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FOREWORD: THE LEGAL HISTORY OF THE GREAT SIT-IN CASE OF *BELL v. MARYLAND*

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INTRODUCTION

Anyone arguing a case in the Court of Appeals of Maryland, the state's highest court, during the years 1992-1996, would have addressed a distinguished bench headed by Chief Judge Robert Murphy, and which also included Associate Judges Lawrence Rodowsky and Robert Bell. A superb administrator, Murphy received high marks for his two decades as head of Maryland's judicial system. Rodowsky, the first Polish-American to sit on the Court, is widely respected for the vast range of his legal knowledge. Bell, the second African-American to sit on the Court of Appeals,[1] is known for his thoughtful and well-researched opinions. In late 1996, Bell succeeded Murphy as Chief Judge of the Court of Appeals.

All three are also gentlemen, a type of judge unfortunately not as common as it should be. They worked well together on the Court. Few know, however, that the three judges are bound by a tie even more long-standing than their common service on the Court of Appeals: a generation ago, Murphy and Rodowsky, who were then Assistant Attorneys General of the State of Maryland, tried to uphold the conviction of Bell for criminal trespass, a prosecution that eventually reached the Supreme Court. *Bell v. Maryland*[2] is justly famous today

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1. The first, Harry Cole, sat from 1977-1991.

2. 378 U.S. 226 (1964). It is a great irony, of course, that the case is named for a man who was to become the Chief Judge of Maryland. That naming is accidental; a dozen

for the light that it sheds on the sit-in movement of the very early 1960s. The case raises fundamental questions concerning the role of the state in enforcing private prejudice, questions still unresolved today. The case also reached a mysterious ending. This Article explores the legal arguments and litigation strategies of that case, both in the Supreme Court and in the Court of Appeals of Maryland.[3]

I. BACKGROUND[4]

The American South, including Maryland, was an overtly racist society in 1960.[5] Although Jim Crow laws had been generally invalidated in the 1950s, the architecture of apartheid was still in place, enforced through social custom backed up by the trespass law.[6] Throughout the South, all public accommodations—motels, restaurants, movies—were segregated. Segregation made everyday life difficult enough for blacks who wanted to travel; the coruscating effect of segregation on all blacks is beyond imagining today.

Maryland, in the early 1960s, only differed in degree from the states of the Deep South. Segregation here was perhaps less violent than in Mississippi or Alabama, but still quite pervasive. The myths of the Old Confederacy were still taught in the public schools (at least to white students). Motels, restaurants, and movie theaters were still segregated. There had been an international uproar over the refusal of Maryland restaurants to serve diplomats from newly-freed African nations who were traveling between New York and Washington.[7] Racism—both conscious and unconscious—pervaded the atmosphere.

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protestors were arrested and Bell's name is first because his was the first name alphabetically.

3. This is not an exercise on personal or oral history. I have not discussed the case with any of the participants, except in the most general way. Instead, I have approached the problem from the perspective of an experienced appellate lawyer reading the public record. For Chief Judge Bell's reminiscences, see Robert Bell, *"Baptism by Fire"*, *in* THE COURAGE OF THEIR CONVICTIONS 141 (Peter Irons ed., 1988).

4. The facts of the litigation are drawn from the Statement of Facts of Appellees and Appellants in their briefs before the Court of Appeals of Maryland. *See* Brief for Appellants, Bell v. State, 227 Md. 302, 176 A.2d 771 (1962) (No. 91).

5. *See generally* JAMES T. PATTERSON, GRAND EXPECTATIONS 375-406, 468-85 (1996).

6. *Brown v. Board of Education*, 347 U.S. 483 (1954), of course, provided the impetus. A series of per curiam opinions then effectively declared illegal all forms of *de jure* segregation. *See, e.g.*, Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (municipal golf courses). It was not until *Johnson v. Virginia*, 373 U.S. 61 (1963), however, that the Court was willing to declare that "it is no longer open to question that a State may not constitutionally require segregation of public facilities." *Id.* at 62.

7. *See generally* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

This was soon to change. The complacent world of the Deep South had already suffered a serious wound in the famous Montgomery Bus Boycott, begun by the immortal Rosa Parks and then led by Martin Luther King, Jr. Another blow was struck by students from North Carolina A & T University when they staged a "sit-in" at a segregated lunch counter in Greensboro, North Carolina in 1960. The sit-in movement spread rapidly through the South. Hundreds of demonstrators were arrested for criminal trespass when they refused to leave a "Whites Only" eating area.

II. THE SIT-IN AND TRIAL

One such sit-in occurred in Baltimore in July 1960.[8] Twelve students were arrested and charged with criminal trespass at Hooper's Restaurant in Baltimore City.[9] On the complaint of the store's owner, the grand jury returned a two-count indictment charging the defendants with criminal trespass.[10] The trial judge, Joseph R. Byrnes[11] of the Criminal Court of Baltimore, after a trial held on November 10, 1960, found the defendants guilty in an opinion that he issued five months later, on March 24, 1961.[12] Judge Byrnes found that the defendants had entered the restaurant and asked the hostess, Ella Mae Dunlop, to be seated. She explained that she could not seat them because "it was not the policy of the restaurant to serve Negroes . . . ."[13] The defendants, however, "persisted" and "took seats at

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8. The facts of the case are presented in more detail in Peter Irons, *"I'm at the Mercy of My Customers"*, *in* THE COURAGE OF THEIR CONVICTIONS, *supra* note 3, at 131-40. That excerpt also contains Chief Judge Bell's remembrances of the case. Bell, *supra* note 3.

9. Hooper's was on the southwest corner of Charles and Fayette Streets in the very heart of downtown Baltimore. It long since has vanished.

10. The first count charged the defendants with trespass after having been advised not to do so; the second with trespass on "posted" property. Brief for Appellants at E.5, Bell v. State, 227 Md. 302, 176 A.2d 771 (1962) (No. 91). The trial court convicted on the first count, but not on the second. *Id.* at E.8. Apparently there was no evidence that the property had been "posted."

11. Judge Byrnes's son, John Carroll Byrnes, is now also a judge on the Circuit Court for Baltimore City, the successor to the Criminal Court of Baltimore. The younger Judge Byrnes discussed the *Bell* case in a memorial tribute to one of the lawyers for the Protestors, Juanita Jackson Mitchell. John Carroll Byrnes, *In Memoriam: Juanita Jackson Mitchell*, 52 MD. L. REV. 522 (1993).

12. Brief for Appellants at 1-2, *Bell* (No. 91). The process strikes a modern reader as very leisurely. A month elapsed between the sit-in and the indictment, and trial did not take place for another four months. The opinion was delayed for another four and a half months. That last delay perhaps might be explained by Judge Byrnes's evident unhappiness in finding the defendants guilty. Perhaps he was waiting for something—anything, including a change in the trespass law—to turn up so that he would not have to issue his guilty verdict.

13. *Id.* at 3.

various tables and . . . at the counter . . . ."[14] They were peaceful; when they were not served, they "began to read their school books."[15] At some point, the trespass statute was read to the protestors, and the police were called when the demonstrators refused to leave. Eventually, the manager of Hooper's obtained warrants for their arrest.[16]

Judge Byrnes's thoughtful opinion rejected the idea that the Fourteenth Amendment "prohibit[s] discriminatory action by private individuals . . . nor [does it] inhibit state action in the form of arrest and conviction for trespass . . . ."[17] He relied heavily on a recent Supreme Court opinion, *Boynton v. Virginia*,[18] a case involving a sit-in at a private restaurant in a bus terminal. Although the Court in *Boynton* struck down the conviction as invalid under the preempting Interstate Commerce Act, it did not reach the constitutional issue.[19] The Supreme Court did say in dicta, however, that "[w]e are not holding that every time a bus stops at a wholly independent restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the . . . Act."[20] Judge Byrnes also relied on recent decisions of the Court of Appeals of Maryland[21] and of the Fourth Circuit[22] holding that there was no general duty to serve customers regardless of race.

Judge Byrnes then convicted the defendants, levied a $10 fine on each, which he suspended, and imposed court costs.[23] The defendants then appealed their convictions to the Court of Appeals.[24]

III. THE BRIEFS IN THE COURT OF APPEALS

In the Court of Appeals, Juanita Jackson Mitchell[25] and Tucker R. Dearing represented the protestors, and Thurgood Marshall and Jack

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14. *Id.* at E.5.

15. *Id.*

16. *Id.* at 3. Note that the police at the scene did not arrest the Protestors.

17. *Id.* at E.6.

18. 364 U.S. 454 (1960).

19. *Id.* at 463.

20. *Id.*

21. Drews v. State, 224 Md. 186, 167 A.2d 341 (1961).

22. Slack v. Atlantic White Tower Sys., Inc., 284 F.2d 746 (4th Cir. 1960) (per curiam).

23. Brief for Appellants at E.8, Bell v. State, 227 Md. 302, 176 A.2d 771 (1962) (No. 91).

24. There was no intermediate appellate court in Maryland in 1961.

25. Mitchell was the wife of the man sometimes called the "101st Senator," Clarence Mitchell of the NAACP, and a well-known civil rights advocate in her own right. *See generally In Memoriam: Juanita Jackson Mitchell*, 52 MD. L. REV. 503 (1993).

Greenberg joined them on the brief.[26] The state was represented by Assistant Attorney General Lawrence Rodowsky, the future colleague of Judge Bell.

Counsel for the appellants had a difficult task. The Court of Appeals had recently decided two cases that had effectively foreclosed a favorable decision using the state action argument.[27] With the primary argument unavailable (although, of course, it had to be preserved for possible review by the Supreme Court), a premium was placed on ingenuity. That goal was achieved. Added to counsel's considerations surely was the knowledge that the *Bell* case had all of the characteristics of a test case, that it might prove the vehicle for a holding that public carriers and innkeepers could not use the state to enforce their discriminatory practices. The challenge in test cases, therefore, is to ignore the easy victory for the client in order to reach the Supreme Court with the test issue. Doing so might be fun, but it also would be unethical. The counsel in *Bell* were up to that challenge.

The Protestors' careful but surprisingly short brief raised three issues: first, the Fourteenth Amendment forbids the use of criminal trespass laws "to enforce the racially discriminatory practices of a private owner who for profit has opened his property to the general public";[28] second, the First Amendment was violated by this use of the criminal trespass statute;[29] and third, the evidence was not sufficient to sustain the conviction.[30]

This Part of the Article will discuss each argument individually, along with the state's response to those arguments. Before doing so, however, a brief discussion of the "state action" concept is in order.

The basic constitutional claim of the Protestors was that the involvement of the police and judiciary in carrying out the racist policies of Hooper's violated the Equal Protection Clause of the Fourteenth Amendment. As every law student knows, however, "state action" is required to trigger that clause. And that was the problem.

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26. Marshall and Greenberg were the famous litigating stars of the "Inc. Fund"—the NAACP Legal Defense Fund, Inc. It was, of course, the Inc. Fund that carried out the NAACP's attack on segregated education culminating in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality (sp. ed. 1994).

27. These cases are discussed *infra* at notes 67-69 and accompanying text.

28. Brief for Appellants at 2, *Bell* (No. 91).

29. *Id.*

30. *Id.*

The state action trigger serves two very important (and complementary) purposes.[31] First, it helps ensure that the government will not get involved in "private" problems. Thus, the state action requirement serves the goal of personal autonomy, removing large areas of activity from governmental intervention. Second, the requirement limits the size and influence of the government. On the other hand, when there is "state action" constitutional guarantees *should* kick in. The reason is that there are things that the state simply cannot be involved with—or to put it differently, there are actions for which the state must assume responsibility. The difficult part, of course, is coming up with a workable test to tell you when state action is present.

At the time of the *Bell* appeals, there were two good reasons for the Protestors to hope that the courts would define state action to include sit-ins. First, in *Shelley v. Kraemer*,[32] the Court had held it unconstitutional for a court to enforce a racially restrictive covenant in a deed.[33] The opinion in *Shelley* can best be described as opaque; however, there certainly were ways to read it that supported the position of the Protestors. Second, in *Burton v. Wilmington Parking Authority*,[34] the Court faced the question of whether there was state action when part of a state building was leased to a segregated restaurant. In another murky opinion, the Court found the action to be unconstitutional;[35] as in *Shelley*, however, there was language the Protestors could use. Here's one example: "The State has so far insinuated itself into a position of interdependence with Eagle [the lessee] that it must be recognized as a joint participant in the challenged activity . . . ."[36] The task, in other words, was not hopeless.

A. State Enforcement of Private Discrimination

1. The Appellants' Position.—The Protestors' first argument in the Court of Appeals was carefully limited. They did not assert that all private discrimination was unconstitutional. Nor did they even argue that all state enforcement of *private* discrimination was illegal. Rather, they argued only that "the States may not, under the Fourteenth Amendment, use their police, judiciary and legislative enactments to

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31. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-2, at 1692-98 (2d ed. 1988).

32. 334 U.S. 1 (1948).

33. *Id.* at 20.

34. 365 U.S. 715 (1961).

35. *Id.* at 717.

36. *Id.* at 725.

enforce racial discrimination for a business open to the public."[37] "This case," it was made clear at this point in the Brief, "does not involve a claim that the State must affirmatively provide a legal remedy against 'private racial discrimination.'"[38]

So limiting the argument certainly was wise as a piece of litigation strategy, although there are a plethora of competing considerations. Appellate lawyers do not usually like to take "extreme" positions that might scare off a court. Thus, the generally preferred argument is one that tells the court something like the following: "We're not asking for wholesale changes in the law; we're merely asking for the application (or maybe, the reworking) of existing law in a new fact situation." After all, it is far easier for a judge, someone who has been trained all of her professional life to worship at the altar of precedent, to hold (or, at least, to pretend to hold) that she is only doing something incremental.

On the other hand, there are several reasons why an institutional litigant such as the NAACP might have an interest in pushing an issue as far as it can—after all, you might get lucky. Moreover, revealing the ultimate destination may help the court get used to seeing where it will have to go eventually. Finally, and somewhat paradoxically, by showing the court the ultimate argument, it might view the incremental model as something devoutly to embrace. (Of course, once the court sees where the line of reasoning could end up, it might be reluctant even to take the first step.) Obviously, there are a number of judgment calls for the lawyers (and their clients) to make.

In the end, it is not difficult to see why the Protestors chose to make the limited argument based on public enforcement of *business* discrimination. Pushing limited arguments, of course, had been the NAACP's strategy in its almost twenty-year effort to end segregated education.[39] More important, perhaps, was the notion that not only would no court ever end all private discrimination, but that it might not be a good idea to do so. At some point, the "right" to be free from discrimination runs up against the "right" to exercise personal autonomy. One suspects that counsel had little trouble with this decision; the private autonomy problem had been a much-discussed issue ever

37. Brief for Appellants at 12, Bell v. State, 227 Md. 302, 176 A.2d at 771 (1962) (No. 91). This argument comes from the separate opinions of Justices Stewart and Frankfurter in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

38. Brief for Appellants at 14, *Bell* (No. 91) (citation omitted). This assertion also distinguished the *Drews* case, relied on by Judge Byrnes below, where the issue was the efficacy of *private* discrimination.

39. *See generally* KLUGER, *supra* note 26.

since the intellectually unsatisfying opinion in *Shelley v. Kraemer*[40] had raised the question.

The business discrimination argument, however limited it might have seemed to some, surely would have done the trick. If a restaurant such as Hooper's could not use the police to enforce its discriminatory practices, then it would be forced to live with demonstrators occupying its lunch tables and counters. That situation could not have been maintained for long; without police enforcement of their "private" discrimination, the segregated restaurants of Baltimore necessarily would have had to capitulate to the demonstrators' demands in short order.

Unfortunately, it is here that the Protestors' position begins to wobble. The logical next part of the argument would be to show why "private" enforcement is unconstitutional. Although the Brief then argues that "the customs of the community" backed Hooper's discrimination,[41] the Brief completely fails to establish *why* customary discrimination is important.[42] All that the Brief does is assert that property rights are not absolute, relying on cases involving railroad regulation and company towns.[43]

2. *The State's Response.*—The State's answer on this issue was also short and succinct. Little time was spent on the state action point. The State merely observed that the Court of Appeals had rejected a similar proposed extension of *Shelley v. Kraemer* in two cases decided earlier in 1961. In the first case, *Drews v. State*,[44] the Court had affirmed the disorderly conduct convictions of sit-in demonstrators at a Baltimore amusement park: "The Park had a legal right to maintain a

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40. *Shelley* held unconstitutional the enforcement of real estate covenants that forbade sale of the property to blacks. 334 U.S. 1, 20 (1948). The opinion, however, failed to explain how any limits, if any there were, on its condemnation of private discrimination, could be found.

41. The argument based on custom was premised on this sole piece of evidence: "The manager and Mr. Hooper testified that if they opened the Restaurant to colored people they were fearful of losing their white customers." Brief for Appellants at 13, *Bell* (No. 91). Hardly compelling evidence, although to paraphrase Justice Holmes, perhaps it was expected that the judges could not forget as judges what they knew as men.

42. There certainly were valid arguments available; 42 U.S.C. § 1983, for example, expressly forbade discrimination under "color of law." *See also* 28 U.S.C. § 1343(a)(3) (2000) (granting federal district courts the power to "redress the deprivation, under color of any State law, . . . providing for equal rights of citizens"). Yet, the Protestors' Brief failed completely to discuss the issue.

43. *See, e. .g.*, Marsh v. Alabama, 326 U.S. 501 (1946) (holding that actions taken by a "company town" are state action for Fourteenth Amendment purposes); Munn v. Illinois, 94 U.S. 113 (1876) (holding railroad regulation permissible).

44. 224 Md. 186, 167 A.2d 341 (1961).

business policy of excluding Negroes. This was a private policy which the State neither required nor assisted by legislative or administrative practice."[45]

The second case, *Griffin v. State*,[46] also involved a protest against racial discrimination at an amusement park. There, the Court had noted that enforcing the criminal trespassing statute in this type of case was "one step removed from State enforcement of a policy of segregation . . . ."[47]

Because the Protestors had failed to address either of these Maryland precedents, the State was not forced to analyze the question of whether amusement parks could be distinguished from restaurants.[48] Accordingly, the State could conclude this part of its Brief with the observation that enforcing discriminatory practices at Hooper's Restaurant—"is at least one step removed from State enforcement of a policy of segregation . . . ."[49]

B. Free Speech and Sit-Ins

1. The Argument.—The Protestors' second argument contended that they had been unconstitutionally denied their right to free expression when the criminal trespass statute was applied to their behavior.[50] This argument, hardly an obvious one, requires the making of several imaginative sub-arguments. An essential part was the assertion that "the right of free speech is not circumscribed by the mere fact that it occurs on private property."[51] The Brief relied on the company town case of *Marsh v. Alabama*, as well as several lower court decisions involving picketing on quasi-private property.[52]

Of course, the defendants were not arrested for actually speaking,[53] so they had to base their argument on what has become known

45. *Id.* at 194, 167 A.2d at 344.

46. 225 Md. 422, 171 A.2d 717 (1961).

47. *Id.* at 431, 171 A.2d at 721.

48. It is easy to understand why the Protestors did not try to draw that distinction themselves; that surely would have been an impossible task.

49. Brief for Appellee at 5, Bell v. State, 227 Md. 302, 176 A.2d 771 (1962) (No. 91).

50. Brief for Appellants at 15, *Bell* (No. 91).

51. *Id.* at 16.

52. The Protestors also relied on *Martin v. City of Struthers*, 319 U.S. 141 (1943) (holding that there is a First Amendment right to deliver handbills on residential property). *Martin*'s impact, however, had been limited by a more recent decision, *Breard v. Alexandria*, 341 U.S. 622 (1951) (holding that a city could prohibit door-to-door solicitation of orders for goods). Neither Brief mentioned *Breard*.

53. They did state that "Appellants here expressed themselves by speech . . . ." Brief for Appellants at 18, *Bell* (No. 91), but that is not wholly accurate. The expressive component of the action surely was physical—occupying seats in an area reserved for whites—rather than verbal.

as symbolic speech. They argued, therefore, that "free expression is not limited to verbal utterances . . . . What has become known as a 'sit-in' is a different but obviously well understood symbol, a meaningful method of communication and protest."[54]

The end of the free speech argument is the most interesting part: "The state . . . certainly has no valid interest in suppressing speech, which . . . does not interfere with privacy, when the speech urges an end to racial discrimination imposed in accordance with the customs of the community."[55] This "no valid interest" argument, made without reference to authority, appears to be but a rhetorical flourish. And yet it is the most powerful argument in the entire Brief, for it captures the essence of both of the Protestors' arguments: that there is no legitimate state interest to offset against their claim of right.

2. The Response.—Surprisingly, the State had some difficulty in replying to the free speech argument. Although it noted that it is "certainly open to doubt whether the act of sitting is a form of communication,"[56] the State accepted the notion that "protest" can be a form of communication. The State instead chose to fight on the grounds that this was not a case where "private property rights must . . . yield to a mere assertion of free speech."[57]

C. Insufficient Evidence

1. The Argument.—The last argument in the Protestors' Brief appears to be technical, but it is not. It was based on the State's failure to prove a fact essential to conviction under the Maryland criminal trespass statute. The Protestors contended that the statutory prohibitions did not "include within its provision 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 . . . ."[58] Thus, the argument ran, if the "trespassers" held a "bona fide claim of right" to a seat in the restaurant regardless of race, then the trespass statute would be inapplicable. The Protestors, it was contended, had such a claim because they thought that they had a "right" to eat at Hooper's.[59]

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54. *Id.* Numerous cases are cited.

55. *Id.*

56. Brief for Appellee at 5, *Bell* (No. 91).

57. *Id.* at 7.

58. Brief for Appellants at 21, *Bell* (No. 91) (quoting MD. ANN. CODE art. 27, § 577 (1957) (amended 1962)).

59. *Id.* at 20.

2. *The Response.*—The State made the obvious reply: The statutory exception only applies to "some interest of the alleged trespasser *in the property* . . . either a claim of ownership . . . or of some right in it short of ownership."[60] Because the Protestors had made no *ownership* claim (as opposed to a claim of right for temporary possession), the State contended that the Protestors obviously fell outside the statutory exception.[61]

D. An Evaluation

1. *The Appellants' Brief.*—The Maryland Constitution was not referred to at all in the Brief. Today, that would be an unusual omission; in 1961, however, lawyers were far more likely to focus on the federal constitution as the primary, or even exclusive source for the protection of individual rights. That is not surprising; there simply was no encouraging precedent for civil rights plaintiffs in the scattered case law dealing with individual rights then available under the Maryland Constitution.[62] Moreover, the Maryland Constitution lacks an equal protection clause,[63] and the Free Speech provision of the Maryland Declaration of Rights[64] provided little additional textual solace to the Protestors. Over all, the Protestors' Brief is a solid, quality job. It avoided purple prose and is easy to follow. It could have used, however, more depth and historical analysis.

2. *The Appellees' Brief.*—The Brief for the State is equally solid. The State treated *Bell* as a fairly ordinary case, as it was to do throughout the litigation, making its handling of the case a lot easier, if not as much fun for the scholar.

IV. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals filed its decision on January 9, 1962. The very short opinion affirmed the convictions.[65] The court addressed only the first two of the Protestors' arguments.

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60. Brief for Appellee at 13, *Bell* (No. 91).

61. *Id.*

62. That statement remains true today. Although the Court of Appeals has said that it will not necessarily follow federal interpretation of parallel constitutional provisions, it almost always has done so. *See, e.g.*, Murphy v. Edmonds, 325 Md. 342, 353-54, 601 A.2d 102, 107-08 (1992).

63. A quarter of a century later, the Court of Appeals somewhat mysteriously found an equal protection "component" to the Due Process Clause in the Maryland Declaration of Rights. State v. Good Samaritan Hosp., 299 Md. 310; 473 A.2d 892, *appeal dismissed*, 469 U.S. 802 (1984).

64. MD. DECL. OF RTS. art. 40.

65. Bell v. State, 227 Md. 302, 176 A.2d 771 (1962).

A. *Criminal Trespass*

In a unanimous opinion written by Judge Henderson, the court summarily rejected the claim 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."[66] Relying on two of its own recent decisions, *Drews v. State*[67] and *Griffin v. State*,[68] the court held that the Protestors did not fall within the "claim of right" exceptions to the criminal trespass case.[69]

B. *Free Speech*

The court devoted a bit more attention to the argument that the sit-in was "a verbal or symbolic protest against the discriminatory practice of the proprietor."[70] It held, however, that any 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."[71] The first part of that statement is unremarkable; public protest cannot go beyond private property lines. The second clause suggests, however, that a right to protest can be found in a restaurant, say, if a public accommodations law were to forbid discrimination there. That remarkable dictum seems never to have become the law.

There is little in this rather pedestrian opinion to suggest that it was a vehicle for fighting out the most important issue of the era. Would the Supreme Court do any better?

V. IN THE SUPREME COURT

A. *The Certiorari Process*

The Protestors quickly filed a petition for certiorari with the Supreme Court.[72] The Petition made three arguments. The first two resembled those that had been made below: first, the use of state

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66. *Id.* at 304; 176 A.2d at 771.

67. 224 Md. 186, 167 A.2d 341 (1961).

68. 225 Md. 422, 171 A.2d 717 (1961).

69. *Bell*, 227 Md. at 304, 176 A.2d at 771-72. The court briefly discussed and properly rejected as irrelevant the month-old decision in *Garner v. Louisiana*, 368 U.S. 157 (1961), where the Supreme Court had reversed a sit-in conviction for lack of evidence without reaching the constitutional issue.

70. *Bell*, 227 Md. at 304, 176 A.2d at 772.

71. *Id.* at 305, 176 A.2d at 772.

72. Petition for Writ of Certiorari, Bell v. Maryland, 378 U.S. 226 (1964) (No. 12). The Petitioners were represented by Jack Greenberg, Constance Baker Motley, and James Nabrit from the NAACP, as well as Juanita Jackson Mitchell and Tucker Dearing from Baltimore. The latter two were listed last on the petition for certiorari; control of the case

power to enforce a custom is state action; and, second, the sit-in was a constitutionally protected exercise of First Amendment rights. The Petition added a third argument, however: the Petitioners had not been given fair warning that their conduct was illegal.

The State responded with a new argument of its own: The case had become "purely academic,"[73] and therefore review would not be in the public interest. This argument was based on the passage by Baltimore City of an ordinance barring local restaurants from refusing service on racial grounds.

The Court granted certiorari on June 10, 1963. The *Bell* case was eventually consolidated with four other sit-in cases.

B. The Briefs

Bell was not the first sit-in case to reach the Supreme Court. In *Garner v. Louisiana*,[74] the Court had expressly refused to decide the "broader constitutional issues," but held that the convictions were "so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment."[75] The "broader issues" were not only open, but the Court had been partially educated about them. The Court also had signaled that it was willing to consider "narrow" issues if necessary to reverse sit-in convictions.[76]

1. The Petitioners' Brief.—The Petitioners first attacked the state action problem. They contended that the use of the state judicial power to enforce discrimination was barred by *Shelley v. Kraemer*, which held that racially restrictive covenants could not be enforced in state court.[77] *Bell*, the argument ran, was an *a fortiori* case after *Shelley* because of the added involvement of the police in the enforcement pro-

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clearly had passed to the New York counsel associated with the NAACP. *See* Bell, *supra* note 3, at 146-47.

73. Brief in Opposition at 3, *Bell* (No. 12).

74. 368 U.S. 157 (1961).

75. *Id.* at 163. Justice Douglas did opine on the "broad" issues. *Id.* at 176 (Douglas, J., concurring). *See generally* Kenneth L. Karst & William W. Van Alstyne, *Sit-Ins and State Action—Mr. Justice Douglas, Concurring*, 14 STAN. L. REV. 762 (1962).

76. In *Peterson v. City of Greenville*, 373 U.S. 244 (1963), the Court had invalidated sit-in convictions because a city ordinance required segregation. *Id.* at 248. It was irrelevant, the Court noted, that the restaurant manager would have excluded the demonstrators in the absence of the ordinance. *Id.*

77. Brief for Petitioners at 17, Bell v. Maryland, 378 U.S. 226 (1964) (Nos. 9, 10, and 12).

cess.[78] Thus, if public enforcement of private discrimination was illegal in the context of racially restrictive covenants, the private discrimination became even *more* illegal when the police were brought into the equation.

Moreover, the enforcement was state action because "the individual act of segregation is performed substantially under the influence of a widespread public custom of segregation, and where this widespread public custom has in turn been substantially supported by formal state law, then the act of segregation is infected with state power."[79] In other words, more than custom is involved; it is custom whose content has been reinforced with positive state law.[80] Thus, in *Bell*, the record was "absolutely clear in establishing that the segregation in question took place solely in obedience to custom, and much against the wishes of the proprietor."[81]

The Protestors' Brief argued that the state had denied equal protection to litigants by maintaining a legal system that subordinated "their claim of equality in public life to a narrow and technical property claim."[82] In other words, the Fourteenth Amendment requires the state to give primacy to claims of equality rather than to claims of property. This argument, which sounds very odd today, no doubt was inserted because counsel were not confident of their state action argument.

The Petitioners were quite sensitive to the concern that an enlarged definition of state action would place constitutional law on the ultimate slippery slope. Thus, they concluded the first part of their Brief by addressing the concern that their view of the Fourteenth Amendment would not lead to the "subjection of the private life of individuals . . ." to its dictates.[83]

Counsel avoided the trap of suggesting a bright-line test to distinguish state from private action. Rather, they urged a functional test requiring the weighing of a number of concerns.[84] That weighing,

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78. *See id. Shelley*, it will be recalled, was a suit between two private citizens. *See* Shelley v. Kramer, 334 U.S. 1 (1948).

79. Brief for Petitioners at 25-26, *Bell* (Nos. 9, 10, and 12).

80. Here, the Protestors, relying on the work of Professor C. Vann Woodward, emphasized the critical role that Jim Crow legislation played in establishing the "segregation system." *Id.* at 28 (citing C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1957)).

81. *Id.* at 31. The Protestors did not cite to a specific piece of evidence, but only to a single page in the record. No doubt they were referring to the statement by the manager of Hooper's that he did not want black customers because their presence would drive out white customers. *See id.* at 28.

82. *Id.* at 33.

83. *Id.* at 48.

84. *Id.* at 48-49.

they asserted, was a very easy task in *Bell* itself: Hooper's was carrying on a public function with minimal associational interests that needed to be protected; there was no competing constitutional claim; the state heavily regulated the businesses at issue; the asserted property interest was minimal and technical; and, finally, Petitioners were expressing themselves on a matter of public concern.[85]

The final argument made by the Petitioners in *Bell*[86] centered on due process: Because the Maryland trespass law only forebade entry *after* a warning had been given, it could not be applied to the Petitioners' conduct because they had entered Hooper's *before* they had been told that they were unwelcome.[87] This hyper-technical argument was strengthened a bit by emphasizing that the Petitioners were being penalized for exercising their right of expression on a very important topic.[88]

The Brief concluded with a short appendix discussing the term "property right."[89] The import of the appendix was to demonstrate that property rights were no longer thought of as absolute—and had not been so analyzed by the law for a long time. Thus, the use of one's property had long been limited by doctrines ranging from implied easements to zoning. Starting from that, it is not a stretch to assert that the legal prohibition of racial discrimination is merely another such limit.

This was hardly a startling revelation to reasonably sophisticated lawyers at the time, including the Justices of the Supreme Court (and their clerks); nevertheless, it is a powerful documentation of how even the most fundamental of legal rights has been subordinated over the centuries to contemporary notions of public policy.

The Petitioners' Brief is a lovely document. It presents a sophisticated approach to a most complex issue. It makes a strong argument for its main point, the linkage of custom with state action. It presented a good case with its functional approach to that problem, although it never came to grips with the difficult question of applying a shifting, balancing test to the common problem of state action.

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85. *See id.* at 50-55.

86. Further arguments concerning actual state involvement were made in the two South Carolina cases. *Id.* at 65-73.

87. *Id.* at 62-63.

88. *Id.* at 64.

89. *Id.* at 75. There was another appendix: "Appendix B: Survey of the Law in European and Commonwealth Countries." *Id.* at 84. The survey purported to show that in France, Italy, Belgium, The Netherlands, Norway, Germany, and England a peaceful sit-in would not be criminal.

2. The Respondents' Brief.—Throughout the proceedings, the State had treated the problem as one of ordinary criminal law. The Supreme Court was no different. Thus, the Brief for Respondents begins: "Conspicuously absent from the facts in this case is state action."[90] Neither United States law nor official power required Hooper's to segregate, and the police had refused to arrest the Protestors, requiring the owner to swear out warrants in front of a Magistrate.[91] Moreover, there was no evidence of any "overriding custom or 'climate' of segregation in the community causing unequal enforcement of otherwise innocuous state laws solely to exclude Negroes on the basis of their race."[92] Indeed, there was evidence to the contrary. The Protestors had been served in other restaurants, and Chief Judge Thomsen[93] of the local federal court had recently held that there was no custom of segregation in Maryland.[94] Finally, there was no evidence that the Protestors were treated any differently than whites who had been asked to leave a restaurant.[95] The State gave short shrift to the due process and vagueness arguments. Not only had the plain language of the statute been violated, but the Protestors had remained on the premises after being asked to leave. That was a clear violation of Maryland law.[96]

The State's Brief was one of high quality that stuck to the obvious: There was no obvious state action and there certainly had been a trespass. Its points were well taken, and it made clear that a reversal would require significant adjustments of constitutional law.

3. The Briefs of the United States as Amicus Curiae.—The United States filed two briefs in the consolidated cases, a main brief and a supplemental brief. Although no explanation is given for the fact that there are two briefs, they do very different things: the first brief attacks

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90. Brief for Respondents at 4, *Bell* (No. 12).

91. *Id.*

92. *Id.* at 5.

93. Roszel Thomsen, the long-time Chief Judge of the United States District Court for the District of Maryland, was a widely respected jurist, both among his brethren on the federal judiciary and in the wider legal community.

94. The case was *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, 127-28 (D. Md.), *aff'd*, 284 F.2d 746 (4th Cir. 1960). I find it very difficult to understand how a court could reach that conclusion. I can certainly remember, as a teenager growing up in Baltimore in the early 1960s, widespread and strongly held racist views. I also remember "colored" motels on Kent Island and segregated movie theaters in Ocean City.

95. Brief for Respondents at 7, *Bell* (No. 12). The State nicely distinguished *Shelley v. Kraemer* on the ground that the right violated there was the "right to use and enjoy property already purchased"—in other words, the case involved a vested property right. *Id.* at 9.

96. *Id.* at 12.

the convictions as unconstitutionally vague, and the second brief addresses the constitutional issues.

a. The Main Brief.—The technical argument can be simply captured: "petitioners . . . were not adequately warned that their conduct was unlawful."[97] Moreover, the prosecutions must be "tested according to strict standards . . . because [the relevant statutes] are here applied against peaceful conduct which is, if illegal, plainly not immoral."[98] Those statutes, moreover, affect "the exercise of First Amendment rights and must be judged for their inhibiting effect on the free exercise of ideas."[99] The gist of the argument was that the Maryland trespass statutes did not expressly condemn conduct such as that of the Protestors, and therefore they had not been given fair warning that their conduct might be found criminal.

b. The Supplemental Brief.—I envy the Supplemental Brief of the United States. It is a brief I wish that I had written. (A great benefit in writing an *amicus* brief is that the heavy lifting is usually done by counsel for the side you are on;[100] they have discussed the facts and the precedents and such and now the *amicus* is free to take the high road.) And take the high road is exactly what the United States did.

The theme was simple: State-enforced discrimination is illegal because a state, in enforcing the trespass laws in public accommodation cases, reinforces the pattern of segregation established by slavery and the Jim Crow laws.[101] Doing so violated the Fourteenth Amendment[102] because the purpose of that Amendment was to end permanently the caste system in American society created by slavery and maintained by the Jim Crow laws.[103]

Listen to a few quotes from the supplemental brief:

> We deal here not with individual action but with a community-wide, public custom of denying Negroes the opportunities of breaking bread with their fellow men in public places

97. Brief for the United States as Amicus Curiae at 24, *Bell* (Nos. 6, 9, 10, 12, and 60).

98. *Id.* at 25.

99. *Id.*

100. This assumes the competence of counsel. And Jack Greenberg and his associates were far better than merely "competent."

101. *See* Supplemental Brief for the United States as Amicus Curiae at 12-14, *Bell* (Nos. 6, 9, 10, 12, and 60).

102. This is not to say that the Solicitor General did not discuss technical precedents; he did. (There is an especially impressive discussion of the legislation preceding the Fourteenth Amendment. *See id.* at 124-27.) But his focus throughout his long brief was on the high road.

103. *Id.* at 13.

> in order to subject them to a stigma of inferiority as an integral part of the fabric of a caste system woven of threads of both State and private action.[104]
>
> . . . .
>
> The only possible conclusion is that segregation in places of public or community is a symbolic act, the sole purpose and effect of which is to stigmatize the Negro as an inferior race, not entitled to full equality even in the public life of the community.[105]

The brief then explained the legal relevance of that stigmatization to the case at hand: "Where the State has delegated to private persons a power so similar to law-making authority, its exercise may fairly be held subject to constitutional restrictions."[106] Doing so would be consistent with the underlying purposes of the Civil War Amendments because: "The central fact of these cases is that the States seek immunity to support the continuance of a caste system in the public life of the community that it was the purpose of the Thirteenth, Fourteenth and Fifteenth Amendments to destroy."[107] Thus, enforcement by the state of "private" discrimination became "state action" when it reinforced the caste system mandated by slavery and Jim Crow.

C. Oral Argument

Argument was heard on October 14 and 15, 1963. Jack Greenberg argued for the Protestors and Loring Hawes for the State of Maryland. Ralph Spritzer[108] argued on behalf of the United States. All nine Justices heard the argument.

1. The Petitioners.—Jack Greenberg focused his argument on the role custom played in Hooper's decision to segregate. Thus, "the choice of the proprietor was not an authentically private decision, but . . . was influenced by the custom of the community."[109] But there must be more than community pressure for there to be state action. Greenberg explained: "This choice of the community in turn . . . to some significant extent . . . has been influenced by an historic pattern of Maryland laws which has the purpose of sustaining a segregated

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104. *Id.* at 11.

105. *Id.* at 36.

106. *Id.* at 89.

107. *Id.* at 111.

108. Spritzer was then an Assistant to the Solicitor General. He later became a professor at the University of Pennsylvania Law School.

109. Transcript of Oct. 14, 1964 Oral Argument at 3, *Bell* (No. 12).

society."[110] Greenberg illustrated this point with an analogy. Someone who has poisoned a well and then cleansed it is still responsible for harm caused by any residue of poison.[111]

Greenberg then turned to the private property argument. He asserted that the Maryland courts had ranked property rights above the Protestors' right to be free from discrimination.[112] But that choice is not a "neutral declaration of a common law," and, in any event, is subject to the discipline of the Fourteenth Amendment. And equal protection forbids ranking the exercise of private property for racially exclusionary purposes above those rights protected by the Amendment.[113] Moreover, state failure affirmatively to protect rights can violate equal protection.

Greenberg concluded by discussing the *ratio ad absurdum* arguments that had been made against his position. The present case, he noted, differed from someone being thrown out of a church or a home where privacy rights should be protected. In contrast, "the case we have here is the case of a place fully open to the public, fully subject to regulation."[114] In short, he presented a bright-line test, based on privacy, for the Court to adopt.

2. *The State.*—The State's beginning argument was simple: The terms of the trespass statute clearly had been violated.[115] Loring Hawes then addressed the custom argument heavily and emphasized the neutrality of the state concerning the prosecution. Maryland did not require segregated facilities, it did not encourage them, and the police had required the owner of Hooper's to go to the police station to swear out a warrant—no arrest had been made at the scene. Moreover, the record contained no evidence of a contemporaneous custom of segregation.[116] The State's arguments, although sound, lacked passion, as if counsel would not object to a reversal. The Court asked relatively few questions, the one long exchange involving an effort (apparent to this reader with the aid of hindsight) to find a way to

110. *Id.*

111. *Id.* at 4.

112. *Id.* at 5.

113. *Id.* Justice Goldberg seemed intrigued by the notion of "ranking" and inquired about a house, a private club, and a buying cooperative. Greenberg's responses made the key inquiry the degree of privateness of each. *Id.* at 6.

114. *Id.* at 7.

115. *Id.* at 8.

116. *Id.* at 8-9. Indeed, the Protestors themselves admittedly had eaten in several restaurants in the same area. *Id.* at 9.

construe the Maryland trespass statute that would permit the Court to overturn the convictions.[117]

3. The United States.—The Government's oral argument was very long, occupying almost twice the number of transcript pages as the combined arguments of the two parties. Indeed, it occupied the whole morning and part of the afternoon of October 15. Obviously, it was to be the main event. Reading it, however, is a great disappointment.

Ralph Spritzer made clear at the outset that he would not address the state action/constitutional issues because "our brief" does not address them, and because an alternative, nonconstitutional ground for disposition was available.[118] I was astonished when I read this. The notion that "our brief" did not address the "big" issues is quite disingenuous: the supplemental *amicus* brief is devoted almost exclusively to constitutional argument; indeed, every sub-heading in the index to that brief is part of the constitutional argument.[119]

What was going on? Well, there are a couple of clues for the reader. First, the case was not argued by Solicitor General Archibald Cox, or by his Deputy, Burke Marshall, but by Ralph Spritzer, someone further down the food chain in their office. I certainly had expected that a case with such potential impact on the Civil Rights movement would have been argued by Cox, a man with a notable background, who had recently argued the leading state action/racial discrimination case of *Burton v. Wilmington Parking Authority*.[120] The second clue was provided by Spritzer early in his argument when he said that "we are mindful of the fact that the President is speaking at this very time, and that the Congress is considering legislation . . . which, if it were adopted, would be directed at the very problem which underlie this kind of litigation."[121]

I put these clues together this way. By having Spritzer argue—and to argue basically boring points—Cox was downplaying the importance of the case. The *amicus* brief, a major effort, had told the Court that the Government thought the case was important. By shifting grounds at argument from the high road to the low road, as it were, the Government was suggesting that the case be decided on

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117. *Id.* at 12-14.

118. Transcript of Oct. 15, 1964 Oral Argument at 2, *Bell* (No. 12).

119. *See* Supplemental Brief for the United States as Amicus Curiae at i-ii, *Bell* (Nos. 6, 9, 10, 12, and 60).

120. 365 U.S. 715 (1961).

121. Transcript of Oct. 15, 1964 Oral Argument at 2, *Bell* (No. 12).

quite limited grounds. And by reminding the Court of the pending legislation, eventually to become the Civil Rights Act of 1964, the Solicitor General was sending two signals: first, don't roil the political waters with a controversial opinion; and second, the sit-in/state action issue will soon go away. The message, in short, was to use some technicality to get the Protestors off the hook, but, in doing so, don't rock the boat.[122]

4. Rebuttal.—The State's rebuttal was made by Russell R. Reno, Jr., and that of the Protestors by Jack Greenberg. The parties' rebuttal took up almost as much time as had their main arguments.

a. The State.—On rebuttal, Reno addressed two points. First, in response to the *Amicus*, he carefully showed how the Maryland trespass statute had been violated.[123] Then he focused on the problem of ambiguity. In a sophisticated argument, he contended that the decision below, by making clear the criminality of the conduct, had "forever afterwards" resolved any ambiguity in the statute.[124] Turning to the free speech side of the ambiguity argument (also referred to as void for vagueness), Reno rightly observed that it was circular in that it assumed that the Protestors had a right to be in Hooper's. If they did not, they had plenty of opportunity on the sidewalk and elsewhere to make their views known.[125]

b. The Protestors.—Although Greenberg broke no new grounds, rebuttal gave him a chance to emphasize the limits legitimate privacy concerns placed on the proposed extension of the state action doctrine. At the end, he encouraged the Court to reverse on almost any ground. "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 customs and laws."[126] Greenberg ended with a flourish of historical perspective:

> [T]o 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

122. Another explanation is that the *Amicus* and the Protestors had split up the argument, with the latter taking the high road. That kind of split is usual where there are joint arguments, but I do not believe it happened in *Bell*. The two clues mentioned in the text counsel against that; more important, I simply find it hard to credit that the Government, if it were interested in the high road, would not argue that position in front of the Court.

123. Transcript of Oct. 15, 1964 Oral Argument at 19, *Bell* (No. 12).

124. *Id.* at 22.

125. *Id.* at 23-25.

126. *Id.* at 30.

> of the slave system which this nation set out to destroy one hundred years ago. And its role in this process has been of this Court's greatest contributions to our constitutional system.[127]

D. The Opinions

The Supreme Court vacated, reversed, and remanded the case.[128] After that simple conclusion, the outcome in the Supreme Court becomes somewhat murky. Indeed, the holdings in *Bell v. Maryland,* along with the other sit-in cases, is aptly captured in the title of a commentary on those cases, "But Answer There Came None."[129] The outcome, in short, satisfied no one.

The case did produce, however, a majority opinion written by Justice Brennan and joined by five other members of the Court. There were two concurring opinions. The first, written by Justice Douglas, was joined only by Justice Goldberg. Justice Goldberg wrote a second concurring opinion that Chief Justice Warren and Justice Douglas joined. Finally, Justices Black, Harlan, and White dissented in an opinion written by Justice Black.

1. The Majority Opinion.—The anticlimax comes at the start of Justice Brennan's majority opinion: "We do not reach the questions that have been argued . . .," he wrote, because, "[i]t appears that a significant change has taken place in the applicable law of Maryland since these convictions were affirmed . . . ."[130]

The "change" in Maryland law the majority referred to was actually two changes. Since the affirmance of the convictions by the Court of Appeals in January of 1962, both the City of Baltimore and the State of Maryland had passed legislation prohibiting discrimination in public accommodations, including restaurants such as Hooper's.[131] As the Court stated, "It is clear from these enactments that petitioners' conduct . . . would not be a crime today; on the contrary, the law . . . now vindicates their conduct and recognizes it as the exercise of a right . . . ."[132]

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127. *Id.* at 31.

128. Bell v. Maryland, 378 U.S. 226, 228 (1964).

129. *See* Monrad G. Paulsen, *The Sit-In Cases of 1964: "But Answer There Came None,"* 1964 SUP. CT. REV. 137.

130. *Bell,* 378 U.S. at 228.

131. The legislation is discussed *id.* at 228-29.

132. *Id.* at 230.

The Court then reviewed Maryland law pertaining to the situation thus presented to the Court: where conduct once illegal becomes legal between the conviction and appellate review.[133] After a brief analysis of that law, Brennan concluded that there was a "quite substantial" argument that the convictions would be reversed under Maryland law.[134]

Finally, the majority addressed the question of whether it *should* remand without addressing the constitutional questions. The majority recalled its constitutional duty to avoid rendering advisory opinions and, after quoting the eminent Chief Justices Stone and Hughes, concluded that the "question of Maryland law raised here by the supervening enactment[s] clearly falls within the rule requiring us to . . . remand the case to the Maryland Court of Appeals."[135] And remand to that court is precisely what the Supreme Court did.

2. The First Concurrence.—The Douglas concurrence (joined by Justice Goldberg) made two points.[136] The first was brief and stated what certainly was obvious: the question involving the "change" in Maryland law had not been raised at argument nor in conference because the issue had been "deemed frivolous."[137] Eight months after argument, however, "it is resurrected to avoid facing the constitutional question."[138] Douglas summed the problem up this way:

> We have in this case a question that is basic to our way of life and fundamental in our constitutional scheme. No question preoccupies the country more than this one; it is plainly justiciable; it presses for a decision one way or another; we should resolve it . . . . When we default, as we do today, the prestige of law in the life of the Nation is weakened.[139]

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133. The Maryland law on this subject is discussed in connection with the decision on remand, *infra.*

134. *Bell,* 378 U.S. at 237.

135. *Id.* at 239. The correct name of Maryland's highest court is the "Court of Appeals of Maryland." It is not clear why the Supreme Court could not get this simple fact straight. Perhaps the Justices were irritated because they had to decide the case.

136. Although both concurring opinions strongly believed that state action was present, both still joined the majority. Justice in the individual case was permitted to triumph over theory.

137. *Bell,* 378 U.S. at 243 (Douglas, J., concurring). Justice Goldberg did not join this part of the opinion.

138. *Id.* Douglas's comments about what had transpired at conference and the "real" reason for the majority's holding are an astonishing breach of judicial etiquette almost without precedent. He obviously felt strongly about the matter. Of course, Douglas also was a Justice who delighted in making mischief.

139. *Id.* at 244-45.

In other words, the "change of law" issue had been invented solely to help the Court avoid answering the constitutional issues raised by the case.

Having vented his frustration at the remand, Douglas then argued at length his second point: The public enforcement of private discrimination by a place of public accommodation constituted unconstitutional state action.[140] This second point, of course, was precisely the issue that occupied the primary attention of the parties in their briefs and at argument. He began by noting that discrimination by a restaurant, especially a corporate-owned restaurant such as Hooper's, reflected not "'personal prejudices,' but business reasons."[141]

Douglas then moved on to his second point (relegating further development of the first to an appendix[142]). That section, drawing on the well-known right to travel in interstate commerce, developed the novel idea that the "right to eat at public restaurants" is protected by the Constitution.[143] Although that argument sounds quite odd, it is closely related to the winning argument in the case that sustained the validity of the Voting Rights Act of 1964.[144]

3. The Second Concurrence.—In addition to joining the Douglas opinion, Justice Goldberg wrote his own concurrence. That concurrence was joined by Chief Justice Warren and, in key part, by Justice Douglas. Goldberg's opinion closely reflected the arguments made by the Protestors in their brief.

The concurrence argued, as had the Douglas opinion, that "the Constitution guarantees to all Americans the right to be treated as equal members of the community with respect to public accommodations."[145] But Goldberg had a different focus than Douglas. Goldberg used the history, purpose, and early decisional law of the Civil War Amendments to find that discrimination in public accommodations was unconstitutional. "The denial of the constitutional right of Negroes to access to places of public accommodation," he wrote, "would perpetuate a caste system in the United States."[146]

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140. *Id.* at 245-46.

141. *Id.* at 246.

142. *See id.* at 260 app. I. The appendix focused on the anonymity of management and control of the modern corporation.

143. *Id.* at 255.

144. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

145. *Bell*, 378 U.S. at 286 (Goldberg, J., concurring).

146. *Id.* at 288.

The traditional role of the common carrier in our legal system lay at the heart of Goldberg's argument. He emphasized that the statutory and common law guarantees of access by all to places of public accommodation lay "at the heart of the Fourteenth Amendment's guarantee of equal protection."[147] Because states must maintain "a system of law in which Negroes are not denied protection in their claim to be treated as equal members of the community, [Maryland] may not use its criminal trespass laws to frustrate the constitutionally granted right."[148]

In the second part of his opinion, Justice Goldberg echoed Justice Douglas in arguing that the owners of Hooper's had no protected associational rights to set against the Protestors' claim to a right of access.[149] Again, Goldberg made the common law practice concerning public accommodations the centerpiece of his argument that although surely there was a constitutional right to privacy, it was not present in the case: "The broad acceptance of the public in this and in other restaurants clearly demonstrates that the proprietor's interest in private or unrestricted association is slight."[150]

4. The Dissent.—Justice Black's dissent began by agreeing with the majority opinion that Maryland follows "the general judicial rule or practice . . . that a new statute repealing an old criminal law will, in the absence of a . . . saving clause, be interpreted as barring pending prosecutions under the old law."[151] The dissent further agreed that the Court should exercise the power to remand so that the Maryland courts could address the state law question.[152] The dissent believed, however, that the constitutional issue should be decided.[153]

Black's dissent noted that the case at bar was "but one of five involving the same kind of sit-in trespass problems we selected out of a large and growing group of pending cases to decide this very question."[154] Although he noted the wisdom inherent in "the salutary general judicial practice of not unnecessarily reaching out to decide

147. *Id.* at 296.

148. *Id.* at 311.

149. *Id.* at 312.

150. *Id.* at 314. This line of thought later would find its way into constitutional jurisprudence in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (holding that associational rights cannot be claimed by an organization that is neither small nor selective, and therefore has no privacy interests needing protection).

151. *Bell*, 378 U.S. at 321 (Black, J., dissenting).

152. *Id.* at 321-22.

153. *Id.* at 322.

154. *Id.*

constitutional questions,"[155] it believed that it would be "wholly unfair to demonstrators and property owners alike as well as against the public interest not to decide [the case] now."[156]

Having reached the merits,[157] Black found that no state action was involved in the case. There simply was no evidence, the dissent argued, that "Maryland in any way instigated or encouraged Hooper's refusal to serve Negroes . . . ."[158] In other words, if the state had not been involved in helping Hooper make his decision to discriminate, the later actions of the police were not illegal.

5. An Evaluation of the Opinions.—The critic's first impulse is to say that the Court blinked, that it was afraid to do what it wanted to do and find state action present. But that perhaps does not give the Brennan position enough credit. Judge Bell himself later saw Brennan as struggling to avoid creating a bad precedent.[159] Given that the Court split three-to-three on the state action issue, that possibility was a very real one. And Douglas's explanation has the ring of truth. The remand obviously was constructed after intense argument among the Justices so that the Court would not have to face the state action question, the real issue in the case.

Was it wise to avoid a decision on the merits? Assuming that Brennan accurately read the tea leaves at the Court's conference following argument, the answer surely is yes. The 1964 Civil Rights Act, the most important civil rights legislation in a century, was working its way through Congress.[160] Its future was perilous; the debate over its constitutionality intense. A decision that the discrimination practiced by Hooper's restaurant was constitutional could have harmed the Act's chance of passage. On the other hand, a decision in favor of the Protestors might have hindered passage of the Act, either because of

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155. *Id.*

156. *Id.* at 323.

157. Justice Black's discussion of the merits began with a discussion of whether the Maryland criminal trespass statute was unconstitutionally vague. Although the dissent noted that the vagueness issue had not been raised by either the parties or the courts below, the dissent spent two pages discussing vagueness before finding the statute valid. *Id.* at 323-25. The discussion concluded with a clear refutation of the vagueness argument: "[I]t is wholly clear that the Maryland statute here is directed not against what petitioners said but against what they did—remaining on the premises of another after having been warned to leave, conduct which States have traditionally prohibited in this country." *Id.* at 325. Justice Black's discussion of vagueness is particularly interesting given the criticism the Brennan opinion received for similarly raising an issue not raised in the proceedings below.

158. *Id.* at 334.

159. *See* Bell, *supra* note 3, at 147.

160. For a brief summary of the Act's passage through Congress, see PATTERSON, *supra* note 5, at 543-47.

the resulting controversy or because of arguments that adoption of the Act no longer was necessary. If the Court believed that to be so, it was time to deploy what Alexander Bickel had recently labeled a "passive virtue."[161] Thus, the Court sought to buy time by deferring the decision. It is easy to follow Brennan's reasoning: If the Court of Appeals of Maryland took the hint and reversed on remand, then nothing would have been lost; the criminal sanctions imposed on the protestors would be removed and a bad precedent avoided. If, on the other hand, the convictions were affirmed below, the Court could then face squarely the problem of state action and public accommodation. But it would do so following the passage of the vital 1964 Civil Rights Act. The Justices also rejected unanimously the labored vagueness and due process arguments based on the language of the trespass statutes. Although obviously an attractive out for the Court, the precedents that would be set were apparently too dangerous to attract the Court. That, of course, was the beauty of the escape route chosen by the majority. It set no bad precedent and, if the Court of Appeals of Maryland took the strong suggestion, the convictions would be overturned. Finally, the passage of the 1964 Act meant that the whole issue would become moot.

The arena, therefore, shifted to the Court of Appeals, and it is to the proceedings in that court on remand to which this Article now turns.

VI. ON REMAND

A. The State's Argument

The State filed its brief first.[162] Its position was simple. The criminal trespass statute had not been repealed.[163] If it had, then all prosecutions under it must fail. But repeal had not taken place, and repeals by implications are disfavored; in the absence of a repeal, the convictions must stand.[164] In any event, the Maryland savings clause

161. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

162. The State was represented on remand in the Court of Appeals by the Attorney General, Thomas Finan, who was later to sit on the Court of Appeals from 1966-1972; Deputy Attorney General Robert Murphy, Chief Judge of the Court of Appeals from 1972-1996; and William J. O'Donnell, later a trial judge in Baltimore City from 1964-1974 and member of the Court of Appeals from 1974 until his death in 1976. Involvement in the *Bell* case obviously was good for one's career.

163. Brief for Appellee at 8-13, Bell v. State, 236 Md. 356, 204 A.2d 54 (1964) (No. 91).

164. *See id.* at 8.

statute[165] saves all prosecutions brought under the repealed statute unless the repeal "expressly provide[s] to the contrary."[166]

The Civil Rights Act of 1964 also was irrelevant. Nothing in that law suggests that "Congress intended the Act to have retroactive application . . . ."[167]

B. The Protestors' Argument

The challenge on remand was to convince the Court of Appeals to follow the strong hint thrown out by Justice Brennan's opinion. The lawyers were up to the challenge; not only did they develop nicely the Brennan suggestion, including a strong policy argument, but they added a new argument based on federal law. The arguments were presented with a good deal of sophistication.

1. The Changes in State and Local Law.—The first argument presented by the Protestors naturally enough tracked Justice Brennan's suggestion that the convictions must be vacated because the trespass laws had changed.[168] As discussed above,[169] both Baltimore City and the state had passed public accommodation laws that, *inter alia,* prevented a restaurant such as Hooper's from discriminating on the basis of race. Thus, under the law as it stood when the case was heard on remand, the Protestors could not have been convicted of criminal trespass. They argued, therefore, that the new "ordinance and statute remove the criminal taint from appellants' activities."[170] Good lawyers always give a favorably inclined court enough argument to base its decision on, but they did not gild the lily. Brennan had shown the way, and the Protestors provided moral support. The "KISS" rule,[171] in other words, was in full play.

2. The Change in Federal Law.—The Brief also advanced a brand new argument. The Protestors argued that the passage of the Civil Rights Act of 1964 required "the abatement of these prosecutions."[172] This argument had two parts. The first was a variation of the earlier one involving the changes in local law. Because the Protestors' conduct was perfectly legal under the 1964 Act, and because federal law

165. MD. ANN. CODE art. 1, § 3 (1957).
166. Brief for Appellee at 12, *Bell* (No. 91).
167. *Id.* at 14.
168. Brief for Appellants at 4-12, *Bell* (No. 91).
169. *See supra* note 131 and accompanying text.
170. Brief for Appellants at 6, *Bell* (No. 91).
171. The KISS rule is well-known to litigators: "Keep It Simple, Stupid."
172. Brief for Appellants at 12, *Bell* (No. 91).

required the abatement of prosecutions based on repealed statues, the Supremacy Clause forbade Maryland from punishing Bell for his actions.[173]

The second variation contended that the federal "Savings Clause"[174] did not help the State because the 1964 Civil Rights Act "contains an express mandate against continued prosecution."[175] Section 203(c) of the Act forbids punishing any person "for exercising or attempting to exercise any right or privilege *secured* by section 201 or 202."[176] Because the Protestors had been attempting to exercise just such a right, they could no longer be prosecuted.

C. The Opinion on Remand

The Court of Appeals of Maryland did not dally. On October 22, 1964, not even six months after the Supreme Court's decision, the court, over a lone dissent, resisted the temptation placed before them by the Supreme Court and voted to affirm.[177]

1. The Majority Opinion.—Judge Hammond wrote the opinion for the Court of Appeals on remand. It is easy to tell that he was not impressed by Justice Brennan's command of Maryland case law. Hammond began with a long recitation of both the facts and the proceedings in the Supreme Court. He then parsed Justice Brennan's majority opinion and concluded that Brennan remanded on the assumption that the Court of Appeals "would take account of supervening changes in the law and apply the principle that a statutory offense which has ceased to exist is no longer punishable at all, and reverse the convictions . . . ."[178]

As a final preliminary, Hammond wrote that there was much to be said for "the position of the State that no harm to the general welfare . . . would be done and that a desirable public result would be achieved if the convictions were reversed . . . ."[179] Somewhat sanctimoniously, however, Hammond added that we "feel constrained to avoid making bad law because the cases may be hard, and to apply the law as we find it to be."[180]

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173. *Id.* at 12-16.

174. 1 U.S.C. § 109 (2000).

175. Brief for Appellants at 17, *Bell* (No. 91).

176. *Id.* (quoting The Civil Rights Act of 1964, Pub. L. No. 88-352, § 203(c), 78 Stat. 241, 244).

177. Bell v. State, 236 Md. 356, 204 A.2d 54 (1964).

178. *Id.* at 360, 204 A.2d at 56. This was not a bad assumption, of course.

179. *Id.* at 363, 204 A.2d at 57.

180. *Id.* Formalism, in short, still lived in Maryland.

The analysis that forced the majority to such a pious conclusion began by noting the common law rule that a conviction that was not yet a final judgment must be reversed if the statutory basis for the conviction has been repealed.[181] The opinion then found that it was "too plain for argument that the passage of the public accommodations law . . . brought about a fundamental change in the State trespass act."[182]

Hammond also rejected Brennan's suggestion that the public accommodations law and ordinance did not repeal or amend the criminal trespass act because neither of the new provisions referred to the trespass law; that argument, Hammond wrote, "simply will not wash."[183] After all, the legislature had changed the trespass act, after it had passed a public accommodations law, in order to remove a conflict with the accommodations ordinance. That sequence "gives rise to an almost inescapable inference that the Legislature knew it was repealing in part . . . the trespass law when it passed the State public accommodations act."[184]

After a lengthy discussion of cases dealing with implied repeal, Hammond found "no basis for finding an express direction by the Legislature in the public accommodations law that existing criminal liabilities or penalties were to be extinguished."[185] The opinion then took another slap at Justice Brennan by finding "much too tenuous and insubstantial" his argument that the use of the present tense in the public accommodations law meant that all existing criminal liabilities should be extinguished.[186] Finally, the court found that the 1964 Civil Rights Act was meant to apply prospectively, "in line with the general presumption that all statutes . . . are intended to operate prospectively . . . ."

2. The Dissent.—Only Judge Oppenheimer dissented.[187] He stated that he disagreed with his brethren "only . . . on the issue of whether the convictions . . . for acts which . . . today would be legal,

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181. *Id.*, 204 A.2d at 57-58.

182. *Id.* at 364, 204 A.2d at 58.

183. *Id.* at 365, 204 A.2d at 59. The language is somewhat disdainful; its use certainly suggests impatience with the Supreme Court.

184. *Id.*

185. *Id.* at 368, 204 A.2d at 60.

186. *Id.*, 204 A.2d at 61. The Court found solace in the fact that the "1963 trespass act in terms applied only to certain named places and did not apply to other named places, and for this reason, if no other, it *must* be inferred that the Legislature was . . . creating new law . . . ." *Id.* at 369, 204 A.2d at 61 (emphasis added).

187. Reuben Oppenheimer sat on the Court of Appeals from 1964 to 1967. He was a distinguished scholar, the author of a number of prominent law review articles.

are to be upheld because of the saving clause statute."[188] Judge Oppenheimer relied on an old and famous dictum from Chief Justice Marshall: "[I]f 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."[189] He then observed that the Court of Appeals had cited Marshall's language with approval in *Keller v. State*,[190] and that the rule just quoted also applies "where there is no repeal or amendment but where the effect of the prior law is abrogated or destroyed."[191] Thus, Judge Oppenheimer would not require a literal repeal or amendment of the trespass statute because the new public accommodations law worked "a fundamental change in the law"; as a result, the convictions could not stand because they were "repugnant to present policy."[192]

The dissent concluded by noting that neither the Maryland legislature nor the Baltimore City Council has intended to save existing criminal trespass convictions when they passed the 1963 public accommodations legislation.[193] Thus, the Maryland savings clause statute could not be used to sustain the convictions.

D. An Appraisal

The Oppenheimer dissent seems to have the better of the argument. The majority opinion is strikingly wooden and formalistic:[194] *viz.*, the savings clause "saves" all convictions. There is no consideration of the critical policy question of whether it makes any sense to uphold a conviction for activity that no longer would be found criminal. As Justice Brennan had explained, it was very unlikely that the legislature that had adopted the Maryland public accommodations law would have wanted "the conviction and punishment of persons whose 'crime' has been not only erased from the statute books but officially vindicated by the new enactments."[195] Moreover, the Hammond opinion ignored the well-known dictum of Chief Justice Marshall, used so effectively by the dissent, that a party must take the law on appeal as he finds it.

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188. *Bell*, 236 Md. at 369-70, 204 A.2d at 61 (Oppenheimer, J., dissenting).

189. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

190. 12 Md. 322 (1858).

191. *Bell*, 236 Md. at 372, 204 A.2d at 62 (Oppenheimer, J., dissenting).

192. *Id.*, 204 A.2d at 63.

193. *Id.* The dissent also observed that the Protestors had filed their petition for certiorari in the Supreme Court on the same day that Baltimore City had changed its laws. *Id.* at 372-73, 204 A.2d at 63.

194. It is not surprising that the court would issue such an opinion in 1964.

195. Bell v. Maryland, 378 U.S. 226, 235 (1964).

VII. DOES IT MATTER?

Until fairly recently, it would have been safe to say that the *Sit-in Cases,* including *Bell,* were interesting in history and theory but lacking in practical significance. After all, post-1938 decisions had seemed to make clear that Congress had more or less plenary authority under the Commerce Clause to adopt legislation in any area that it chose.[196] And Congress, of course, has adopted significant and effective legislation to deal with the problem presented in *Bell.* Thus, whether a restaurateur's decision to indulge her racial prejudices constituted "state action" had become merely an academic question.[197]

Unfortunately,[198] the Supreme Court has now placed limits on congressional power, not only under the Commerce Clause, but in other areas as well.[199] To be sure, the current Court has made quite clear that Congress retains full power under Section 5 of the Fourteenth Amendment to rectify wrongs protected by that Amendment.[200] The Court also has made clear, however, that Congress could not use that authority to protect rights to an extent beyond that accorded by the Court itself.[201] Thus, at least as long as this bitterly fought line of cases remains the law, and as long as federal and state civil rights legislation remains intact, the state action question remains an academic one. No doubt my views on the issue are clear by now. State action occurs when the state authorizes private use of the trespass law to trump the common law. Because Hooper's had opened its doors to the general public—as the common law required—there was no significant privacy interest to assert on the other side of the equation. The Protestors' convictions, therefore, were unconstitutional.

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196. The key case was *Wickard v. Filburn,* 317 U.S. 111 (1942) (holding that Congress can regulate a farmer's personal use of a dozen acres of corn).

197. This question has gnawed at me since I first taught Constitutional Law in 1977.

198. At least from my point of view.

199. *See, e.g.,* United States v. Lopez, 514 U.S. 549 (1995) (holding the Gun-Free School Zones Act of 1990 invalid because it exceeded Congress's authority under the Commerce Clause). The best short treatment of this line of cases that I know is Ronald D. Rotunda, *The New States' Rights, the New Federalism, the New Commerce Clause, and the Proposed New Adjudication,* 25 OKLA. CITY U.L. REV. 869 (2000).

200. *See* Rotunda, *supra* note 199, at 879-96.

201. *See id.* at 888-96. The key case is *City of Boerne v. Flores,* 521 U.S. 907 (1997) (holding that the Religious Freedom Restoration Act of 1993 was invalid because it exceeded Congress's power under Section 5 of the Fourteenth Amendment); *see also* United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress lacked power under either the Commerce Clause or the Fourteenth Amendment to adopt the Violence Against Women Act).

VIII. THE SURPRISE

When I got this far in my reading for this Article, I realized that I had missed something. The decision by the Court of Appeals discussed in the proceeding paragraphs had *affirmed* the convictions. But I *knew* that the convictions had been overturned; or, at least, so went local lore. Obviously, my research assistant, a very able student, I might add, had not pulled all of the cases. So, I Shepardized the case myself. To my astonishment, there was no further decision by the Court of Appeals, no reversal following a petition for rehearing.

Eventually, I read the official report of the decision in the *Maryland Reporter.* (I had been using an online printout of the case from the *Atlantic Reporter.*) Still nothing. Finally, however, a meticulous rereading discovered the following. In the *Maryland Reporter,* the report of the decision on remand lists, as it always does, counsel for the parties; that listing is followed by the date of the decision and the opinions themselves. But if the reader looks very carefully at the report of *Bell v. Maryland,* she will find the following unusual if not unique entry (reprinted in full):[202]

> Decided October 22, 1964
> Petition for rehearing filed November 23, 1964, granted December 7, 1964, and reversed April 9, 1965.

This entry is missing from the report of the remand in the *Atlantic Reporter.*[203] A researcher, in other words, would know of the reversal only from a very careful reading of the *Maryland Reporter,* an event most unlikely to happen.

That hidden, laconic announcement roused my interest. What had prompted this *volte-face*? Had Justice Brennan, for example, talked with Judge Hammond? Alas, the answer is more prosaic. On November 23, 1964, the Protestors filed a Petition for Rehearing in the Court of Appeals. The Petition noted that the Supreme Court had heard arguments in two cases a month earlier, cases which raised the very abatement issue that had just been rejected by the Court of Appeals. As a result, there was "a substantial likelihood that the Supreme Court may hold that the Civil Rights Act of 1964 abates such prosecutions [as the Protestors']."[204] Without comment, the Court of Appeals granted the petition, but did not set the case for argument.

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202. Bell v. Maryland, 236 Md. 356, 357 (1964).

203. Bell v. Maryland, 204 A.2d 54 (Md. 1964).

204. Petition for Rehearing at 1-2, Bell v. State, 236 Md. 356, 204 A.2d 54 (1964) (No. 91).

On December 14, 1964, the Supreme Court issued its opinion in *Hamm v. City of Rock Hill*,[205] holding that the 1964 Civil Rights Act did indeed abate all pending prosecutions of those who had been arrested for activity that the Act protected.[206] Although *Hamm* readily appears controlling, the Court of Appeals waited nearly five months to issue an order on April 9, 1965, reversing the convictions and assessing costs against the State, thereby ending the historic case of *Bell v. Maryland.*

205. 379 U.S. 306 (1964). The majority opinion was written by Justice Clark. Justices Black, Harlan, Stewart, and White all wrote separate dissents. The dissenters clearly had the better arguments.

206. *Id.* at 314-15.