SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1963.

Robert Mack Bell et al., Petitioners, *v.* State of Maryland.	On Writ of Certiorari to the Court of Appeals of the State of Maryland.

[June 22, 1964.]

Mr. Justice Brennan delivered the opinion of the Court.

Petitioners, 12 Negro students, were convicted in a Maryland state court as a result of their participation in a "sit-in" demonstration at Hooper's restaurant in the City of Baltimore in 1960. The convictions were based on a record showing in summary that a group of 15 to 20 Negro students, including petitioners, went to Hooper's restaurant to engage in what their counsel describes as a "sit-in protest" because the restaurant would not serve Negroes. The "hostess," on orders of Mr. Hooper, the president of the corporation owning the restaurant, told them, "solely on the basis of their color," that they would not be served. Petitioners did not leave when requested to by the hostess and the manager; instead they went to tables, took seats, and refused to leave, insisting that they be served. On orders of the owner the police were called, but they advised that a warrant would be necessary before they could arrest petitioners. The owner then went to the police station and swore out warrants, and petitioners were accordingly arrested.

The statute under which the convictions were obtained was the Maryland criminal trespass law, § 577 of Art. 27 of the Maryland Code, 1957 edition, under which it is a misdemeanor to "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." The convictions were affirmed by the Maryland Court of Appeals, 227 Md. 302, 176 A. 2d 771 (1962), and we granted certiorari. 374 U. S. 805.

We do not reach the questions that have been argued under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. It appears that a significant change has taken place in the applicable law of Maryland since these convictions were affirmed by the Court of Appeals. Under this Court's settled practice in such circumstances, the judgments must consequently be vacated and reversed and the case remanded so that the state court may consider the effect of the supervening change in state law.

Petitioners' convictions were affirmed by the Maryland Court of Appeals on January 9, 1962. Since that date, Maryland has enacted laws that abolish the crime of which petitioners were convicted. These laws accord petitioners a right to be served in Hooper's restaurant, and make unlawful conduct like that of Hooper's president and hostess in refusing them service because of their race. On June 8, 1962, the City of Baltimore enacted its Ordinance No. 1249, adding § 10A to Art. 14A of the Baltimore City Code (1950 ed.). The ordinance, which by its terms took effect from the date of its enactment, prohibits owners and operators of Baltimore places of public accommodation, including restaurants, from denying their service or facilities to any person because of his race. A similar "public accommodations law," applicable to Baltimore City and Baltimore County though not to some of the State's other counties, was adopted by the State Legislature on March 29, 1963. 49B Md. Code § 11 (1963 Supp.). This statute went into effect on June

1, 1963, as provided by § 4 of the Act, Acts 1963, c. 227. The statute provides that:

> "It is unlawful for an owner or operator of a place of public accommodation or an agent or employee of said owner or operator, because of the race, creed, color, or national origin of any person, to refuse, withhold from, or deny to such person any of the accommodations, advantages, facilities and privileges of such place of public accommodation. For the purpose of this subtitle, a place of public accommodation means any hotel, restaurant, inn, motel or an establishment commonly known or recognized as regularly engaged in the business of providing sleeping accommodations, or serving food, or both, for a consideration, and which is open to the general public . . . ." [1]

It is clear from these enactments that petitioners' conduct in entering or crossing over the premises of Hooper's restaurant after being notified not to do so because of their race would not be a crime today; on the contrary, the law of Baltimore and of Maryland now vindicates their conduct and recognizes it as the exercise of a right, directing the law's prohibition not at them but at the restaurant owner or manager who seeks to deny them service because of their race.

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[1] Another public accommodations law was enacted by the Maryland Legislature on March 14, 1964, and signed by the Governor on April 7, 1964. This statute re-enacts the quoted provision from the 1963 enactment and gives it statewide application, eliminating the county exclusions. The new statute was scheduled to go into effect on June 1, 1964, but its operation has apparently been suspended by the filing of petitions seeking a referendum. See Md. Const., Art. XVI; Baltimore Sun, May 31, 1964, p. 22, col. 1. Meanwhile, the Baltimore City ordinance and the 1963 state law, both of which are applicable to Baltimore City, where Hooper's restaurant is located, remain in effect.

An examination of Maryland decisions indicates that under the common law of Maryland, the supervening enactment of these statutes abolishing the crime for which petitioners were convicted would cause the Maryland Court of Appeals at this time to reverse the convictions and order the indictments dismissed. For Maryland follows the universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it. Thus, in *Keller* v. *State*, 12 Md. 322 (1858), the statute under which the appellant had been indicted and convicted was repealed by the legislature after the case had been argued on appeal in the Court of Appeals but before that court's decision, although the repeal was not brought to the notice of the court until after the judgment of affirmance had been announced. The appellant's subsequent motion to correct the judgment was granted, and the judgment was reversed. The court explained, *id.*, at 325–327:

> "*It is well settled, that a party cannot be convicted*, after the law under which he may be prosecuted has been repealed, although the offence may have been *committed before the repeal*. . . . *The same principle* applies where the law is repealed, or expires pending an appeal on a writ of error from the judg*ment of an inferior court*. . . . *The judgment in a* criminal cause cannot be considered as final and conclusive to every intent, notwithstanding the removal *of the record to a superior court*. *If this were so*, there would be no use in taking the appeal or suing out a writ of error. . . . And so if the law be re-

pealed, pending the appeal or writ of error, the judgment will be reversed, because the decision must be in accordance with the law at the time of final judgment."

The rule has since been reaffirmed by the Maryland court on a number of occasions. *Beard* v. *State*, 74 Md. 130, 135, 21 A. 700, 702 (1891); *Smith* v. *State*, 45 Md. 49 (1876); *State* v. *Gambrill*, 115 Md. 506, 81 A. 10, 12 (1911); *State* v. *Clifton*, 177 Md. 572, 574, 10 A. 2d 703, 704 (1940).[2]

It is true that the present case is factually distinguishable, since here the legislative abolition of the crime for which petitioners were convicted occurred after rather than before the decision of the Maryland Court of Appeals. But that fact would seem irrelevant. For the purpose of applying the rule of the Maryland common law, it appears that the only question is whether the legislature acts before the affirmance of the conviction becomes final. In the present case the judgment is not yet final, for it is on direct review in this Court. This

[2] The rule has also been consistently recognized and applied by this Court. Thus in *United States* v. *Schooner Peggy*, 1 Cranch 103, 110, Chief Justice Marshall held:

"It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

See also *Yeaton* v. *United States*, 5 Cranch 281, 283; *Maryland* v. *Baltimore & O. R. Co.*, 3 How. 534, 552; *United States* v. *Tynen*, 11 Wall. 88, 95; *United States* v. *Reisinger*, 128 U. S. 398, 401; *United States* v. *Chambers*, 291 U. S. 217, 222–223; *Massey* v. *United States*, 291 U. S. 608.

would thus seem to be a case where, as in *Keller*, the change of law has occurred "pending an appeal on a writ of error from the judgment of an inferior court," and hence where the Maryland Court of Appeals upon remand from this Court would render its decision "in accordance with the law at the time of final judgment." It thus seems that the Maryland Court of Appeals would take account of the supervening enactment of the city and state public accommodations laws and, applying the principle that a statutory offense which has "ceased to exist is no longer punishable at all," *Beard* v. *State*, *supra*, 74 Md. 130, 135, 21 A. 700, 702 (1891), would now reverse petitioners' convictions and order their indictments dismissed.

The Maryland common law is not, however, the only Maryland law that is relevant to the question of the effect of the supervening enactments upon these convictions. Maryland has a general saving clause statute which in certain circumstances "saves" state convictions from the common-law effect of supervening enactments. It is thus necessary to consider the impact of that clause upon the present situation. The clause, 1 Md. Code § 3 (1957), reads as follows:

> "The repeal, or the repeal and re-enactment, or the revision, amendment or consolidation of any statute, or of any section or part of a section of any statute, civil or criminal, shall not have the effect to release, extinguish, alter, modify or change, in whole or in part, any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute, section or part thereof, unless the repealing, repealing and re-enacting, revising, amending or consolidating act shall expressly so provide; and such statute, section or part thereof, so repealed, repealed and re-enacted, revised, amended or consoli-

> dated, shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings or prosecutions, civil or criminal, for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions imposing, inflicting or declaring such penalty, forfeiture or liability."

Upon examination of this clause and of the relevant state case law and policy considerations, we are far from persuaded that the Maryland Court of Appeals would hold the clause to be applicable to save these convictions. By its terms, the clause does not appear to be applicable at all to the present situation. It applies only to the "repeal," "repeal and re-enactment," "revision," "amendment," or "consolidation" of any statute or part thereof. The effect wrought upon the criminal trespass statute by the supervening public accommodations laws would seem to be properly described by none of these terms. The only two that could even arguably apply are "repeal" and "amendment." But neither the city nor the state public accommodations enactment gives the slightest indication that the legislature considered itself to be "repealing" or "amending" the trespass law. Neither enactment refers in any way to the trespass law, as is characteristically done when a prior statute is being repealed or amended.[8] This fact alone raises a substan-

[8] Thus the statewide public accommodations law enacted in 1964, see note 1, *supra*, is entitled "An Act to repeal and re-enact, with amendments . . . ," the 1963 Act, and provides expressly at several points that certain portions of the 1963 Act—none of which is here relevant—are "hereby repealed." But the 1964 enactment, like the 1963 enactment and the Baltimore City ordinance, contains no reference whatever to the trespass law, much less a statement that that law is being in any respect "repealed" or "amended."

tial possibility that the saving clause would be held inapplicable, for the clause might be narrowly construed—especially since it is in derogation of the common law and since this is a criminal case—as requiring that a "repeal" or "amendment" be designated as such in the supervening statute itself.[4]

The absence of such terms from the public accommodations laws becomes more significant when it is recognized that the effect of these enactments upon the trespass statute was quite different from that of an "amendment" or even a "repeal" in the usual sense. These enactments do not—in the manner of an ordinary "repeal," even one that is substantive rather than only formal or technical—merely erase the criminal liability that had formerly attached to persons who entered or crossed over the premises of a restaurant after being notified not to because of their race; they go further and confer upon such persons an affirmative right to carry on such conduct, making it

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[4] The Maryland case law under the saving clause is meager and sheds little if any light on the present question. The clause has been construed only twice since its enactment in 1912, and neither case seems directly relevant here. *State* v. *Clifton*, 177 Md. 572, 10 A. 2d 703 (1940); *State* v. *Kennerly*, 204 Md. 412, 104 A. 2d 632 (1955). In two other cases, the clause was ignored. *State* v. *American Bonding Co.*, 128 Md. 268, 97 A. 529 (1916); *Green* v. *State*, 170 Md. 134, 183 A. 526 (1936). The failure to apply the clause in these cases was explained by the Court of Appeals in the *Clifton* case, *supra*, 177 Md., at 576–577, 10 A. 2d, at 705, on the basis that "in neither of those proceedings did it appear that any penalty, forfeiture or liability had actually been incurred." This may indicate a narrow construction of the clause, since the language of the clause would seem to have applied to both cases. Also indicative of a narrow construction is the statement of the Court of Appeals in the *Kennerly* case, *supra*, that the saving clause is "merely an aid to interpretation, stating the general rule against repeals by implication in more specific form." 204 Md., at 417, 104 A. 2d, at 634. Thus, if the case law has any pertinence, it supports a narrow construction of the saving clause and hence a conclusion that the clause is inapplicable here.

unlawful for the restaurant owner or proprietor to notify them to leave because of their race. Such a substitution of a right for a crime, and vice versa, is a possibly unique phenomenon in legislation; it thus might well be construed as falling outside the routine categories of "amendment" and "repeal."

Cogent state policy considerations would seem to support such a view. The legislative policy embodied in the supervening enactments here would appear to be much more strongly opposed to that embodied in the old enactment than is usually true in the case of an "amendment" or "repeal." It would consequently seem unlikely that the legislature intended the saving clause to apply in this situation, where the result of its application would be the conviction and punishment of persons whose "crime" has been not only erased from the statute books but officially vindicated by the new enactments. A legislature that passes a public accommodations law making it unlawful to deny service on account of race probably did not desire that persons should still be prosecuted and punished for the "crime" of seeking service from a place of public accommodations which denies it on account of race. Since the language of the saving clause raises no barrier to a ruling in accordance with these policy considerations, we should hesitate long indeed before concluding that the Maryland Court of Appeals would definitely hold the saving clause applicable to save these convictions.

Moreover, even if the word "repeal" or "amendment" were deemed to make the saving clause prima facie applicable, that would not be the end of the matter. There would remain a substantial possibility that the public accommodations laws would be construed as falling within the clause's exception: "unless the repealing . . . act shall expressly so provide." Not only do the policy considerations noted above support such an interpretation,

but the operative language of the state public accommodations enactment affords a solid basis for a finding that it does "expressly so provide" within the terms of the saving clause. Whereas most criminal statutes speak in the future tense—see, for example, the trespass statute here involved, 27 Md. Code § 577: "Any person or persons who *shall* enter upon or cross over . . . ."—the state enactment here speaks in the present tense, providing that "it *is* unlawful for an owner or operator . . . ." In this very context, the Maryland Court of Appeals has given effect to the difference between the future and present tense. In *Beard* v. *State, supra,* 74 Md. 130, 21 A. 700, the court, in holding that a supervening statute did not implicitly repeal the former law and thus did not require dismissal of the defendant's conviction under that law, relied on the fact that the new statute used the word "shall" rather than the word "is." From this the court concluded that "The obvious intention of the Legislature in passing it was, not to interfere with *past* offences, but merely to fix a penalty for *future* ones." 74 Md., at 133, 21 A., at 701. Conversely here, the use of the present instead of the more usual future tense may very possibly be held by the Court of Appeals, especially in view of the policy considerations involved, to constitute an "express provision" by the legislature, within the terms of the saving clause, that it did intend its new enactment to apply to past as well as future conduct—that it did not intend the saving clause to be applied, in derogation of the common-law rule, so as to permit the continued prosecution and punishment of persons accused of a "crime" which the legislature has now declared to be a right.

As a matter of Maryland law, then, the arguments supporting a conclusion that the saving clause would not apply to save these convictions seem quite substantial. It is not for us, however, to decide this question of Mary-

land law, or to reach a conclusion as to how the Maryland Court of Appeals would decide it. Such a course would be inconsistent with our tradition of deference to state courts on questions of state law. Nor is it for us to ignore the supervening change in state law and proceed to decide the federal constitutional questions presented by this case. To do so would be to decide questions which, because of the possibility that the state court would now reverse the convictions, are not necessarily presented for decision. Such a course would be inconsistent with our constitutional inability to render advisory opinions, and with our consequent policy of refusing to decide a federal question in a case that might be controlled by a state ground of decision. See *Murdock* v. *Memphis*, 20 Wall. 590, 634–636. To avoid these pitfalls—to let issues of state law be decided by state courts and to preserve our policy of avoiding gratuitous decisions of federal questions—we have long followed a uniform practice where a supervening event raises a question of state law pertaining to a case pending on review here. That practice is to vacate and reverse the judgment and remand the case to the state court, so that it may reconsider it in the light of the supervening change in state law.

The rule was authoritatively stated and applied in *Missouri ex rel. Wabash R. Co.* v. *Public Service Comm'n*, 273 U. S. 126, a case where the supervening event was—as it is here—enactment of new state legislation asserted to change the law under which the case had been decided by the highest state court. Speaking for the Court, Mr. Justice Stone said:

> "Ordinarily this Court on writ of error to a state court considers only federal questions and does not review questions of state law. But where questions of state law arising after the decision below are presented here, our appellate powers are not thus restricted. Either because new facts have supervened

since the judgment below, or because of a change in the law, this Court, in the exercise of its appellate jurisdiction, may consider the state questions thus arising and either decide them or remand the cause for appropriate action by the state courts. The meaning and effect of the state statute now in question are primarily for the determination of the state court. While this Court may decide these questions, it is not obliged to do so, and in view of their nature, we deem it appropriate to refer the determination to the state court. In order that the state court may be free to consider the question and make proper disposition of it, the judgment below should be set aside, since a dismissal of this appeal might leave the judgment to be enforced as rendered. The judgment is accordingly reversed and the cause remanded for further proceedings." (Citations omitted.) 273 U. S., at 131.

Similarly, in *Patterson* v. *Alabama*, 294 U. S. 600, Mr. Chief Justice Hughes stated the rule as follows:

"We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case." 294 U. S., at 607.

For other cases applying the rule, see *Gulf, C. & S. F. R. Co.* v. *Dennis*, 224 U. S. 503, 505–507; *Dorchy* v. *Kansas*, 264 U. S. 286, 289; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 155–156.[5]

The question of Maryland law raised here by the supervening enactment of the city and state public accommodations laws clearly falls within the rule requiring us to vacate and reverse the judgment and remand the case to the Maryland Court of Appeals. Indeed, we have followed this course in other situations involving a state saving clause or similar provision, where it was considerably more probable than it is here that the State would desire its judgment to stand despite the supervening change of law. In *Roth* v. *Delano*, 338 U. S. 226, the Court vacated and remanded the judgment in light of the State's supervening repeal of the applicable statute despite the presence in the repealer of a saving clause which, unlike the one here, was clearly applicable in terms. In *Dorchy* v. *Kansas, supra*, 264 U. S. 286, the supervening event was a holding by this Court that another portion of the same state statute was unconstitutional, and the question was whether Dorchy's conviction could stand nevertheless. The state statute had a severability provision which seemingly answered the question conclusively, providing that "If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision . . . ." Nevertheless, a unanimous Court vacated and reversed the judgment and remanded the case.

[5] See also *Metzger Motor Car Co.* v. *Parrott*, 233 U. S. 36; *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688; *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511; *Roth* v. *Delano*, 338 U. S. 226, 231; *Williams* v. *Georgia*, 349 U. S. 375, 390–391; *Trunkline Gas Co.* v. *Hardin County*, 375 U. S. 8.

so that the question could be decided by the state court. Mr. Justice Brandeis said, 264 U. S., at 290–291:

> "Whether § 19 [the criminal provision under which Dorchy stood convicted] is so interwoven with the system held invalid that the section cannot stand alone, is a question of interpretation and of legislative intent. . . . Section 28 of the act [the severability clause] . . . provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command.
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> "The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court. . . . In cases coming from the state courts, this Court, in the absence of a controlling state decision, may, in passing upon the claim under the federal law, decide, also, the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to the state court. We think that course should be followed in this case.
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> ". . . In order that the state court may pass upon this question, its judgment in this case, which was rendered before our decision in [the other case], should be vacated. . . . To this end the judgment is
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> *Reversed.*"

Except for the immaterial fact that a severability clause rather than a saving clause was involved, the holding and the operative language of the *Dorchy* case are precisely in point here. Indeed, the need to set aside the judgment and remand the case is even more compelling here, since the Maryland saving clause is not literally applicable to the public accommodations laws and since state

policy considerations strengthen the inference that it will be held inapplicable. Here, as in *Dorchy*, the applicability of the clause to save the conviction "is a question of interpretation and of legislative intent," and hence it is "appropriate to leave the determination of the question to the state court." Even if the Maryland saving clause were literally applicable, the fact would remain that, as in *Dorchy*, the clause "provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command." The Maryland Court of Appeals has stated that the Maryland saving clause is likewise "merely an aid to interpretation." *State* v. *Kennerly*, note 4, *supra*, 204 Md., at 417, 104 A. 2d, at 634.

In short, this case involves not only a question of state law but an open and arguable one. This Court thus has a "duty to recognize the changed situation," *Gulf, C. & S. F. R. Co.* v. *Dennis*, *supra*, 224 U. S., at 507, and, by vacating and reversing the judgment and remanding the case, to give effect to the principle that "the meaning and effect of the state statute now in question are primarily for the determination of the state court." *Missouri ex rel. Wabash R. Co.* v. *Public Service Comm'n*, *supra*, 273 U. S., at 131.

Accordingly, the judgment of the Maryland Court of Appeals should be vacated and the case remanded to that court, and to this end the judgment is

Reversed.