

HOUSING AND THE LAW: LESSON 6: HANDOUT 3

CONCURRENCE: JONES V. MAYER (1968)¹

Argued: April 1-2, 1968

Decided: June 17, 1968

MR. JUSTICE DOUGLAS, concurring.

The Act of April 9, 1866, 14 Stat. 27, 42 U.S. .C. § 1982, provides:

in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

This Act was passed to enforce the Thirteenth Amendment, which, in § 1, abolished "slavery" and "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted" and, in § 2, gave Congress power "to enforce this article by appropriate legislation."

Enabling a Negro to buy and sell real and personal property is a removal of one of many badges of slavery.

Slaves were not considered men. . . . They could own nothing; they could make no contracts; they could hold no property, nor traffic in property; they could not hire out; they could not legally marry nor constitute families; they could not control their children; they could not appeal from their master; they could be punished at will. (W. Dubois, *Black Reconstruction in America* 10, 1964).

The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced the notion that the white man was of superior character, intelligence, and morality. The blacks were little more than livestock – to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.

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

Justice Douglas agreed with Justice Stewart's opinion and the court majority. According to § 1982 and the 13th Amendment, Congress is empowered to enact legislation that eliminates "badges of slavery," such as racial discrimination in private property sales.

The justice believes that slavery led White people to believe that they were superior to African Americans. He argues this is a "curse" that has become difficult to eliminate as the discrimination it created continues to thrive.

¹ Excerpts retrieved from https://www.law.cornell.edu/supremecourt/text/392/409#writing-USSC_CR_0392_0409_ZD.

The justice outlines and lists examples of “badges of slavery” that show how slavery has continued to persist in different forms and that its legacy still remains. He cites previous cases the Supreme Court has heard to prove his point.

spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting. Negroes have been excluded over and over again from juries solely on account of their race, or have been forced to sit in segregated seats in courtrooms. They have been made to attend segregated and inferior schools, or been denied entrance to colleges or graduate schools because of their color. Negroes have been prosecuted for marrying whites. They have been forced to live in segregated residential districts, and residents of white neighborhoods have denied them entrance. Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches; public parks; restaurants; public beaches, municipal golf courses; amusement parks; buses; public libraries. A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he addressed her as "Mary," although she had made the simple request to be called "Miss Hamilton."²

Today the black is protected by a host of civil rights laws. But the forces of discrimination are still strong. A member of his race, duly elected by the people to a state legislature, is barred from that assembly because of his views on the Vietnam war.³

Real estate agents use artifice to avoid selling "white property" to the blacks. The blacks who travel the country, though entitled by law to the facilities for sleeping and dining that are offered all tourists, may well learn that the "vacancy" sign does not mean what it says, especially if the motel has a swimming pool.⁴

The justice claims that even though some protections now exist for African Americans, discrimination against them is still prevalent. He again lists examples to support his position.

On entering a half-empty restaurant, they may find "reserved" signs on all unoccupied tables.

The black is often barred from a labor union because of his race.

² *Lane v. Wilson*, [307 U.S. 268](#); *Strauder v. West Virginia*, [100 U.S. 303](#); *Johnson v. Virginia*, [373 U.S. 61](#); *Brown v. Board of Education*, [347 U.S. 483](#); *Pennsylvania v. Board of Truants*, [353 U.S. 230](#); *Sweatt v. Painter*, [339 U.S. 629](#); *Loving v. Virginia*, [388 U.S. 1](#); *Buchanan v. Warley*, [245 U.S. 60](#); *Shelley v. Kraemer*, [334 U.S. 1](#); *Plessy v. Ferguson*, [163 U.S. 537](#); *New Orleans Park Improvement Assn. v. Detiege*, [358 U.S. 54](#); *Lombard v. Louisiana*, [373 U.S. 267](#); *Mayor of Baltimore v. Dawson*, [350 U.S. 877](#); *Holmes v. City of Atlanta*, [350 U.S. 879](#); *Griffin v. Maryland*, [378 U.S. 130](#); *Gayle v. Browder*, [352 U.S. 903](#); *Brown v. Louisiana*, [383 U.S. 131](#); *Hamilton v. Alabama*, [376 U.S. 650](#).

³ *Bond v. Floyd*, [385 U.S. 116](#)

⁴ *Heart of Atlanta Motel v. United States*, [379 U.S. 241](#)

He learns that the order directing admission of his children into white schools has not been obeyed "with all deliberate speed," but has been delayed by numerous stratagems and devices. State laws, at times, have even encouraged discrimination in housing.⁵

The justice argues that the examples he has listed should be enough to prove that discrimination stemming from slavery still exists. Even though Congress passed the Fair Housing Act in 1968, he claims that its passage does not lessen the importance or basis for the court's current decision.

This recital is enough to show how prejudices, once part and parcel of slavery, still persist. The men who sat in Congress in 1866 were trying to remove some of the badges or "customs" of slavery when they enacted § 1982. And, as my Brother STEWART shows, the Congress that passed the so-called Open Housing Act in 1968 did not undercut any of the grounds on which § 1982 rests.

⁵ *Brown v. Board of Education*, [349 U.S. 294](#), 301; *Reitman v. Mulkey*, [387 U.S. 369](#).