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# Jones v. Alfred H. Mayer Co.:

## An Historic Step Forward

Arthur Kinoy\*

The historic decision last June by the Supreme Court in *Jones v. Alfred H. Mayer Co.*,<sup>1</sup> reasserting for the first time in almost 100 years the constitutional mandate in the thirteenth amendment to abolish the badges and indicia of human slavery from all aspects of American society,<sup>2</sup> has begun to meet with sharp criticism.<sup>3</sup> This is, of course, no surprise. One might expect outcries from quarters of the country in which the far less abrasive vocabulary of *Brown v. Board of Education*<sup>4</sup> still evokes memories of "Black Monday," "massive resistance" and "interposition."<sup>5</sup> What is perhaps more surprising is that the current attack on *Jones* emanates from the home territory of Wendell Phillips, William Lloyd Garrison and Charles Sumner.

It has recently been suggested in the *Harvard Law Review* that the Court in *Jones* was "carried away by opportunity and

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1. 392 U.S. 409 (1968). Mr. Justice Stewart wrote the opinion for the majority of the Court. Mr. Justice Douglas wrote a separate concurring opinion. *Id.* at 444. Mr. Justice Harlan wrote a dissenting opinion joined in by Mr. Justice White. *Id.* at 449.

2. *Id.* at 439. The opinion of the Court embraces the analysis of the sweep of the thirteenth amendment set forth in the *Civil Rights Cases*. There both the majority opinion of Justice Bradley and the dissenting opinion of the first Justice Harlan agreed that the Emancipation Amendment was not restricted to a narrow abolition of human slavery, but rather affirmatively embodied a broad "charter of liberty," which enacted "universal freedom" and abolished all "badges and incidents of slavery" as well as the institution of slavery itself. 109 U.S. 3, 20-26, 35-36, 43 (1883).

3. See Henkin, *The Supreme Court, 1967 Term, Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968).

4. 347 U.S. 483 (1954). The "vocabulary" of *Brown v. Board of Education* is grounded in the conceptual arena of "equal protection of the laws" and avoids any discussion of the inter-relationship of racial segregation to the remaining influences of the outlawed system of slavery. I have discussed elsewhere the serious problems which flowed from the failure of the original *Brown* opinions to articulate squarely the nature and genesis of the rights involved in striking down a system of racially segregated education. See Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967); cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445 (Douglas, J., concurring opinion): "Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. . . . They [Negroes] have been made to attend segregated and inferior schools . . . ."

5. See, for example, the "Southern Manifesto," signed by almost all of the then Congressmen from the Southern states. 102 CONG. REC. 3948 (1956).

temptation" to overreach its proper constitutional role by giving "the country statutes which no Congress ever enacted."<sup>6</sup> Moreover, in the traditional foreword to the *Harvard* summary of the work in the 1967 term, Professor Henkin goes on to characterize the constitutional restatement of the sweep of the thirteenth amendment as a "virtuoso performance," unnecessary and by clear implication unwise.<sup>7</sup> I disagree. I would suggest, as I have previously,<sup>8</sup> that it is impossible to overstate the potentially profound importance to the nation of this bold and courageous reaffirmation of historical realities and legal concepts which have lain buried for years under the conceptual rubble of the 1877 betrayal of the first Reconstruction.<sup>9</sup> In sharp contrast to the recent *Harvard* criticism, it would seem to me that in reminding the country that "by its own unaided force and effect the Thirteenth Amendment abolished slavery and established universal freedom" and in reaffirming congressional power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States," the Court, in the words of Mr. Justice Clark concurring in *Baker v. Carr*, was acting in its "greatest tradition."<sup>10</sup> And I would suggest further that when the Court in phrases of grim reality characterized the "herding" together of black men, women and children into the great urban ghettos of America as a "relic of slavery,"<sup>11</sup> it was reaching out to its ultimate and most important role as a teacher and keeper of the conscience of society. I would defend the proposition once advanced by Justice Brandeis that in the deepest sense judges cannot escape their responsibilities as teachers of men.

The frank recognition that the overwhelming problems of contemporary America in relation to its black citizens are related to the failure of our society for over 100 years to eliminate the pervading

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6. Henkin, *supra* note 3, at 83.

7. *Id.* at 87.

8. See Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company*, 22 RUTGERS L. REV. 537 (1968).

9. See generally Kinoy, *supra* note 4. In this article I have suggested that the Bradley majority opinion in the *Civil Rights Cases* in 1883 developed a legal theory predicted upon a concept of a "secondary" and "corrective" thrust of the fourteenth amendment which established a juridical rationale for the earlier 1877 political decisions to abandon primary national responsibility for the enforcement of the new rights granted to the race of freedmen. In respect to the national significance of the 1877 political decisions, see generally C. VANN WOODWARD, *REUNION AND REACTION* (1951). See also K. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877* (1965).

10. 369 U.S. 186, 262 (1962).

11. 392 U.S. at 442-43.

influences of a supposedly dead social institution—the system of slavery—can be of enormous importance in the difficult days ahead.

In its simplest terms the Supreme Court in *Jones* proclaimed an historical truth which no organ of responsible leadership—governmental, political, cultural or scientific—has been willing to acknowledge publicly for almost 100 years: that the structure of human slavery was never fully uprooted in this country and that America's black citizens continue to be oppressed by the remaining existence of the badges and indicia of the supposedly outlawed system. This profound understanding which the *Jones* case expressed—that the “herding” of black men, women and children into the great urban ghettos is a “relic of slavery”<sup>12</sup> and thus prohibited by the commands of the thirteenth amendment—has enormous constitutional implications for the future of American society. If the fundamental problems of the black ghettos are in truth “relics” of the slave system, they are subject to the full and plenary power of the national government. The thirteenth amendment, as the Court reminded the nation last June, “by its own unaided force and effect . . . abolished slavery, and established universal freedom.”<sup>13</sup> This new national right of freedom for the black man and his children was no narrow manumission from bondage. It was a charter of “universal freedom” which carried with it the right of the race of freedmen to be henceforth free from the stamp of inferiority imposed by the “badges and indicia” of the institution of human slavery. Accordingly, as the Court carefully pointed out, the Congress has the full power “to pass all laws necessary and proper for abolishing all badges and indicia of slavery in the United States.”<sup>14</sup> If

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12. *Id.*

13. *Id.* at 439; *cf.* Civil Rights Cases, 109 U.S. 3, 20 (1883).

14. 392 U.S. at 439. In *Jones* the Court reasserted the conclusions of the congressional enactors that “Congress has the power under the Thirteenth Amendment rationally to decide what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.” *Id.* at 440. The further question, as to whether the amendment reaches beyond constitutional authorization for *legislative* action, the Court specifically reserved for another day. Mr. Justice Stewart carefully limited the holding of *Jones* to the precise question of constitutional authorization for congressional action to eliminate the badges and indicia of slavery, pointing out that “whether or not the Amendment *itself* did any more . . . [is] a question not involved in this case.” *Id.* at 439. I have suggested elsewhere that this question, left open in *Jones*, as to whether the amendment is “self-executing”—as the Bradley opinion in the Civil Rights Cases, 109 U.S. 3, 20 (1883), would clearly imply—is critically important to an unfolding of both a judicial and executive role in the future enforcement of the now reasserted mandate of the amendment to root out the vestiges of slavery from all areas of American life. See generally Kinoy, *supra* note 8. In *Jones* the Court finds its precedential authority for its reading of the thirteenth amendment in the Civil Rights Cases, 109 U.S. 3 (1883). Both the

discrimination in housing is, as the Court so characterized it, a "relic of slavery" and if it perpetrates the "badge" of inferiority, which was the hallmark of the slavery system, then every branch of government has the power and indeed the duty to eradicate it from all areas of national life.

Ever since the turning point opinions of the Supreme Court in the 1883 *Civil Rights Cases*, which marked the emergence of a legal rationale for justifying the political decisions of 1877 abandoning the promises of Radical Reconstruction and withdrawing national protection for the newly emancipated race,<sup>15</sup> the Court has avoided discussing the problems of black citizens in terms of the continuing impact of the slave system. This has created enormous conceptual problems as the Court has struggled in recent years to redefine the frontiers of constitutional power in this most critical of areas.<sup>16</sup> But this reluctance to acknowledge the historical roots of these contemporary problems lies deep in our national heritage. In a certain sense, all American society has acted out a charade for over 100 years. Neither the governing institutions nor the majority of the white population of the country has been willing to face the incredible reality of American history: the unspoken truth that a nation with such high pretensions to world leadership in science, in culture, and in democratic government could have tolerated for so long in every section of the country and in every aspect of its national existence, customs, practices, and a way of life inherited from a system of social organization long condemned by the entire civilized world. Yet this was and is the harsh and naked fact which conditions so much of contemporary American society. But this central historical fact—that the social system of slavery was never fully uprooted and that its badges and indicia continue to mark the black man with the hallmark of slavery, the stamp of an "inferior race"<sup>17</sup>—has been buried deep in our national consciousness. It is an unpleasant and upsetting fact, one which is easier submerged than recognized, easier ignored than acknowledged. For almost a century in every area of national existence—political, social, cultural, and even the historical sciences—we have chosen to act blandly as if the abrasive truth was nonexistent.

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majority and dissenting opinions in that case were in agreement that the thirteenth amendment "is undoubtedly self-executing without any ancillary legislation." 109 U.S. at 20.

15. See note 9 *supra*.

16. See, e.g., the discussion of the evolution and development of the "state action" concept in Kinoy, *supra* note 4, at 414.

17. *Id.* at 410-14.

Accordingly it is impossible, I would suggest, to overstate the potentially profound importance of this first formal recognition by the Court that the most pressing domestic problems today, erupting from the cauldrons which are our urban and rural ghettos, are "relics" of the slave system and the results of the continued existence of "badges and indicia" of the supposedly banned way of life. The Court for the first time since Reconstruction has brushed aside the camouflage rhetoric accumulated over the past decades and bluntly has characterized "the racial discrimination . . . [which] herds men into ghettos" as a "relic of slavery." The potential significance of this formulation lies even beyond the enormous legal and constitutional implications which flow from this recognition of historical reality. The profound understanding reflected in the *Jones* decision—that the vast disturbing problems which are erupting from the black ghettos of America, urban and rural, are a direct consequence of white America's failure to uproot the vestiges and remains of the barbaric system of human slavery—places these questions in the only perspective which will allow of their solution short of an expanding series of catastrophes and cataclysms which could well destroy the nation.<sup>18</sup>

This understanding that the gigantic problems of black poverty, discrimination and second-class citizenship flow directly from the failure to enforce and to implement the national commitment, 100 years old, to abolish the slave system creates a context for examining these questions which once and for all settles all issues of priority. There can be no debate, no "weighing and balancing" of competing values, no counterposing of national projects of exploration of space or asserted overseas commitments when the issue is the nation's survival. And this *is* the issue when questions involve the century-old obligation to burn out from the land all remnants of the system of human slavery. The ultimate value judgment that the nation cannot survive half-slave and half-free was not made in these last years in the smoky days of Watts, Newark, Detroit and Washington. It was made 100 years ago and embedded in the fundamental law of the land. Thus the frank recognition by the Court that the fundamental problem of the herding together of black men, women and children into the great ghettos of America is a remnant of the supposedly outlawed system of human slavery can illuminate every facet of the complex questions

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18. See generally REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

which so trouble the country. The elimination of the inferior status which characterizes the black citizen's position in housing, employment, education and the administration of justice, within such a context, can only be viewed as a national crisis question requiring the highest priority and total commitment of every national resource. In this sense the pronouncements of the Court in the *Jones* opinion sweep far beyond the important legal and constitutional doctrines they augur. In response to what is perhaps the most fundamental role of the Court in our system of government—to be the ultimate teacher and reminder of those first axioms without adherence to which a democratic society cannot survive—the Court has sharply placed the most pressing problems of contemporary American society into a framework which can compel immediate national concern and national action.

This forthright reaffirmation by the Court of the national commitment to eradicate all vestiges of the system of slavery, its badges and indicia, from American life occurs at a particular critical moment in our history. The pressures which led in 1877 to a wholesale abandonment of the solemn promises, made only a decade earlier, of equality and freedom for the emancipated race are once again gathering to impose a potential new "1877" upon the nation. From every quarter pressures are now mounting to force the national government to retreat from the position of affirmative responsibility for the enforcement of the rights of black citizens, which had slowly reemerged in the period of black upsurge and national rethinking stimulated by the seminal decision in 1954 of *Brown v. Board of Education*. A concerted effort is now underway to shift emphasis away from federal enforcement in the area of equality in education<sup>19</sup> and employment.<sup>20</sup> A year after the

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19. The efforts to undermine an effective federal role in enforcing desegregation of educational facilities centers around attempts to minimize or eliminate implementation of Title VI of the Civil Rights Act of 1964, which empowers federal agencies to withhold funds from school districts which fail to comply with desegregation standards. The utilization of federal power under Title VI to enforce Health, Education and Welfare Department "guidelines," *cf.* *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967), has come increasingly under attack from congressional sources. *See, e.g.*, *N.Y. Times*, Jan. 30, 1969, at 16, col. 1: "Senator Strom Thurmond, Republican of South Carolina, has been particularly active since the election in trying to thwart federal fund cut-offs from threatened districts." There have been recent indications that the executive branch is reconsidering the entire approach to an affirmative federal sanction role, such as the warnings of the outgoing Attorney-General as to the impact of any lessening of federal enforcement of HEW guidelines. *New York Times*, Jan. 7, 1969, at 1, col. 6. *See also* 115 CONG. REC. S1162 (daily ed. Jan. 31, 1969); 115 CONG. REC. S1169 (daily ed. Jan. 31, 1969) (statement by

National Advisory Commission on Civil Disorders reported a critical division of urban society into "separate and unequal" communities and proposed a massive program of national effort to avert an impending disaster,<sup>21</sup> an equally eminent Commission has only recently reported that no substantial efforts have been undertaken on a national scale to meet this crisis and that the situation has, if anything, deteriorated sharply.<sup>22</sup>

It is at such a turning-point moment that the constitutional concepts boldly enunciated in *Jones* assume critical importance. Underlying the historic reassertion of the profound commitments contained in the "charter of universal freedom" enacted in the thirteenth amendment is a renewed recognition that the constitutional right of black freedom is a nationally created right. As I have earlier suggested,<sup>23</sup> the constitutional implications which flow from such a recognition are sweeping in their implications for contemporary America. The national commitment to guarantee that the children of the freedmen be raised from the slavery-imposed status of "inferior" beings, so candidly described in *Dred Scott v. Sandford*,<sup>24</sup> to the status of free and equal participants in the hitherto white "political community" which constitutes the "people of the United States"<sup>25</sup> imposes an affirmative duty upon all governments, state and national, to enforce this "charter of universal freedom."<sup>26</sup> Upon each coordinate branch of the national government—legislative, executive and judicial—rests a primary affirmative responsibility, under the first principles of federalism, to protect and implement the nationally

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Secretary Finch, Department of Health, Education and Welfare); McGill, *Listen Please*, Sec. Finch, Atlanta Constitution, Feb. 4, 1969, at 1, col. 1.

20. Federal enforcement efforts in the field of discrimination against employment have also been increasingly under sharp attack. See, for example, the three-part series of articles in Barron's National Business and Financial Weekly, Dec. 23, 1968, Jan. 20, 1969 and Feb. 24, 1969, setting forth in great detail the mounting criticism of federal enforcement efforts in this area by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance.

21. Note 18 *supra*.

22. See URBAN COALITION AND URBAN AMERICA, INC., ONE YEAR LATER (1969). The report concluded inter alia: "If the commission is equally correct about the long run, the nation in its neglect may be sowing the seeds of unprecedented future disorder and division. For a year later, we are a year closer to being two societies, black and white, increasingly separate and scarcely less unequal."

23. See Kinoy, *supra* note 4.

24. 60 U.S. (19 How.) 393 (1857).

25. *Id.* at 404-05.

26. Civil Rights Cases, 109 U.S. 3, 20 (1883).



created right of black freedom.<sup>27</sup> Since *McCulloch v. Maryland*<sup>28</sup> it is beyond question that the Congress has both the power and the obligation to take all "appropriate" steps to enforce the right of black men and women granted by the "charter of universal freedom" to be free from the stigma of inferiority in all areas of life inherited from the now outlawed system of human slavery. Under the Constitution the executive branch has the independent affirmative duty to utilize the full panoply of its constitutional and statutorily invested powers to enforce this nationally created right. And I would suggest that it has become equally clear that the national courts have, under the Constitution, the power and the duty to utilize the full sweep of federal judicial power to affirmatively protect this nationally created right of black citizens to be once and forever free from the burdens of remaining concepts of racial inferiority which pervade every area of American life.<sup>29</sup>

In an earlier period it was the Court which provided the rationale for the abandonment for almost a century of the premise of affirmative national responsibility for the elimination of the vestiges of the slave system from American life. It is an interesting commentary upon the resiliency and unique importance of the institution that in the present period it is the Court which reasserts

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27. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

28. 17 U.S. (4 Wheat.) 159 (1819).

29. An eloquent statement of the sweep of this affirmative responsibility on all branches of government to eradicate all the "relics" of slavery is contained in the opinion of the Fifth Circuit Court of Appeals in *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840, 872-73. (1967): "*Brown's* broad meaning, its important meaning, is its revitalization of the national constitutional right the Thirteenth, Fourteenth, and Fifteenth Amendments created in favor of Negroes. This is the right of Negroes to *national* citizenship, their right as a class to share the privileges and immunities only white citizens had enjoyed as a class. *Brown* erased *Dred Scott*, used the Fourteenth Amendment to breathe life into the Thirteenth and wrote the Declaration of Independence into the Constitution. Freedmen are free men. They are created as equal as are all other American citizens and with the same unalienable rights to life, liberty, and the pursuit of happiness. No longer 'beings of an inferior race'—the *Dred Scott* article of faith—Negroes too are part of 'the people of the United States,'

"A primary responsibility of federal courts is to protect nationally created constitutional rights. A duty of the States is to give effect to such rights—here, by providing equal educational opportunities free of any compulsion that Negroes wear a badge of slavery. The States owe this duty to Negroes, not just because every citizen is entitled to be free from arbitrary discrimination as a heritage of the common law or because every citizen may look to his state for equal protection of the rights a state grants its citizens. As Justice Harlan clearly saw in the Civil Rights Cases (1883) . . . *the Wartime Amendments created an affirmative duty that the States eradicate all relics, 'badges and indicia of slavery' lest Negroes as a race sink back into 'second-class' citizenship.*"

those concepts which can stand if implemented as a barrier to a second, and this time even more disastrous, retreat from national responsibility for the enforcement of the unfulfilled promises of freedom and equality for the black citizens of this country. It has become rather fashionable in some quarters to be sharply critical of the Court. Criticism of the institution by the legal profession is, of course, a right and a duty, but it carries with it a correlative obligation to support and defend the institution when it performs its most historic role of unflinchingly restating the constitutional premises upon which a democratic society rests, especially when the restatement touches the raw nerve of public sensitivity. By reminding the nation that the impending crises arising out of the erupting urban and rural ghettos flow from the pervasive impact for more than 100 years of the remnants of the system of human slavery, the Court has performed an extraordinary service consistent with its highest duties in the constitutional system. It is now the responsibility of the other branches to rise to the challenge implicit in *Jones* and to take those drastic measures necessary to meet the affirmative responsibility of government to enforce the "charter of universal freedom."

