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suspect, and fairly rigorous safeguards must be met in order to justify it.

The lack of consistency among the Circuits in dealing with the question of employer interrogation suggests the need for a definitive ruling from the Supreme Court. Such a ruling should reject both the first and third approaches mentioned above. The *per se* doctrine is too inflexible and would not seem to be required by the Act. On the other hand, the third approach does not sufficiently appreciate the great danger inherent in employer interrogation and lacks specific guidelines by which conduct can be tested. The most reasonable view is to recognize that interrogation can sometimes be useful and harmless, but that it can very easily lend itself to abuse. Thus, any definitive ruling should lay down the requirements to be met in order to justify such interrogation. Some of the cases discussed above suggest several which should certainly be included; the purpose must be legitimate (and the legitimate purposes should be spelled out); there should be no background of employer hostility toward the union; the employee should be apprised of the purpose of the inquiry and assured against reprisal; the interrogation must not be coercive by its nature (to be considered here are the identity of the interrogator and the place and method of interrogation); and, finally, the interrogation must be confined to the necessities of the legitimate purpose.

Philip R. Riegel, Jr.

OPEN HOUSING—1866 CIVIL RIGHTS ACT—1968 CIVIL RIGHTS ACT—THIRTEENTH AMENDMENT

In *Jones v. Alfred H. Mayer Co.*¹ petitioner alleged that respondents refused to sell petitioner a home for the sole reason that he was Negro, and prayed for an injunction under 42 U.S.C. Section 1982. The United States District Court denied relief,² and the Court of Appeals for the Eighth Circuit affirmed.³ The Supreme Court granted certiorari and reversed on the ground that Section 1 of the Civil Rights Act of 1866, now 42 U.S.C. Section 1982, was intended to reach private acts of discrimination and that the act was constitutional under the thirteenth amendment. This Note offers a comparison of the Civil Rights Act of 1866

1. 892 U.S. 409 (1968).

2. *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115 (E.D. Mo. 1966).

3. *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33 (8th Cir. 1967).

as interpreted in *Jones v. Mayer* with the Civil Rights Act of 1968, and a consideration of the decision and its effect on the traditional interpretation of the Thirteenth Amendment.

The 1968 Act

The Fair Housing Title of the Civil Rights Act of 1968⁴ prohibits discrimination on basis of race, color, religion, or national origin in the sale and rental of housing,⁵ in the provision of facilities connected with the sale or rental of housing,⁶ in the financing of housing,⁷ and in the provision of brokerage services.⁸ It further prohibits advertisements which indicate a preference on the basis of race, color, religion, or national origin.⁹ Until December 31, 1968, its prohibitions apply only to federally owned dwellings or dwellings built with the assistance of federal grants or loans.¹⁰ After that date all dwellings other than those sold or rented by those defined in the act to be bona fide individual owners will fall within the scope of the statute. After December 31, 1969 even this latter type will be covered if a broker or agent is used or if the advertising indicates a discriminatory preference.¹¹ Religious organizations and private clubs may limit sale or rental of housing to their own members.¹²

An aggrieved party may either sue in his own name for injunction and damages, including punitive damages up to \$1,000, or he may call upon the Secretary of Housing and Urban Development for assistance.¹³ The Secretary is authorized to investigate the complaint and attempt to resolve the problem by informal methods. Should the efforts of the Secretary be unsuccessful the aggrieved party still may bring a civil action in his own name.¹⁴ In cases where there is apparently a pattern of resistance to the provisions of the act or there is an issue of general public importance the Attorney General may intervene by filing suit.¹⁵

4. Pub. L. 90-284, tit. VIII (April 11, 1968), 82 Stat. 73 (1968 CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 706 (May 5, 1968)), hereinafter referred to as the FAIR HOUSING TITLE OF THE 1968 ACT.

5. *Id.* § 804 (a).

6. *Id.* § 804 (b).

7. *Id.* § 805.

8. *Id.* § 806.

9. *Id.* § 804 (c).

10. *Id.* § 803 (a).

11. *Id.* § 803 (b).

12. *Id.* § 807.

13. *Id.* §§ 810, 812.

14. *Id.* § 810 (d).

15. *Id.* § 813.

The 1866 Act Compared

In contrast to the detailed provisions of the 1968 Act, 42 U.S.C. Section 1982 provides simply, "All citizens of the United States shall have the same right, in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." The most important distinction between the 1968 Act and the 1866 Act is that under *Jones*¹⁶ the latter prohibits private discrimination in any sale or lease while the 1968 Act carefully exempts individual owners from its provisions provided they do not use brokers or advertising which indicates a discriminatory preference.¹⁷ The 1866 Civil Rights Act has a much more limited scope of application than the new Fair Housing Title, for as the Court in *Jones v. Mayer* says:

"The statute in this case [42 U.S.C. § 1982] deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin. It does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling. It does not prohibit advertising or other representations that indicate discriminatory preferences. It does not refer explicitly to discrimination in financing arrangements or in the provision of brokerage services. It does not empower a federal administrative agency to assist aggrieved parties. It makes no provisions for the intervention of the Attorney General. And, although it can be enforced by injunction, it contains no provisions expressly authorizing a federal court to order the payment of damages."¹⁸

The Court is apparently unwilling to apply Section 1982 to any situation other than racial discrimination directly related to the sale or lease of property. Of course, whether the 1866 Act reaches brokerage and financing services or discrimination other than on account of race will be of no importance after December 31, 1969, when the 1968 Act obtains its full coverage.¹⁹

As the above quotation indicates, an award of damages is not expressly provided for in the 1866 Act. However, in a footnote the Court states that there is good precedent for an award of damages even where not expressly authorized by a statute

16. 392 U.S. 409, 413 (1968).

17. FAIR HOUSING TITLE OF THE 1968 ACT § 803(b)(1).

18. 392 U.S. 409, 413-14 (1968).

19. FAIR HOUSING TITLE OF THE 1968 ACT § 803.

and that damages possibly could be awarded in the proper circumstances under Section 1982.²⁰ But even though damages may be awarded in a proper case, Section 1982 can be enforced only by the aggrieved party bringing suit in federal court. Such a remedy is anemic compared to the vigorous enforcement provisions of the 1968 Act. Clearly the wisest course in most cases would be to apply to the Secretary of HUD for assistance under the Civil Rights Act of 1968. However, the 1968 Act applies only to real property while Section 1982 applies to real or personal property,²¹ and it may be that Section 1982 will find its greatest application in cases involving personal property.

The Opinion and Dissent

Much of the *Jones v. Mayer* decision is devoted to showing that Congress in 1866 did intend to reach private acts of discrimination by the passage of the Civil Rights Act. Justice Harlan's dissent on this point is much more convincing than is Justice Stewart's opinion for the majority. At the outset the majority found that there was no case squarely holding that Section 1982 or its predecessors were not intended to reach private discrimination;²² thus the Court was not bound by the *Civil Rights Cases*,²³ *Corrigan v. Buckley*,²⁴ or *Hurd v. Hodge*,²⁵ all of which strongly indicate Section 1982 was not intended to reach private acts of discrimination.²⁶ As a prelude to its consideration of the legislative history, the Court declared that Section 1982 appeared on its face "to prohibit all discrimination against Negroes in the sale or rental of property."²⁷ However, as the dissent pointed out, "there is an inherent ambiguity in the term 'right' as used in § 1982."²⁸ It may mean either "a right to equal status under the law . . . or . . . an 'absolute' right enforceable against private individuals."²⁹ Justice Harlan believed that the statute on its face suggests the former interpretation;³⁰ it does not, at least, demand the latter.

20. 392 U.S. 409, 414 n.14 (1968).

21. Compare 42 U.S.C. § 1982 (1964) to the FAIR HOUSING TITLE OF THE 1968 Act.

22. 293 U.S. 408, 417-20 (1968).

23. 109 U.S. 3 (1883).

24. 271 U.S. 323 (1926).

25. 334 U.S. 24 (1948).

26. Cf. the dissenting opinion in *Jones*, 392 U.S. 409, 450-52 (1968).

27. 392 U.S. 409, 421 (1968).

28. *Id.* at 452-53.

29. *Id.* at 453.

30. *Id.* at 454.

The Court next referred to the original wording of the Civil Rights Act of 1866:

"[Section 1] . . . [A]ll persons born in the United States . . . are hereby declared to be citizens of the United States: and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime shall have the same right, in every State and Territory to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

"[Section 2] . . . [A]ny person who under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as punishment for crime . . . or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor. . . ." ³¹

Since the act reaches custom³² as well as laws, statutes, ordinances, and regulations the Court felt that Congress must have intended to secure the rights guaranteed by the statute "against interference from any source whatever, whether governmental or private."³³ Stewart continued, "Indeed, if § 1 had been intended to grant nothing more than an immunity from governmental interference, then much of § 2 would have made no sense at all."³⁴ But surely, as the dissent pointed out, the original form of the Act indicates even more strongly than Section 1982,

31. Act of April 9, 1866, ch. 31, §§ 1, 2, 14 Stat. 27, reenacted by § 18 of the Enforcement Act of 1870, Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140, 144.

32. 392 U.S. 409, 423 (1968): "To the Congress that passed the Civil Rights Act of 1866, it was clear the right . . . might be infringed not only by 'state or local law' but also by 'custom, or prejudice.'" In a footnote, *id.* at 423 n.30, Justice Stewart explained that the words "state or local law" and "custom or prejudice" were found in a bill passed several weeks before the House began debate on the Civil Rights Act of 1866. The bill was designed to enlarge the power of the Freedmen's Bureau but was vetoed by the president.

33. *Id.* at 424.

34. *Id.*

which does not contain the words "law, statute, ordinance, regulation or custom," that Congress intended the act to apply *only* to action under state or community authority.³⁵ Furthermore, the language of Section 2 "no more implies that § 2 was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed,' . . . than it does that § 2 was carefully drafted to enforce all of the rights secured by § 1."³⁶

The Court believed the congressional debates also established that Congress intended the 1866 Act to reach private acts of discrimination. The dissent urged most persuasively that Congress did not so intend and succeeded at least in casting substantial doubt on the majority's analysis of the legislative history. For instance, the Court gave much weight to comments made by Senator Trumbull of Illinois, the author of the 1866 Act, which may be read to show that Trumbull did intend the bill to reach private discrimination.³⁷ However, the dissent presented three clear statements by the Senator that the law would have effect *only* in the states which had discriminatory laws.³⁸ It is difficult to believe in view of these statements that Trumbull intended his bill to extend to private action. However, the Court also believed that the civil sanctions of the Act, Section 1, were to have broader application than the criminal sanctions in Section 2.³⁹ If this were the case then Trumbull's statements

35. *Id.* at 454.

36. *Id.*

37. In one passage the opinion quotes Senator Trumbull's comments on a bill introduced by Wilson of Massachusetts to strike down all racially discriminatory laws in the South. *Id.* at 430: "I hold under that second section . . . Congress will have the authority . . . *not only to pass the bill of the Senator from Massachusetts, but a bill that will be much more efficient to protect the freedman in his rights.* And . . . when the . . . amendment [the thirteenth] shall have been adopted, if the information . . . be that the men . . . are deprived of the privilege . . . *to buy and sell when they please . . . I shall introduce a bill . . . that will secure those men every one of these rights. . . It is idle to say a man is free . . . who cannot buy and sell, who cannot enforce his rights.*" The bill Trumbull introduced was eventually the Civil Rights Act of 1866. Compare the statements made by Trumbull after his bill had been introduced, note 38 *infra*.

38. *Id.* at 459-60: "On January 20, Senator Trumbull . . . uttered the first of several remarkably similar and wholly unambiguous statements which indicated that the bill was aimed only at 'state action.' He said: '*It [Trumbull's bill] will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished.*'"

"Senator Trumbull several times reiterated this view. On February 2, replying to Senator Davis of Kentucky, he said, . . . *if the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatever in the State of Kentucky.*

"On April 4 . . . he said: '*It [Trumbull's bill] could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union.*'"

39. *Id.* at 424-25.

would not be irreconcilable with the Court's conclusion. But Harlan demonstrated that one of the passages relied on in support of the Court's position was quoted clearly out of context and did not mean, as the Court claimed, that Congressman Wilson of Iowa, the floor manager of the bill, believed Section 1 had a broader application than Section 2.⁴⁰ Finally, the dissent made the common sense point that against the background of mid-Nineteenth Century America, where racial discrimination was commonplace, it is incredible to believe Congress would act to prevent private discrimination.⁴¹

Constitutionality of the 1866 Act

The thirteenth amendment is not on its face restricted to state action⁴² as is the fourteenth amendment, and it seems never to have been seriously doubted that Congress could reach

40. *Id.* at 425 n.33, where the majority opinion stated: "When Congressman Loan asked... Mr. Wilson of Iowa 'why the committee limit the provisions of the second section to those who act under color of law,'... he was obviously inquiring why the second section did not also punish those who violated the first *without* acting 'under color of law.' Specifically he asked:

"Why not let them the penalties of § 2 apply to the whole community where the acts are committed?" Mr. Wilson's reply was particularly revealing. 'If... he had viewed acts not under color of law as not violative of § 1 at all, that would have been a short answer to the Congressman's query. Instead, Mr. Wilson found it necessary to explain that the Judiciary Committee did not want to make 'a general criminal code for the States.' Hence only those who discriminated 'in reference to civil rights... under color of... local laws' were made subject to the criminal sanctions of § 2.'"

The dissent, *id.* at 469, quotes the full exchange between the Congressmen and it becomes apparent at once that Wilson did not believe § 1 had any broader application than § 2:

"Mr. LOAN... Why does the committee limit the provisions of the second section to persons who act under the color of law. Why not let them apply to the whole community where the acts are committed?"

"Mr. WILSON, of Iowa. That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment.

"Mr. WILSON, of Iowa. We are not making a general criminal code for the States.

"Mr. LOAN... Why not abrogate those laws instead of inflicting penalties upon officers who execute writs under them?"

"Mr. WILSON, of Iowa. A law without a sanction is of very little force.

"Mr. LOAN. Then why not put it in the bill directly?"

"Mr. WILSON, of Iowa. That is what we are trying to do."

41. *Id.* at 475: "... In this historical context I cannot conceive that... purely private discrimination not only in the sale or rental of housing but in *all* property transactions would not have received a great deal of criticism explicitly for this feature. The fact that the 1866 Act received no criticism of this kind is for me strong additional evidence that it was not regarded as extending so far."

42. U.S. CONST. amend. XIII: "Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

private action under the thirteenth.⁴³ The question of constitutionality of the 1866 Act, as in other thirteenth amendment cases, turned not on state action but upon whether Congress had legislated against activities which imposed badges and incidents of slavery. On this point the *Jones* opinion said:

“Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one.”⁴⁴

Clearly, the Court considered the determination of what are badges and incidents of slavery to be primarily a congressional function and would not overturn legislation under the thirteenth amendment unless that determination was irrational. On the other hand, the *Civil Rights Cases*⁴⁵ recognized that Congress had the power to legislate against the badges and incidents of slavery in support of the thirteenth amendment, but held that mere discriminations in the enjoyment of accommodations, which the Civil Rights Act of 1875 made illegal, were not badges of slavery. Thus it was essentially the Court, not Congress, that determined what constituted badges and incidents of slavery. Subsequent cases have also considered that determination to be primarily a judicial function.⁴⁶ It should be obvious that Congress has now been given much more power to act under the thirteenth than it had prior to *Jones v. Mayer*. Yet, far from overruling the earlier cases, the *Jones* decision approved language used in the *Civil Rights Cases* concerning the power of Congress under the thirteenth amendment.⁴⁷ Arguably, there was no need to distinguish the earlier cases from *Jones* because much of the rubric used to define the powers of Congress lends itself to liberal interpretations. In this respect *Jones v. Mayer* is similar to *Katzenbach v. Morgan*,⁴⁸ a case decided under the fourteenth amendment which in fact broadened congressional

43. *Clyatt v. United States*, 197 U.S. 207 (1904); *Civil Rights Cases*, 109 U.S. 3 (1883).

44. 392 U.S. 409, 440-41 (1968).

45. 109 U.S. 3 (1883).

46. *Taylor v. Georgia*, 315 U.S. 25 (1941); *Hodges v. United States*, 203 U.S. 1 (1905); *Clyatt v. United States*, 197 U.S. 207 (1904). *Cf. Plessy v. Ferguson*, 163 U.S. 537 (1895).

47. 392 U.S. 409, 438-42 (1968). The Court did expressly overrule *Hodges v. United States*, 203 U.S. 1 (1905), on the ground that the view expressed therein as to the power of Congress under the thirteenth amendment was incompatible with the other cases. In fact, it seems the result of *Hodges*, not the approach, is what the Court objects to. *Id.* at 442-43, n.78.

48. 384 U.S. 641 (1965).

power under the fourteenth while retaining the earlier formulations of congressional power.

Prior to *Katzenbach v. Morgan* Congress had been limited to legislating against state action that denied to citizens the rights guaranteed by the fourteenth amendment.⁴⁹ The Court in *Morgan* held invalid a New York statute requiring English literacy as a voting requirement on the ground that the requirement conflicted with Section 4(e) of the 1965 Voting Rights Act, although the literacy requirement as applied *did not violate* the fourteenth amendment. Thus, Congress may now decide for itself what legislation is appropriate under the fourteenth amendment provided it does not reach individual action.⁵⁰ The test of constitutionality cited by the Court in *Morgan* was the well-known formulation of Chief Justice Marshall in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional."⁵¹ However, there is no reason to believe that the Court has reserved to itself a greater function in the fourteenth amendment cases after *Morgan* than in the thirteenth amendment cases after *Jones*. Therefore, as applied to the Reconstruction Amendments, the earlier Marshall formulation and the rational connection formulation in *Jones* most probably have the same meaning.⁵²

Conclusion

By basing the *Jones* decision on the thirteenth amendment the Court may have augmented the power of Congress to enact civil rights legislation. However, it is difficult to imagine what may now be done under the thirteenth amendment that could not as effectively be done under the commerce clause and the equal protection clause of the fourteenth amendment. Nonetheless, Congress may now enact civil rights laws without having

49. *Screws v. United States*, 325 U.S. 91 (1944); *Strauder v. West Virginia*, 100 U.S. 303 (1879); *United States v. Cruikshank*, 92 U.S. 555 (1875).

50. Even this requirement may soon fall as six members of the Court indicated in the *United States v. Guest*, 383 U.S. 745 (1966), that Congress could reach private action under the fourteenth amendment. However, the case was decided on different grounds. *Id.* at 762, 781.

51. *Katzenbach v. Morgan*, 383 U.S. 641, 650 (1965), quoting from *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

52. This is certainly true of the thirteenth amendment because the Court, in addition to its rational connection test, agreed that the 1866 act met the requirements of the Marshall formulation. 392 U.S. 409, 443-44 (1968).

to design legislation around the commerce clause.⁵³ Surely it is more forthright to base civil rights legislation on the reconstruction amendments which, after all, were designed to protect human rights than it is to base such acts on the commerce clause.

J. Brooks Greer, III

TORTS—STATUTORY VIOLATIONS AND NEGLIGENCE PER SE

Defendant motorist Guidry, after passing defendant McFarlain's car while approaching an intersection, stopped on the wrong side of the two lane highway. As a result defendant McFarlain's view to the left was obscured so that she failed to see plaintiff motorcyclist approaching on the intersecting street. She ventured into the intersection and collided with plaintiff. The trial court entered judgment against both defendants. On appeal the judgment was upheld against Mrs. McFarlain but reversed as to Mr. Guidry, the court stating that as between the two defendants Guidry's negligence was passive and not the moving cause of the accident. *Monger v. McFarlain*, 204 So.2d 86 (La. App. 3d Cir. 1967).

Defendant Guidry violated two provisions of the Highway Regulatory Act. He passed another car at an intersection and drove on the left side of the road.¹ Violation of a criminal statute, although characterized as negligence per se, will not usually occasion civil liability unless it is deemed to be the "proximate cause" of some resultant injury.² In determining proximate cause in cases of statutory violation it must be found that the injury which in fact occurred was within the range of risks from which the legislature intended to afford protection.³

53. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), which upheld the Civil Rights Act of 1964 on the basis of the commerce clause. See also *Katzenbach v. McClung*, 379 U.S. 294 (1964).

1. LA. R.S. 32:75 (1950): "No vehicle shall be driven to the left of the center of the highway."

Id. 32:76 provides in part: "No vehicle shall at any time be driven to the left side of the highway under the following conditions:

"(2) When approaching within one hundred feet of or traversing any intersection or railroad track . . ."

2. *Theunissen v. Guidry*, 244 La. 631, 153 So.2d 869 (1963); *Cavalier v. Peerless Ins. Co.*, 156 So.2d 105 (La. App. 1st Cir. 1963); *Moses v. Mosley*, 146 So.2d 263 (La. App. 3d Cir. 1962).

3. *Dartez v. City of Sulphur*, 179 So.2d 482 (La. App. 3d Cir. 1965); *Moses v. Mosley*, 146 So.2d 263 (La. App. 3d Cir. 1962); Comment, 16 LA. L. REV. 391, 395 (1956).