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Standing to Sue by the Victim of Racial Discrimination

Alton C. Todd

it as applied to cocaine. The standard evidently must be the probability that the drug was obtained from a legal source.

The various tests for the validity of a presumption, despite their differences in language, operate in essentially the same manner. Also, there is little difference in the end result of the "reasonability" test of *Mobile*, the "rational connection" test of *Tot*, and the "more likely than not" test of *Leary*. In fact each of these three landmark cases was decided without overturning any previous test. The Court in *Turner* hints at a new test when it states that the conviction would stand even if judged "by the more exacting reasonable-doubt standard normally applicable in criminal cases . . . ."[51] Even this test, when applied to the validity of a presumption, would be essentially a question of reasonability.

The danger arises from the ease with which the standard of reasonability may, in drug cases, become burdened with a mathematical interpretation. In *Turner* possession of 275 glassine bags containing seven grams of heroin was held to establish purchase or distribution, while possession of a sugar solution containing one gram of cocaine was not. Evidence that domestic production of heroin amounted to less than one per cent of the amount smuggled supported a conviction, while evidence indicating that some five kilograms of cocaine were stolen in a year in which some 85 kilograms were imported did not.

The danger is obvious. As more cases are reviewed, the Court may gradually drift toward a mathematical standard of reasonability, which will be used to convict a defendant whose guilt must be proven beyond a reasonable doubt. If, for example, the Court sustained a conviction when the evidence established that ninety-five per cent of the drug in question was of foreign origin, then by implication the Court would announce the rule that a ninety-five per cent probability establishes guilt beyond a reasonable doubt. Such a precedent might force the Court either to extend the mathematical test to other cases or to admit that the original defendant was convicted on something less than a reasonable-doubt standard.

Burk E. Bishop

Standing To Sue by the Victim of Racial Discrimination

Cheryl and James Walker rented an apartment from the defendant. They were evicted allegedly because of their failure to pay the rent on time, and because of other tenants' complaints of noise.[1] The Walkers, contending they were evicted because they had entertained Negro guests,[2] filed a

[51] *Id.* at 416.

[1] Although the rental records showed that the rent was paid late, they also revealed that many other tenants made their payments on the same day or after the plaintiffs and none of these other tenants was evicted for late payment. There was evidence that the plaintiffs were loud, but no complaint was made to the management of the apartment or to the plaintiffs.

[2] Discrimination against Negroes was the apparent policy of the apartment owners. To avoid

complaint against the apartment owner in federal district court, seeking relief under 42 U.S.C. § 1982.[3] That statute provides that "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."[4] The jurisdiction of the court was challenged on the ground that the plaintiffs were "white citizens," and that the statute applied only to Negroes. *Held*: 42 U.S.C. § 1982 protects all citizens who are the victims of discrimination that is directed against Negroes. *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969).

I. Protection of the White Victim of Racial Discrimination

The Constitutional Basis and Scope of Section 1982. The thirteenth amendment provides for the abolition of slavery and involuntary servitude except as punishment for a criminal conviction.[5] Pursuant to the enabling clause of the amendment, Congress enacted the Civil Rights Act of 1866.[6] Section I of the 1866 Act, now 42 U.S.C. § 1982, extends the right to hold and convey real and personal property to the Negro. However, some congressmen questioned the federal government's constitutional authority to enact laws which would be binding on the states.[7] This and other factors led to the passage of the fourteenth amendment.[8] After this amendment was ratified, Congress re-enacted the 1866 Civil Rights Act.[9] The re-enactment created confusion as to the constitutional basis and the extent of the statute. If the Act was passed pursuant to the fourteenth amendment, it would be limited to preventing state-sanctioned discrimination.[10] However, if it was based on the thirteenth amendment, it would also reach private discrimination against Blacks in the purchase and sale of property.[11]

Cases interpreting the scope of the thirteenth amendment and the constitutional basis of the Civil Rights Act of 1866 added to the confusion. Some courts found the amendment abolished not only slavery per se, but also the incidents of slavery, including the gamut of racial discrimination

renting to Negroes, the defendants maintained fictitious leases with fictitious deposit checks. If a prospective Negro tenant doubted that an apartment had actually been rented, these fictitious records were shown to him. Testimony showed that the owners disliked not only Negroes, but also those who associated with them.

[3] 42 U.S.C. § 1982 (1964).

[4] *Id.*

[5] U.S. Const. amend. XIII, § 1.

[6] Civil Rights Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. *See also* Comment, *Racial Discrimination and the Civil Rights Act of 1866*, 23 Sw. L.J. 373 (1969).

[7] Cong. Globe, 39th Cong., 1st Sess. 2961 (1866). *See also id.* at 2461, 2498, 2506, 2896, 3035. Senator Poland of Vermont stated: "It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States, and I cannot doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress." *Id.* at 2961.

[8] H. Flack, The Adoption of the Fourteenth Amendment 94-95 (1908); J. TenBroek, Equal Under Law 201-03 (1965); Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 9 Nat'l B.J. 27, 69 (1951).

[9] Enforcement Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144.

[10] Hurd v. Hodge, 334 U.S. 24 (1948); Corrigan v. Buckley, 271 U.S. 323 (1926); Civil Rights Cases, 109 U.S. 3 (1883); Virginia v. Rives, 100 U.S. 313 (1879).

[11] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); United States v. Morris, 125 F. 322 (E.D. Ark. 1903).

and prejudice.[12] Others interpreted the thirteenth amendment as prohibiting only involuntary servitude.[13] In addition, early decisions indicated that the thirteenth amendment was the basis of the 1866 Act,[14] while later decisions considered the statute to be based on the fourteenth amendment.[15]

The confusion created by Congress' re-enactment of the 1866 Civil Rights Act after ratification of the fourteenth amendment, and the contradictory conclusions of cases which had interpreted the thirteenth amendment and the constitutional authority for the Act, left the amendment's scope and the statute's basis unsettled until the 1968 Supreme Court decision in *Jones v. Alfred H. Mayer Co.*[16] There, the Court held that the 1866 Civil Rights Act was based on the thirteenth amendment, and that it prohibited all private and public discrimination.[17]

In *Jones* the petitioner sought to buy a house and lot from the respondent real estate agency. The offer was refused for the sole reason that the petitioner was a Negro. In finding for the petitioner, the Court relied specifically on the 1866 Civil Rights Act, stating that Congress intended the statute to reach all forms of racial discrimination, whether practiced by the state or by private persons. Reasoning that the legislation was not passed merely to nullify racist laws of the Confederacy, but rather to eliminate the institutions which had made the Negro an inferior citizen,[18] the Court held that the scope of the 1866 Act was not altered by the 1870 re-enactment.[19] It admitted that some congressmen supported the fourteenth amendment because they feared the Act to be unconstitutional, but the Court found that the re-adoption in no way shifted the basis of the statute from the thirteenth to the fourteenth amendment.[20] Although the Court said that the thirteenth amendment gave Congress the "power . . . to determine what are the badges and incidents of slavery . . . ,"[21] it did not expressly state what incidents of slavery are prohibited by the amendment itself. Neither did the Court specifically determine whether the 1866 Act prohibits all discrimination, whether the victim be black or white.

[12] Civil Rights Cases, 109 U.S. 3 (1883); United States v. Morris, 125 F. 322 (E.D. Ark. 1903). The basic connotation of the phrase "incidents of slavery" is explained by Justice Bradley in the *Civil Rights Cases*:

> Congress . . . by the Civil Rights Bill of 1866 . . . undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its [incidents of slavery] substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.

109 U.S. at 22.

[13] Corrigan v. Buckley, 271 U.S. 323 (1926); Hodges v. United States, 203 U.S. 1 (1906).

[14] United States v. Cruikshank, 25 F. Cas. 707 (No. 14,897) (C.C.D. La. 1874) (Bradley, Circuit Justice); *In re* Turner, 24 F. Cas. 337 (No. 14,247) (C.C.D. Md. 1867) (Chase, Circuit Justice); United States v. Rhodes, 27 F. Cas. 785 (No. 16,151) (C.C.D. Ky. 1866) (Swayne, Circuit Justice).

[15] Hurd v. Hodge, 334 U.S. 24 (1948); Corrigan v. Buckley, 271 U.S. 323 (1925); Civil Rights Cases, 109 U.S. 3 (1883).

[16] 392 U.S. 409 (1968).

[17] *Id.* at 338-39.

[18] *Id.* at 426-27.

[19] *Id.* at 436.

[20] *Id.*

[21] *Id.* at 440.

An Alternative Basis for Establishing Standing. As a general rule of practice, one cannot raise a constitutional objection unless he has been denied rights protected by a constitutional provision.[22] However, under certain circumstances the courts have allowed exceptions to this general rule.[23] One such exception was applied in *Barrows v. Jackson*,[24] where the petitioner and respondent were parties to a covenant which restricted the use and ownership of their property to whites. The petitioners sued the respondent in a California state court for damages for breach of the covenant. The Negroes to whom the land was sold were not made parties to the suit, but the respondent relied for her defense upon the invasion of the Negroes' fourteenth amendment right to equal protection. In affirming the state court's refusal to enforce the restrictive covenant, the Supreme Court said: "Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained."[25] The "peculiar circumstances" by which the Court justified its departure from the general rule were: (1) the action of a state court might result in a denial of constitutional rights to Negroes, (2) the white respondent would be penalized for affording the Negroes their constitutional rights, and (3) the Negroes would not be the appropriate party to bring the action for the white person's injury.[26] Although the Court allowed the white respondent to rely upon the Negro's rights, it did not set aside the rule which normally precludes a person from asserting the rights of others. Rather, it concluded that when justice so requires, the exception should be applied.

II. Standing of Whites To Sue

In concluding that white victims of racial discrimination are protected by 42 U.S.C. § 1982, the court in *Walker v. Pointer*[27] included in its opinion two complementary, but distinct, rationales. As the primary basis for granting jurisdiction, the court interpreted *Jones v. Alfred H. Mayer Co.* to hold that the statute prohibits "all discrimination" and protects "all citizens." As a secondary jurisdictional basis, the court, reasoning from *Barrows v. Jackson*, held that white citizens have standing to sue when they are victimized for vindicating Negro rights which are protected by the statute.

The Jones' Rationale. In determining the scope of the statute, the court looked to the purpose of the thirteenth amendment. It observed that the

[22] Barrows v. Jackson, 346 U.S. 249, 257 (1953).

[23] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407 (1942); Helvering v. Gerhardt, 304 U.S. 405 (1938); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Truax v. Raich, 239 U.S. 33 (1915).

[24] 346 U.S. 249 (1953).

[25] *Id.* at 257.

[26] *Id.* at 258-60.

[27] 304 F. Supp. 56 (N.D. Tex. 1969).

amendment was enacted to free all men, and that it is not limited to the protection of a specific race. The court found that the amendment was intended to abolish all discrimination, including what traditionally has been labeled "incidents of slavery." The district court extended the phrase to encompass not only Negroes, but also whites who may suffer from this stigma.

The court also looked to the original purpose and judicial interpretation of the statute. As originally enacted, section 1982 was designed to implement the thirteenth amendment by providing for equal property rights. The court placed specific emphasis on the first five words of the Act, interpreting "all citizens of the United States" to include white persons. However, the statute later qualifies the right it guarantees by defining it as "the same right . . . as is enjoyed by white citizens."[28] The court resolved this inherent statutory limitation by looking to the congressional debate during the passage of the 1866 Act and the Supreme Court's decision in *Jones*. Contrary to the district court's observation, congressional debate does not conclusively show that the bill was intended to extend to the kind of "incidents of slavery" and discrimination found in *Walker*.[29] An incident of slavery, as defined by the Supreme Court in the *Civil Rights Cases*,[30] is a disability to the Negro which, because of his color, has outlasted the institution of slavery. Congressional debate prior to the passage of the thirteenth amendment supports the contention that the amendment was intended to destroy the institution of slavery and all its incidents which impaired the rights of a free man.[31] The Court in *Jones* seemed to uphold this contention. However, it is questionable whether the Supreme Court would go as far as the district court's interpretation of "incidents of slavery" and the breadth of section 1982. If the statute does not include such discrimination, it is doubtful that a white person could have standing under it. The district court concluded that under the Supreme Court's decision in *Jones*, "all citizens" who are the victims of "racially motivated discrimination" have standing.[32] The phrase "all citizens" was interpreted to include members of any race. Undoubtedly, under section 1982 as interpreted by the Supreme Court in *Jones*, if a white person is discriminated against because of *his* race or color, he may be protected by the statute. However, in this case the Walkers were not evicted because of their race but because of their associations with Negroes. Finding the Walkers to have standing, the court interpreted the *Jones* phrase, "all racially motivated discrimination," to include the incident of racial discrimination presented in *Walker*.

[28] *See* notes 3-4 *supra*, and accompanying text.

[29] The district court quoted Senator Trumbull, the author of the bill: "[T]he bill would 'break down all discrimination between black men and white men'." 304 F. Supp. at 59. However, prior to its passage, Senator Trumbull made some ambiguous statements concerning the application of the bill to private, as well as state, actions. Possibly to assure the passage of the bill, he seemed to shift his position from an all-encompassing bill to one prohibiting "*State* Legislatures from enslaving, under any pretense, those whom the first clause [of the thirteenth amendment] declared should be free." CONG. GLOBE, 39th Cong., 1st Sess. 43 (1866) (emphasis added).

[30] Civil Rights Cases, 109 U.S. 3, 23 (1883).

[31] CONG. GLOBE, 38th Cong., 2d Sess. 142 *passim* (1865). *See also* Comment, *Racial Discrimination and the Civil Rights Act of 1866*, 23 Sw. L.J. 373 (1969).

[32] 304 F. Supp. 56, 58-60 (N.D. Tex. 1969).

It is questionable that either the 1866 Civil Rights Act or the *Jones* decision was intended to include within the meaning of "incidents of slavery" discrimination against whites which occurs solely because of their associations with Negroes. To limit the coverage of the statute to those persons who are actually discriminated against because of their race does not read a racist purpose into the statute, as the court claims, but merely restricts the scope of the statute's protection to that originally intended.

The Barrows' Rationale. The secondary ground on which the court based the Walkers' standing is found by reading *Barrows v. Jackson* in connection with *Jones*. The Supreme Court in *Barrows* recognized that one may be a victim of racial discrimination without being a member of the specific race which is discriminated against, but only by attempting to vindicate that race's rights. This decision not only supports the district court's conclusion, but sets forth an additional basis for the Walkers' standing. The jurisdictional prerequisites of *Barrows* were found to be present in *Walker*. First, the Walkers had "suffered substantial harm" because of their extension of the leasehold to Negro guests.[33] For having black associates in their apartment, they were evicted. Second, in addition to the harm to the Walkers there was also a denial of certain "lesser but cognizable property interests" of Negro persons which are protected by section 1982.[34] These lesser interests included the "freedom to 'go and come at pleasure' " and the possibility of injury to potential "tangible property interests" such as the right to an "implied easement of ingress and egress over the common area controlled by defendants immediately adjacent to the Walker leasehold."[35] The "breadth of section 1982," the court said, encompasses all property interests; if these interests are not protected, the Negro would be harmed substantially.[36] Third, in meeting the final prerequisite of *Barrows* the court said: "[T]he failure to provide a remedy for racially motivated interruption of leaseholds would seriously diminish the willingness of whites in general to entertain Negro guests."[37]

Because *Barrows* arose under the fourteenth amendment and dealt with constitutional rights, its application to *Walker* is necessarily restricted. However, the court resolved this restriction by reading *Barrows* with *Jones*. After *Jones*, state action is no longer a prerequisite for granting relief under section 1982. Therefore, although *Barrows* did not interpret section 1982 and the rights vindicated were constitutional, its basic rationale is applicable in the *Walker* case.[38] The district court observed that *Barrows*

[33] *Id.* at 61-62.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 62.
[37] *Id.* at 61.
[38] An additional distinction, not discussed by the court, is that in *Barrows* the assertion of another's rights was used defensively, whereas in *Walker* the plaintiffs were seeking affirmative relief under a statute which protected another's rights. However, the Supreme Court recently permitted a white person to maintain an action under § 1982 when that person is punished for vindicating Negroes' rights protected by that statute. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

departed from the general rule "that one cannot raise a constitutional objection" unless he is a member of the class denied a constitutional right.[39] *Barrows* recognized that this rule is followed unless the circumstances of the case are so peculiar that justice would require an exception. As in *Barrows*, the Walkers were the appropriate parties to bring the action and were penalized for vindicating the rights of minorities, if it can be said that they were injured for extending property interests to the Negroes. The injury to the whites was obvious. But the court's basis for finding the denial of property rights to Negroes is tenuous. "Implied easement," potential "tangible property interests," and "an opportunity to receive possessory interests"[40] are intangible "property" rights which are encompassed by section 1982 only by means of a strained interpretation of the statutory language.[41] However, if these interests can be said to be protected by the statute, the Walkers would have standing under the rationale of the *Barrows*' exception.

III. Conclusion

The two rationales from which the district court reasoned to reach its conclusion that white victims of black racial discrimination have standing under 42 U.S.C. § 1982 are quite different, although they accomplish the same results. The *Jones* rationale, as applied by the court, concentrates upon the rights which the white citizen has under the statute. However, the *Barrows* rationale shifts the focus from the rights denied the white to those of the Negro, but allows the white citizen standing if he has been punished for affording the Negro his rights.

The Civil Rights Act of 1866 was enacted to assure the Negro those rights deemed to be protected by the thirteenth amendment. Because the assaults upon the Negro's freedom were so flagrant, it is doubtful that the thirty-ninth Congress even contemplated that a white could be discriminated against. Amazingly, after over a hundred years, this problem has only recently begun to be confronted by the courts. The Supreme Court in the landmark decision of *Jones v. Alfred H. Mayer Co.* concluded that if a white is discriminated against because of his color, he has a remedy under 42 U.S.C. § 1982. The district court expanded the language of *Jones* and the protection of the statute to include those citizens who are victimized not because of *their* race but that of their companions. The social desirability of the court's objective is not questioned. But because there is some doubt as to the extent of the protection of the statute, the preferable basis for the decision is the rationale of *Barrows*. It does not require the plaintiff to be a member of the race denied a statutory right, as may be required by the statute as it has been interpreted and applied.

Alton C. Todd

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[39] 304 F. Supp. at 61-62.

[40] *Id.*

[41] *See* note 4 *supra*, and accompanying text. *See also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).