Petitioners and ultimately, after due consideration, decide upon effecting the arrests. Viewed in this light, it is submitted that Collins' actions, as such Special Deputy Sheriff, did not, considering all the circumstances, constitute unconstitutional state involvement in the park's racially discriminatory admission policies.

***24** II.

MARYLAND'S CRIMINAL TRESPASS STATUTE IS NOT VOID AS BEING UNCONSTITUTIONALLY VAGUE, AS APPLIED TO PETITIONERS CONDUCT IN THIS CASE.

Maryland's criminal trespass statute proscribes entry upon or crossing over land, premises or private property of another "after having been duly notified by the owner or his agent not to do so", it being the express intention of the act "to prohibit any wanton trespass upon the private land of others". The Maryland Court of Appeals found from the evidence that Petitioners did, in fact, have the required actual notification not to enter the amusement park, both before and during the time they were picketing the premises (R. 79). Should this Court concur in that conclusion, it would, of course, be unnecessary to reach the question raised by amicus curiae as to the constitutionality on grounds of vagueness of the Maryland criminal trespass statute.

The lower court nevertheless further concluded that a refusal to leave premises upon demand of the owner, even though original entry was lawful, was within the range of conduct proscribed by the statute, in that words such as "enter upon" or "cross over", as used in the statute, were synonymous with the word "trespass". In Alford v. United States, 274 U.S. 284, this Court upheld the conviction of a person under a statute penalizing the building of a fire "near" any forest in the public domain. The Court said that the word "near", taken in connection with the danger to be prevented, laid down a plain enough rule of conduct for anyone who seeks to obey the law. Similarly, in Omaechevarria v. Idaho, 246 U.S. 343, this Court held that

men familiar with range conditions and desirous of observing the law would have little difficulty in knowing what was prohibited by a statute forbidding the herding of sheep ***25** on any cattle "range", "usually" occupied by any cattle grower. It has been held further that a criminal statute, penalizing a bank employee for receiving money, checks or other property as a deposit in the bank when he has knowledge that it is insolvent, is not unconstitutionally vague although "insolvent", which has several meanings, was not defined in the statute. Eastman v. State, 131 Ohio State 1, 1 N.E. 2d 140, appeal dismissed 299 U.S. 505.

This Court has said, in effect, that persons of ordinary intelligence engaged in an activity coming within the purview of a criminal statute are in a position to know what that statute forbids. McGowan v. Maryland, 366 U.S. 420, 428; United States v. Harriss, 347 U.S. 612, 617. The Petitioners here fall well within this rule. They arrived at the entrance to the park carrying picket signs protesting the owner's racially discriminatory practices. In light of such evidence, it can hardly be said that Petitioners did not fully appreciate the owner's admission policy. Subsequently, when they entered the premises, each Petitioner received personal notification from Lieutenant Collins that he was not welcome and was to immediately leave the premises. Any further movement upon the property or the failure to leave the property at that time would clearly be a trespass within the meaning of the statute.

***26** CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of conviction should be affirmed.

U.S.,1963.
Griffin v. State of Maryland

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

- 1963 WL 105774 (Appellate Brief) Brief for the United States as Amicus Curiae (Oct. Term 1963)
- 1963 WL 105773 (Appellate Brief) Brief for Petitioners (Aug. 23, 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)

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