



Incidents of slavery: On the high court's notions of life in Memphis

by Harvey Silverglate

The price of liberty, we are told, is eternal vigilance. Eternal vigilance is difficult, however, when one is monitoring the Supreme Court of the United States under the leadership of Nixon's hand-picked chief justice, Warren E. Burger, for it is not easy to make special note of a gradual, case-by-case erosion of our rights and liberties. Once in a while, however, this court makes a decision that is so far from what civilized Americans have come to expect the Constitution to mean and to protect that it shocks even lawyers, who cannot always be counted upon to understand the common-sense (as opposed to strictly legal) implications of a judicial outrage.

Late last month, the Supreme Court decided that the 13th Amendment, which outlaws slavery, and the historic Civil Rights Acts passed in the aftermath of the Civil War (which was, at latest report, won by the Union forces) do not prevent the city of Memphis, Tennessee, from separating an all-white, affluent enclave from a predominantly black ghetto by closing off a major roadway leading from the ghetto just at the point that it reaches the border of the white area. Even lawyers were shocked, although this landmark opinion — a blot on the conscience of the nation — was barely noticed in the news media.

The 13th Amendment and the Civil Rights Acts have long been thought to outlaw not just the practice of slavery itself, but also all "badges and incidents of slavery." The dismantling of Jim Crow segregation began on the assumption that it was a badge or incident of an outlawed system of involuntary servitude. As Justice Thurgood Marshall, the court's only

black member, put it in his dissenting opinion: "Because I do not believe that either the Constitution or federal law permits a city to carve out racial enclaves I dissent."

Unfortunately, Marshall was able to persuade only two other justices to go along with this proposition, namely, Eisenhower appointee William Brennan and Nixon appointee Harry Blackmun (who, in recent years, has shown encouraging signs of deviating from the Nixon-Burger line in a number of instances). Nixon appointees Burger, Lewis Powell, and William Rehnquist, along with Eisenhower appointee Potter Stewart, cast their votes in support of a majority opinion written by Ford appointee John Paul Stevens, thereby giving this pernicious doctrine a clear five-man majority. (Kennedy appointee Byron "Whizzer" White concurred with the result, but not necessarily with the majority's reasoning, thus adding the weight of a sixth vote to the ruling.)

The facts in the case, even when described by the court majority, would seem to make it clear that the city of Memphis had erected a barrier to separate a white enclave from a predominantly black community. The majority admitted that most of the facts involved in the litigation were not contested, but that "inferences to be drawn from the evidence . . . are subject to some disagreement." This proved to be a considerable understatement.

Hein Park is a small, all-white residential community in Memphis; to the north of it is a predominantly black community. West Drive is a major artery that runs from this black area into the center of Hein Park. The Hein Park Civic Associa-

tion, representing property owners in the neighborhood, petitioned the local planning board to close West Drive at the point that it entered Hein Park. The petition, which was signed by all but one of the property owners in the area, gave three justifications for what was conceded to be an unusual action: that it would reduce traffic in the area, that it would make the area safer for children, and that it would reduce "traffic pollution in a residential area, e.g. noise, litter, interruption of community living."

Justice Marshall, in his dissent, gave short shrift to these reasons. He quoted testimony from the evidentiary hearing in the trial court, in which proponents of the measure said that they were acting to protect "the safety and tranquility of a residential neighborhood" by preventing "undesirable traffic" from entering it. These words, noted Marshall (partly on the basis of common sense, and partly, one must assume, out of bitter experience), "too often in our nation's history . . . have been little more than code phrases for racial discrimination."

Marshall's analysis of the inferences to be drawn from the testimony and evidence in the trial court was considerably bolstered by the testimony of the one resident who refused to sign the petition, Sarah Terry. Terry testified that the person who approached her to seek her signature on the petition noted that the "traffic" that the closing meant to eliminate was "undesirable traffic." Marshall noted, with evident anger and sarcasm, that "The common-sense understanding of Terry's testimony must be that the word 'undesirable' was meant to describe the traffic that was actually using the street, as opposed to any traffic that might use it." This "undesirable traffic," noted Marshall, "was predominantly Negro." The picture that emerges, he concluded, "is one of a white community, disgruntled over sharing its street with Negroes, taking legal measures to keep out the 'undesirable traffic,' and of a city, heedless of the harm to its Negro citizens, acquiescing in the plan."

The majority was obviously not comfortable with Marshall's analysis of the motives of the Hein Park petitioners. Rather than deal with these motives and the consequences of catering to them

discriminatory.

The court has applied this intent test to school-segregation cases. The court has ruled that certain drastic remedies for desegregating racially separate schools may be applied only in situations where it can be proven that the school board and other official bodies in charge of the school system acted with an intent to segregate the schools. It is, of course, difficult — and in many cases, impossible — to come up with such proof, for there are not many school boards that would, for example, draw school district lines and announce publicly that they are doing so in order to separate white students from black.

Similarly, the court has dealt serious damage to the laws meant to protect the voting rights of black citizens, by holding that certain voter-registration practices, certain voting-district boundary lines, and certain at-large electoral systems, all of which might have the result of diluting or limiting the votes of black citizens, are not unlawful if they were created for "facially neutral" reasons. Such tinkering with the voting rights of black citizens has threatened decades of slow and difficult progress in the effort to give the nation's minorities the benefits of equal citizenship and of the "one man/one vote" doctrine.

Thus, the court majority in the Memphis case found that "there is no evidence that the closing was motivated by any racially exclusionary desire" on the part of the city officials. The court concluded that Sarah Terry's testimony that the language of the person soliciting signatures for the closure petition, who described the traffic as "undesirable traffic," supported rather than undermined the validity of the closure decision because, absent conclusive evidence of discriminatory intent, it is fine to bar traffic where little (white) kids play. The court drew this conclusion notwithstanding its admission that opponents of closure had unsuccessfully suggested other, less drastic means to curb the danger of traffic accidents, such as the establishment of slow speed zones, traffic signals, and other impediments to fast traffic (obviously, the whites no more wanted blacks driving slowly through their enclave than they wanted blacks speeding through).

through official governmental action, the majority stated in a footnote that since the black citizens "have sued the city, the mayor, and the city council and its chairman," the court would "focus on the decisions of these public officials, and not on the actions of the residents of Hein Park, in determining" whether the blacks met their burden of proving that the city officials acted more out of racial prejudice than out of "neutral motives," such as traffic control and preservation of a neighborhood's serenity. The majority thus never dealt with the important question of whether a local governmental body could properly implement the property owners' request simply by adopting "facially neutral" pretexts or justifications for its actions. Nor did the majority deal with the clear history of the 13th Amendment and the Civil Rights Acts implementing the Amendment, which without doubt were meant to outlaw both governmental and privately imposed badges and incidents of slavery. To ignore the rather clearly expressed prejudice of the citizens, and to focus instead on the more polished (but still transparent) pretexts advanced by the city officials, is a serious insult to all black citizens, and indeed to all citizens possessing any intelligence whatsoever.

Perhaps most important, from a legal point of view, the court stipulated — though the 13th Amendment and the Civil Rights Acts do not — that the black citizens had to prove "discriminatory intent" in order to receive court relief from the badges and incidents of slavery imposed by the white citizens' group or the governmental bodies. This doctrine of "discriminatory intent" was created, and has been invoked by, the Burger court in recent years to gut crucial provisions of those statutes and court opinions promulgated to help eliminate racial discrimination in the United States. The court has held, in a number of important cases brought to effectuate the 14th Amendment (which assures all citizens "due process" and "equal protection of law") and civil-rights legislation passed pursuant to that Amendment, that it is not enough for a plaintiff to prove that certain governmental actions place a certain group of citizens at a disadvantage; rather, the plaintiff must prove that the defendants *intended* their conduct to be

discriminatory. ¹ ~~discriminatory~~ The evidence that white property values would increase due to closure, while black property values would decrease. The court noted, first, that any decrease in black property values would be "speculative," but in any event long-term. The court also dismissed any such effect on property values as being incidental to a facially neutral street closure.

Once the court concluded that there was no racial bias in the closure decision, it seems obvious, it fit all the evidence into its preconceptions or, worse, just ignored the evidence to the contrary. This is the only way of explaining the court's bizarre and insulting conclusion that barring blacks from a white enclave does not (in the words of the Civil Rights Acts) deprive black citizens of the same rights that white citizens have "to inherit, purchase, lease, sell, hold, and convey real and personal property," since the blacks are not being barred from "access to black homes." Only the latter action, concluded the court, would violate the Act by hampering blacks "in the use of their property." (Under this reasoning, then, one must assume that Terry, who refused to sign the closure petition, could sue to reopen the street, since it hampered her access to her own property. Does anyone want to bet on the outcome of such a case should it ever reach this Supreme Court?)

In light of this decision made on the basis of this factual record, Justice Marshall's dissent is actually quite mild. If the erection of a barrier between an all-white enclave and a black ghetto — a barrier resulting in inconvenience and lower property values to the blacks and increased "tranquility," protection from "undesirable traffic," and higher property values for the whites, who have acted over the years to keep their neighborhood all-white and who initiated the drive to close the street — is not to be considered "an incident or badge of slavery," then certainly there is no such thing any longer as a badge of slavery. When the Supreme Court, under Chief Justice Earl Warren, outlawed school desegregation, in 1954, it abolished the "separate but equal" doctrine. With this case, however, the Burger court has not simply revived this doctrine, but has gone as far as to allow even a bit of inequality to result from the separation of the races. □