Mr. Justice Stevens and the Zeitgeist

ARTHUR SHENFIELD

On June 26, 1976 the Supreme Court handed down its judgment in the consolidated cases of *McCrary and Gonzales v. Runyon and the Fairfax-Brewster School (427 US 160)*. By a majority of seven to two the Court found in favor of McCrary and Gonzales. One of the seven was Mr. Justice Stevens, whose judgment, however, differed fundamentally from that of his brethren. Indeed he averred that their analysis of the problems presented by the case was wholly without merit. Nor did he present a different analysis which might have propelled him by a different road into the camp of the majority in the final judgment. He joined them because, although he believed their decision to be entirely ill-founded, it conformed to precedents established by the Court in recent years, which he believed it was undesirable to upset. But his reluctance to upset these precedents arose only partly from the general desirability of maintaining the stability of the law (the principle of *stare decisis*). It also arose, and decisively, from his belief that the majority judgment conformed, as he put it, to the *mores* of today. Without this he would not have allowed *stare decisis* to prevent him from dissenting from the majority judgment.

Mr. Justice Stevens is reputed to be one of the ablest and most scholarly of the judges appointed to the Supreme Court in recent years. Yet in this case he handed down a decision which must have offended against all his instincts and training as a lawyer because he felt unable to stand against the *Zeitgeist*. If this is what an able and scholarly judge may do, one may ask what need there is for trained lawyers on the Bench. A cadi sitting under his palm tree, or a King Solomon adjudicating in inspired but wholly arbitrary manner on a case of disputed title to a baby, would surely serve us just as well.

One must hasten to make clear that all intelligent judges have some regard to the *mores* of their time. The law changes with changing *mores,* and the judges are the instrument of the change, except where legislators do it by way of new statutes. But when judges reshape the law to the conditions of changing times, they traditionally do it, especially in the Anglo-American system, with a loyalty to and respect for the principles handed down to them from the past. The law is a living thing which changes as it grows and develops. Yet, as a human being changes his appearance through time in the process of growth but remains the same recognizable person, so does, or should, the law of a good and therefore stable, society remain in essence the same structure.

A judge who is fully seized of the requirements of his task will not conform to Mr. Dooley's prescription of following the results of the last election, not because he hews to inherited law as if it were that of the Medes and Persians, but because he will not bend it to the merely ephemeral changes of view of the people. The verdict of the last election will weigh with him very little, if at all, unless it is the capstone of a series of elections and thus, or

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in some other way, indicates that it represents one of those deep but slowly germinating movements which change the face of society. Even then he will not proceed to tear up the roots of the law. He will not allow the *Zeitgeist* to make nonsense of the law. He cannot avoid in some measure being a maker, as well as an interpreter, of the law, but when he makes law he will do it with circumspection and in a posture which as far as possible suggests that he is only finding, not making, it. And he will usually do it this way even if he is what his brethren would call an innovative judge. Even if he believes that the law ought to be torn up by the roots and revolutionized, he will not succumb to the *hubris* of imagining that he is entitled, or even qualified, to perform such a task. He will leave it to the legislators. The rule of *stare decisis* is itself intended to make him handle the thread of the law passed down to him by his predecessors with care and respect and avoid the temptation to make innovation lightly or wantonly.

These principles are sometimes imperfectly expounded when judges and political scientists are anxious to emphasize the capacity of the law to change and adapt itself to changing circumstances. They then sometimes give the impression, at least to careless readers, that the fluidity of the law overrides all else. Thus Blackmun, J. in the famous Bakke case (46 LW 4896) quoted the late Cardozo, J. "The great generalities of the Constitution have a content and significance that vary from age to age"; and Woodrow Wilson (when he was a professor of political science). "But the Constitution of the United States is not a mere lawyer's document; it is a vehicle of life, and its spirit is always the spirit of the age"; and Chief Justice Marshall (in *McCulloch v. Maryland,* 1819), "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 consist with the letter and spirit of the Constitution, are constitutional."; on which Blackmun commented, "These precepts of breadth and flexibility and ever present modernity are basic to our constitutional law." His emphasis on flexibility and modernity was intended to support his approval of modern affirmative action programs, as instanced by the University of California program against which Bakke protested.

What is remarkable about these quotations is that while the statements by Cardozo and Woodrow Wilson are wide open to almost any interpretation, that by Marshall clearly is not. Notice that the aim of change must be within the Constitution, and its means must be consistent with the letter and spirit of the Constitution, if it is to be acceptable. Notice further that these limitations apply even in constitutional cases, where it is well established that greater freedom and flexibility of construction is available to judges than in the construction of statutes or of earlier authorities. In the light of the Fourteenth Amendment, it almost passes understanding how public reverse racial discrimination, however worthy its motives may be, could possibly be held to fall within the four corners of Marshall's prescription. That Blackmun, J. thought that it did, shows how perilous it is for a judge to ride away without restraint on his flexibility horse, for that way lies self-persuasion that up is down, tall is short, right is wrong.

It is true that there have been eminent lawyers, including judges, who have not accepted the above account of the proprieties of the judicial process. There have been periods when, for example, "sociological jurisprudence" and "legal realism" have attracted wide attention and approval, resulting in a great deal of judicial flexibility and innovation. The late Judge Jerome Frank, for example, propounded the view that there were almost no constraints upon a judge other than his perception of justice, the surrounding social "facts" (in addition to the traditionally perceived narrow facts) of the case, and the needs of the time. However, though it would be false to say that it has left no influence at all, Frank's legal realism has proved to be at best a passing fashion; and sociological jurisprudence is now on the wane, having invaded but not captured the field from the traditional doctrines of the nature of law and the judicial function. Long after Frank's perceptions of doing justice have been forgotten., lawyers will remember and cherish Car-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

dozo's way of changing the law by finding it, of developing it by nursing what came down to him.

Mr. Justice Stevens thus appeared to be on the horns of a dilemma. The recent precedents of the Court merited respectful consideration. Yet they themselves, in his view, had wantonly uprooted the law and made nonsense of it. In that case was it not his duty to treat them as an aberration, indeed as a breach of the law? If so, was it not also his duty to pick up the thread of the law as it was before the excrescences of these precedents arose, and thus hand it on in its proper form? If he allowed his view of the mores of today to determine his judgment, was he not thus permitting the matter to be decided by the very influence which produced these false precedents? In that case his duty would be betrayed, not fulfilled, by *stare decisis*.

The case before us is not one of those which merely produce interesting conundrums for lawyers. It concerns a subject which is of the highest, most sensitive, and most widespread public interest in modern America, namely racial discrimination. Hence, if Mr. Justice Stevens' decision was a false one, it is of great public significance; for if his repute is well-founded, the United States is unlikely to get many judges, if any, more competent than he is.

The facts of the case were as follows. The Fairfax-Brewster School and a school run by the defendants Runyon named Bobbe's Private School, were private, commercially operated schools in Virginia. They were wholly private in the sense that they received no federal, state, or other public funds whatsoever. They advertised their services to the general public in the local Yellow Pages and elsewhere, but when the parents of the parties McCrary and Gonzales applied to have them admitted, the schools refused to admit them solely because they were Negroes. These parties therefore brought suit, by their parents, for injunctive and damage relief, on the ground that racial discrimination of this character was unlawful.

Mr. Justice Stewart delivered the opinion of the majority of the Court (Burger, CJ, Blackmun, J., Brennan, J., Marshall, J., and himself, together with Powell, J. and Stevens, J., who filed separate opinions). Mr. Justice White filed a dissenting opinion, in which he was joined by Rehnquist, J. The substance of Stewart, J.'s opinion was as follows:

1. The issue was whether a federal law, namely 42 USC Sect. 1981, prohibited private schools from excluding qualified children solely because they were Negroes.

2. The case was not concerned with the right of a private *social* organization to limit membership on racial grounds. Nor was it concerned with the right of a private school to limit its students to those of a particular religious faith even if that faith practices racial exclusion. These schools were commercially operated and non-sectarian. Nor, further, was the case concerned with a First Amendment right to engage in association for the advancement of beliefs and ideas, which would give parents the right to send their children to schools which promoted the belief that racial segregation was desirable; for it was concerned with the practice of racial discrimination which, unlike the promotion of a belief in its virtue, was not protected by the First Amendment. Nor, still further, was the case concerned with a constitutional right of privacy. Though parents had a constitutional right to send their children to private schools and to select private schools offering specialized instruction, they had no constitutional right to provide their children with private education unfettered by reasonable governmental regulation.

3. Section 1981 was derived from the Civil Rights Act, 1866. It was passed pursuant to the Thirteenth Amendment, which abolished slavery and authorized the enactment of legislation to remove the badges and incidents of slavery. It stated, inter alia, the following:

> All persons within the jurisdiction of the United States shall have the same right to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal protection of the laws and proceedings for the security of persons and property as is enjoyed by white citizens.

In the light of this provision, the racial exclusion practiced by these schools amounted to

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

a classic violation of Section 1981, since it clearly deprived the children concerned of the same right to make a contract as white children had.

4. The issue had in essence been decided by the Court in *Jones v. Mayer (392 US 409)*. That case was concerned with the right of a Negro to buy a piece of real estate on the same terms as those offered to white persons, and so rested on Section 1982, not Section 1981. But the principles governing the two Sections were the same. In that case the Court had held that the exclusion of a Negro from the purchase because of his race was unlawful, and that Section 1982 guaranteed that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." Section 1981 offered the same guarantee outside the field of real estate transactions.

5. The Court had also made the same decision in parallel circumstances (not concerned with schooling but with other cases of contracts offered only to whites and barred to Negroes) in *Sullivan v. Little Hunting Park (396 US 229)*, *Tillman v. Wheaton-Haven (410 US 431)*, and *Johnson v. Railway Express (421 US 454)*. Thus the principles of the case were well established, and accordingly it was clear that the schools' refusal to admit Negro children was unlawful.

Mr. Justice Powell, though concurring with the majority, was at pains to see to it that the decision was not so widely construed as to suggest the proscription of cases of discrimination which he considered to be legitimate. The distinction in his view lay between truly private discrimination and quasi-private discrimination. In truly private discrimination there was some form of personal or individualized relationship, and such discrimination, which might well be found in some educational arrangements, would be protected. The discrimination practiced by the schools in this case was private only in the sense that they were owned and managed by private persons and that they were not direct recipients of public funds. Their actual and potential constituency was more public than private. They advertised to the general public and, given some minimum qualifications, they accepted children from the general public, except only Negroes. Thus their discrimination offended against Section 1981 and was not saved by any contrary considerations.

In his dissenting judgment Mr. Justice White argued, in summary, as follows:

1. The equal right to make contracts provided by Section 1981 was a right equal to that enjoyed by white citizens. This right was simply the right to make contracts with willing parties, no more and no less. Indeed it was implicit in the concept of a contract that the parties to it were willing to enter into it. Section 1981 had nothing to say about the reasons why a party might be unwilling to enter into a contract.

2. The legislative history of Section 1981 showed that it was rooted in the Fourteenth Amendment, not the Thirteenth. Hence it struck only at discrimination imposed by or under the authority of State law or practice.

3. The case was not governed by *Jones v. Mayer* because that came under Section 1982, whose legislative history differed from that of Section 1981. Unlike Section 1981, Section 1982 was indeed rooted in the Thirteenth Amendment. Nor was the case governed by any other authority consistent with the majority 's view. Section 1981 had been on the statute books since 1870, and this was the first time that it was construed in the sense adopted by the majority. When it was considered by the Court in cases almost contemporaneous with the passage of the statute, its construction then showed that it reached only discrimination imposed by states.

Mr. Justice Stevens' concurring judgment is concise enough to be given here at length:

> For me the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided.
>
> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, and its progeny have unequivocally held that S 1 of the Civil Rights Act of 1866 prohibits private racial discrimination. There is no doubt in my mind that that construction of the statute would have amazed the legislators who voted for it. Both

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

its language and the historical setting in which it was enacted convince me that Congress intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own and convey property, and to litigate and give evidence. Moreover, since the legislative history discloses an intent not to outlaw segregated public schools at that time, it is quite unrealistic to assume that Congress intended the broader result of prohibiting segregated private schools. Were we writing on a clean slate, I would therefore vote to reverse.

But *Jones* has been decided and is now an important part of the fabric of our law. Although I recognize the force of Mr. Justice White's argument that the construction of S 1982 does not control S 1981, it would be most incongruous to give those two sections a fundamentally different construction. The net result of the enactment in 1866, the re-enactment in 1870, and the codification in 1874 produced, I believe, a statute resting on the constitutional foundations provided by both the Thirteenth and Fourteenth Amendments. An attempt to give a fundamentally different meaning to two similar provisions by ascribing one to the Thirteenth and the other to the Fourteenth Amendment cannot succeed. I am persuaded, therefore, that we must either apply the rationale of *Jones* or overrule that decision.

There are two reasons which favor overruling. First, as I have already stated, my conviction that Jones was wrongly decided is firm. Second, it is extremely unlikely that reliance upon *Jones* has been so extensive that this Court is foreclosed from overruling it. *Compare Flood v. Kuhn*, 407 U.S. 258, 273-274, 278-279, 283. There are, however, opposing arguments of greater force.

The first is the interest in stability and orderly development of the law. As Justice Cardozo remarked, with respect to the routine work of the judiciary, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Turning to the exceptional case, Justice Cardozo noted "that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank disavowal and full abandonment . . . If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." In this case, those admonitions favor adherence to, rather than departure from precedent. For even if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today.

The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society. This Court has given a sympathetic and liberal construction to such legislation. For the Court now to overrule *Jones* would be a significant step backwards, with effects that would not have arisen from a correct decision in the first instance. Such a step would be so clearly contrary to my understanding of the *mores* of today that I think the Court is entirely correct in adhering to *Jones*.

With this explanation, I join the opinion of the Court.

Four questions arise here:

First, in passing the Civil Rights Act, 1866, did Congress have the intention to proscribe private racial discrimination?

Secondly, on any reasonable interpretation conforming to the rules of construction of statutes, can it be said that Section 1981 proscribes private racial discrimination?

Thirdly, was Mr. Justice Stevens right to allow adherence to recent precedent, and in particular that of *Jones v. Mayer*, to determine his judgment?

Fourthly, on the merits was not the verdict of the Court's majority a just one? Ought not private racial discrimination to be proscribed? Is

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

that not in accord with the true spirit of the Constitution, the best mores of our time, and the needs of a humane society?

On the first question, Mr. Justice Stevens' statement "There is no doubt in my mind that that construction would have amazed the legislators who voted for it" is perhaps excessively mild and polite for so preposterous a proposition. The legislators of 1866 would not only have been amazed by it. They would have risen up in high dudgeon against it. In the first place, as Stevens, J. points out, they had no intention to outlaw segregation even in public schools, obviously thinking it to be right and proper. Still less could they have intended to outlaw it in private schools. In the second place the legislators of 1866 lived in an age when the sanctity of contract and the concept of contract as the meeting of two or more willing minds, were held in far higher esteem than in our day. They would have displayed an enormous sense of outrage if they were told that they had legislated a right to make a contract with an unwilling partner. Furthermore, not only was private discrimination against Negroes in their time so widespread in the North, not merely the South, as almost to be the norm, but in the District of Columbia itself the legislators witnessed it, as well as discrimination in public facilities, every day that they were there.

In *Jones v. Mayer* Mr. Justice Stewart also delivered the majority verdict, and there he attempted to show that the intention of the legislators was to strike down acts of individuals, as distinct from states, because the Act forbade the deprivation of rights but punished only deprivation by any person "who under color of any law, statute, ordinance, or regulation or custom shall subject or cause to be subjected any inhabitant . . . to the deprivation of any right." A person acting under color of law, statute, ordinance or regulation would be relying on State authority. So too with custom. Certain customs (*e.g.*, customs of a trade) are often recognized by a state or its courts as a normal and justifiable way of behaving. Thus the custom referred to here also rested on some kind of public authority or approval. The private discrimination which Stewart, J. sought to bring under this head could in fact proceed without calling in aid any custom, not to mention any law, statute, ordinance or regulation.

Mr. Justice Stewart construed this to mean that Congress had carefully exempted private discrimination from punishment only, not from the general prohibition of the Act. This is a remarkable construction of a statute, and shows how far a judge may submit himself to contortions in order to make his point. The plain meaning of the Section is surely to limit the ambit of the Act to discrimination by, or under the authority or approval of, a state. Stewart, J. called in aid for his construction the reply of the floor manager of the bill in the House to the question why it did not punish private discrimination. The reply was that the Judiciary Committee did not want to make a general criminal code for the states. To deduce from this therefore the bill prohibited private discrimination is so fantastic in logic and in the process of judicial construction as to make one wonder how it could be propounded in any court of law, not to mention the august Supreme Court of the United States.

However, the intention of the legislators of 1866 is not decisive. It is the words of the statute which must be construed, and if their meaning diverges from the intention of the legislators, so much the worse for the legislators. If the meaning of the words is clear, then except in certain unusual cases which need not detain us here, a court will not look to the intentions of the legislators. It will do so only if the meaning of the words is not wholly clear. We must therefore consider the second question.

The relevant words are " . . . shall have the same right to make and enforce contracts . . . as is enjoyed by white citizens." Now the only right enjoyed by white citizens then or now (apart from "rights" created by the Court's decision in this case) was and is the right to make and enforce contracts with willing partners. The words are entirely clear, and Mr. Justice White's interpretation of them is inexpugnable, as Stevens, J. admits.

In *Jones v. Mayer* Mr. Justice Stewart said the following, and, as noted above, he applied the same considerations to the case before us:

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> Negro citizens . . . would be left with a mere paper guarantee if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. 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.

This is a marvelous example of how, in determined judicial hands, words can be made to mean anything. Of course in law there is nothing to distinguish a dollar note held by one man from that held by another, whether he be black or white, Jew or Gentile, Greek or barbarian, tall or short, fat or thin, clever or stupid. In that sense all dollar notes are equal.

But in the sense presented by Stewart, J., it is not true that, if equal rights and equal freedom are to prevail, a dollar must purchase the same thing in one man's hand as in another man's hand. If one man has a reputation for probity and creditworthiness, his dollar will buy more than that of a man with a contrary reputation. If a man lives in Alaska, his dollar will buy less than that of a man in New York. If a man, who will usually be black, lives in a ghetto where the cost of running a grocery store is above the average, his dollar will buy less than that of a man, most often white, who buys his food in a suburban supermarket. If a man's cousin or friend is in the wholesale business and he is given the advantage of relationship or friendship his dollar may buy things at wholesale prices while another man's dollar will buy at retail prices. Are these cases of servitude, or of imperfect freedom?

What Stewart, J. really meant was that though there may be various legitimate cases where one man's dollar will buy more than another man's dollar, a difference in purchasing power arising solely from race is illegitimate. If a black man and a white man are exactly equally creditworthy, or non-creditworthy, there must be no difference in the purchasing power of their respective dollars.

This may be a very worthy aim. But whether it is or is not, it cannot be distilled from the Thirteenth Amendment, or the Civil Rights Act, 1866, or Sections 1981 and 1982 derived from that Act, without doing violence to the words concerned and to the principles of legal construction. If this should be the policy of the American people, it is par excellence a matter for the legislators. If private discrimination of the kind before us is to be proscribed, the Congress of the United States is the body with the authority to do it, and as White, J., pointed out, it did not do it in 1866. For the Supreme Court to find that it was done because in the majority's opinion it ought to have been done, or ought now to be done, is a grave case of the objectionable tendency of the Court in recent years to act as a legislative rather than a judicial body.

Notice how, in order to emphasize his point, Stewart, J. succumbed to the temptation to make a soap box speech like any other legislator. If a dollar in the hands of a Negro did not buy the same thing as a dollar in the hands of a white man (in the unjustifiable sense presented by the judge), then "the Thirteenth Amendment made a promise the nation cannot keep." Picture an Irishman, Italian, Pole or Hungarian coming to the United States a century ago. He thought that he was coming to the freest country in the world, a view which few people in the world would then have contested or would now contest. But he had to put up with a good deal of private discrimination. Mr. Justice Stewart would have had to tell him that he was a slave, for the Thirteenth Amendment which abolished slavery, meant at least (no less!) the proscription of private discrimination of the kind applied to him. One can imagine what kind of answer our European immigrant, breathing the free air of America, would have given to the judge.

Incidentally, a particular situation could arise from the majority's decision which would be truly ludicrous. Since the First Amendment protects the propagation of ideas, Mr. Justice Stewart conceded that parents would have a right to send their children to a school which

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

promoted the belief that racial segregation was desirable. Thus a school which loudly proclaimed the virtue of segregating blacks from whites, and thus unavoidably used language offensive to blacks, would be acting lawfully; but a school which, without any racist language at all, simply did not accept black children, would not!

It may be said that this merely illustrates the difference between speech and action. Speech, however reprehensible, is protected, action is not. But some action, which may be just as reprehensible, may be shielded by speech. On Stewart, J.'s view it would not merely be the proclamation of the virtue of racial segregation which would be protected; it would also be the operation of private schools which proclaimed and promoted such a view, as long as they did not actually refuse admission to members of the race which they said should be segregated!

All this, or most of it, Mr. Justice Stevens well understood. Yet he decided to go with the majority. Can his decision be defended?

He decided to follow the rule of *stare decisis*. On his side he had the well-known statement of Mr. Justice Brandeis, though it was Stewart, J., not he, who quoted it, namely "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation."

This is perhaps the strongest statement of the rationale of *stare decisis* that can be made. But notice the proviso that correction can be had by legislation. In this case it was legislation itself, namely the Civil Rights Act, 1866, which had been construed in the line of cases relied upon in such a way as to torture its meaning and to produce a legislative result which, Stevens, J. firmly believed, the legislators never intended. The Brandeis statement is therefore hardly more than slender support for the Stevens decision.

Mr. Justice Stevens called in aid the dictum of Mr. Justice Cardozo which is quoted in his judgment, but he had to engage in some logical gymnastics in order to do so. Cardozo argued against *stare decisis* in cases where mores had changed (no doubt meaning where they had changed substantially or fundamentally). Stevens, J. turned this into a call to abide by *stare decisis* where the line of authority accords with up-to-date mores, and the legislation which the line of authority misconstrued accorded with mores now out-of-date. Whether Cardozo would have approved of this deduction, one cannot know, but it would be a rare logician who would approve of it.

The Corpus Juris Secundum statement of the rule of *stare decisis* is less misleading than the Brandeis statement, namely ". . . the rule will not be applied to the extent of perpetuating error" (21, § 187). Furthermore, in his judgment Stevens, J. himself gave two excellent reasons for *not* abiding by *stare decisis*. "First . . . my conviction that *Jones* was wrongly decided is firm. Second, it is extremely unlikely that reliance upon *Jones* has been so extensive that this Court is foreclosed from overruling it."

The conclusion is surely inescapable that Mr. Justice Stevens' adherence to the verdict of the majority was a supine submission to the *Zeitgeist*. If so, his posture was more regrettable than that of his colleagues. For they knew not what they were doing, but he did.

The *Zeitgeist* is clearly powerful. Is it not after all carrying us in the right direction? Was not justice done in this case, even if not according to law? Ought not racial discrimination of this kind to be proscribed? Ought we not to rejoice in a Supreme Court that is determined to see right prevail, whatever kind of reasoning it may use? These questions cannot be sidestepped. They call for an answer.

However, let us first recognize that in a society which prizes the Rule of Law, justice done not according to law is not to be welcomed, and it may be very reprehensible. If we are to seek justice without regard to law, then at the very least we can dispense with courts manned by judges trained in the law. As suggested above, a cadi or a King Solomon could do as good a job, and perhaps a better one. But in a truly good society, certainly if it has grown to any stage of complexity, justice needs to be done according to law, and only according to law.

But was justice done at all in this case? The

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

question cannot be decided by the unquestionable odiousness of some forms of private racial discrimination. Not everything which a wise and disinterested observer might declare to be odious, say for example adultery or promiscuous fornication, ought necessarily to be made unlawful. There are worthy citizens who believe that prostitution and drug-trafficking, amongst other repellent practices, should be placed in the same column. The essential point is that in a free society every adult and responsible person has a right to a castle of his or her own which cannot lawfully be invaded by the power of the state, whether it be by way of legislation, executive action, or judicial action. This is the principle of the limited state. It is also the original conception of the American Constitution.

This principle is clearly embodied in the First Amendment, which protects the right to propagate opinions, however odious or repellent they may be. The question in the case of racial discrimination is where the bounds of the private castle should be. Public discrimination is clearly wrong because there the power of the state invades the castles of those who suffer the discrimination. Are all types of private discrimination different from public discrimination?

Mr. Justice Powell sought to draw the bounds so as to enclose and protect discrimination rooted in some form of personal or individualized relationship. There is clearly merit in his view. But what gives the state the right to draw the bounds no wider than the Powell lines? Freedom of contract is itself so basic a freedom that the onus of showing that it should be abridged by the state rests upon those asserting it, and the onus is not discharged by showing that the freedom to be abridged produces results odious or painful to some people. The fundamental principle must surely be that, as long as the object of a contract is itself lawful (unlike, say, prostitution in numerous jurisdictions), the freedom to choose one's contracting partner is a basic freedom to be constricted only, as for example under the theory of anti-trust laws, where the construction is thought to be necessary to preserve freedom of contract itself.[1]

This assertion of the basic quality of freedom of contract in a free society will of course appear to be strangely old-fashioned to those who imagine that it was buried for ever with the abandonment of substantive due process by the Supreme Court from 1937, or perhaps 1941, onwards. One can say with some confidence that it is unlikely to be long before this comes to be seen for the error that it is. Substantive due process was abandoned under the influence of a host of myths and superstitions which sprouted mainly from the soil of the Great Depression and thus gripped the public mind. The mills of God grind slowly but they grind exceeding small. Forty years' experience is beginning, however slowly and haltingly, to open the public's eyes to the emptiness of the claims made for governmental regulation and intervention, and the counterproductivity or downright harmfulness of most examples of their practice.

If human relationships are not determined by contract, they will be determined by status. Long ago we in the Anglo-Saxon world, if not in the Western world generally, were taught that our society progressed by moving from status to contract. In recent decades the state everywhere in the Western world has embarked on innumerable interferences with freedom of contract which in effect give status a determining role. That these measures have been widely approved, or not widely opposed, is partly due to the fact that their effect in moving us back from contract to status is not perceived. The judgment of the Supreme Court in the case before us, a legislative rather than a judicial determination, is one of this family of interferences.

But how can this be? In the eyes of the Court the purpose of the judgment was to widen, not narrow, the field of contract. This was surely different from other measures intended to benefit "disadvantaged" racial groups, such as affirmative action programs, which it may be alleged give a privileged status to their beneficiaries.

It looks different, but it is not. Affirmative action is to be condemned because it is openly and clearly a case of public racial discrimination. It also happens to be largely counter-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

productive, which is why intelligent black Americans oppose it. Its sophistical defense, based upon the alleged need to redress the effect of past public discrimination by way of such programs, need not detain us here. We need note only that affirmative action is promoted as a part of a strategy of social engineering. By its nature social engineering of whatever form inevitably seeks to erect status as the principal determinant of the structure of society, and for that reason amongst others it is inimical to the operation of a free society.[2]

To require citizens to enter into contracts against their will, in order to enable "a dollar in the hands of a Negro to purchase the same thing as a dollar in the hands of a white man," is to engage in social engineering. Its form is patently different from that of affirmative action, but its purpose is of the same order. Every man who is able to oblige another man to enter into a contract against his will, is given a privileged status; and the other man is given an underprivileged status.

But perhaps here is a case where the end may justify the means. If it produces a racially tolerant and harmonious America, ought we not to welcome it? Perhaps, yes. But what grounds are there for the belief that this will be the happy outcome? A guilt-ridden nation in a hurry to cure the social ills of centuries presents a pitiable face to the world, for it will not succeed. When Mr. Attlee became the Prime Minister of Britain at the head of the first Labor Government after World War II, he declared that its task was to clean up the mess of centuries. It has turned out to be a mess of Britain that he and his successors have made.

People will always rebel against differential status. "When Adam delved and Eve span, who was then the gentleman?" It has not taken whites long to perceive the inequity to themselves of affirmative action. Why should we believe that they will not react resentfully against other racially inspired limits to their freedom? If and when they do so react, the effect will be racial disharmony, not harmony.

Mr. Justice Stevens would have done well to stick to his perception of the law. He would have served the interests of law, of liberty, and perhaps in the end of racial harmony itself.

[1]This is not intended to mean that anti-trust laws in fact preserve freedom of contract. In practice the greater part of the body of American anti-trust law has been inimical to freedom of competition and contract.

[2]It is some years a go since the Supreme Court began to slide from contract to status in the field of race relations. See the excellent article by Phyllis Tate Holzer and Henry Mark Holzer, "Liberty or Equality," *Modern Age*, Spring 1964.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The Fact-Value Dichotomy as an Intellectual Prison

DANTE GERMINO

TWENTY-FIVE YEARS AGO, the political scientist David Easton made the following observations about the widespread acceptance of the fact-value dichotomy in American social science:

> This assumption, generally adopted today in the social sciences, holds that values can ultimately be reduced to emotional responses conditioned by the individual's total life-experiences. In this interpretation, although in practice no one proposition need express either a pure fact or a pure value, facts and values are logically heterogeneous. The factual aspect of a proposition refers to a part of reality; hence it can be tested by reference to the facts. In this way we check its truth. The moral aspect of a proposition, however, expresses only the emotional response of an individual to a state of real or presumed facts. It indicates whether and the extent to which an individual desires a particular state of affairs to exist. Although we can say that the aspect of a proposition referring to a fact can be true or false, it is meaningless to characterize the value aspect of a proposition in this way.[1]

Easton's inelegant formulation of the logical positivist fact-value dichotomy has the advantage of its brutal frankness. So-called "value" propositions, do not "refer to reality" at all. "Reality" apparently is what we discover by "barefoot empiricism," to employ William Glaser's felicitous phrase. In any event, Easton tells us, "facts and values are logically heterogeneous." This means that were we to attempt to derive a norm (or value) from a fact (or a "part of reality"), we should be committing the "naturalistic fallacy" which forbids us under pain of methodological death to derive an "ought" from an "is."

The logic of logical positivism is this: stick to your last and do not mess around in the muck of values and "soul stuff." To be sure, each of us could go about parading our "value judgments" but why should we do so, given that they are our irrational responses "conditioned by our total life experiences" to a set of "real or presumed facts"? The profession is interested in our "facts" not in our psyches, says Easton.

As an illustration of the markedly deflationary effect of the fact-value dichotomy on so-called statements of value, I offer the following translation, as it were, of Jeffersonian English into Eastonian political science. Thomas Jefferson, who died in 1825 and of course was benightedly unaware of the fact-value dichotomy, could write: "We hold these truths to be self-evident: that all men are created equal and are endowed by their Creator with certain unalienable rights."

Rendered into "mainstream" political science, Jefferson's words would sound today something like this:

> We hold these values, which do not refer to a part of reality, and cannot be said to be either true or false, and which can ultimately be reduced to our emotional responses, not to be self-evident of course, but rather to indicate the extent to which we desire a particular state of affairs to exist: that all men are created equal and are endowed by their Creator with certain unalienable rights; except that neither the notion of creation, nor that of a Creator, nor that of "unalienable rights" is testable. And so, perhaps we might just as well forget the whole thing.

I shall not dwell on the obviously nihilistic implications of "mainstream" social science's fact-value dichotomy. Many good books have been written on this subject.[3] I did find inter-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED