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Attacking Discrimination through the Thirteenth Amendment

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The legal structures have in practice proved to be neither structures nor law. The sparse and insufficient collection of statutes is not a structure; it is barely a naked framework. Legislation that is evaded, substantially nullified and unenforced is a mockery of law. In this light, we are now able to see why the Supreme Court decisions have not made history. The decisions indeed mandated a profound degree of genuine equality; for that reason, they failed of implementation. They were, in a sense, historical errors . . .

—Martin Luther King, Jr.

THE INADEQUATE AVENUES of direct relief available to those groups that have been discriminated against have been a cause of frustration and a source of alienation leading in certain instances to violence. The inability of our legal system to assure equal job opportunity has contravened the very essence of the thirteenth amendment of the United States Constitution prohibiting slavery.[1]

The landmark decision of *Jones v. Alfred H. Mayer Co.*[2] has been the Supreme Court's clearest articulation of the right to be free from discrimination; the constitutional protection of such freedom springs from the thirteenth amendment.[3] The 1968 *Jones* decision was the rebirth of the Civil Rights Acts of 1866.[4] Although the Court specifically limited the barring of all racial discrimination in the sale or rental of property, section 1982 of the 1866 Act was held to be a valid exercise of the power of Congress to enforce the thirteenth amendment. The Court, thereby recognized the intent of Congress *to eradicate the badges and incidents of slavery.*

Justice Douglas' cocurring opinion in *Jones* acknowledged that the many civil rights cases which had come before the court depicted "a spectacle of slavery unwilling to die."[5] The decision stirred substantial debate among constitutional theoreticians. United States Senator Sam Ervin commented that ". . . the *Jones* case is a glaring example of the Court's habit of effecting constitutional revision by

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[1] U.S. CONST., amend XIII.

[2] 392 U.S. 409 (1968).

[3] *Id.*

[4] 42 U.S.C. §§ 1981, 2 (1886), (re-enacted as § 18 of the Enforcement Act of 1870).

[5] 392 U.S. 409 (1968) (Douglas, J., concurring). Among the major cases cited by Justice Douglas were Strauder v. W. Va., 100 U.S. 303 (1880); Plessy v. Ferguson, 163 U.S. 537 (1896); Lane v. Wilson, 307 U.S. 268 (1939); Shelley v. Kraemer, 334 U.S. 1 (1948); Brown v. Board of Educ., 347 U.S. 483 (1954); and Hamilton v. Alabama, 376 U.S. 650 (1964).

judicial fiat."[6] Others contended that the decision ". . . reaffirmed the vitality of judicial activism in the field of race relations."[7] No longer a constitutional antique, the thirteenth amendment presents Congress with an opportunity through primary and *direct* legislation to enact methods necessary and proper for the abolition of all badges and incidents of slavery in America.[8]

Judicial and Congressional Limitations

Before exploring what protection might be afforded through the thirteenth amendment, one should understand the frustrations involved in the area of civil rights litigation. Government segregation was judicially approved in the "separate, but equal" doctrine of *Plessy v. Ferguson*.[9] This 1896 decision established an era of racial discrimination, which was supported by state action. Not until 1954 did the Court strike down the separate, but equal doctrine[10] and begin to address itself to "equal protection" of minorities against discrimination under the fourteenth amendment. The fourteenth amendment, however, has been relatively ineffective in combatting discrimination because of the necessity of "state action."

Although decisions over the past five years would indicate the possible expansion of the fourteenth amendment's equal protection clause,[11] it is unlikely that the Court will view the clause more broadly than it has. This is particularly true in light of the ever-present concept of federalism. Since 1833, the states have been responsible for the protection of civil rights[12] and, consequently, direct federal protection against discrimination has been limited.

Until 1964, Congress was constiutionally restricted in its efforts to legislate directly against the invidious evil of discrimination.[13] *Heart of Atlanta Motel, Inc. v. United States*,[14] in which the constitutionality of Title II of the Civil Rights Act of 1964 was challenged, expanded the concept of interstate commerce to include acts of racial discrimination. Therefore, Congress had the power, through the commerce clause, to enact safeguards against discrimination. Again, substantial constitutional debate arose. Justice Douglas in a concurring opinion stated:

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[6] S. Ervin, *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 VAND. L. REV. 485 (1969).

[7] Note, *Jones v. Mayer: The 13th Amendment and Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019 (1969).

[8] M. KONVITZ, A CENTURY OF CIVIL RIGHTS 105 (1961).

[9] 163 U.S. 537 (1896).

[10] Brown v. Board of Educ., 347 U.S. 483 (1954).

[11] United States v. Guest, 383 U.S. 745 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Reitman v. Mulky, 387 U.S. 369, 373 (1967).

[12] Barron v. Mayor and City Council, 32 U.S. (7 Pet.) 243 (1833).

[13] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[14] *Id.*

> It is rather my belief that the right of the people to be free of state action that discriminates against them because of race, like the 'right of persons to move freely from State to State . . . ,' occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.[15]

On the other hand, Professor Freund asserted that the commerce clause is, in fact, the better vehicle for Congress to use against discrimination:

> . . . under the commerce clause, for that is primarily a grant of legislative power to Congress, which can be exercised in large or small measure, flexibly, pragmatically, tentatively, progressively, while the recognition of guaranteed rights, if they are declared to be conferred by the Constitution, is not to be granted or withheld in fragments.[16]

The search for an avenue by which discrimination could be attacked through such concepts as state action and the commerce clause was far from ended with the enactment of the 1964 Civil Rights Act.[17] Title II of that Act was similar in many respects to the ill-fated, but significant Civil Rights Act of 1875[18] which dealt with equal access to public accommodations and served as the focal point of the celebrated *Civil Rights Cases*.[19] Section one of the Act of 1875 prohibited discrimination based on race in the use of "inns, public conveyances . . . theaters, and other places of public amusement . . ."[20] The Court held that the regulation of public accommodations in regard to segregating facilities was not "state action" authorized under the fourteenth amendment. More importantly however, the Court acknowledged discriminatory practices in the use of public accommodations as private action and that the thirteenth amendment applied to the abolition of slavery in private action.

The Court would not conclude in the *Civil Rights Cases* that voluntary acts of racial discrimination in public accommodations constituted *indicia* of slavery. The *Civil Rights Casss* are additionally significant in view of Justice Harlan's dissent which, in part, serves as a basis for modern interpretation of the thirteenth amendment. His minority opinions are the very guidelines which the Court has utilized in its interpretations of the thirteenth amendment.[21]

> Exemption from race discrimination in respect of the civil rights which are fundamental in *citizenship* in a republican government, is, as we have seen, a new constitutional right created by the nation, with express power in congress [sic] by legislation,

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[15] *Id.* at 297.
[16] FREUND, ON LAW AND JUSTICE 16 (1968).
[17] 42 U.S.C. §§ 1971, 1975(a) *et seq.*
[18] Act of March 1, 1875, Ch. 114, 18 Stat. 335.
[19] 109 U.S. 3 (1883).
[20] Act of March 1, 1875, Ch. 114, 18 Stat. 335. 109 U.S. 3 (1883).
[21] *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

> to enforce the constitutional provision from which it is derived. [Discrimination] . . . is a badge of servitude, the imposition of which congress [sic] may prevent under its power, through appropriate legislation, to enforce the thirteenth amendment . . . ."[22]

Thirteenth Amendment: Historical Intent

The ultimate meaning of the proposed thirteenth amendment was debated in the Reconstruction Congress. Significantly, one of the amendment's drafters commented that the question of emancipation (and of the thirteenth amendment which was addressed thereto) was to be taken "entirely away from the politics of the country."[23] Inferentially, regionalism and sectional prejudices were not to interfere with congressional attempts to insure freedom for the black man; rather, judicial determinations as to *what are* examples of *badges of slavery* must rule.

The logic of this interpretation has been borne out by Professor Tenbroeck who has suggested that the sponsors and supporters thought the thirteenth amendment to be far from the first step in the abolition of slavery; but, was, in effect, the last or ultimate step in the eradication of slavery.[24] Harlan's dissent implies an appreciation for Congress' intent which was based on the drafters' comments. When he acknowledged that "Discrimination . . . is a badge of servitude . . .",[25] was he not dealing with the very issue which the Congress had considered eighteen years prior to the *Civil Rights Cases* when the thirteenth amendment was enacted? Still, many would argue that the thirteenth amendment must be interpreted literally in that "neither slavery nor involuntary servitude . . . shall exist within the United States . . . ."[26] With the exception of the *Jones* decision, precedent would support that argument. In the *Civil Rights Cases*, the Court reversed the convictions of individuals for violating the 1866 Civil Rights Act on the basis that Congress was not empowered to deal with private discrimination. These cases involved the denial of privileges and accommodations of a theater and the refusal of a train conductor to allow seating in a railroad car because of race.[27] Narrow interpretation of the thirteenth amendment involving intimidation of Negroes,[28] restrictive covenants,[29] as well as denial of public accommodations, would lead one to conclude that strict construction, if not consistent with original congressional intent, was at least founded on precedent.

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[22] Civil Rights Cases, 109 U.S. 3, 56 (1883).

[23] Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1300 (1969).

[24] Tenbroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CALIF. L. REV., 171, 176 (1951).

[25] 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

[26] U.S. CONST., amend. XIII.

[27] 109 U.S. 3, 26 (1883).

[28] *See* 2 RACE REL. L. SURV. 230 (1971), citing Hodges v. United States, 203 U.S. 1 (1906).

[29] *See, id.*, citing Corrigan v. Buckley, 271 U.S. 323 (1926).

The majority held in the *Civil Rights Cases* that "mere" discrimination on account of race or color was not regarded as a badge or incident of slavery.[30] It was some eighty years before the Court again squarely faced the issue involved in the *Civil Rights Cases* and again considered the historical intent behind the thirteenth amendment.

In 1966, the Eighth Circuit Court of Appeals affirmed the dismissal of a suit filed by a black and his wife against a private housing developer who had denied them housing opportunities because of their race. The petitioner argued that Sections 1981 and 1982 of U.S.C. 42 served as the foundation upon which a cause of action arose. Speaking then for the appellate court, present Supreme Court Justice Harry Blackmun stated:

> . . . it is not for our court, as an inferior one, to . . . take the lead in expanding constitutional precepts when we are faced with a limiting Supreme Court decision which, so far as we are told directly, remains good law.[31]

The grant of writ of certiorari of Joseph Lee Jones' case set the groundwork for a Supreme Court interpretation of the thirteenth amendment which it heretofore avoided. In its first in-depth decision on the thirteenth amendment since the *Civil Rights Cases*, the Court, through Justice Stewart, traced Section 1982 back to its origin, stating that Congress had passed it "in sweeping terms."[32] He dismissed the respondent's argument in that the intent of Congress in passing the 1866 Civil Rights Act was simply to eradicate the post-Civil War "Black Codes," which were passed throughout the South to deny rights and opportunities to newly freed slaves. Justice Stewart stated that: ". . . the Civil Rights Act was drafted to apply throughout the country, and its language was far broader than would have been necessary to strike down discriminatory statutes."[33]

What of the historical intent behind the thirteenth amendment? Justice Stewart quoted the sponsor of the original draft of the thirteenth amendment, Senator Trumbull of Illinois, Chairman of the Judiciary Committee, who was reported to have said:

> It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his right. When the constitutional amendment is adopted, I trust we may pass a bill . . . that will be *much more sweeping and efficient* . . . ."[34]

Of course, the "more sweeping and efficient" legislation was passed as the 1866 Civil Rights Act.[35] According to Justice Stewart, significant

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[30] 109 U.S. 3, 26 (1883).

[31] 379 F.2d 33 (8th Cir., 1967).

[32] 392 U.S. 409 (1968).

[33] *Id.*

[34] CONG. GLOBE, *39th Cong., 1st Sess.* 43 [Emphasis added].

[35] On December 13, 1865, the Senate ratified the thirteenth amendment. It was certified by the Secretary of State on December 18, 1865. The Civil Rights Act was introduced by Senator Trumbull on January 5, 1866.

note was made of Senator Trumbull's statement that the bill should "break down all discrimination between black men and white men."[36] In light of the historical intent, the Court held that the Act, enacted under the authority of the thirteenth amendment, "was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law . . . ."[37] In dramatically concluding the Court's decision in *Jones*, Justice Stewart admonished: "If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep."[38]

The Logic of the Thirteenth Amendment Expanded

If *Jones v. Alfred H. Mayer Co.* has, in fact, breathed life into the thirteenth amendment and Section 1982 by providing blacks with a direct cause of action against private housing discrimination, then attention must be directed to Section 1981 which relates to contractual rights and which was enacted concurrently with Section 1982. Impliedly, such contractual rights include employment contracts (or rights to employment contracts). This issue has been brought to and continues to face the courts.[39] In a race relations survey it was found that, since 1968, the courts have considered the *Jones* rationale in a number of employment discrimination cases.[40]

In a case of first impression, the Southern District of Ohio held in 1968 that "membership in and/or a referral status in a union is a contractual relationship and/or a link in the chain of making a contract" and, accordingly, Section 1981 was applicable to a discriminatory employment situation.[41] Another decision, considering discriminatory employment practices, traced the history of Section 1981, acknowledging that both Sections 1981 and 1982 originated as part of Section one of the Civil Rights Act of 1866, and found, "It follows inescapably, therefore, that if 42 U.S.C. 1982 covers private discrimination in housing, 42 U.S.C. 1981 covers private discrimination in making and enforcing employment contracts."[42]

To expand the meaning of Section 1981, other courts have considered its significance, although not necessarily in employment situations.[43] In a case involving Section 1981, where the "security of prop-

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[36] CONG. GLOBE, 39th Cong., 1st Sess., 599 [Emphasis added].
[37] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1963).
[38] *Id.*, at 443.
[39] Dobbins v. Local 212, Electrical Workers, 292 F. Supp. 413 (S.D. Ohio 1968): Clark v. American Marine Corp., 304 F. Supp. 603 (E.D. La. 1969); Waters v. Wisconsin Steel Workers of International Harvester Co., 427 F.2d 476, 484, 485 (7th Cir. 1970); Sanders v. Dobbs Houses, Inc. 439 F.2d 1097 (5th Cir. 1970).
[40] 2 RACE REL. L. SURV. 230, 234, *et seq.* (1971).
[41] Local 313, Electrical Workers v. United States, 292 F. Supp. 413, 443 (S.D. Ohio 1968).
[42] Clark v. American Marine Corp., 304 F. Supp. 603, 610 (E.D. La. 1969).
[43] United States v. Medical Soc. of S.C., 298 F. Supp. 145 at 152 (D.S.C. 1969): Wash. v. Baugh Constr. Co., 313 F. Supp. 598 (W.D. Wash. 1969); Robertson v. Great Am. Ins. Co. of N.Y., 48 F.R.D. 404 at 418, 419 (N.D. Ga. 1969).

erty" was being interfered with,[44] the Court held "the holding and logic of [the *Jones*] case should be applied to the other sections of the Civil Rights Act enacted at the same time. The history and purposes of these sections are so similar that any distinction would be artificial."[45]

It has been suggested that, as with the concept of due process under the fourteenth amendment, the concept of slavery under the thirteenth amendment can be expanded through judicial interpretation.[46] In *Jones*, "badges of slavery" was used in the Court's discussion of "freedom," a term substantially more elastic than slavery. Justice Douglas' concurring opinion reflected the need to expand the meaning of slavery because the existent legislation which had been enacted decades ago, was ineffective against the actual denial of opportunity for minorities.

In the classic, *An American Dilemma,* Gunnar Myrdal pointed out that legislative emancipation came about in this country for the black man without provision for the tools by which he might take advantage of his new freedom. Accordingly, his emancipation was relatively meaningless.[47] Justice Douglas frankly reviewed the obstacles faced by minorities in his observations that discrimination, per se, was a badge of servitude.[48] Although specifically concluding that Section 1982 provided the means of relief in housing discrimination situations, he did note that Section one of the 1866 Act, which included Section 1981, served "to enforce the Thirteenth Amendment."[49]

If we can validly expand the meaning of slavery in the context of societal needs, do we not find other groups being denied equal opportunity because of religion, national origin, ancestry, and sex? Knowing the thrust of the original congressional intent and judicial interpretation, can the thirteenth amendment be applied to discriminatory activity on these other bases? An *amicus curiae* brief, filed by the federal Equal Employment Opportunities Commission, contended that 42 U.S.C. Section 1981 is applicable to discrimination based on sex as well as discrimination based on race.[50] The argument focused primarily on the contention that status of women in America satisfy the "indicia of slavery," as defined in the *Jones* decision.[51]

It has been further argued that remedies under Title VII of the 1964 Civil Rights Act make it unnecessary for the courts to consider

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[44] Gannon v. ACTION, 303 F. Supp. 1240 (E.D. Mo. 1969).
[45] *Id.*
[46] Note, *supra* note 23, at 1301. It should be noted, however, that "slavery" is fairly explicit in its denotation as compared to the vague and ambiguous principle of "due process of law."
[47] G. MYRDAL, AN AMERICAN DILEMMA 224, 229 (1944).
[48] 392 U.S. 409 (1968).
[49] *Id.*
[50] Adams v. Pinellas Opportunity Council, —F. Supp.— (M.D. Fla. 1971).
[51] *Id.*

and grant individual relief through Section 1981.[52] By analogy, the Supreme Court specifically indicated in *Jones* that a comprehensive open housing law (Title VIII of the 1968 Civil Rights Act) did exist, but it did not prohibit petitioner from exercising his rights under Section 1982, as intended by Congress. Thus, based on *Jones*, there is no firm grounds for dismissal of a Section 1981 action on the argument of administrative remedy. Even with substantial avenues of redress,[53] *Jones* would seem to hold that the legislative intent of Section 1981 would be to provide a direct remedy for discrimatory violations of contractual rights.

There is truth to the contention that thirteenth amendment prohibitions "actually [have] little direct bearing on the specific legal responses to the subtle, multifaceted and variant problems of employment discrimiation."[54] Yet, enforcement of civil rights through the thirteenth amendment may be the turning point in our legal system whereby direct accessible relief from discrimination may be obtained. By so doing, compliance with the directive, mandated by Congress over a century ago in removing the badges and incidents of slavery in America, may finally be realized.

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[52] Evans v. Local 2127, Electrical Workers, 303 F. Supp. 1359 (N.D. Ga. 1969).

[53] *See* R. Olson, *Employment Discrimination Litigation: New Priorities in the Struggle for Black Equality*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 20 (1970).

[54] S. ROSEN, EMPLOYMENT, RACE AND POVERTY 483 (1967).