IN THE

Supreme Court of the United States

October Term, 1961 1963

No. 926 12

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

Petitioners,

—v.—

STATE OF MARYLAND.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Petitioners,

—v.—

STATE OF MARYLAND.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above-entitled case on January 9, 1962.

Citations to Opinions Below

The opinion of the Court of Appeals of Maryland is unreported as of yet and is set forth in the appendix hereto, *infra*, pp. 6a-8a. The opinion of the Criminal Court of the City of Baltimore is unreported as of yet and is set forth in the appendix hereto, *infra*, pp. 1a-5a.

Jurisdiction

The judgment of the Court of Appeals of Maryland was entered January 9, 1962, *infra*, pp. 6a-8a. On April 5, 1962, Mr. *Justice Black* signed an order extending petitioners' time for filing petition for writ of certiorari to and including June 8, 1962.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, §1257(3), petitioners having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

Whether Negro petitioners were denied due process of law and equal protection of the laws as secured by the Fourteenth Amendment:

1. When arrested and convicted of trespass for failing to leave a public restaurant which in accordance with community custom adhered to a policy of excluding Negroes.

2. When petitioners were denied freedom of expression secured by the Fourteenth Amendment when convicted of trespass upon refusal to leave a public restaurant while engaging in a sit-in protest demonstration.

3. When said convictions were obtained under a statute so vague as to give no fair warning that their conduct was prohibited.

Constitutional and Statutory Provisions Involved

1. This case involves §1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Article 27, §577 of the Code of Maryland (1957), which states:

> Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor, and on conviction thereof before some justice of the peace in the county or city where such trespass may have been committed be fined by said justice of the peace not less than one, nor more than one hundred dollars, and shall stand committed to the jail of county or city until such fine and costs are paid; provided, however, that the person or persons so convicted shall have the right to appeal from the judgment of said justice of the peace to the circuit court for the county or Criminal Court of Baltimore where such trespass was committed, at any time within ten days after such judgment was rendered; and, provided, further, that nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others.

Statement

Petitioners, twelve Negro students, were arrested for engaging in a sit-in protest in a Baltimore, Maryland restaurant (Tr. 3-5), and were convicted of trespass in violation of Article 27, Section 577 of the Maryland Code, 1957 ed.

A group of fifteen to twenty Negro students (Tr. 7) including petitioners, entered Hooper's Restaurant, Baltimore about 4:15 p.m., June 17, 1960 (Tr. 7). In the lobby of the restaurant, the hostess, acting on the orders of Mr. Hooper, the owner, told them: "I'm sorry, but we haven't integrated as yet" (Tr. 7, 8). She later testified that the group was properly dressed, and that, had they been white people, they would have been seated (Tr. 14).

> Q. . . . "Now, you refused them admission to this restaurant solely on the basis of their color, is that correct? A. Yes, sir" (Tr. 13-14).

Similar admissions were made by the manager (Tr. 20). The petitioners took seats at tables both in the main dining room and in a lower-level cafeteria (Tr. 16). At the time, the restaurant manager was explaining to a leader of the group that the restaurant policy prohibits service to Negroes (Tr. 16, 43-44). While many of the group sat one to a table, this action did not nor was it intended to interfere with the service of other customers (Tr. 51-52).

At the owners' request, police were called and the State trespass statute was read to the group (Tr. 17), some of whom left the premises (Tr. 18). Warrants were obtained against the others who failed to leave after an additional warning (Tr. 18-19).

Petitioners waived preliminary hearings in the Magistrates' Court, and were indicted by the Grand Jury of

Baltimore City and found guilty of trespass after trial without jury in the Criminal Court of Baltimore. Each petitioner was fined $10.00, which fine was suspended because as the Trial Court found, " . . . these people are not law-breaking people; that their action was one of principle rather than any intentional attempt to violate the law." Petitioners appealed to the Maryland Court of Appeals which affirmed.

Mr. Hooper, the restaurant owner, testified, "I wanted to prove to them it wasn't my policy, my personal prejudice, but that I'm at the mercy of my customers" (Tr. 25). "I go on record as I favor what you people are trying to do . . . but I do not approve of your method in trying to reach it" (Tr. 32-33).

A leader of the group testified that they had gone to the restaurant hoping to be served (Tr. 45); that while they knew Hooper's policy was to serve only whites, eating places sometimes changed their policies on the spot when the group presented itself and requested service (Tr. 57-58). Having been refused service, petitioners proceeded to inform the public of the discriminatory nature of Hooper's policy (Tr. 46). Some began picketing outside of the restaurant (Tr. 46) while others sought a similar goal by sitting quietly at the tables waiting to be served.

How the Federal Questions Were Raised and Decided Below

At the close of the State's case in the trial court and again at the conclusion of petitioners' case, petitioners moved for a directed verdict in their favor (R. 41, 76). While the grounds upon which these motions were based do not appear in the record, it is clear from the opinion of the Criminal Court of the City of Baltimore, *infra*, pp. 1a-5a, and the

opinion of the Court of Appeals of Maryland, pp. 6a-8a, that federal constitutional questions were properly raised in the Courts below and decided adversely to petitioners' contentions.

The Court of Appeals of Maryland summarized petitioners' contentions as follows:

> "The appellants contend that the State may not use its judicial process to enforce the racially discriminatory practices of a private owner, once that owner has opened his property to the general public, and that the Maryland Criminal Trespass Statute, although constitutional on its face, has been unconstitutionally applied" (*infra*, p. 7a).
>
> "The appellants further contend, however, that the Maryland Statute, as applied, denies to them the freedom of speech guaranteed under the First and Fourteenth Amendments to the United States Constitution" (*infra*, pp. 7a-8a).

The Court of Appeals of Maryland explicitly rejected petitioners' constitutional objections, *infra*, pp. 7a-8a, holding:

> "We find it unnecessary to dwell on these contentions at length because the same arguments were fully considered and rejected by this Court in two recent cases, *Drews* v. *State*, 224 Md. 186, and *Griffin & Greene* v. *State*, 225 Md. 422. . . . and that the statutory references to entry upon or crossing over, cover the case of remaining upon land after notice to leave." [1]

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[1] Both *Drews* v. *State* (No. 840, 1960 Term; renumbered No. 71, 1961 Term) and *Griffin* v. *State* (No. 287, 1961 Term) are sit-in cases pending before this Court.

The Court further held, *infra,* p. 8a, that:

> "On principle, we think the right to speak freely and to make public protest does not import a right to invade or remain upon the property of private citizens, so long as private citizens retain the right to choose their guests or customers. We construe the *Marsh* case, supra, as going no further than to say that the public has the same right of discussion on the sidewalks of company towns as it has on the sidewalks of municipalities. That is a far cry from the alleged right to engage in a 'sit-in' demonstration."

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With Decisions of This Court Which Condemn the Use of State Power to Enforce a State Custom of Racial Segregation.

The record in this case clearly shows that the petitioners were refused service, ordered to leave the Hooper Restaurant, and arrested and convicted of a crime because they were Negroes. Without dispute, the practice of the Hooper Restaurant was to open its doors to the public and stand ready to serve food to white persons and to refuse such service to Negroes. It is also apparent that the arrests were made in support of this discrimination, and that the trial court convicted petitioners on evidence plainly indicating that race, and race alone, was the basis for the order to leave and the consequent arrest for failing to leave. This is thus a case where the difference in treatment to which petitioner has been subjected is clearly a racial discrimination.

There are several dominant and relevant components of action by state officials in the chain of events leading to appellant's conviction and punishment for violating the racially discriminatory customs. Here, as in all criminal prosecutions, there is action by state officers in the persons of the police, prosecutors and judges; the official actions of such officers are "state action" within the meaning of the Fourteenth Amendment. The subject of judicial action as "state action" was treated exhaustively in part II of Chief Justice Vinson's opinion in *Shelley* v. *Kraemer,* 334 U. S. 1, 14-18; cf. *Boynton* v. *Virginia,* 364 U. S. 454; policemen (*Screws* v. *United States,* 325 U. S. 91; *Monroe* v. *Pape,* 365 U. S. 167) and prosecutors (*Napue* v. *Illinois,* 360 U. S. 264) are equally subject to the restraints of the Fourteenth Amendment.

Ever since the *Civil Rights Cases,* 109 U. S. 3, 17, it has been conventional doctrine that racial discrimination when supported by state authority, violates the Fourteenth Amendment's equal protection clause; and since *Brown* v. *Board of Education,* 347 U. S. 483, it has been settled that racial segregation constitutes a forbidden discrimination.

However, in this case the involvement of the public law enforcement and judicial officers in the racial discrimination practiced against petitioner, through their use of the state's criminal law machinery to support and enforce it, is now sought to be excused because, it is said, there is also "private action" involved, and the state is said to be merely enforcing "private property" rights through its criminal trespass laws.

It is said that only "trespassers" and not Negroes are punished by the state, and thus it is private property rights and not racial discrimination that is being preserved by the state's officers and laws. But we must ask, what is the nature of the property right here recognized and enforced

by the state? Moreover, does this property right have any proper relation to the state's legitimate interest in the protection of the right to privacy or state customs and laws?

As a starting point it is fit to observe, as this Court did in *Shelley* v. *Kraemer, supra,* that the mere fact that property rights are involved does not settle the matter. The Court said at 334 U. S. 1, 22:

> "Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. Marsh v. Alabama, 326 U. S. 501, 90 L. ed. 265, 66 S. Ct. 276 (1946)."

This Court has said on several occasions, "that dominion over property springing from ownership is not absolute and unqualified." *Buchanan* v. *Warley,* 245 U. S. 60, 74; *United States* v. *Willow River Power Co.,* 324 U. S. 499, 510; *Marsh* v. *Alabama,* 326 U. S. 501, 506; cf. *Munn* v. *Illinois,* 94 U. S. 113. As the Court said in *Marsh, supra,* "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793, 796, 802."

Obviously then further inquiry must be made as to the specific nature of the property right of the Hooper Restaurant which is being enforced by the State in this criminal trespass prosecution. At the outset, it is clear that the case does not involve state enforcement of a property owner's desire to exclude a person or persons for reasons of whim or caprice. The owner testified that he refused to serve the petitioners and ordered them from his restaurant in order to conform with the community custom and a racially segregated "way of life" which has been fostered and buttressed by law (Tr. 25).

Petitioners submit that it is readily apparent that the property interest being enforced against them on behalf of the Hooper Restaurant, bears no substantial relation to any constitutionally protected interest of the property owner in privacy in the use of his premises. The State is not in this prosecution engaged in protecting the right to privacy. It has long been agreed by the courts that a state can "take away" this property right to racially segregate in public accommodation facilities without depriving an owner of Fourteenth Amendment rights. *Western Turf Asso.* v. *Greenberg,* 204 U. S. 359; *Railway Mail Ass'n* v. *Corsi,* 326 U. S. 88; *Pickett* v. *Kuchan,* 323 Ill. 138, 153 N. E. 667, 49 A. L. R. 499 (1926); *People* v. *King,* 110 N. Y. 418, 18 N. E. 245 (1888); Annotation 49 A. L. R. 505; cf. *District of Columbia* v. *John R. Thompson Co.,* 346 U. S. 100.

And indeed a great number of states in our nation have enacted laws making it criminal to engage in just the type of racially discriminatory use of private property which the Restaurant seeks state assistance in preserving here.[2]

From the fact that the States can make the attempted exercise of such a "right" a crime, it does not follow neces-

[2] See collections of such laws in Konvitz, A Century of Civil Rights, *passim* (1961).

sarily and automatically that they must do so, and must refuse (as petitioners here urge) to recognize such a claimed property right to discriminate racially in places of public accommodation. But the fact that the States can constitutionally prohibit such a use of property and that when they do so they are actually conforming to the egalitarian principles of the Fourteenth Amendment (*Railway Mail Ass'n* v. *Corsi, supra,* at 93-94) makes it evident that the property interest asserted by the Hooper Restaurant is very far from an inalienable or absolute property right. Indeed the property owner here is attempting to do something that the state itself could not permit him to do on state property leased to him for his business use (*Burton* v. *Wilmington Parking Authority,* 365 U. S. 715), or require or authorize him to do by positive legislation (*cf.* Mr. Justice Stewart's concurring opinion in *Burton, supra*).

A basic consideration in this case is that the restaurant involved is a public establishment in the sense that it is open to serve the public and is part of the public life of the community (Mr. Justice Douglas, concurring in *Garner* v. *Louisiana,* 368 U. S. 157, 176). As a consequence of the public use to which the property has been devoted by the owner, this case involves no real claim that the right to privacy is being protected by this use of the State's trespass laws. And, of course, it does not follow from the conclusion that the State cannot enforce the racial bias of the operator of a restaurant open to the public, that it could not enforce a similar bias by the use of trespass laws against an intruder into a private dwelling or any other property in circumstances where the state was exercising its powers to protect an owner's privacy. This Court has recently reiterated the principle that there is a constitutional "right to privacy" protected by the Due Process

clause of the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643, 6 L. ed. 2d 1081, 1090, 1103, 1104; see also *Poe* v. *Ullman*, 367 U. S. 497 (*dissenting* opinions).

It is submitted that due consideration of the right to privacy affords a sound and rational basis for determining whether cases which might arise in the future involving varying situations should be decided in the same manner urged by petitioner here—that is, against the claimed property interest. Only a very absolutist view of the property "right" to determine those who may come or stay on one's property on racial grounds—an absolutist rule yielding to no competing considerations—would require that the same principles apply through the whole range of property uses, public connections, dedications, and privacy interests at stake. The Court has recognized the relation between the right of privacy and property interests in the past. See e.g. *Thornhill* v. *Alabama*, 310 U. S. 88, 105-106; *Breard* v. *Alexandria*, 341 U. S. 622, 626, 638, 644.

Petitioners submit that a property right to determine on a racial basis who can stay on one's property cannot be absolute at all, for this claimed right collides at some points with the Fourteenth Amendment right of persons not to be subjected to racial discrimination at the hand of the government. *Burton* v. *Wilmington Parking Authority, supra; Shelley* v. *Kraemer, supra.* Mr. Justice Holmes said in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Petitioners certainly do not contend that the principles urged to prevent the use of trespass laws to enforce racial discrimination in a lunch counter operated as a public business would prevent the state from enforcing a similar bias in a private home where the right of privacy has its greatest meaning and strength. A man ought to have the right to order from his home anybody he prefers not to have in it, and ought to have the help of the government in making his order effective. Indeed, the State cannot constitutionally authorize an intrusion into a private home except in the most limited circumstances with appropriate safeguards against abuses. *Mapp* v. *Ohio, supra;* cf. *Frank* v. *Maryland,* 359 U. S. 360. Racial discrimination in a private home, or office, or other property where the right of privacy is paramount is one thing. Racial discrimination at a public restaurant is quite another thing indeed.

Finally the property involved in this case is "affected with a public interest," *Munn* v. *Illinois,* 94 U. S. 113. By its use it has become "clothed with a public interest [is] of public consequence, and affect[s] the community at large" (*id.* at 126).

It is submitted that the totality of circumstances in this case, including the actions of the State's officers in arresting, prosecuting and convicting petitioners, the public character of the business property involved, the plain and invidious racial discrimination involved in the asserted property rights being protected by the state, the absence of any relevant component of privacy to be protected by the state's action in light of the nature of the owner's use of his property, and the state custom of segregation which has created or at least substantially buttressed the type of discriminatory practices involved, are sufficient to require a determination that the petitioners' trespass convictions have abridged their rights under the Fourteenth Amendment.

II.

The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment.

Petitioners were engaged in the exercise of free expression, by verbal and nonverbal requests to the management for service, and nonverbal requests for nondiscriminatory restaurant service, implicit in their continued remaining in the dining area when refused service. As Mr. Justice Harlan wrote in *Garner* v. *Louisiana*: "We would surely have to be blind not to recognize that petitioners were sitting at these counters, when they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." 7 L. ed. 2d at 235-36. Petitioners' expression (asking for service) was entirely appropriate to the time and place at which it occurred. They did not shout or obstruct the conduct of business. There were no speeches, picket signs, handbills or other forms of expression in the store possibly inappropriate to the time and place. Rather they offered to purchase food in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas" (*Abrams* v. *United States*, 250 U. S. 616, 630, Holmes, *J.*, dissenting), within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U. S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U. S. 88 (picketing); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 633-634 (flag salute); *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449 (freedom of association).

Questions concerning freedom of expression are not resolved merely by reference to the fact that private property is involved. The Fourteenth Amendment right to free ex-

pression on private property takes contour from the circumstances, in part determined by the owner's right of privacy, and his use and arrangement of his property. In *Breard* v. *Alexandria,* 341 U. S. 622, the Court balanced the "householder's desire for privacy and the publisher's right to distribute publications" in the particular manner involved, upholding a law limiting the publisher's right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers,* 319 U. S. 141 where different kinds of interests led to a corresponding difference in result. Moreover, the manner of assertion and the action of the State, through its officers, its customs and its creation of the property interest are to be taken into account.

Thus, petitioners submit that a determination of their right to free expression requires consideration of the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action is supporting. *Marsh* v. *Alabama,* 326 U. S. 501.

In *Marsh, supra,* this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize for their faith, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N.L.R.B.,* 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama, supra,* involving picketing on company-owned property; see also *N.L.R.B.* v. *American Pearl Button Co.,* 149 F. 2d 258 (8th Cir. 1945); *United Steelworkers* v. *N.L.R.B.,* 243 F. 2d 593, 598 (D. C. Cir. 1956), reversed on other grounds, 357 U. S. 357, and compare the cases mentioned above with *N.L.R.B.* v. *Fansteel Metal Corp.,* 306 U. S. 240, 252, condemning an employee seizure of a plant. In *People* v. *Barisi,* 193 Misc.

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

As Mr. Justice Douglas said while concurring in *Garner* v. *Louisiana*, 368 U. S. 157:

> "Restaurants, whether in a drug store, department store, or bus terminal, are a part of the public life of most of our communities. Though they are private enterprises, they are public facilities in which the states may not enforce a policy of racial discrimination."

The court below denied that the trespass convictions of the petitioners denied any First or Fourteenth Amendment rights stating:

> "On principle, we think the right to speak freely and to make public protest does not impart a right to invade or remain upon the property of private citizens, so long as private citizens retain the right to choose their guests or customers" (App. 8a).

But in this case, the property had been opened to the public, for profit, and race alone was the basis for refusal to serve petitioners. Significantly, the refusal of service was not because of the owner's caprice, but because he felt constrained to conform to the racial prejudice of the community. Thus, under the circumstances of this case, it is

not a general property right which the state enforced by the arrest of petitioners, but a community pattern of racial discrimination which the state clearly may not sanction, *Civil Rights Cases,* 109 U. S. 3, and should not be permitted to encourage or support. See Henkin, *Shelley* v. *Kraemer: Notes for a Revised Opinion,* 110 U. of Pa. L. Rev. 473, 499 (1962).

Where free expression rights are involved, the question for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the state has the right to prevent. *Schenck* v. *United States,* 249 U. S. 47, 52. The only "substantive evil" sought to be prevented by this trespass prosecution is the elimination of racial discrimination and the stifling of protest against it; but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination.

III.

The Decision Below Conflicts With the Decisions of This Court Barring Convictions Under Criminal Statutes and Warrants Which Give No Fair and Effective Warning That Petitioners' Actions, Which Violate No Standard Required by the Plain Language of the Law, Are Prohibited.

The fact that the arrest and conviction were designed to short circuit a bona fide protest is strengthened by the necessity of the state court to make a strained interpretation of the statute in order to bring petitioners' conduct within its ambit. Petitioners' conviction for trespass rests on an interpretation which flies in the face of the plain words of the statute, which reads:

> "*Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so* shall be deemed guilty of a misdemeanor, and on conviction thereof before some justice of the peace in the county or city where such trespass may have been committed be fined by said justice of the peace not less than one, nor more than one hundred dollars, and shall stand committed to the jail of county or city until such fine and costs are paid; provided, however, that the person or persons so convicted shall have the right to appeal from the judgment of said justice of the peace to the circuit court for the county or Criminal Court of Baltimore where such trespass was committed, at any time within ten days after such judgment was rendered; and provided, further, that nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others." (Emphasis added.)

In this case, however, petitioners had entered the restaurant and asked to be assigned seats at a table before they were advised by the hostess, "We have not integrated as yet" (Tr. 8). They had taken seats and had discussion about the restaurant's policy with both the manager and the owner before the trespass statute was read to them and they were formally asked to leave. Clearly petitioners' failure to obey this request does not bring their action within the purview of this statute. Under the Court of Appeals of Maryland's construction of the law conduct is reached which the words of the statute do not fairly and

effectively proscribe, thus depriving petitioners of any notice that their acts would subject them to criminal liability. There is no assertion that petitioners "enter[ed] . . . after having been notified . . . not to do so" only that they remained after being told to leave. In terms of the clear command of the statute as to entry after notice, this case would fall within the principle of *Thompson* v. *Louisville*, 362 U. S. 199 as a conviction resting on no evidence of guilt.

The vice of vagueness is particularly odious where the right of free speech is put in jeopardy. Conduct involving free speech can only be prohibited by a statute "narrowly drawn to define and punish specific conduct as constitute a clear and present danger to substantial interest of the state." *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, 308; *Garner* v. *Louisiana*, 368 U. S. 157, 185 (Mr. Justice Harlan concurring). If the Court of Appeals of Maryland can affirm the convictions of these petitioners by such a construction they have exacted obedience to a rule or standard that is so ambiguous and fluid as to be no rule or standard at all. *Champlin Ref. Co.* v. *Corporation Com. of Oklahoma*, 286 U. S. 210. Such a result cannot but have a "potentially inhibiting effect on speech." *Smith* v. *California*, 361 U. S. 147, 151. But when free expression is involved, the standard of precision is greater; the scope of construction must, therefore, be less. If this is the case when a State Court limits a statute it must *a fortiori* be the case when a State Court expands the meaning of the plain language of a statute. *Winters* v. *New York*, 333 U. S. 507, 512.

CONCLUSION

WHEREFORE, for the foregoing reasons petitioners pray that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

IN THE

CRIMINAL COURT

PART III OF BALTIMORE CITY

Indictment 2523 Y/1960

STATE OF MARYLAND,

—v.—

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

MEMORANDUM OPINION

BYRNES, *J.*

On July 12, 1960 the above named defendants, students attending local schools, were indicted by the Baltimore City Grand Jury for trespassing on the premises of Hooper's Restaurant at the southwest corner of Fayette and Charles Streets in Baltimore City. The first count of the indictment charges that the defendants

> "... on the seventeenth day of June, in the year of our Lord nineteen hundred and sixty, at the City aforesaid, unlawfully did enter upon and cross over the land, premises and private property of a certain corporation in this State, to wit, Hooper Food Co., Inc., a corporation, after having been duly notified by Albert Warfel,

> who was then and there the servant and agent for Hopper [sic] Food Co., Inc., a corporation, not to do so; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State."

The second count charges that the defendants

> ". . . unlawfully did enter and trespass on certain property of Hooper Food Co., Inc., a corporation which said property was then and there posted against trepassers [sic] in a conspicuous manner; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State."

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

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

The trespass statute, Article 27, section 577 of the Maryland Code, 1957 Ed. was read to the defendants and they were told by the manager, Albert R. Warfel, that they were trespassers, and they were then requested to leave. Upon

their refusal to do so, police were summoned. Warfel was advised by the police that in order to have defendants ejected by the Baltimore City Police Department it would be necessary for him to obtain warrants for their arrest for trespassing. Warrants were obtained and the arrests followed. Defendants waived a hearing before the Magistrate at the Central Police Station and the case was referred to the Grand Jury.

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

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

questions there presented (the same ones advanced here) and held that the restaurant at an interstate bus terminal, although privately owned, was an "integral part of the bus carriers transportation service for interstate passengers" and any racial discrimination in the restaurant violated provisions of the Interstate Commerce Act barring discriminations of all kinds.

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

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

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

In the most recent case dealing with efforts of Negroes to force the owners of business premises to open their establishments to all comers through so-called "sit-in" tactics, our Court of Appeals in *Drews* v. *State,* —— Md. ——, 167 A. 2d 341 (1961) affirmed Judge W. Albert Menchine's

conviction of four persons charged with disorderly conduct for refusing to leave Gwynn Oak Amusement Park in Baltimore County after being ordered to do so. Speaking for the Court, Judge Hammond pointed out that the duty imposed by the early common law to serve the public without discrimination was later confined to exceptional callings where an urgent public need required its continuance, such as innkeepers and common carriers. Continuing Judge Hammond stated that

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

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

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

/s/ JOSEPH R. BYRNES
Judge

Filed March 24, 1961

Opinion by Henderson, *J.*

Filed: January 9, 1962

IN THE

COURT OF APPEALS OF MARYLAND

No. 91—September Term, 1961

ROBERT MACK BELL, *et al.*,

—v.—

STATE OF MARYLAND.

BRUNE, *Circuit Judge*,
HENDERSON,
PRESCOTT,
HORNEY,
MARBURY, *Judges*.

These appeals are from $10.00 fines imposed, but suspended, after convictions in the Criminal Court of Baltimore for trespassing on the privately owned premises of Hooper's Restaurant. The appellants entered the premises in protest against the restaurant owner's policy of not serving negroes and refused to leave when asked to do so. In fact, they occupied seats at various tables and refused to relinquish them unless and until they were served. The manager thereupon summoned the police and swore out warrants for the arrest of the "sit-in" demonstrators. They elected not to be tried by the magistrate and were subsequently indicted and tried.

Opinion by Henderson, J.

The appellants contend that the State may not use its judicial process to enforce the racially discriminatory practices of a private owner, once that owner has opened his property to the general public, and that the Maryland Criminal Trespass Statute, although constitutional on its face, has been unconstitutionally applied. Apparently the appellants would concede that the owner could have physically and forcibly ejected them, but deny that he could constitutionally invoke the orderly process of the law to accomplish that end.

We find it unnecessary to dwell on these contentions at length, because the same arguments were fully considered and rejected by this Court in two recent cases, *Drews* v. *State,* 224 Md. 186, and *Griffin & Greene* v. *State,* 225 Md. 422. We expressly held in the *Griffin* case, contrary to the arguments now advanced, that demonstrators are not within the exception in the Maryland Trespass Statute, Code (1957), Art. 27, sec. 577, relating to "a *bona fide* claim of right or ownership", and that the statutory references to "entry upon or crossing over", cover the case of remaining upon land after notice to leave.

We have carefully considered the latest Supreme Court case on the subject, *Garner* v. *Louisiana,* —— U. S. ——, 30 L. W. 4070, decided December 11, 1961. There, convictions of "sit-in" demonstrators for disturbing the peace were reversed on the ground that the convictions were devoid of evidentiary support. Chief Justice Warren, for a majority of the court, found it unnecessary to consider contentions based on broader constitutional grounds. In the absence of further light upon the subject, we adhere to the views expressed in the *Griffin* case.

The appellants further contend, however, that the Maryland Statute, as applied, denies to them the freedom of

speech guaranteed under the First and Fourteenth Amendments to the United States Constitution. They argue that their action in remaining on the premises amounted, in effect, to a verbal or symbolic protest against the discriminatory practice of the proprietor. They rely heavily upon *Marsh* v. *Alabama,* 326 U. S. 501. In that case a distributor of religious literature on the sidewalk of a "company town" was prosecuted and convicted of trespass when he declined to leave or desist. The conviction was reversed on First Amendment grounds, despite the finding of the State court that the sidewalk had never been dedicated to public use. Cf. *Tucker* v. *Texas,* 326 U. S. 517, involving a village owned by the United States. But it would appear that the rule of the *Marsh* case had not been extended to the interiors of privately owned buildings, even those of a quasi-public character. See *Watchtower Bible & T. Soc.* v. *Metropolitan Life Ins. Co.,* 79 N. E. 2d 433 (N. Y.); cert. den. 335 U. S. 886; rehearing den. 335 U. S. 912; *Hall* v. *Commonwealth,* 49 S. E. 2d 369 (Va.); appeal dism. 335 U. S. 875; and *Breard* v. *Alexandria,* 341 U. S. 622. On principle, we think the right to speak freely and to make public protest does not import a right to invade or remain upon the property of private citizens, so long as private citizens retain the right to choose their guests or customers. We construe the *Marsh* case, *supra,* as going no further than to say that the public has the same rights of discussion on the sidewalks of company towns as it has on the sidewalks of municipalities. That is a far cry from the alleged right to engage in a "sit-in" demonstration.

Judgments affirmed with costs.