In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

Washington, D. C.

October 14, 1963

WILLIAM L. GRIFFIN, ET AL., Petitioners,
vs.
STATE OF MARYLAND, Respondent. — No. 6

CHARLES F. BARR, ET AL. vs. CITY OF COLUMBIA — No. 9

SIMON BOUIE AND TALMADGE J. NEAL
vs.
CITY OF COLUMBIA — No. 10

ROBERT MACK BELL, ET AL. vs. STATE OF MARYLAND — No. 12

JAMES RUSSELL ROBINSON, ET AL. vs. STATE OF FLORIDA — No. 60

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vs.	:	No. 60
STATE OF FLORIDA, Respondent	:	

Washington, D. C.

Monday, October 14, 1963

Oral argument in the above-entitled matters was convened at 10:15 a.m.

PRESENT:

The Chief Justice, Earl Warren, and Associate Justices Black, Douglas, Clark, Harlan, Brennan, Stewart, White and Goldberg.

APPEARANCES:

On behalf of William L. Griffin, et al., petitioners:

Joseph L. Rauh, Jr.

On behalf of the State of Maryland, respondent:

Robert C. Murphy

On behalf of Charles F. Barr, et al., petitioners:

Matthew J. Perry

On behalf of Simon Boule and Talmadge J. Neal, Petitioners

Constance Baker Motley

On behalf of Respondent City of Columbia:

David W. Robinson

The Chief Justice: Number 12 -- Bell v. Maryland.

The Clerk: Counsel are present.

The Chief Justice: Mr. Greenberg.

ORAL ARGUMENT ON BEHALF OF PETITIONERS

By Jack Greenberg

Mr. Greenberg: This case is here on writ of certiorari to the Court of Appeals in Maryland. The petitioners have been convicted of violating Article 27, section 577 of the Public General Laws of Maryland, the trespass statute, which is the same statute that was read to you by Mr. Rauh, and was the statute that was involved in the Glen Echo Case. They were indicted on a two count indictment which appears on page 6 of the record stating that the petitioners did unlawfully enter upon and pass over the land premises and private property of a certain corporation, in this case, to wit, Hooper Food Company, Inc., a corporation, after having been duly notified by Albert Warfel, who was then and there the agent of the Hooper Food Company, not to do so.

The second count of the indictment alleges that they entered upon this property which was then and there posted against trespassers. They were fined -- they were found guilty on count one, fine $10 and costs, the fine being suspended. They were acquitted on count two.

Petitioners claim that their conviction violates the equal protection claus of the Fourteenth Amendment in that the

criminal proceedings and judgment enforced racial segregation against them. They also claim that the Judges below violated the due process clause of the Fourteenth Amendment in that there is no evidence to sustain their conviction under the indictment and statute which I have just read.

If it were to be held there were sufficient evidence, the indictment -- the statute could not give them notice required.

Justice Brennan: Was that question raised in the Circuit Court?

Mr. Greenberg: Yes, sir, it was raised sufficiently, particularly in terms of the free speech argument and varying necessary argument in this and it is really a different way of saying the same thing in a case such as this.

Justice Brennan: It was not raised in terms of --

Mr. Greenberg: It was not raised in terms, but sufficiently to be here as in Wright v. Georgia and other cases where speech and vagueness are linked.

Justice Goldberg: Does that mean you are adopting the Solicitor General's arguments on vagueness. You go along with it?

Mr. Greenberg: I go along with it. I think we argued it first. It appears at length in the writ of certiorari in our brief.

Justice Stewart: He is adopting your argument.

Mr. Greenberg: Well, I do not characterize it that way.

However, we will not argue orally because this is the only argument the Solicitor makes, and I suppose this is the one he would be arguing orally.

The facts of the case are in many respects similar to the facts of the other cases which have just been argued.

On June 17, 1960, a group of 15 to 18 Negro students, among whom were the petitioners who numbered a dozen, entered the lobby of Hooper's Restaurant in Baltimore.

We were met by the hostess at the door, or rather within the restaurant beyond the door, and she stated, "I am sorry, but we haven't integrated as yet." The restaurant's manager, Mr. Warfel, whose name appears in the indictment, came up at this point and began to talk to the petitioners. He testified that he told them it was company policy that we haven't integrated the restaurant. Then he said in the process of transferring the company policy -- the petitioners sat at various tables in the restaurant and they proceeded to hedge-hop, which is explained as spreading out and sitting at various other tables in the restaurant.

The owner of the corporation, the owner operating the restaurant arrived and instructed Warfel to call the police. When the police arrived, petitioners were seated at various tables, some upstairs, which is a restaurant, and downstairs, which is a cafeteria and grille.

Warfel read the Maryland Code to the petitioners, and the waitress took down their names, and Mr. Hooper went to the Magistrate to obtain warrants.

There is no question that they were refused service, and an effort was made to eject them from the restaurant solely on the basis of their color.

Hooper made it clear that he agreed with the petitioners' objective. He testified that, "I go on record as favoring what you people are trying to do." He also said, "I told Mr. Warfel

that I felt personally that it was an insult to human dignity. I sympathize with it." He also told them that his customers govern his policy.

Petitioners' equal protection argument in this case is presented in three parts, and essentially the same as petitioners in the cases preceding this.

The arrest and conviction sought only to enforce the decision of the owner, and consequently under Shelley v. Kraemer, which was argued at length by Mr. Rauh, and other cases holding similarly, the State has participated to some significant extent in enforcing and encouraging racial segregation, and that such State action was forbidden by the Fourteenth Amendment.

We are wholly urging such an argument upon the Court, but in view of the fact that it has been argued at length previously, we would prefer to concentrate on this oral argument in other aspects of the question.

Petitioners submit also in other cases that the choice of the proprietor was not an authentically private decision but, as is abundantly demonstrated by the record, was influenced by the custom of the community. In fact, in this case it is more clear than any other case, because Mr. Hooper said, "I wholly believe that what you are trying to do -- ". He said, "I completely agree with you, but my choice is influenced by the community."

This choice of community, in turn, we submit, was to some

significant extent, and that is, the terms of the burden was, to a certain degree, influenced by the historic pattern of Maryland laws, which have the purpose of sustaining a segregated society. I think it should be recognized that upon these convictions -- when these convictions occurred, Maryland had not in the sense it has been suggested here, turned the corner and started enacting public accommodation legislation, and so forth.

At that time Maryland was a State without laws of that sort, and we say that under such circumstances the very least State action should be held at a low in State custom, unless something to the contrary, something contrary to common experience, is shown.

We say that it is beyond belief that a State such as Maryland, although its policy is now in the process of change, has not helped to change the State laws and customs where, for many years, it has had a statutory policy of requiring segregation in many institutions of public life.

This is not to charge the present regime in the State with wrongdoing, but rather simply to recognize that State responsibility for custom, having once happened, continues to play a role of what occurs in life. And to this extent we submit the State continues, or at least at the time of this conviction certainly, would continue to be involved to a significant degree in the manifestation that the custom should help to create, shape, and perpetuate.

It may be that a simple analogy would be that if one is poisoned a well -- I should say if one has poisoned a well and then later repented and sought to cleanse it -- nevertheless, some of the residue of the poison remains, and the members of the public drink it.

All we are saying is that the man who poisoned the well is to some significant degree involved in the illness that has befallen those that have drunk the water, even though he has repented and made efforts to undo what he did.

Justice Stewart: Do customs produce law or laws produce customs?

Mr. Greenberg: I think both occur, obviously. But to the extent that laws produce or shape customs, the State is significantly involved in it.

Justice Stewart: Generally speaking, laws reflect the mores of the community rather than create them.

Mr. Greenberg: Well, I think sometimes they do. Sometimes they represent the enlightened or unenlightened views of the community leaders, who are either ahead or behind the community. I think it depends on the law of the situation. Sometimes it is one and sometimes it is the other.

Once the law is on the books, it then plays a role in influencing and educating and encouraging and shaping.

Justice Stewart: There is no law of that kind here directly affecting this restaurant, is there?

Mr. Greenberg: Not in the segregation sense, no.

Justice Stewart: The laws that you have selected?

Mr. Greenberg: Page 30.

Justice Stewart: 31 and 32 are what you have been amplifying, I suppose.

Mr. Greenberg: That is correct.

Justice Stewart: Now, as I understand the Maryland -- it has a law looking the other way -- requiring nondiscrimination?

Mr. Greenberg: Some of the counties. Baltimore also. This has happened since these convictions.

In addition to the custom arguments already argued, petitioners would urge upon the Court other fundamental considerations. That is in this case, as in other cases, the State has upheld the claim of the proprietor, in this case called the property right of the claim of the petitioners for equal treatment.

The claim that the Court of the City of Baltimore has held is a matter of Maryland law in the absence of appropriate legislation forbidding racial discrimination of operators of privately-owned restaurants, even though generally open to the public, may discriminate against persons of another color or race, however unfair such a policy may be.

The Maryland Court of Appeals has held in the context of the racial issue that private citizens retain the right to choose the guests or customers, and furthermore that this may

be enforced by the criminal law of the State.

We submit this is not a neutral declaration of a common law that always was and emanated from nowhere, but rather the expression of a ranking of values on behalf of the State, which in terms are quoted in our briefs, and there is no transcendental body of law outside of any particular State.

Justice Holmes has a number of times written to the same effect.

The law of property of a State, and its ranking of property claims as against others, is subject to the requirements of the Fourteenth Amendment. It is held in Marsh v. Alabama and Shelley v. Kraemer. Property rights must be created. The values of the Fourteenth Amendment, by the nature of this constitutional position, are dominant.

The State denies equal protection of the laws when it ranks above these values the claim of the proprietor to the public, and licensed by the State for the purpose of being open even to the public -- the right to exclude some persons from establishments solely on the grounds of race.

Justice Goldberg: What would your ranking be in the case of a house?

Mr. Greenberg: I would say that the Fourteenth Amendment, Mapp v. Ohio, Justice Harlan's opinion in Poe v. Ullman indicates there is a constitutional right of privacy, which in the case of a private home I would suggest be dominant against something

of this sort. I think a public case can make no such claim and, in fact, is so thoroughly regulated that it is not the same sort of situation.

Justice Goldberg: How about private clubs?

Mr. Greenberg: I think if it were a genuinely private club, yes, it would partake of the privacy protection. If it were a sham, and the place open to the public under the name of a club -- and there have been cases under the public accommodation statutes to this effect -- and when it has been found to be a club it has been held -- to have the right to make choices of this sort, no matter how reprehensible.

Just to be under the name of a club to us -- the State Commissioners have said you can't do that.

Justice Goldberg: How about buying cooperative or selling cooperative?

Mr. Greenberg: I would think, again -- I am not too familiar with the operation of that type; I think it would depend upon how genuinely public or private it was. I just don't know.

I once belonged to a cooperative grocery store. As far as I could tell, it was like any other grocery store and I don't think they should be permitted to discriminate.

On the other hand, if there were some element of privacy, it might be different. A church case discussed this morning -- I don't feel that it is necessary to argue how something like that would come out at a time like this.

I think the values to be taken into consideration are fairly clear.

It is the position of petitioners that to the extent that this ranking is in the form of an abdication of State power or refusal to act, to protect the Negro citizen, the State has as much responsibility as it has affirmatively sanctioned in exclusion in terms of positive legislation. State inaction and various circumstances has been held to deny the protection of the laws and burden the failure of the State to insist upon a nondiscrimination clause in the legislation and would play a role in the decision and was so characterized in Terry v. Adams which was a case in which in most views the State did nothing and thereby State action in the constitutional sense appeared. Various cases in the Court of Appeals, the cases cited in our briefs, they take that in. This Court assumed that the States were living up to their responsibilities in taking the affirmative action and that is to protect the Negro citizens and only in view of this was the judgment of the Court rendered as it was.

What form the State protection would have to take is not in issue at this time. The only thing petitioners admit is a fortiorari, a criminal conviction cannot be imposed under the circumstances.

The principal argument made against this type of position is that the logic leads too far, that there is no State

responsibility here because it would lead to an absurd result in the case of a club or church or home. Everybody gives the case in terms of a little boy asking for cigarettes or somebody being thrown out of a house or church. The case we have here is a case fully open to the public, fully subject to regulation. Indeed, due process of law is not taken away from such property owner. Due process of law would be taken away from the home owner if he were required to have guests in his home, no matter what the race. We submit that these were absurd arguments of self-defeating nature. They are so far removed from the type of case we have here they indicate the type of case we have at hand is one surely within the protection of the Fourteenth Amendment.

Justice Goldberg: Mr. Greenberg, you would not change your argument if from the spot the proprietor wasn't going to serve in any department?

Mr. Greenberg: That is my case. I have a case involving not a lunch counter but a restaurant.

Justice Goldberg: So your argument would be that any area, regardless of the problem -- regardless of the department the public must be included?

Mr. Greenberg: I would say the State has an affirmative responsibility to protect them. The form that it takes or involves is another question but certainly a fortiori we can't have a situation -- an arrest and conviction. We would

submit that for these reasons the conviction in this case should be resisted.

The Chief Justice: Mr. Hawes.

ORAL ARGUMENT ON BEHALF OF RESPONDENT THE STATE OF MARYLAND
by
Loring E. Hawes

Mr. Hawes: Mr. Chief Justice, may it please the Court, the facts in this case are considerably different, we believe, from the other cases presented here, particularly on the application of the trespass statute. For here there was a warning given. The petitioners perhaps gave the warning and it was perfectly clear from the testimony of the leader of the group required in the record, that they were not permitted to seat themselves in the restaurant due to the notice that they had that they were not integrated yet and the trial court took this into consideration.

If you will note the opinion of Judge Byrnes in the court below, where he noted that they were refused seats in this restaurant -- the physical layout of the restaurant is perhaps important to the Court's decision here, in that there was a lobby. The petitioners entered the restaurant through a revolving door and came into a room known or referred to in the record as a lobby. At the end of the lobby opens the door and there are four steps. At the top of the steps there is a station and it is the common practice in

the restaurant for the hostess to seat all customers coming into the dining area. There is a fence separating the dining room and the lobby in this restaurant. The Maryland trespass statute not only prohibits entry but it prohibits crossing over. These petitioners crossed over the restaurant premises after being warned not to do so. Not only did they enter and were told not to go downstairs, they crossed over a portion of the premises. This is precisely what the Maryland statute prohibits.

There is another element in this case which is of significance, I believe. The police refused to arrest petitioners. The police were called by the owner sometime after the petitioners had entered the restaurant and asked -- the owner and manager of the restaurant, had at length conversed with the leader of the group, to try to persuade them to leave peacefully. He explained this policy to them and he stated that he was refusing service simply because his customers did not want to eat with Negroes. This was the only reason he gave.

The police were called by the owner, asked petitioners to leave, and when the police arrived they refused to even read the trespass statute. This was done by the restaurant manager himself. The police took no part whatsoever in the goings on in the restaurant itself. The owner went all the way down to the police station to swear out warrants. He went down to the

police station and the magistrate apparently called or was called -- it is not clear from the record -- by the petitioners and they made arrangements to voluntarily come down to the court the following Monday on their own recognizance. There was not custody taken. There was no arrest. The State in this situation was certainly a neutral party.

We feel that under the facts and circumstances in this case, that this Court is faced with a square decision on whether a State criminal trespass conviction of Negroes protesting racial segregation policy in a private restaurant, in a private building constitutes State action proscribed by the protection clause of the Fourteenth Amendment where neither local laws nor custom requires segregation.

Now, the mere recitation of the statutes is not in our view -- this does not constitute any State custom as far as the State of Maryland is concerned. As far as we know -- as far back as 1960, Chief Judge Thompsen of the United States District Court, District of Maryland, in a case in which custom was a factual matter before the court decided in Slack v. Atlantic White Tower System, that as far back as 1957 there was no custom of segregation in Maryland. Furthermore, there is no evidence before the Court in support of the petitioners' contention that there was such a custom.

On the other hand, the petitioners later admitted that on previous occasion, or on several previous occasions, in

the same general area, same community, they had been served in restaurants. This was certainly very damaging on the part of the chief witness for the defendant, the petitioners, in this case. If they had been served in other restaurants, certainly this negates any community custom of segregation. There is no evidence to the contrary, either.

The owner in this case will not be penalized in any way because he admitted Negroes. There would be no State action that could be taken to force him to admit Negroes. He had no contract with any other restaurant owners. There was no State law, there was no State policy, there was no State action in any respect that could compel the restaurant owner here to segregate his facility.

On the question of licensing, in Maryland, there is no difference between the licensing of a club in which persons are excluded and a restaurant except where the facility, no matter what it may be, is operated without profit to the operators. Now, this is the only distinction made in the licensing statute which is section 8 of article 56 of the Maryland Code.

The health statute which involves the regulation by the State on the grounds of sanitation, etc., applies to all facilities, whether they be country clubs, private eating clubs -- whatever they may be.

Justice Stewart: I suppose all statutes apply to private homes as well.

I am sorry -- I should say I suppose the health statutes apply to private homes as well, do they not, in Maryland?

Mr. Hawes: Yes. In this case there was a rat infestation in the home, and this Court ruled that where there was evidence outside of the home that there was such a rat infestation, the Health inspector could enter the house.

Now, the Maryland statute certainly is not directed at sit-in demonstrations, or segregated facilities, or anything of this sort of thing. As a matter of fact, in the prior case the Maryland Court of Appeals, in which the statute was tried to be applied, it was overruled by the Court, in Krauss v. Maryland. The Court stated that the statute would have been applicable if notice had been given in the case where there was repossession of an automobile -- a man's property.

The question involved there was whether there was notice given, and the Court there found there was no such notice and the owner wasn't there at the time and the people went on the property, and the forewarning they had was that he had a lien on the car.

All trespassers, regardless of their race, color, sex, color of hair -- whatever manner -- whatever characteristics they have -- the owner of the private property in Maryland wishes to call into play to forbid their entry, are equally guilty under the Maryland trespass statute.

If a woman wants to go into a store to buy, and the owner

doesn't wish to let her enter, I don't think she could call upon the Fourteenth Amendment in the situation. The Fourteenth Amendment says nothing about race or color. It merely says it affords protection.

In fact, this Court, in Brown v. Board of Education, said that after an exhaustive study of the debates in Congress and other materials available, at the time that the Fourteenth Amendment was passed, at the time the Civil Rights bills were enacted, that this Court could not determine with any certainty what the Fourteenth Amendment was aiming at.

This was stated in a unanimous Opinion of this Court in Brown v. Board of Education.

So I think that the remarks of Mr. Justice Goldberg in this regard, that the Fourteenth Amendment and Thirteenth Amendment must be read together is not quite the meaning which was given to the Fourteenth Amendment by this Court on that occasion.

Justice Goldberg: You are not contending that the Thirteenth and Fourteenth and Fifteenth Amendments had nothing to do with Negro rights; is that it?

Mr. Hawes: They certainly had something to do with Negro rights, but that is not the only thing they had to deal with.

Justice Goldberg: The drift of your argument for the moment is that you are trying to play down the significance of these Amendments to be considered on the status of the Negro.

Mr. Hawes: I am not saying they are not applicable. In fact, it is perfectly clear they are applicable to the Negro situation. But the example that was cited by Mr. Justice Douglas in the Civil Rights issue and in the Slaughterhouse cases was on the privileges and immunities.

Justice Goldberg: But not restricted to that?

Mr. Hawes: It is not restricted to it, either. The Fifteenth Amendment again, in Smith vs. Allwright does state that the right to vote shall not be denied on the grounds of race or color. That is clearly such a case.

The Fourteenth Amendment clause includes a whole bundle of rights. This Court has been used to enforce the rights of the First Amendment, Fifth Amendment, and other Amendments to the Constitution.

It is not simply a protection due to the expressions that have been used in some of the cases of slavery. The Amendment just hasn't been determined to be that in all the cases.

Now, it can hardly be said here, then, that the State compelled, coerced, or mandated the discrimination. The State here had no connection whatsoever with the decision of this owner to segregate this particular restaurant, nor with rights that are constitutionally protected and which were denied to the petitioners.

In the Civil Rights cases it was made clear that there must be an abrogation of denial of the rights for which the State

alone could be held responsible. This was a fundamental wrong that was intended to be remedied.

The distinction that can be applied in Shelley v. Kraemer here, I think should be looked at in the light of some other situations.

For instance, where there is a will in which there is a testamentary clause which prohibits a share of the estate to go to one of my sons who marries out of the Hebrew faith. Such was the case in Gordon v. Gordon, which came up in this particular Court after Massachusetts had stated that after such a discriminatory clause in a rule which was given effect in the Courts of Massachusetts was perfectly valid. This Court denied certiorari in this case.

In another situation, the Girard trustees case which came up to this Court from the Courts of Pennsylvania -- in that case it was held that there was no prohibitive State action when the provisions in the testamentary instrument -- the will of Girard set up a trust to be exercised in the first instance when it came up to that Court by the City of Philadelphia. It was thrown out on those grounds -- the Court in Pennsylvania then appointed individual trustees, which continued the discriminatory policy of this Girard College, which was set up under the trust.

When the trust came again before this Court on certiorari, the Court denied certiorari.

Now, it is hard to look at those cases, or hard to justify the rulings in those cases with the results to the petitioners here on the grounds of State action.

In other cases, the Black v. Cutter Lab in which there was a discriminatory provision in the collective bargaining agreement, which actually was decided in this Court -- it was found not to be on the grounds of State action.

There are other examples that perhaps could be raised. Now, several cases have been mentioned to this Court today which I think deserve a little comment, and one is Marsh v. Alabama.

In comparing that with Terry, for instance, we find that some positive action on the part of the States -- first, it should be borne in mind in these cases involving rights that were reserved by other rights -- in that case, it was the Thirteenth Amendment, which certainly has a different connection with the racial issue due to the wording of the Amendments.

The other involves the First Amendment. Here we don't have any such. Here the parties came onto the property and were refused service and didn't have any rights, either, to be there.

Now, the mere denial of rights by the area to give them redress certainly shouldn't mean State action. I don't think the Court has gone that far.

The Chief Justice: Didn't they have a right to be on the property until told to get off?

Mr. Hawes: That is their question. Yes, I believe that is so.

The Chief Justice: Yes.

Mr. Hawes: They were inside the door.

The Chief Justice: When were they told to get off?

Mr. Hawes: At the steps, where the hostess was.

The Chief Justice: What did they say at that time?

Mr. Hawes: What did who say?

The Chief Justice: What did they tell them about getting off the property at that time?

Mr. Hawes: They were told they weren't integrated yet.

The Chief Justice: Does that mean they were to get off the property?

Mr. Hawes: They were not permitted to be seated. But the question is --

The Chief Justice: They said they were not integrated.

Mr. Hawes: But they disregarded what the hostess said, and they rose over to where the seats were.

The Chief Justice: Half of them didn't even come in, did they?

Mr. Hawes: They all came in the same door.

The Chief Justice: But they weren't all there, were they?

Mr. Hawes: I think, according to the record, they were.

The Chief Justice: There were a number of them who did not go through that entrance at all.

Mr. Hawes: Your Honor probably -- you were probably thinking of the previous incident in the restaurant where some of the people went into the bar. In this case they all came in the same door into the lobby.

The Chief Justice: I thought some of them went in another door.

Mr. Hawes: No, sir. They all came in the same door, and they congregated in the lobby. As to the refusal to let them be seated, part of them pushed by the hostess and proceeded and were seated in the dining room at various tables, and the others went downstairs to the grille in the basement, but they had been warned prior to doing this, and this is evident from their own leader's testimony, pages 42 and 43.

The Chief Justice: Who had to warn them?

Mr. Hawes: Both the hostess and manager had warned them.

The Chief Justice: By saying, "We haven't integrated as yet."?

Mr. Hawes: Yes, sir.

The Chief Justice: That means they were prohibited from being on the property?

Mr. Hawes: I think it was understood to mean that.

The Chief Justice: Under the statute?

Mr. Hawes: Yes, sir.

The Chief Justice: So that's when the crime was committed, when they moved from that spot?

Mr. Hawes: That's right.

The Chief Justice: The crime was committed right then?

Mr. Hawes: That's right. And one of the petitioners, if I remember correctly, in the record, said that they were refused seats, and at another point he says that they knew they were going to be arrested. This is part of their technique for demonstrating in this restaurant.

Justice Goldberg: The crime did not take place at the point where the hostess said, "We are not integrated."? In your opinion, it took place at the point where they pushed past her and went and sat down?

Mr. Hawes: That's right.

Justice Goldberg: And then you rely upon crossover?

Mr. Hawes: That's right.

Justice Goldberg: Do you think the statute was intended to cover that, when it said crossover -- do you consider that?

Mr. Hawes: Yes, sir; simply because there is another Maryland statute, Section 576, which says that where signs are posted and there is entry, then that is the crime.

Now, --

The Chief Justice: Were there signs posted here?

Mr. Hawes: There were no signs; no, sir. But whether the actual crime took place at the street or inside the lobby doesn't particularly matter here, as long as the facts show there was a crime committed. Merely moving out to the street

doesn't help any.

On the question of vagueness, certainly this Court's decision in Alford v. United States is far more difficult to understand than what the Maryland Court of Appeals did in this case.

Now, the Maryland Court of Appeals found there was a considerable crime -- that there was a crime committed, the statute was violated. Whereas, in Alford, this was the first instance that anyone had come upon this situation. In Alford, there was a statute which prevented the construction or the building of a fire in a forest near the public domain. The statute said the man was convicted for building a fire near the forest.

Now, he was the first one to come before this Court, or any Court in which -- an appellate court -- to determine what that statute meant. The Court upheld the conviction.

Certainly, the Maryland statute was not only clear -- the words are easy to understand, but there was without a doubt a warning not to enter the particular parts of the restaurant where the petitioners went, after which they entered and crossed over.

Justice Goldberg: Don't you have a more recent case of this Court that leads you in that connection -- the National Dairy case, last term?

Mr. Hawes: I am not familiar with that case.

Justice Goldberg: That was a case where the Court held

under the statute prohibiting sales at unreasonable prices, that a man could be convicted on the information that he sold below cost. That construction was made in this Court and the conviction sustained. Some of us dissented. But that was a holding of this Court.

Mr. Hawes: I think perhaps in that case you have a little bit different construction of the word. Isn't that a case where there was an agency which determined what the --

Justice Goldberg: No, there was not. But I am just suggesting that it might be helpful to you in your argument in this connection.

Mr. Hawes: I appreciate the suggestion, Your Honor.

In summary, I would say that if the basis of constitutionality of such conviction -- which under the decisions of this Court for the past hundred years appears to be the standard, then the State of Maryland cannot be held responsible for this conviction.

If anything, the officers of the State here discouraged the owner from bringing the case even into Court. We required him to go down to the police station which, in a number of cases, they didn't even do. There is no evidence at all that the police had forewarning of the incident that took place -- that there was any State encouragement of the segregation policies of the restaurant -- they had no ownership rights in the building or the restaurant itself. There was no one in the employ that was

working there -- all the mitigating factors that seemed to bother this Court in rendering its decision in this field are absent in this case, and there doesn't seem to be an easy way to reach the decision one way or the other on the primary constitutional issues raised.

Therefore, the State of Maryland respectfully submits that the judgment below should be affirmed.

The Chief Justice: We will recess.

(Whereupon, at 2:28 o'clock p.m., the Court recessed to reconvene at 10:00 o'clock a.m., Tuesday, October 15, 1963.)

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In The

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

Washington, D. C.

October 15, 1963

ILLIAM L. GRIFFIN, ET AL., Petitioners, vs. TATE OF MARYLAND Respondent.	No. 6
- - - - ARLES F. BARR, ET AL., vs. CITY OF COLUMBIA	No. 9
- - - - ON BOUIE AND TALMADGE J. NEAL vs. TY OF COLUMBIA	No. 10
- - - - BERT MACK BELL, ET AL. vs. STATE OF MARYLAND	No. 12
- - - - RS RUSSELL ROBINSON, ET AL., vs. STATE OF FLORIDA	No. 60

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JAMES RUSSELL ROBINSON, ET AL., Petitioners,	:	
vs.	:	No. 60
STATE OF FLORIDA, Respondent	:	

Washington, D. C.

Tuesday, October 15, 1963

Oral argument in the above-entitled matters came on for further hearing at 10:10 a.m.

PRESENT:

The Chief Justice, Earl Warren, and Associate Justices Black, Douglas, Clark, Harlan, Brennan, Stewart, White and Goldberg.

APPEARANCES:

On behalf of James Russell Robinson, et al., Petitioners:

Alfred I. Hopkins

On behalf of The State of Florida:

George R. Georgieff

On behalf of Amicus Curiae:

Ralph S. Spritzer

On behalf of State of Maryland, Respondents:

Russell R. Reno

On behalf of City of Columbia, Respondents:

John W. Sholenberger

On behalf of Petitioners:

Jack Greenberg

- - -

The Chief Justice: Mr. Spritzer.

ARGUMENT BY AMICUS CURIAE

BY MR. SPRITZER

Mr. Spritzer: Mr. Chief Justice, may it please Your Honors, in addressing myself to the five cases which are before the Court, I shall attempt to first set forth the general approach which we follow, one which is common to all of the cases. I then propose, if Your Honors please, to discuss the Florida case, which stands in our view somewhat apart from the others, because its statute is unique.

Then I would like to turn to the specific arguments which were made in the South Carolina and Maryland cases, which from the standpoint of our analysis at least we may consider somewhat as a group.

After setting forth the arguments I have outlined, I shall also attempt to state briefly why I think the points that we argue were adequately comprehended by the arguments made in the state courts, and why in any event they are here.

Let me say in that connection at the outset that even if this Court should conclude, in one or more of these cases, that the point which is argued in the amicus brief was not sufficiently presented, not presented with sufficient explicitness in the state courts, it does not follow from that, or would not follow from that that the issue drops out of the case, as was suggested yesterday.

In the Avent case, which was here last term, the case was obviously within the jurisdiction of this Court because various constitutional arguments were raised and duly preserved.

However, the petitioner in that case did not raise at any stage of the litigation an argument based on an allegation that the City of Durham, which was the place where he was convicted, had an ordinance requiring segregation.

Indeed, he had made no attempt to prove the existence of such an ordinance.

Nonetheless, this Court having jurisdiction of the case concluded that that issue ought to be considered. It vacated the judgment, accordingly, and remanded the case to the Supreme Court of North Carolina in the light of its decision in one of the companion cases.

Having jurisdiction of these cases, this Court has it within its power, under the certiorari jurisdiction, to make such disposition as the justice of the case may require.

Let me also say at the outset that our brief does not address itself, and I shall not in oral argument address myself, to the broad and undeniable very serious and important question whether there should be a re-definition of the concept of state action for purposes of administering the provisions of the Fourteenth Amendment.

I need hardly to dwell upon the rule so often emphasized by the Court that it will not ordinarily reach broad constitu-

tional issues if more limited principles are disposited. Particularly so, I take it, where those more limited principles are themselves well settled.

We believe that these cases fall under that precept.

In this connection, I would also say that we are mindful of the fact that the President is seeking at this very time, and that the Congress is considering legislation -- of course national in scope -- which, if it were adopted would be directed at the very problems which underlie this kind of litigation.

Before leaving these preliminaries, I would also remind the Court that the Solicitor General has expressed his readiness in his brief, should the Court, contrary to our present expectation, find that the grounds of reversal which we urge are not dispositive -- his readiness to address himself further at the suggestion of the Court to the broader constitutional issues which have been moved.

Now, in each of these cases, of course, as the Court has heard at length, a group of Negro citizens, in some instances accompanied by white sympathizers, unsuccessfully sought service at a private place of business open generally to the public.

In all of the cases, as we read these records, the petitioners were invitees. In none of the cases had they received any warning before coming on the premises that they were not to enter.

Yet in four of the cases, excluding only Florida, we deal with statutes which on their face condemn nothing more than entry

after warning not to enter.

Justice Goldberg: What about the Maryland statute that also says cross over?

Mr. Spritzer: I do not read it as adding anything, and neither did the Maryland courts. The Maryland courts in these cases decided the issue before it solely on the basis that these people had entered without notice, but that the statute covered remaining after notice to leave as well as entering after notice not to enter.

I shall attempt to develop that further when I get to that phase, Your Honor.

Now, the Florida statute of course does proscribe remaining after notice to leave. It imposes such a duty, however, only when the entrant has behaved objectionably, by engaging in specified types of misconduct, or when his presence is found detrimental to business.

As has already been stated by the parties to that case, the Florida appellants were never told that their exclusion was based upon any one of the limited statutory grounds which alone would make their act of remaining an offense -- even though they made repeated inquiry as to why they were being directed to leave.

Broadly, then, we shall argue on all of these cases that there was a denial of due process, a lack of adequate warning from the statute, that the conduct subsequently charged as unlawful was in fact a violation of the state criminal law.

We are not, of course, questioning the role of the State Supreme Court in interpreting state statutes. We are dealing with the constitutional right of fair notice or fair warning.

Justice Goldberg: Does that mean that in all future cases you would regard fair warning to be given, but that in this series of cases fair warning is not given? Is that the necessary import of your argument?

Mr. Spritzer: I think a different question would arise if the statute had previously been interpreted. We do not have that question here, because these statutes, as I shall develop, were interpreted for the first time in what we regard as this novel fashion in the cases now here.

Justice Goldberg: Where do you find that distinction drawn in the decisions of this Court? The reason I mention that is you cite Amsterdam a few pages prior to that, his note on vagueness, and he says quite the contrary, summarizing the Court's decision. He says "If the Supreme Court in passing on these penal statutes has invariably allowed them the benefit of whatever clarifying gloss state courts may have had in the course of litigation in the very case at bar," citing a number of decisions in this Court. And that seems to me to reach the whole basis of your argument, doesn't it?

Mr. Spritzer: If adequate notice in the constitutional sense were provided by the conviction rather than by the statute, then the concept of fair notice to my mind would disappear. I

would reject that completely.

Justice Goldberg: You disagree with that analysis of the cases?

Mr. Spritzer: I do. I am not speaking in reference -- with reference to the particular cases which he cites, because I do not know the context from which that comes. But I certainly believe that if a statute on its face fails fairly to give any warning, that it would be a destruction of the whole concept of protection which the due process clause has been set to guarantee, to say that that notice is adequately provided when the judge --

Justice Goldberg: What about National Dairy?

Mr. Spritzer: Well, National Dairy for one thing involved the requirement of scienter, specific knowledge by the defendant. There is no basis for saying that there was any scienter in this case. So I think that falls into a quite different category.

I would like to make this general observation before getting further into the specifics of these cases, as to why we think it is eminently proper to read these statutes with a scrutinizing eye and to apply here with purposeful strictness the requirement of fair notice.

In the first place of course we are dealing with criminal statutes. These are not simply acts relating to the laws of property. And this Court has said in Cline vs. Frink Dairy -- I do not know whether this would fit into Mr. Amsterdam's analysis

-- that the Fourteenth Amendment imposes upon the state an obligation to frame its criminal statute so that those to whom they are addressed may know precisely what standard of conduct is required.

The state is obliged, in its statute.

Secondly, we are not dealing with conduct which by any stretch of the imagination is inherently or morally wrong. The people involved in these cases were casting what is no more than common bread in the life of the community.

In the Barr case, the testimony of one of the defendants I think epitomizes the feeling that one gets from a reading of these records. He was on the stand, explaining what happened when he sought service at the drugstore counter. He says that a white lady was occupying the adjoining place at the counter. And then he goes on -- I will use his words -- "She sat there and began eating just as if I was a human being sitting beside her, which I was."

We agree with Professor Frimes' observation that in applying the rule against vagueness or overbroadness, something should depend on the moral quality of the conduct.

A third reason why the statutes should be carefully scrutinized in their application is the petitioners here were engaging in a peaceful and orderly protest against discrimination.

As Mr. Justice Harlan observed in his opinion in the Garner case, such a demonstration is as much a part of the free trade in

ideas as is verbal expression.

Justice Harlan: Of course you have to recognize that was in the context of a situation where the record shows that the demonstration was going on with the owner's consent.

Mr. Spritzer: Yes. I would add, nonetheless -- I do not think the force of the point is destroyed by Your Honor's correct observation -- that my point here is that a vague statute is a threat to the exercise of such First Amendment rights also. Because if the citizen cannot be sure when his conduct falls within a statutory ban, more than likely he will timidly force his right to express what the law does not or cannot prevent.

There is another side I think to that coin -- through the overzealous policeman -- this is an invitation to the abuse of power or to discriminatory enforcement. I think it apparent that the misuse of authority to arrest or to order an exclusion or to order dispersion may effectively deny the exercise of First Amendment rights, whatever the ultimate disposition of the matter should it go to court.

Through all of these reasons, then, we urge that the statutes involved in these cases should be sustained in their application only if they give clear forewarning that the conduct ultimately charged was of a prohibitive kind.

Let me turn, then, without further delay to the specifics of the Florida case.

The counsel in that case have already referred to the statute.

It is set forth also in the government's brief, beginning at page 18.

I would like to take a moment to stress once again the structure of that statute.

The first numbered paragraph provides in substance that the proprietor or the manager of a hotel, ressturant, apartment house, motor court, and various other establishments, shall have the right to remove a guest who is intoxicated, immoral, profane, lewed, brawling; also one who engages in language calculated to disturb the peace and comfort of other patrons, or to damage the reputation of the establishment.

And then finally the management is authorized to require the departure of one who in its opinion is a person whom it would be detrimental to his business to serve.

Now, I think by plain, I would say, necessary implication this statute says that there is no way to remove one who is not obnoxious in his conduct and whose presence is detrimental to the operation of the business.

It does not confer the right to exclude a patron of an inn or a restaurant for any reason. If that were the purpose, there would have been no reason for the statute. There were already criminal trespass laws in the State of Florida.

We do not think it authorizes, for example, exclusion for reasons of racial prejudice.

Justice Black: Suppose that conclusion was made because the

owner thought it would be detrimental to his business, in his opinion.

Mr. Spritzer: Then I think that it would meet the terms of the statutes, yes, sir.

Now, it was not -- well, let me pause a minute before getting to the information.

As the Court has heard, and I would emphasize again, the invitees of this establishment, the eighteeen Negroes and whites who walked in, were permitted to sit down -- and who sat there for some half hour, were not told at any point, that they made repeated inquiries, as to why they were being excluded. It was stated for the first time by the management that his reason for excluding the group was that he considered their presence detrimental to his business.

It was not charged of course, that the appellants had engaged in any objectionable conduct. It was alleged only in the information that the manager was of the opinion, when he ordered the appellants to leave, that serving them would be detrimental to the restaurant.

I say therefore, that we have here a case in which there is no objective standard by which the appellants could tell if they were being excluded for a reason permissible under the statute.

Justice Stewart: Well, the statute makes it a subjective standard, does it not? That is, the fourth category of the statute.

Mr. Spritzer: I agree.

Justice Stewart: Explicitly makes it subjective.

Mr. Spritzer: Yes. Their obligation to leave depended entirely upon the subjective determination by the manager that their continued presence would be detrimental to business. And I say further that since the manager adamantly refused to state his reason when asked to do so, that the appellant had no means whatever of ascertaining whether he had a reason recognized by Florida law or some reason which was not recognized by Florida law.

Justice Stewart: I should think --

Mr. Spritzer: Such as racial prejudice.

Justice Stewart: I should think the very request to leave inherently --

Mr. Spritzer: Shows that he wishes them to leave.

Justice Stewart: That in his opinion --

Mr. Spritzer: That he wishes them to leave.

Justice Stewart: Subjectively.

Mr. Spritzer: But the trespass statute in Florida, unlike this statute, gives a right to have people leave for any reason. This statute implies clearly that a patron of a restaurant or hotel cannot be excluded for any reason. Therefore, it is not enough to say "leave". The question is whether he is ordering them to leave, since the people are charged with the violation of this statute, for a reason which Florida says is a permissible reason.

Justice Black: The statute itself says he doesn't have to tell them a reason.

Mr. Spritzer: The statute says after notice. It does not say --

Justice Black: First notify that he no longer desires to entertain them.

Mr. Spritzer: Yes. I would assume that if he was notifying someone who was obviously intoxicated to leave, that perhaps he would have to say no more.

Justice Black: The statute says notify such guests of the hotel or apartment house that he no longer desires to entertain them. That is all it says. I am not saying it should not. But how can you escape the fact that that is what it says? That is the only duty it imposes.

Mr. Spritzer: Well, my argument is that the statute to give notice, where it depends upon a subjective determination, must also be read to require, to escape constitutional objection --

to require that the basis of that determination be known to the person whose conduct would be made criminal.

Justice White: Mr. Spritzer, there is a written notice specified in the statute, if the owner wants to use it.

Mr. Spritzer: There is. That is presumably designed for the situation of overnight guests in the hotel.

Justice White: Whatever it happens to be designed for, there is a specific notice which would satisfy the statute. And that notice is singularly lacking in any explanation for the request to leave.

Mr. Spritzer: I assume that in the case where somebody's conduct is measurably by an objective standard, as in the case of most of the reasons for exclusion --

Justice White: But in this statute, you think this would not be an adequate statutory notice -- it would be adequate only in the cases you have just mentioned.

Mr. Spritzer: Where the conduct itself is proscrib d in the statute itself. In other words, I am suggesting that if my criminality under a State law depends upon someone else's believing something, and if contrariwise I am acting entirely within my rights under the State law, if he believes something else, then surely due process at the least must require that liability does not attach until I am informed what he does in fact purport to believe.

Putting it concretely, if the manager had answered the

inquiry put to him by these appellants and had said, "I want you to leave because I do not like Negroes", I would say that it would seem clear that was not an offense as prescribed by the statute, or at least that no one reading this statute could so conclude.

How then, could these appellants know that by the simple act of their continued presence they were committing an offense under this law?

Justice Harlan: You would have a somewhat different case, wouldn't you, if the statute read,"who in the reasonable opinion of the management". Then you would have had a so-called objective standard. The statute does not say that.

Mr. Spritzer: I am not suggesting that the statute requires that the manager's opinion, if he held one, that someone's presence would be detrimental to business need be one that was rationally determined. Maybe it would be foolishly determined and it still might satisfy the statute.

I do say that the statute on its face accords the right to the patron of establishments of this type to come on such premises and to remain there, unless they are excluded for a reason specifically set forth in the statute. And I say further that these appellants could not know that the manager purported to have a reason which Florida law would say was a sufficient reason under this statute when the only basis would be a subjective determination which you refuse to communicate.

Justice White: Don't you really accept the fact that notice here was adequate under the statute -- was all the notice the statute required, and your real point at least for us must be that if that is true the statute is unconstitutional.

Mr. Spritzer: My basic point is that if you read the statute otherwise, that it certainly runs afoul of the requirements of forewarning.

Justice Harlan: By the same token, why aren't the trespass statutes unconstitutional?

Mr. Spritzer: They do not require or limit the owner to have a particular reason for exclusion.

Justice Harlan: But Justice White just pointed out to you what was done here does satisfy the terms of the statute, and your argument is that even so it is unconstitutional.

Mr. Spritzer: I do not read the statute as being satisfied by a directive to leave without any explanation in circumstances where there is no objective conduct which comes within the statute.

Justice Harlan: Apart from the language of the statute, Mr. Spritzer, the State court has construed it that way in this case.

Mr. Spritzer: The State court has said in one word that this statute was non-discriminatory.

Justice Harlan: That assumes certainly that the statute was complied with.

Mr. Spritzer: I go further and say whether one can read the opinion as assuming that or no -- I say further that the statute, if so construed, fails to provide any forewarning to the appellants who were excluded that they could be excluded for such reason.

Justice Harlan: Then I come back to the question as to why the trespass statutes on the same argument are not constitutional.

Mr. Spritzer: The trespass statutes do not make the conduct criminal, depending upon the reason, depending upon the conduct of the particular persons who are on the premises.

Justice Harlan: Nor does this statute, in the last clause.

Mr. Spritzer: Well, so viewed I would disagree with your interpretation of the statute, because I think the fair reading of this statute is that one can only lose his right to remain on the premises for specified reasons, and the thrust of the last clause, as I see it, is that the manager must have a permissible reason, if the appellants have no basis for knowing whether the reason which the manager entertains is a persmissible one under Florida law or not -- if the appellants cannot know whether they are within their rights in remaining, or whether the manager is violating the statute by directing them to leave, because he has an impermissible reason -- then I do not think they have received the notice.

Justice White: If he had written out the notice just .

exactly as the statute requires and handed it to them, you would still make the same argument.

Mr. Spritzer: I would interpret the statute, the written form of notice doubtless, to cover the cases in which the appellants have engaged in conduct which is already made known because it is specifically proscribed in the statute. Whether it is designed to apply to a restaurant or not is of course questionable also.

Justice Black: Are you asking that we send the case back to Florida to take a new look at the statute, or that we ourselves reconstrue the statute as meaning what you now say it means?

Mr. Spritzer: I was talking in terms of what the statute appears to say in relation to the question whether it gives fair warning, which is ultimately the constitutional issue of due process.

Justice Black: You have not been asking that we construe the statute as you think they should have construed it.

Mr. Spritzer: No, I am not.

Justice Black: Then we are bound to reach your constitutional question as to vagueness.

Mr. Spritzer: Yes, and I have been referring to the language of the statute only in relation to the constitutional issue as to whether it gives warning.

Justice Goldberg: Mr. Spritzer, does your argument mean

that the proprietor has to state in terms of the statute itself the ultimate conclusion? Let me put this case to you, the trial judge put. He said, as I read his opinion, that he often has been excluded because he did not wear a tie. Now, suppose that the restaurant owner had a rule based upon his opinion that it was detrimental to his business to have customers who did not wear ties. Suppose he came in and he said -- without a tie, and the restaurant owners said, "You cannot come in because you are not wearing a tie". And then it is prosecuted under this statute. Is there fair warning?

Mr. Spritzer. It seems to me to suffice for purposes of this case, Your Honor, to point out that it is fully agreed that there was nothing indecorous, in the comment of the appellants in this case. But they did not fit within any of the described categories -- brawling, obscene, and so on. That the only basis conceivable for their exclusion under the statute would have been the manager believed that their mere presence would be detrimental to his business.

In these circumstances I would say that when they put to him, by specific inquiry, the question why they were being required to leave, and he refused to answer, I would say that in these circumstances they had no way of knowing that they were committing an offense by remaining -- because it was at least as likely, viewed from their standpoint at the time, that he was excluding them for what I would have considered clearly

an impermissible reason under the statute, namely, racial prejudice. That was at least as fairly inferable as the explanation which he volunteered for the first time at the trial of the case, namely, that he thought it would be bad for business.

Justice Black: In effect, you are asking us to escape one constitutional question by holding a State statute unconstitutional on another ground.

Mr. Spritzer: It is certainly a constitutional issue also. It is a familiar and traditional constitutional issue -- whether the statute gives fair notice that conduct is criminal.

Justice Douglas: Are you raising that question in each of these cases?

Mr. Spritzer: I will go to the point now, if Your Honor prefers. I had planned to deal with it after setting forth my specific arguments in the Maryland and South Carolina cases, to get to that question.

Justice Brennan: If I may say so myself, I notice time is fleeting. I do hope that you will get to the issues.

Mr. Spritzer: I will. I would like to repeat, before I leave Your Honor's question, that I think it is necessarily within the jurisdiction of the Court in all of the cases and the basis that I indicated earlier in my discussion of the Avent case -- because even if the Court should conclude that this issue was not raised, that these issues were not raised, with sufficient explicitness in the State Court, this Court may consider whether it should dispose of the case by reaching a broader constitutional issue which is tendered, or whether it should remand the case for further consideration of the more limited issue by the State tribunals, as was done in the Avent case.

Now, turning to the entry after warning statutes, the South Carolina statute is in our brief at page 8 and provides that the entry upon lands of another after notice from the owner or tenant shall be a misdemeanor.

Now, from context which I have omitted, the statute appears to refer to open lands rather than business practices. But whether or not it is so restricted, it plainly requires, according to its terms, an advance notice.

In the Barr and Boule cases, in both of which the petitioners were indisputably invitees at the time of entry into the drug store, the County Court dealt with this -- that was the intermediate court of appeals -- by citing a civil case which states that one who refuses to depart when ordered to do so is a trespasser ab initio.

The instant cases, however, do not involve the common law of trespass; they involve a criminal statute prohibiting a precise act -- entering after warning or notice not to enter.

Justice Goldberg: General, wouldn't we be blind to the actual facts in all of these cases if we closed our eyes to what was happening; that in all of these cases the proprietor did not want to serve Negroes, demonstrations were going on against this, that the petitioners in all cases knew that they were not invited for the particular service that they desired; and that, knowing this, they nevertheless entered upon the premises?

Would not we be blind to close our eyes to those obvious facts?

Mr. Spritzer: I think that the petitioners may well have supposed that they would not be welcomed in these establishments. I think, as Justice Black indicated yesterday in the discussion, the operation of these criminal laws does not depend on whether the persons entering would have reason to think they might not be welcome. They would depend upon a specific notice or warning not to enter. No such warning was given in any of these cases.

I think also Justice Frankfurter addressed himself to this kind of problem in the Garner case, in his Opinion, and he suggested there that one has a right to presume, even though he has not been welcomed in the past, that an owner may change his policies if nonviolently challenged. Experience, he said, teaches that such modifications do occur. And I would say that these cases teach that.

As we were told yesterday, in at least two of these establishments, the Glen Echo Amusement Park and the Eckerd Pharmacy in Columbia, they voluntarily changed their practices. And I think it a fair supposition that in an instance such as these, the efforts to obtain service played a prominent role in that change.

Justice Goldberg: Am I wrong in my recollection of the record, that in at least two of these cases the petitioners themselves picketed with signs saying that "This restaurant does

not serve Negroes."?

Mr. Spritzer: The record does not show that these petitioners, so far as I am aware, picketed.

Justice Goldberg: I thought I read that.

Mr. Spritzer: It does show that there were pickets outside. Whether the petitioners were involved does not appear. Indeed, in the Bell case in Baltimore, the picketing began only after the refusal to serve.

Now, there was picketing in the Glen Echo case. I do not recall anything to indicate, one way or the other, whether the particular petitioners involved in those cases --

Justice Goldberg: I thought it was the Glen Echo case.

Mr. Spritzer: My recollection may be wrong.

Now, I would like to say also about the Maryland cases, that there is no question that the Maryland courts affirmed the convictions on the basis that these statutes could be read, although in terms they prohibited entry after warning, as if they said remaining after notice.

Justice Harlan: That is true in all of the cases?

Mr. Spritzer: Yes. It was suggested, I think, in the Maryland cases that they had actual notice. This is not -- I do not think the record bears that out. But, in any event, it is not the basis of the Court's disposition, because the Trial Court in the Griffin case, Record 73, stated:

"The evidence shows the defendants have trespassed

upon this corporation's property, not by being told not to come on it, but after being on the property they were told to get off." That was in the Griffin case.

In the Bell case, the Court of Appeals disposed of the statutory question simply by reference to its decision in Griffin.

In other words, the Maryland Courtsconsistently have taken the view that these convictions were valid, that these statutes, though in terms they forbade entry after warning, could be read, according to the Court's interpretation, to forbid remaining after notice to leave.

I have indicated earlier -- I cannot take the time now to develop the point -- that Maryland and South Carolina construed these statutes in that manner for the first time in these cases, though theretofore the requirement of strict notice had been strictly imposed.

We have also noted in our briefs that the jurisprudence of other States and the statutes of other States have traditionally drawn a distinction between a statute which proscribes entry after warning, in a statute which comprehensively proscribes what would be taken in by civil trespass, or which deals in separate categories with entry after warning or remaining after notice to leave.

Let me, without attempting to elaborate our contentions in these cases further, turn to the matter of how and to what extent these issues were presented in the State courts.

Now, in the Griffin and Bell cases, certainly the parties presented to the Court the question whether this statute, which proscribed only entry after warning, could be applied to their conduct.

In presenting the question, they did not take the further step and say if the statute is read to apply to this conduct, it would offend the due process clause of the Fourteenth Amendment, because it would not give clear forewarning.

They did argue vigorously that the statutes did not apply by their terms. And the Maryland courts, both the lower courts and the Court of Appeals, considered that issue.

The parties also placed emphasis on the fact that they were invitees. They also claimed the benefits of the due process clause. But I must, in candor, state that the arguments based upon the due process clause were cast in terms of State aid of discrimination, or the doctrine of Shelley v. Kraemer, rather than any specific reference to the matter of statutory notice.

I think it is perfectly plain that the Maryland courts considered the meaning and the substance of their statutes, when the argument was made to those courts that the statute did not apply to the conduct involved. And one could hardly conceive that a Court which has just said, "This statute applies to such-and-such conduct, despite the words which might lead one to conclude otherwise" would then turn around and say, "We

have now adopted such a strange and bizzare construction of the statute that it is unconstitutional from the standpoint of the Fourteenth Amendment."

So, in substance, certainly the Maryland Court has considered whether this statute may be applied to this conduct.

Justice Black: Suppose the Court should disagree with you as to one of the cases. What would you say, then, would be the weight of your argument as to reaching this second constitutional question in the other cases?

Mr. Spritzer: I am not sure that I understood what Your Honor meant by the second.

Justice Black: Suppose the Court should decide that the statute in Florida was not ambiguous. It would still have to decide the other cases. What would your argument be about what they should be decided on?

Mr. Spritzer: Well, the other cases are the Maryland and South Carolina cases. I would say they should clearly be decided or can properly be decided on the basis that those entry after warning statutes failed to give adequate notice, consistent with the Fourteenth Amendment, that remaining as distinguished from entering after notice to leave constituted an offense.

Justice Black: However, if we were to decide the other, it would cut out the ground of your argument that we could thereby escape decision of the constitutional question.

Mr. Spritzer: I assume that if the Court reached a broad

issue, if it found it necessary or appropriate to reach a broad issue in the Florida case, that issue you might well be dispositive of in the other cases also.

It depends, I would suppose, on which broad issue and how broadly the broad issue was decided.

But I think from the standpoint of broader contentions made --

Justice Black: I am unable to follow your measurement between the narrow and the broad issue. But that is beside the point.

Mr. Spritzer: I have been speaking as a narrower issue, perhaps such a more familiar issue, the question of whether a statute gives adequate notice as to the criminal conduct which it forbids. I have used "narrower" in that sense.

Justice Harlan: I would like to ask you a question. This is prompted by what my brother Black asked you.

Assuming that the Court does reach in one or more of these cases what you call the broader issues, is the Government requesting an opportunity to -- the Solicitor General requesting an opportunity to file a brief on those issues or to be heard further orally on those issues, or are you leaving the question as to whether the Court asks for that?

Mr. Spritzer: I would think that is for the Court to decide. The intention was to express, of course, the complete readiness of the Government to submit further briefing or argument, if the Court should so desire.

Justice Harlan: That answers my question.

Justice Black: It is not your intention that the Court postpone these cases until next year, is it, in order to have an opportunity to argue again, in case there is disagreement with this argument?

Mr. Spritzer: I think our answer, Your Honor, would be that we certainly would feel that it is for the Court and the Court alone to decide whether any further briefing or argument would be helpful. We do not mean to imply any view as to what the Court would find most expedient from the standpoint of conducting its business.

The Chief Justice: It is time for lunch. But I think the Court probably would like to hear a few more minutes of argument, and whether the other cases are properly here. Suppose you take ten minutes when we come back, and the appellees may have ten minutes also.

(Whereupon, at 12:00 noon a luncheon recess was taken, the Court to reconvene at 12:30 p.m., the same day.)

AFTERNOON SESSION

12:03 P.M.

The Chief Justice: Mr. Spritzer, you may continue.

Mr. Spritzer. Than you, Your Honor. I shall make it very brief.

ARGUMENT OF AMICUS CURIAE,

BY MR. SPRITZER -- resumed

Mr. Spritzer. As to the two South Carolina cases, counsel for the state agrees in his brief that the question of the application of the application of the South Carolina entry after notice statute to the kind of conduct charged in these cases was presented to the trial court and to the intermediate Court of Appeals.

The County Court in that case did discuss the issue whether this statute could be applied to one who had permission as to the time he entered and concluded that it could.

The state's contention is that this question was not adequately presented to the State Supreme Court.

Now, as to the disposition by the State Supreme Court, in the Barr case, as was mentioned yesterday, the South Carolina court stated that the exceptions which were presented to it in terms of a prima facie case, not having been made out, and as the phrase was used in South Carolina, the corpus delicti not having been proved, the South Carolina court said in the Barr case that those assignments of error were too general.

Nonetheless, in the Bouie case which was a companion case, as argued in the South Carolina courts, it was decided some weeks after the Barr case, the court refers to identical assignments of error, the language is the same and it does go on to say on the merits that the trespass statute applies. However, in a third case which was argued with these two cases, the Charleston vs. Mitchell case involving alleged violation of the same statute in Charleston, in that case, the Supreme Court of South Carolina discusses specifically the question that the statute with which we are concerned in Barr and Bouie can be applied to the conduct of the kind charged here, or rather it is defective because of the uncertainty or vagueness of its application.

The South Carolina Supreme Court in the Charleston vs. Mitchell case resolves this question of vagueness in favor of these state's contentions.

Now, the Mitchell case was decided -- it was not only argued, as I understand it, before the South Carolina Supreme Court with the Barr and Bouie cases, it was actually decided a day before Barr and some weeks before Bouie, so that I take it there could be no question that the South Carolina Supreme Court was fully aware and that it did consider, when it had all of these cases under advisement, the issue whether these statutes may fairly be applied to entry which was made without warning or without notice.

Justice Brennan: Do you know when the Mitchell case came here?

Mr. Spritzer: It is pending on petition now.

Justice Brennan: When was petition filed?

Mr. Spritzer: Lately, I believe. I don't know the date. The number of the case is cited in the index to our brief, Your Honor.

Justice Clark: Are the assignments about the same?

Mr. Spritzer: No, there is a much more specific assignment of error in the Mitchell case in relation to vagueness -- the question of vagueness.

Justice White. In Bouie I gather the point that you are talking about was argued in the brief at some length, even though the assignment may not have been.

Mr. Spritzer: I think the brief concentrated largely on the resisting of arrest point, but I would have to refresh my recollection.

That brings me to the -- this brings me back to the Florida case. It is perfectly clear from the assignment of error in this case what the Florida appellants claimed that they were excluded for a reason which was not permissible under the statute. It is also clear, however, that they related this thing to a contention based upon Shelley vs. Kraemer rather than to a contention in terms of adequate forewarning by the statute. The Court can refer very readily to the assignment of error

in that case for itself, at page 9 of the Florida Record.

Perhaps I should say one further word, if I may, about the essence of our forewarning contention in relation to the Florida case.

I don't know that I have made our position on that as clear as I should like.

We start with the point that this statute by any fair reading necessarily implies to a person who wants to know what is forbidden and what is not forbidden, that he has a right to go to a motel or hotel or restaurant, that he cannot be excluded at will, but can only be excluded for one of a limited number of reasons specified in the statutes.

Starting from that we question whether one who has done no act which is described as specified as objectionable under the statute can be held to have adequate notice that he is in violation in circumstances where his being in violation depends on whether the proprietor means one thing or another, and the proprietor fails to indicate which, and it is not fairly inferable which.

In those circumstances we say persons who are in the restaurant have no way of telling whether they are engaged in conduct which is protected by this Florida statute -- because this statute doesn't give a right to exclude for any reason, as the criminal trespass law does. It gives the owner of that type of establishment a much narrower right to exclude.

We question whether in these circumstances he can tell whether he is being excluded for a permissible reason or one which is not recognized under Florida law. And in those circumstances, we think that he has no way of knowing that he has engaged in conduct which is forbidden by the statute.

Now, the written form of notice for this I think can certainly not be given a reading so broad as to convert what is apparent throughout the statute, as a statute which only grants limited rights of exclusion to the owner -- that written form of notice provision cannot be read as meaning that the proprietor can exclude for any reason.

We think that in circumstances where the reason is not apparent and cannot be known and circumstances where the persons on the premises ask the reason, that they cannot be held criminal if they are not even told whether the manager of the establishment purports to have a reason for exclusion which is recognized by Florida law.

Justice White: I would make the same argument -- do you have the same argument as to the last section of the statute?

Mr. Spritzer: In circumstances where there is no way of knowing or ascertaining whether there is a permissible reason or not.

Justice White: You would make the same argument if the fifth reason wasn't there, wouldn't you?

Mr. Spritzer: Yes.

Justice White: And as long as the notice to leave is not accompanied by a reason --

Mr. Spritzer: In circumstances where there is no way of knowing or ascertaining whether there is a permissible reason under the law.

Justice White: There would be no way of knowing the reason the manager was excluding them for this unless he told them.

Mr. Spritzer: I suppose if I were engaging in a fight or was drinking in the establishment --

Justice White: You might have some differences of opinion as to whether you were drunk or not. People like that usually do.

Mr. Spritzer: One might and I am not reaching the question whether there would be any other circumstances in which the manager would be obliged to give a reason. I am suggesting that at least in circumstances where the behavior is unimpeachable, that the manager has a duty to advise of the reason and putting it in constitutional terms, that the persons there cannot know that they are committing an offense under the terms of the statute if they are not given a reason.

The Chief Justice: Mr. Reno.

REBUTTAL ARGUMENT ON BEHALF OF THE STATE OF MARYLAND, RESPONDENTS,

BY RUSSELL R. RENO, ASSISTANT ATTORNEY GENERAL, STATE OF MARYLAND

Mr. Reno: Mr. Chief Justice, and may it please the Court. Before addressing myself to the vagueness arguments, the doctrine as it has been argued by the Solicitor General, let me, at the risk of repeating ourselves, once again reaffirm the position of the State of Maryland that insofar as the Bell case is concerned, which is No. 12, we feel that it gives abundantly clear that the conduct which took place in that case was clearly covered by the Maryland Trespass Statute.

As you know, the Maryland statute applies to not only entry upon, but also to crossing over.

Now, in the Bell case the Bell defendants entered the lobby of Hooper's Restaurant in Baltimore.

This lobby has been described as being just past the door, the revolving door to the premises and it is a different level from the restaurant area, the eating area of the restaurant. It is separated by four steps. One must go up four steps to the eating area and one must go down some stairs to get to the grille in the basement.

The Bell defendants at first congregated in this lobby. The hostess who testified that she was the one who gave people their seats in the restaurant -- that this was not the type restaurant where you could take your own seat -- stood at the top of the stairs and she told them, "I am sorry, but we haven't integrated as yet".

The defendants replied, "Well, you mean you are not going to seat us?"

The hostess replied, "Well, that's right. That's Mr. Hooper's orders."

Thereupon colloquy ensued between the Bell defendants or one of the group and the hostess and Mr. Warfel the manager while they were speaking, the five defendants rushed past. In other words, the lower court opinion was to brush past the hostess and the manager, crossed over into the eating area of the restaurant and took places and seats. Some of them, instead of going up the four steps and crossing over into the eating area of the restaurant went down some steps into the basement area. But I think that it can be fairly stated the

statute contemplates this sort of conduct. This is crossing over as that term is used within the Maryland statute. Therefore we respectfully suggest that at least so far as the Bell case is concerned, the void argument which the Solicitor General makes could not apply.

Justice Goldberg: Mr. Spritzer indicated, didn't he, in his argument, that the Supreme Court of Maryland did not rely upon crossing over?

Mr. Reno: Sir, I don't think we can make that statement. I will say this -- when the Supreme Court -- the Court of Appeals of Maryland, which is our lowest court heard the Bell case, the Griffin case had already been decided. Now, I must be frank to admit that Griffin is a refusal to leave case. It is not an entry case, if you consider entry in the very limited sense which it is being argued by the Solicitor General.

The opinion in the Bell case is quite short when it deals with this subject. It simply cites Griffin as authority.

Justice Goldberg: It does say something. It says something a little more than the Solicitor General I think indicated.

Mr. Reno: This is certainly true. But may I make this point: I don't think that we can criticize the Court of Appeals for Maryland for being less specific than what by hindsight we may now wish they had been. My reason for saying this is because the appellants, the Bell appellants, when

they argued that case before the Maryland Court of Appeals were not nearly as specific as perhaps the Solicitor General would now wish that they could have been. Certainly the specificity required in the Maryland Court of Appeals certainly should be proportional to the specificity of the argument presented to them. Frankly, the arguments presented to them on that appeal were not finely drawn as they are now attempting to be drawn in this court.

So your point is a good one. But I think that is the answer to it.

Justice White: Even if the crossing over provision were not in the statute, I suppose you would argue that entering one part of the premises from another part of the premises was a literal compliance with the statute.

Mr. Reno: That is true, sir. That entry need not be from the outer boundaries of the property. It can be from the lobby into the restaurant area.

Now, on the void for vagueness doctrine, which is asserted by the Solicitor General, to the extent that it is applicable at all to the Maryland cases, it would, we submit, only apply in the Griffin case.

The Chief Justice: Does it apply to Griffin?

Mr. Reno: No, sir. And I shall now try to explain to you why I don't believe it applies.

First of all, let me state the reasons that I can see for

the growth of this doctrine.

One reason that it has grown -- one reason that has been enunciated on occasion by this court is what the text writers refer to as the "mousetrap reason". The criminal defendant who is faced with an ambiguous statute, he doesn't know how to govern his conduct under the statute because it is ambiguous, he does something and then he finds himself in the criminal courts of the state being prosecuted. So that from the point of view of the criminal defendant this is one reason asserted for the doctrine.

The second reason which has been asserted for the doctrine, and the reason which I submit is the crucial reason and the real reason, and the one that is most often employed, is that vague statutes, ambiguous and vague statutes make for irregular and erratic law enforcement by police officers and by judges and juries. Because if they have cases which deal with statutes that don't have standards written into them, the jury itself is not in the position of drawing the standards. And different juries may draw different standards in different cases.

Now, this is a particular problem for this court, I think, in dealing with appeals from state courts, because the scope of your review of state court decisions I think is somewhat more limited than it is of the review of decisions which come out of the district courts. This is not the case of any lack of power. Well, it is I guess, because it is a lack of power

on your part. The problem is, you must take the statutes as they are construed by the state courts. You must deal with them as the state construes them. However, when you get a statute from the district court, you may construe that statute just so. And as a result, I think it can be fairly said that in many instances a statute which to me is a vague statute has been upheld by this court when it is a federal statute. But if that statute had been a state statute, you might have required the void for vagueness doctrine to strike it down, and the reason being there is more opportunity for abuse when you have a state vague statute because the actual facts may be somewhat hidden by the standards by the jury or by the construction that a court may apply, that make good judicial review by you not as effective as it might be in a district court case.

Now, these I think are two reasons for ambiguity and I submit that the second reason is the one that is most important to this case.

Now, there are two types of ambiguity as I see it. One of them I would refer to as the resolvible ambiguity. Now, this is the one I think we have in this case.

This is the one, for example, that was presented in the ALFORD case, which was cited in our brief, where the crime was a crime to build a fire in or near timber upon the public domain. The person who broke the fire was faced with a statute,

and you could not tell from the statute whether the prohibition was against building a fire near timber on the public domain -- whether the fire had been on the public domain, or whether the prohibition was building a fire near the public domain. In other words, the question was not clear whether the fire had to be on the public domain to constitute a crime.

Now, that man was faced with what is referred to as the "mousetrap" situation there. He didn't know what to do. The court, however, construed that statute as saying that the reference was to timber upon the public domain, and that it would be a crime for a fire to be over the domain or near it.

That interpretation resolved the ambiguity in the statute. Now, forever after that a person who was faced with this statute would know that it meant building a fire next to the public domain. So this is an example of a resolvable ambiguity. And this is what I suggest we have in the Maryland situation in the Griffin case. I am not conceding that there is an ambiguity in the statute. But if there was one, it certainly was resolved by the Maryland case and forever aftewards, trespasses in restaurants will know that even though they are lucky enough to get into the door of the restaurant without being told to leave, once they are there, and they are asked to leave and they don't, that this is encompassed within the Maryland trespass statute. So I would submit that the Maryland law is of the resolvable ambiguity type.

Now, the other type of ambiguity, I guess, I would refer to as the omnibus ambiguity. This is the kind of ambiguity that is not resolved by judicial decision but which continues on from case to case, one which is inherently devoid of standards, one of which it is difficult to assign standards to. Now, that I think is the worst kind of ambiguity to have because that is the kind that leads to eratic law enforcement in subsequent cases, because the jury has to draw the standards, if no standards have been placed on it by the state courts. This was the type ambiguity, I would submit, that can be found in Cline vs. Frink Dairy Company which permitted commissions in the restraint of trade where the sellers intended to mark the product at a reasonable price, products which could not otherwise be so marked. There was a case where the words "reasonable price" I would submit is best not susceptible of accurate standards being attached to it, and one which would be of the omnibus ambiguity type, and would be struck down.

Now, I have already given you the example of the ALFORD case. This is a resolvable ambiguity, but it was a "mousetrap" type case. This man was "mousetrapped". But this, nevertheless said this was not void for vagueness and permitted the conviction to stand.

Now, I cite this case as authority for the proposition that the "mousetrap" reason for void for vagueness is not the one that this court is really concerned with. I am not going

to suggest that it is not a concern at all to the court, but it is not a primary one. The primary situation where this court is called upon to adopt the void for vagueness doctrine is one where you have an omnibus ambiguity, one which contributes to subsequent "mousetrapping" of a potential defendant, and one which is likely to give rise to erratic law enforcement, particularly in state courts on subsequent occasions.

Other ambiguous statutes which have been upheld, even though the "mousetrap" factor is present, Vandanny Petroleum Company which involved -- prohibited the unreasonable waste of natural gas.

Now, on its face that seems like a somewhat ambiguous statutory reference. But the court would apply the judicial gloss to that statute -- they said they would interpret unreasonable waste in the context of that amount of gas which was necessary to lift crude oil to the surface from the ground. Once the statute was given that standard, it became permissible or possible, with almost mathematical certainty through the application of engineering formulas, for a person to determine exactly how much natural gas -- what was an what was not waste. So there we see and have a judicial gloss which resolves the ambiguity, even though the initial defendant was trapped in that case -- this Court nevertheless refused to apply the void for vagueness doctrine.

Now, let me make a few comments about the free speech argument which Mr. Spritzer raised in his brief on the ambiguity point. He pointed out that when you are dealing with areas of free speech, this Court is more likely to apply the void for vagueness doctrine than you might otherwise apply it in some other situation. I think as an abstract proposition this is probably true. But I don't think that this case is a free speech case of the type that the court would apply the void for vagueness doctrine, or at least not based on your past performance in this area. It seems to me that the void for vagueness doctrine in the free speech areas are one which would be applied where you had the unresoluble, omnibus ambiguity

type which might conceivably include within its criminal scope certain areas of permissible free speech. This might discourage the person from exercising his free speech for fear of being dragged through the criminal courts of the state. But even more important, a person exercising free speech properly, when he is tried, in the course of his trial, particularly if this is done in the State court, with an omnibus type statute, he may find himself convicted in a situation where this court, because of its more limited scope of review of State court decisions, cannot give this man redress. So in that situation, where you have omnibus vague statutes that deal in the area of free speech, then this Court I think is likely to apply the void for vagueness doctrine but I submit this is not the sort of case we have here. I think we have a resoluble ambiguity situation and which would not be a proper one for the employment of that doctrine.

Now, let me make another comment about Mr. Spritzer's void for vagueness argument with respect to free speech.

I think -- this is difficult to articulate -- but it appears to me that the ideal way which these people are trying to disseminate by means of these sit-in demonstrations that they should be permitted to eat in unsegregated restaurants -- this is the idea they are seeking to communicate.

Now, what Mr. Spritzer wants us to do is for this Court to recognize the validity of that ideal. He says that they

should be permitted to do -- to have the language they are seeking to secure by their free speech otherwise they would be denied this free speech. This may be so, but it seems to me the place to present that argument is to make the constitutional argument before this Court, that refusing to seat Negroes in restaurants is a violation of this free speech. Well, this is not being done in this case. Instead, he seeks to apply the void for vagueness doctrine which I think he would say would avoid the necessity of making a decision on that issue.

In short, he is, I think, asking us to presuppose that Negroes have a right to be on the premises. This is the issue which is the primary issue in this case which is being asserted by the appellants in this case. They think they do have a right. If that is the case, then that is the issue that should be decided, and it should not be avoided by attempted application of the void for vagueness doctrine.

Thirdly, on the question of free speech, I think this court must take into account the other opportunities which these people had to exercise their free speech rights. There was the sidewalk in front of Hooper's Restaurant, that is the area in front, and of course the front of Glen Echo -- in fact, the record shows that picketing was carried on there. And this would, I think, give them opportunity to communicate their ideas to the people within the Park as they came out and within the restaurant as they came out. So that this is not like the

company town -- people spend I suppose 90 per cent in their own home town. If you cannot get in there to talk to them, it is unlikely that you would ever be able to communicate your ideas to them. When you are dealing with restaurants and amusement parks, this only consumes a very small fraction of per cent of every day life. He must get in and out of the place. If you can contact him at the gate I would think this would satisfy the requirements of free speech.

I see my time is up. I would only make one further comment. As Justice Goldberg has already alluded to, there is a comment, I think -- it is a law review note that appears in 109 University of Pennsylvania Law Review that deals with this void for vagueness subject, the thesis which I enunciated today, certainly not original with me. They are explored at great length in that note which I would call to your attention.

Thank you.

The Chief Justice: Mr. Sholenberger.

REBUTTAL ARGUMENT ON BEHALF OF RESPONDENTS,

CITY OF COLUMBIA,

By John W. Sholenberger

Mr. Sholenberger: Mr. Chief Justice and if it please the Court, in dealing with this question of vagueness, that has been raised by the Solicitor General, it seems to me that we take the position that this question is being raised when it was not raised properly before the South Carolina State Supreme

Court, and also that it was not properly raised by the exceptions to this Court.

Now, this question as to vagueness was argued in our argument in chief yesterday and in other arguments yesterday. However, in that connection, I would like to call the Court's attention to the language of our statute which is in the Bouie and Barr cases. The statute, among other things, reads as follows:

"After notice from the owner or tenant prohibiting such action, shall be a misdemeanor and be punishabled by a fine not to exceed $100 and hard labor not exceeding 30 days."

Now, certainly under that language of the statute and under the decisions of our supreme court in Bouie and Barr cases, the Court must have considered that the action taken in these two cases by a proprietor of a drug store did constitute trespass on the part of the parties that failed to leave upon request.

I call your attention to State versus Bradley, 126 South Carolina, 528, 128, Southeastern, 240 that is not contained in the brief. In that case our supreme court, a very old case, they did state by dicta, that a property owner had the right to demand a person -- demand a person to leave his premises after the person had made a lawful entry. Failure to leave was a misdemeanor. I should say, I am sorry, that it was a person who made an unlawful entry.

That is exactly what we have had in these cases. I am not going to attempt, nor do I think it is the City's position that we are going to attempt to determine and go into the philosophy, psychology of ideas and reasons for a proprietor of a drug store to refuse to serve colored people in the lunch counter section of the drug store or a variety store. However, as a law enforcement officer I, and our police department are interested in keeping the peace of our City, keeping the tranquility and peace of the City. Now, what are the basic interests involved in a trespass law?

One, to keep the peace and two, to protect private property. The State or nation cannot exist without these two basic principles being upheld. Race has no part in these two basic principles nor does religion or other things. The statutes involved in our cases in Columbia have no element of racial discrimination. They protect a white person just as well a Negro person or any other person, regardless of his race or creed.

The City of Columbia at the time when the Barr and Bouie cases believed that under the Constitution a proprietor or owner of a place of business had the right to order anyone from the premises in order to protect and preserve the peace. That belief did not necessarily concern itself with a Negro or any other person whom the owner or proprietor deemed undesirable. The City Government at the time these cases arose was not

concerned with racial segregation as such. It was concerned with the safety, good order and peaceful tranquility in the community. It is time we stopped and tried to understand that no individual or class of people only are under the law. To remain in an establishment after being asked to leave, in my opinion, is a violation of our trespass law and as it stood on the books at the time of these cases and that should continue to be the law of the land. I think Justice Goldberg has answered the question in regard to whether or not these people had noticed this morning and in our question to the Solicitor General's argument, and I believe that we have to recognize that these people did have notice, that all of them had notice in addition to that after that they had additional notice to leave.

My conception of this trespass law is a basic American freedom and way of life. If we forget this principle both colored and white will suffer the loss of this freedom.

To digress for a moment, let us assume that a proprietor in an establishment does not desire my presence or a Negro's presence or anybody else's presence and they refuse to leave upon request. He grabs up a shotgun and a death results. Now, certainly, that is the kind of a situation that a trespass law is designed to prevent, and certainly, instead of that man taking the right of self-help to get the person off his premises, it is right and just and proper that he call upon a police

officer to enforce the trespass law. I cite that case to you because it happened in Columbia, South Carolina on our main street on October 4, 1963.

The Chief Justice: On your main street?

Mr. Sholenberger: Yes, sir; in a restaurant on our main street.

The Chief Justice: In a restaurant?

Mr. Sholenberger: Yes. A Greek ran it. He has been there for years, and it was patronized by the general public.

There is mentioned in Judge Crews' order of Richland County -- that was the intermediate appellate court -- that there are Negro eating establishments in the City of Columbia that do not serve white people. I know, from my own knowledge, from prosecuting in the Recorder's Court on occasion, that our police department recently arrested and convicted two white women who attempted to enter a Negro restaurant in a Negro section of our city, and the arrest request was made by the Negro proprietor.

Now, I say to this Court with all due respect that, again I repeat and reiterate, that this trespass law protects everybody -- not just the white man or not just the Negro, but everybody.

The Chief Justice: May I ask what you have to say to the argument South Carolina has declared its policy of segregation, and that is the State in its action is following out the mandate of the State. If not specifically in this action, certainly by implication, because of the other statutes that they have enumerated here, such as circuses, traveling shows, on steam

ferries and carrier station restaurants or eating places, streetcars, and where they even require them to remove themselves as far as possible from white people, if white people are on those streetcars and on buses, State Parks, the State having closed their parks?

Mr. Sholenberger: Some of our politicians made that statement.

The Chief Justice: All of your politicians made those laws, though. Those laws are on those books.

Mr. Sholenberger: Yes, sir, Mr. Chief Justice, they are on our books, but most of them are outmoded and not abided by. For instance, we have integration on our buses. We have integration on our trains.

The Chief Justice: Most of these were reenacted in 1962?

Mr. Sholenberger: It might have been. A lot of times before our code codifiers don't take out things that they should take out because they are outmoded and not used any more. But certainly because of the State having a certain number of statutes on its books that do tend to restrict the color or the race does not necessarily establish that as a custom of the people as a whole.

After all, the people establish custom, not the law, not the Legislature. And the law follows the customs that are established by the people because we elect people that make the law. Certainly, I do not think that that --

The Chief Justice: So, no matter what your laws -- no matter what laws your State might pass, you say that because the people are responsible for that through their customs, that the State is not chargeable with any discriminatory laws?

Mr. Sholenberger: No, sir, and I do not think it would be State action for a police officer to arrest in a strictly trespasser -- somebody has to protect people from the trespasser, and it is far better to get a police officer to do it than attempt to take the law into our own hands, and possibly kill somebody.

The Chief Justice: That wasn't really the question I asked. But if you have answered it, it is all right.

Mr. Georgieff.

REBUTTAL ARGUMENT ON BEHALF OF THE STATE OF FLORIDA, RESPONDENTS,

BY GEORGE R. GEORGIEFF, ASSISTANT ATTORNEY GENERAL, STATE OF FLORIDA

Mr. Georgieff: Mr. Chief Justice, may it please the Court, I think what Mr.Spritzer probably insisted on more than his claim of vagueness was, that these people weren't told why the management had made up its mind that it didn't want to continue to have them there. If that is what it means, if that is what he means, I would like to suggest that if we have to give a reason that is acceptable to the people to whom you give the notice to leave, that literally you deprive him of the right to

make an independent judgment that satisfies him in the circumstances.

Apart from the fact that this was never presented below, and you can read the assignment of error forty times if you like, if you find in that assignment of error in any position taken by these people before any of the Florida courts that had this case, anything that remotely resembles an argument based on vagueness, you go ahead and do it, but I defy you to find it there.

But to get back to this -- if he says it is vague, I submit that it cannot be vague. If he contends, on the other hand, that they should have been given a reason, a reason legally before they can be held accountable for not having left, then I quarrel with that seriously.

If we do not have to have a reason to eject somebody from our home, and that is based exclusively on what I or you consider to be a good enough reason, it may be the most terrible in the world, but if it satisfies you, you have the undeniable right to eject him with whatever force, if necessary. We presume that you would call the police.

Now, if this statute purports to do the same for a manager or owner of a business house, hotel, restaurant, whatever it may be -- if he has to give these people a reason, then it may well be that they will disagree with that as a valid reason and remain -- putting that man in the position of having to resort to something else.

Now, to the person who is drunk, brawling, et cetera, as Mr. Justice White observed, he has an opinion that he may not be drunk. It may well be that these people will have a reason -- will have reason to believe that what the management considers a valid reason is not, to them, one. So you leave that in a position where it cannot be resolved.

There are areas where we don't find situations set out in those enumerated by the legislation. I would imagine a situation would be where, suppose I ran a restaurant and a man had been there and had robbed me some months before and I remembered who he was, but he had not been apprehended. So he is dressed immaculately, behaved beautifully, was white. I had no reason under the enumerated sections to eject him or to ask him to leave. But I would say that in my mind -- in my independent judgment I had a reason to ask him to leave, to wit, a well earned fear that he might rob me again.

So I ask him, but I don't tell him why. So I don't put him on notice. The man may take off and flee. So I call the police and he comes up and says, "Look, it is true you told me to leave, because you considered that my presence would be detrimental to your business, but you did not tell me why." Well, he can find out why during the course of the trial.

If he doesn't fall within the enumerated group, then he knows when he enters that if for any reason that satisfies me as a private owner I no longer wish to have him there, that is

not the crime, not my deciding it. The crime is his refusal to leave when I have made that subjective determination -- which is no different than you encounter in your home.

Justice Harlan: Do you think this statute cuts down, as Mr. Spritzer argues, the application of the general trespass statutes with respect to this class of establishment?

Mr. Georgieff: I do not, sir.

Justice Harlan: What is the purpose of this statute?

Mr. Georgieff: Well, I imagine that under the Hotel and Restaurant Commission's authority, they will consider the questions raised -- naturally, because of the atmosphere. I could not deny that. That would be foolish. They wanted something, something specifically dealing with these places of public accommodation, to wit, hotels and restaurants.

I cannot tell you precisely what was argued before the legislative committees when they entertained this legislation in the nature of a bill. But I can tell you that it is always insisted on by the owners, who presented a substantial lobby, asking for something, not so much limited to themselves as particularly spelling out what their rights were under these things.

That is to say, if they had to go under 823, or whatever it was, would it be a situation where therewould be a lot of litigation involved -- do you come within this? If you read the general trespass statute you are pretty well limited to

premises, et cetera. They figure if you spell it out to be hotels, motels, restaurants, or places of public accommodation, you are still left with the general public and with the general trespass statute.

But now we have something specifically directed to us which sets it out.

Now, in those three sections -- those first three sections where they spell out a number of things, you don't fall within the general trespass statute. It is only under subsection 4 that you come within it -- I mean the "or any other patron or person."

Justice White: Was your general trespass statute an entry after warning type, or what?

Mr. Georgieff: It is both.

Justice White: Your general trespass?

Mr. Georgieff: Yes, sir. In other words, it covers a situation where you enter without authority and you are asked to leave, and you don't. So it is covering both, in effect.

Now, invariably, most of the times it occurs that the person is wanted to leave and he doesn't. That is just a practical thing but it covers those situations.

Justice Black: When was the statute passed?

Mr. Georgieff: 1959, sir, I believe. It may have been 1957. I think it was 1959 and it has been amended in 1961 but that amendment is not here since this action occurred before then.

Justice Black: Does the amendment in any way relate to this?

Mr. Georgieff: I don't believe so. I don't think so.

Mr. Justice Harlan, I don't know if I answered your question.

Justice Harlan: I wonder if these cases could have been prosecuted under your general trespass statute?

Mr. Georgieff: I think they perhaps could have. I believe they could have. I don't know why any particular selection was made here except that it would be a restaurant as such and there was this statute.

I suppose on chance reflection I guess we would have been less assailable had we done it under the general trespass statute. But it seems to me if the reason for allowing, let's say, the objector -- in both circumstances it didn't matter. In other words, the legislative rationale I cannot begin to explain to you. A lot of times --

Justice Harlan: Let me ask you this question. Was this statute resistance to the segregation decisions of this Court?

Mr. Georgieff: I honestly do not believe that it was.

Justice Harlan: You mentioned 1959, 1960.

Mr. Georgieff: Well, I think -- I happen to know that Florida has been relatively free from any substantial demonstrations. I am happy to report this.

Of course there is no guarantee that that is a condition that would have a long life. But we have been relatively free from that sort of thing. And certainly in the Greater Miami area there has been precious little of it, if indeed any. And so whatever difference it makes, Shell's City Restaurant is now integrated.

I have not seen it that way but it is represented to me by competent people that it is.

I do not believe that it was designed to resist integration. Our schools are integrated. All facilities, all transportation facilities in interstate commerce are integrated as you must know from your decision. Eastern Shore from Palm Beach on down, aside from private clubs which may exist has no segregation policy, either announced or otherwise.

Now, that doesn't guarantee that each establishment invites anyone in particular, but I would say generally speaking, you would find nothing to evidence an overall policy or whatever it is. So I realize I have taken a long time to perhaps not say a

great deal, but I think I am honestly telling you that I don't believe it was designed for integration.

If it was, it failed in that respect.

Justice Harlan: I was just curious as to why the statute along with the trespass statutes, which I assume from what you said earlier wouldn't have covered this situation.

Mr. Georgieff: Well, as I say, aside from the wishes -- aside from the wishes of the people, the people to whom it seemed to be directed, I cannot give you a reason other than that. Maybe that it is a more foolish wish than a wise one. I have often been confronted with legislation that I would rather not have there. This doesn't happen to be one since it does fall, except for the enumerations exactly within the confines of the trespass.

Justice Goldberg: Your general trespass statute -- is your general trespass statute cited in any of the briefs?

Mr. Georgieff: I think it is cited in both of them.

Justice Goldberg: Is it quoted?

Mr. Georgieff: I have not quoted it. I think counsel for the appellants may have. I am not certain, sir.

To the suggestions by the Solicitor General that in the atmosphere of legislation which is enacted in Congress, I might say if you were to decide that you wanted to strike down all these convictions, and say that this was state action, you still would not avoid the very real possibility of self-help. So lest anyone suggest that your action would do away with the need for

Congressional enactment, don't you believe it. You may be faced with the situation where we are all going to wear a pistol to handle our differences in defense of our private property.

I suggest if you do not find that this is state action and I don't want you to decide it, if I have any right to say, please don't decide on vagueness or anything. I put it to you squarely. If you find this is the state action, then by all means have at it. If you do not, then say so and let us know whether a citizen may enjoy his property as he is meant to enjoy it.

If you diminish the rights of those who do own it in order to bestow rights on another group, then do you not diminish the whole in every regard?

Now, if that is sound, and if this is logical, then by all means do affirm the action of the Florida Supreme Court.

I think that you won't have any difficulty in reaching that conclusion if you view this as I submit you should, that the State of Florida did nothing more here than respond to a call for help which a citizen is empowered to do, and that they insist he did.

They don't want him to take the situation into his own hands. They do for him what he ought not to do. If you are going to say that he must do it himself, then we are in a worse position than we were before.

Thank you.

The Chief Justice: Mr. Greenberg.

REBUTTAL ARGUMENT IN BEHALF OF PETITIONERS

BY MR. JACK GREENBERG

Mr. Greenberg: Mr. Chief Justice, may it please the Court, this is a rebuttal argument in Barr and Bouie vs. South Carolina and the Bell vs. Maryland.

I think it is important at this stage of the case to focus on what these cases are really all about. During the argument yesterday and today and in previous cases of this sort there has been considerable discussion about hypothetical discrmination. The discussion of that problem and the whole area of whimsical irrational discrmination is virtually nowhere a real problem and certainly nowhere a problem connected with any of these cases. Such a case arose and so the law and the courts would not be concerned with it.

But the pattern of rational discrmination is characteristic of great sections of our country and this is a problem that the Fourteenth Amendment is designed to deal with.

The current throughout these cases --

Justice Black: Why do you say sections?

Mr. Greenberg: Well, it is throughout the country, Mr. Justice Black -- there was the implication. In some sections of the country it takes different forms, it is more prevalent than other sections.

In some sections of the country it is dealt with by

positive state legislation. States make an effort to deal with it. No other sections of the country encourage it. We feel that it is a Constitutional difference.

The current throughout these five cases and in questions posed by the courts and argued by opposing counsel has been the issue whether the proprietor of the amusement park, the luncheon counter or restaurant has the right to select his customers. And if not, what in the Constitution deprives him of that right? But we respectfully submit to the Court that these cases involve the question of whether these criminal convictions should be affirmed or reversed.

When we speak of right in such a context, what we mean is, can the proprietor invoke the full machinery of the state police, the prosecutor, the courts and so forth to impose criminal sanctions on the Negro citizens who seek service in places of public accommodation open to all except Negroes.

In that sense of the word "right", that question as I have put it, and that question alone is involved here. We are not talking about homes, churches, car pools and so forth. We are talking about places of public accommodation.

Even in connection with the problem of the home, we have suggested to the Court that a reasonable limitation on the doctrine can be found in the Constitutional considerations, and I don't think it is to be assumed, to paraphrase Mr. Justice Holmes in a case in which it was suggested that the power

to tax involves the power to destroy -- that should the proposition be put to this Court that a decision saying that a Negro cannot be arrested for sitting at a luncheon counter, that such a conviction cannot be reversed because then the home would be invaded, the answer would be, I am certain not so long as this Court sits.

This case is not even like Burton vs. Wilmington Parking Authority in which the plaintiff sought an injunction to compel. To be sure, we have expressed the view and argued it in brief that a Negro has a Fourteenth Amendment right to be serviced in a place of public accommodation, or to be more precise, a Fourteenth Amendment right not to be denied service because of his race. And we have found that right suggested in our brief and argued in at least three different places.

The fact that the state is involved to a significant degree, the fact that the refusal stems from a community right custom generated and shaped by state law and so forth -- we have argued that any right, a right in the opinion of a proprietor to be able to exclude a Negro who refused to give him service, if upheld by the state constitutes a denial of equal protection by the law.

Furthermore it states, I say there is this obligation -- the states have an obligation -- they have an obligation which the civil rights cases assume they had to fulfill and continue to fulfill to protect the Negro in the circumstances.

Justice White: Mr. Greenberg, I take it your position does include the proposition that the proprietor is privileged to exclude, but the Negro has the right to enter the restaurant and be served, and that he would have and should have recourse to the state or have some remedy in the courts to enforce that right?

Mr. Greenberg: Yes, I think the civil rights cases properly assume that either by state legislation or state common law that such a right would be recognized and upheld.

Justive White: I thought the case said whether or not there is such a right is a different question which we need not decide.

Mr. Greenberg: That it says we decide these cases on the assumption that such a right exists.

Justice White: Exactly. And if there was such a right then the case gave an answer to it. If there was no such a right, there was no occasion for the opinion at all.

Mr. Greenberg: I am not certain that I catch the force of your question or your comment.

Justice White: I am just suggesting the court in that case did not decide --

Mr. Greenberg: It did not decide the question.

Justice White: It was quite a different question.

Mr. Greenberg: We get into the question of what cases hold and what they mean. I think it is important to seek the assumptions. They proceeded on the basis that the court thought it was deciding a case in the context of a State law or State common law doctrine which protects Negroes.

How that obligation is to be enforced is not the question here now. Congress certainly, we submit, could enact legislation to do that, but a fortiori a Negro seeking service under such circumstances should not be subject to arrest, prosecution, conviction and so forth.

The proposition we chiefly urge and, indeed, the only proposition --

Justice Harlan: If your proposition is correct -- (unintelligible)

Mr. Greenberg: No, Your Honor, because the federal legislation would provide a remedy. It would permit the Attorney

General to bring a suit. There is a question to which I am not certain that I have the answer to whether Title 42, Section 1983 which uses the term under color of law in the jurisdictional sense is co-extensive with State action, consequently whether such a Negro could file an action to compel service in the Federal Courts under existing Federal jurisdictional legislation. I don't know. But I say this certainly means Congress could enact a statute conferring such jurisdiction on the Federal Courts. But the only proposition we are hearing today is these criminal convictions cannot stand and they cannot stand, we submit, because State enforcement of a businessman's racial prejudice cannot co-exist with Shelley versus Kraemer. These cases are criminal cases and because they involve the prejudices acted out in the public area, they follow a fortiori in Shelley. To say that the State acts neutrally in enforcing the businessman's prejudices ignores all we know about the nature of law and there is the celebrated quote in the Shelley versus Kraemer, that the 14th Amendment bars the indiscriminate position of inequality. And so here the fact that is so remote a fantasy can be entertained, that South Carolina law and Maryland might use their criminal processes against whites unwelcomed to an anti-white lunch counter is a constitutional irrelevancy.

Getting back to Shelley again for a moment, this case is even closer to Shelley than has been discussed or assumed so

far. Because if a man who brought the action for ejection, who sought the injunction against the Negro in the home in which he was an occupant was seeking to eject the Negro, the plaintiff's own property, which plaintiff had a property right, it was characterized as a negative reciprocal easement and that Negro was in there physically present upon the plaintiff's negative reciprocal easement. In that case it was an action for injunction. It could very well be an action for ejectment. It could very well under the State action be an action for trespass. Nevertheless this Court held that under the circumstances the plaintiff could not invoke the process of the State to exclude the Negro from his, the plaintiff's negative reciprocal easement.

Finally, we repeat our insistence in arguing that giving Shelley his right in these cases which arise in the public areas implies no weakening of genuine rights of privacy which the Constitution recognizes -- a businessman's private office or, indeed, the private office of Woolworth's or more consistently in the home.

The constitutional principle of privacy has been characterized in (unintelligible) where the poorest man may in his cottage bid defense to all the force of the crime. Not very long ago this Court in Silverman against the United States quoted from Judge Frank's defense in Lee which I would like to read to the Court for a moment. "A man can still control a

small part of his environment, his house. He can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution." This is still a sizeable hunk of liberty, with protecting from encroachment. A sane, decent, civilized society must provide some such shelter from public scrutiny, some insolated enclosure, some enclave, some inviolate place which is a man's castle. What Shelley does do under these circumstances in the case at bar is to command these criminal convictions be reversed and does not intrude into general private life.

Now, in conclusion, while the cases have been argued as separate issues for Maryland, South Carolina and Florida, involving five different groups of young people seeking service at different kinds of establishments-an amusement park, restaurant and a lunch counter, these are different examples of a single issue that has been before this Court now, in its narrow sense, for at least three years, and indeed, viewed in its broader sense all the way back to the civil rights cases up through Strauder against Sweet, Brown and all the celebrated cases.

In 1960 there was Boynton versus Virginia which, while involving the commerce clause and the Interstate Commerce Act was the principal antecedent of what we have been hearing today. In 1961 there was Garner and its companion cases against Louisiana and decided on the basis of due process. The fact

that there is no evidence to sustain the conviction -- this was decided. This past year there was Peterson and its companion cases based upon the fact that there was an explicit city ordinance of a municipal policy requiring a proprietor to discriminate racially, even though it was conceded at the argument the ordinance was not worth the paper it was written on.

Common to the cases of these years past has been the argument that enforcement by a state of racial discrimination, even though it originated in the decision of the owner of a private restaurant or luncheon counter, violated the equal protection clause of the 14th Amendment.

Justice Black: Is that the Boynton case?

Mr. Greenberg: That was argued in Boynton also.

Justice Black: That is not what the decision was based on.

Mr. Greenberg: No, I couldn't say it was common to the decision. I said it was a common issue in all the cases. But certainly Boynton was decided on the commerce clause, and the Interstate Commerce Act.

Justice Black: Act?

Mr. Greenberg: Yes.

Justice Black: It was not a clause?

Mr. Greenberg: No. But I was trying to make the point that this has been a common thread of issue which this Court has recurrently faced.

On certiorari, pending on certiorari I would imagine that

perhaps a dozen or even more cases involving a similar issue. And pending in our lower courts, Justice of the Peace courts, State Supreme courts, there are cases involving thousands of persons, principally in the southern part of the United States. That is the issue -- can the State by arrest and conviction enforce discrimination in public life? In Boynton and Garner and the seven cases of last term they affirmed the historic role of this Court as an expositor of the great amendments of this Constitution, the 13th, 14th and 15th Amendments, designed to expunge considerations of race from American life. The decisions of this Court have been met in part by the most encouraging reactions in large part, voluntary compliance on the part of proprietors and communities. In fact, nowhere does the perception of Barrows against Jackson -- nowhere is this more eloquently vindicated than in our experience with sit-ins. Barrows held that for States to grant damages against the vendor would encourage racial discrimination in housing, even though the Court observed that to enter into such agreements would not in and of itself be illegal.

The constant policy of this Court in striking down convictions time after time in cases of this sort has discouraged community policies which are created by state racial customs and laws.

We would therefore respectfully request to this Court that to affirm these convictions below, on whatever grounds, can do

nothing but give aid and comfort to attitudes and practices wholly unsympathetic to our most deeply cherished traditions of freedom.

Conversely, to reverse the convictions below, and to strike at the heart of the network of discrimination confronting us today, although it is fast dissolving, can only accelerate dissolution of the slavery system which this nation set out to destroy 100 years ago and its role in this process has been one of this Court's greatest contributions to our constitutional system.

(Whereupon, at 1:45 o'clock p.m., oral argument in the above-entitled matters was concluded.)

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