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Civil Rights -- Discrimination in the Sale of Private Property

Martin Engels

CASES NOTED

CIVIL RIGHTS—DISCRIMINATION IN THE SALE OF PRIVATE PROPERTY

Attracted by an advertisement in the *St. Louis Post-Dispatch*, the Joneses attempted to buy a house in Alfred H. Mayer's private subdivision. They could not, however, solely because Mr. Jones was black, and it was company policy not to sell to Negroes. Relying in part on 42 U.S.C. § 1982 (1964),[1] the Joneses sought an injunction to enforce their federal right to buy property. The district court held that the subdivision's functioning as a municipality and its being subjected to licensing, zoning, and other governmental regulations did not constitute the requisite state involvement necessary to invoke section 1982, and dismissed the complaint;[2] the Eighth Circuit affirmed.[3] On certiorari,[4] the Supreme Court, in a case of first impression, *held*, reversed: Section 1982, properly enacted under the thirteenth amendment, empowers the federal courts to grant injunctive relief to those who have been discriminated against on the basis of race in the sale or rental of *any* property. *Jones v. Alfred H. Mayer Co.*, 88 S. Ct. 2186 (1968).

The price the Court has paid for this undoubtedly moral and sociologically prudent decision is nonconformity with most of the precedent on the subject. Previously, courts have turned their backs on racial discrimination in the sale of private property by traveling two parallel and related routes, *viz.*, a policy of abstention from any totally non-governmental sphere of activity, and judicial emasculation of the thirteenth amendment,[5] and its progeny, section 1982. Finding force in the common law penchant for looking with disfavor on restrictions on the alienation of land,[6] and in the concept of due process of law,[7] judicial reluctance to in-

1. "All citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Originally enacted in 1866 as ch. 31, § 1, 14 STAT. 27, this section was reenacted in substantially the same form by the Enforcement Act of 1870, ch. 114, § 18, 16 STAT. 140, 144. Although codified in the Revised Statutes of 1874 as 42 U.S.C. §§ 1981-82 for a number of years, hereinafter it will be referred to by its present codification, § 1982.

2. Jones v. Alfred H. Mayer Co., 255 F. Supp. 115 (E.D. Mo. 1966).

3. Jones v. Alfred H. Mayer Co., 379 F.2d 33 (8th Cir. 1967).

4. Jones v. Alfred H. Mayer Co., 389 U.S. 986 (1967).

5. "Section 1. Neither slavery nor involuntary servitude, . . . shall exist within the United States . . . .

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

6. *E.g.*, Bean v. Patterson, 122 U.S. 496, 499 (1887) ("that absolute power which a man possesses over his own property, by which he can make any disposition of it . . ."). *See generally* Friedman, *The Law of the Living, The Law of the Dead: Property, Succession and Society*, 1966 Wis. L. Rev. 340, 355-65; Hecht, *From Seisin to Sit-In: Evolving Property Concepts*, 44 B.U.L. Rev. 435, 440 (1964). *But see* Rice, *Bias in Housing: Toward a New Approach*, 6 Santa Clara Lawyer 162, 166 (1966):

> It is important to note here that there is no absolute right to own and dispose of property. Consistent with the Constitution as well as the moral idea of stewardship of wealth, the right of property can be subjected by law to reasonable regulations for the common good.

7. *See* Mr. Justice Black dissenting in Bell v. Maryland, 378 U.S. 226, 331 (1964):

terfere with private discrimination has been rooted, to a large measure, in the use and interpretation of the fourteenth amendment.[8] Since our courts have insisted, albeit with increasing liberality, that some degree of state involvement was necessary to summon the fourteenth amendment to vindicate a deprivation of civil rights,[9] purely private action, by default, lay beyond the ambit of judicial protection.[10] Indeed, the "right" of an individual to discriminate had been so firmly entrenched,[11] that even sympathetic judges[12] preferred to redraw "the line"[13] on state action, rather than conceptually tread on private rights.

Although there were strong indications that the sweep of the thirteenth amendment was intended to be quite broad,[14] once enacted, the treatment it received both in the lower courts,[15] and later in the Supreme Court,[16] was, at best, confining. The Emancipation Amendment was, of course, not burdened by the "state action" limitation of the fourteenth,[17]

> [W]hen one party is unwilling, as when the property owner chooses *not* to sell to a particular person or *not* to admit that person, then, as this Court has emphasized, . . . he is entitled to rely on the guarantee of due process of law . . . and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use . . . . (emphasis his).

Apparently the Justice was not aware of section 1982, enacted ninety-eight years previous to the making of this statement, which he, as a member of the majority in *Jones,* now considers "valid legislation."

> 8. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

9. *Compare* Civil Rights Cases, 109 U.S. 3 (1883) *with* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) *and* Reitman v. Mulkey, 387 U.S. 369 (1967). *See also* Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee,* 66 COLUM. L. REV. 855 (1966); Williams, *The Twilight of State Action,* 41 TEXAS L. REV. 347 (1963).

10. Johnson v. Levitt & Sons, Inc., 131 F. Supp. 114 (E.D. Pa. 1955); Hill v. Miller, 64 Cal. 2d 757, 415 P.2d 33, 51 Cal. Rptr. 689 (1966); Housing Authority v. Cordova, 130 Cal. App. 2d 883, 279 P.2d 215 (1955), *cert. denied,* 350 U.S. 69 (1956); *cf.* Oliphant v. Brotherhood of Locomotive Firemen and Eng'r, 262 F.2d 359 (6th Cir. 1958), *cert. denied,* 355 U.S. 893 (1959); Ming v. Horgan, 3 RACE REL. L. REP. 693 (Sup. Ct. 1958); *see also* MacGregor v. Florida Real Estate Comm'n, 99 So.2d 709 (Fla. 1958).

11. "There is a relative dearth of authority upon the matter, probably because the property owner's right to deal with whom he pleases in this respect has been generally assumed . . . ." Annot., 14 A.L.R.2d 153, 155 (1950).

12. *See, e.g.,* Judge Fuld dissenting in Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), in a typical exercise in "'state action' metaphysics"; Kinoy, *The Constitutional Right of Negro Freedom,* 21 RUTGERS L. REV. 387 (1967).

13. Hackley v. Art Builder's, Inc., 179 F. Supp. 851, 857 (D. Md. 1960).

14. Jones v. Alfred H. Mayer Co., 88 S. Ct. 2186, 2202-05 (1968); Gressman, *The Unhappy History of Civil Rights Legislation,* 50 MICH. L. REV. 1323 (1952); Kinoy, *supra* note 12.

15. LeGrand v. United States, 12 F. 577 (C.C.E.D. Tex. 1882); Cory v. Carter, 48 Ind. 327 (1874); Bowlin v. Commonwealth, 65 Ky. (2 Bush.) 5 (1867). *See also* Charge to Grand Jury—Civil Rights Act, 30 F. Cas. 1005 (No. 18,260) (C.C.W.D. Tenn. 1875). *Contra,* United States v. Morris, 125 F. 322 (E.D. Ark. 1903).

16. Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882). *See also* Plessy v. Ferguson, 163 U.S. 537 (1896).

17. Clyatt v. United States, 197 U.S. 207 (1905); United States v. Shackney, 333 F.2d 475 (2d Cir. 1964). *Contra,* People v. Brady, 40 Cal. 198 (1870).

and "[clothed] Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . . ."[18] Paradoxically, the prevailing view was that to make it applicable to acts of racial discrimination "would be running the slavery argument into the ground . . . ."[19] Despite a unique federal case[20] and the enlightened, vigorous dissents of the first Mr. Justice Harlan[21] arguing that Negro freedom is meaningless without freedom from discrimination, the thirteenth amendment, until resurrected in *Jones*, remained overwhelmed by the weight of authority.[22]

While the thirteenth amendment was being bludgeoned by narrow judicial interpretation, section 1982 was also falling on hard times.[23] Due to fears of the growing impotence of the amendment under which it was enacted, Congress reenacted section 1982 under the fourteenth[24] in order to eliminate any doubts of its validity. Rather than renewing any vitality the law may have had, the reenactment gave the Court a chance to vitiate further the rights of the Freedmen[25] by ruling, in effect, that to preserve the validity of the Civil Rights Acts, they must be construed as being directed only at state action.[26] With only slight authority to the contrary,[27]

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

19. *Id.* at 24.

20. United States v. Morris, 125 F. 322 (E.D. Ark. 1903). As the *Jones* opinion noted, 88 S. Ct. at 2192-93, this was the only case to pass directly on the validity of the thirteenth amendment in relation to section 1982. Upholding an indictment of conspiracy to prevent Negroes from occupying land, Judge Treiber held that:

> [C]ongress has the power, under the provisions of the thirteenth amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of these privileges [one of which is the right to lease land] is solely on account of his race or color . . . .

United States v. Morris, *supra* at 330.

21. *E.g.*: "[T]heir freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race . . . ." Civil Rights Cases, 109 U.S. 3, 36; *see* Hodges v. United States, 203 U.S. 1, 20-38 (1906); Plessy v. Ferguson, 163 U.S. 537, 553-64 (1896).

22. In Hodges v. United States, 203 U.S. 1 (1906), the Court struck a federal indictment charging conspiracy to prevent Negroes from enforcing labor contracts at a saw mill. Limiting federal jurisdiction under the thirteenth amendment only to acts of actual slavery or involuntary servitude, the Court said the authority to enforce such as those protected by section 1982 resides only in the several states.

Twenty years later, the thirteenth was weakened further in Corrigan v. Buckley, 271 U.S. 323 (1926), wherein defendant's appeal of an injunction prohibiting him from selling to Negroes in violation of a restrictive covenant was dismissed with strong dictum as to the amendment's frailty.

23. *See* Gressman, *supra* note 14, and authorities cited therein.

24. Jones v. Alfred H. Mayer Co., 88 S. Ct. 2186, 2201-02; *see* note 1 *supra*.

25. Relying on C. WOODWARD, REUNION AND REACTION (1951), Prof. Kinoy, *supra* note 12, at 396-99, suggests that the majority of the Court in the Civil Rights Cases, 109 U.S. 3 (1883), which set the tone for many years to come, endeavored, and were successful, to reflect the Compromise of 1877 by shifting the primary responsibility of enforcement of Negro rights to the states.

26. Civil Rights Cases, 109 U.S. 3 (1883) (dictum); Virginia v. Rives, 100 U.S. 312 (1879) (dictum).

27. United States v. Morris, 125 F. 322 (E.D. Ark. 1903); *see* Judge Edgerton dissenting in Hurd v. Hodge, 162 F.2d 233, 235-46 (D.C. Cir. 1947), *rev'd*, 334 U.S. 24 (1948); Beech Grove Inv. Co. v. Civil Rights Comm'n, — Mich. —, 157 N.W.2d 213, 229 (1968) (Souris, J.

subsequent decisions bore the mark of this politically motivated heritage of restraint,[28] and section 1982 fell into desuetude.

Bent on adding another rung to its ladder of decisions which aim at securing the black man's proper place in American society, the Justices of the Supreme Court plunged headlong into this impressively large, if perhaps specious, body of authority. They distinguished;[29] they disapproved;[30] they overruled;[31] they incorporated the dissents of the first Mr. Justice Harlan;[32] they went to great lengths to ascertain the intent of Congress.[33] Despite this façade of legal gymnastics, the entire thrust of this landmark decision, which *appears to suggest otherwise,* is a reversal of a century of judicial thinking vis-à-vis the thirteenth amendment and section 1982:

> Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.[34]

Hence, section 1982 "must encompass every racially motivated refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing."[35] Although there will surely be those who insist that "the Supreme Court is tellin' me how to sell my house," the result merely forbids one who has placed his property on the market from discriminating against a potential buyer on the basis of race, lest the power of a federal injunction be brought to bear.

In light of the constitutionally expansive direction in which the Supreme Court has been moving, a finding for the petitioner in *Jones*, despite the "good law to the contrary,"[36] should astonish no one.[37] The Court's

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concurring) ("It is my opinion that that federal statute elevated to the rank of civil right the right, among others listed, to purchase real property . . . .").

28. Dicta in Hurd v. Hodge, 334 U.S. 24, 31 (1948) ("The action toward which the provisions of the statute under consideration is directed is governmental action."); Oyama v. California, 332 U.S. 633, 640 (1948) ("By federal statute, enacted before the Fourteenth Amendment but vindicated by it, the states must accord to all citizens the right to take and hold real property."); Corrigan v. Buckley, 271 U.S. 323 (1926); Buchanan v. Warley, 245 U.S. 60 (1917); Hodges v. United States, 203 U.S. 1 (1906); Moffett v. Commerce Trust Co., 75 F. Supp. 303 (W.D. Mo. 1947), *aff'd,* 187 F.2d 242 (8th Cir. 1951).

29. *E.g.,* section 1982's limitation to state action as found in the authorities cited note 26 *supra* was found to be dictum. 88 S. Ct. 2186, 2193 n.25 (1968).

30. It is true that a dictum in Hurd v. Hodge . . . characterized Corrigan v. Buckley . . . as having 'held' that '[t]he action toward which the provisions of the statute . . . [are] directed is governmental action.' . . . But no such statement appears in the *Corrigan* opinion, and a careful examination of *Corrigan* reveals that it cannot be read as authority for the proposition attributed to it in *Hurd.*

Id.

31. 88 S. Ct. at 2205 n.78: "Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled."

32. *Id.* at 2204-05.

33. Over sixty percent of the majority opinion concerns itself with debates of the Reconstruction Congresses that tend to support their conclusion.

34. 88 S. Ct. 2186, 2203-04 (1968).

35. *Id.* at 2194.

36. Jones v. Alfred H. Mayer Co., 379 F.2d 33, 43 (8th Cir. 1967).

37. In affirming the complaint's dismissal, apparently against their "personal inclinations,"

thirteenth amendment methodology, however, was, to some extent, unexpected. The petitioners' alternative ground for relief—that the public nature of the subdivision[38] and its other governmental relationships such as licensing[39] should place them under the fourteenth amendment umbrella—led some to speculate that an extension of the "state action" concept would be the grounds for reversal.[40] It has been suggested that a state's failure to deal with discrimination, *i.e.* state *in*action, would be a sufficient violation of fourteenth amendment rights.[41] Still others, since the "elastic in the concept [of state action] can be stretched just so far,"[42] would hold that under section 5 of the fourteenth amendment[43] Congress is not limited by the "state action" of section 1,[44] and may therefore reach purely private action in protecting the privileges and immunities of United States citizens.[45] Nevertheless, the Court chose to take some pressure off the fourteenth amendment, and its action harbours profound implications for lawmakers, as well as for the law itself.

Perhaps the most significant of these is the powerful new tool it gives legislatures to deal with problems of racial discrimination. Unlike the 1870's, it is no longer "running the slavery argument into the ground"[46] to label private acts of discrimination badges of servitude. Conservative jurisdictions now automatically have a rather pervasive fair housing law. Congress and those states which would have taken the initiative to attack *any* form of racial discrimination now have extra constitutional ammu-

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id., the Eighth Circuit presaged what was to follow: "It would not be too surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complaint of this kind." *Id.* at 44. For the definitive analysis of predictability in courts of appeals *see* K. LLEWELLYN, THE COMMON LAW TRADITION (1960).

38. *See* Marsh v. Alabama, 326 U.S. 501 (1946).

39. There is no difference, as I see it, between a State authorizing a licence to practice racial discrimination and a State, without any express authorization of that kind nevertheless . . . the operation of a licensing system in an environment where the whole weight of the system is on the side of discrimination.

Reitman v. Mulkey, 387 U.S. 369, 385 (1967) (Douglas, J. concurring); *see also* Mr. Justice Douglas concurring in Garner v. Louisiana, 368 U.S. 157 (1961).

40. 53 CORNELL L. REV. 314 (1968); 16 KAN. L. REV. 247 (1968); 33 MO. L. REV. 140 (1968); 21 VAND. L. REV. 271 (1968). Some of these articles also displayed a degree of skepticism about the possibility of the Court using the grounds it did for reversal.

41. *See* Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964); Silard, *supra* note 9; *cf.* Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961):

By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

42. Kinoy, *supra* note 12, at 417.

43. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

44. Notes 9 and 10 *supra*, and accompanying text.

45. This was originally the thesis of the first Mr. Justice Harlan in his dissent in the Civil Rights Cases, 109 U.S. 3, 5 (1883). It reappears in language in United States v. Guest, 383 U.S. 745, 761-62 (1966) (Clark, Black, and Fortas, JJ. concurring) and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 279-86 (1964) (Douglas, J. concurring). *See generally* Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. CAL. L. REV. 274 (1967).

46. Note 20 *supra*, and accompanying text.

nition. In fact, the impact can already be noticed in New York where *Jones* was relied on to sustain the state's anti-discrimination law.[47]

Besides laying a broader foundation for future laws, and Mr. Justice Stewart's suggestions to the contrary notwithstanding,[48] *Jones* renders much of the Fair Housing Title of the Civil Rights Act of 1968[49] academic.[50] Effective January 1, 1969,[51] the Act declares discrimination in the offer or sale of housing because of race, color, religion, or national origin illegal.[52] In addition to procedural differences,[53] it exempts from its coverage the "Mrs. Murphy's Boarding House" dwelling unit,[54] non-residential property,[55] single family housing,[56] sale of property without the services of a real estate agent,[57] and property of religious groups.[58] However, *Jones*, as far as discrimination based on race is concerned, covers *all* property. Between the two exists a gap wherein housing discrimination for non-racial reasons in the areas excluded from the Act find no prohibition. Yet the fact that in this country the Negro is the most frequent sufferer of discrimination overshadows the above limitation in the present law. It may also be noted that the Court withheld judgment as to whether section 1982 allows for compensatory and punitive damages,[59] both provided for in the new Act.[60] This appears to be a logical and anticipated extension of the instant case.[61] Moreover, in the

47. State Comm'n for Human Rights v. Kennelly, 37 U.S.L.W. 2084 (N.Y. App. Div. July 11, 1968). *See also* the Public Accommodations Title of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201-7, 78 Stat. 241 (1968), the validity of which was sustained in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), on the basis of the Constitution's commerce clause. Although it would take an explicit reversal of the Civil Rights Cases, 109 U.S. 3 (1883), which tacitly took place in *Jones* anyway, today the Act could easily be sustained on the basis of *Jones*.

48. Jones v. Alfred H. Mayer Co., 88 S. Ct. 2186, 2189-90 (1968).

49. Pub. L. No. 90-284, 82 Stat. 73 (1968).

50. In Mr. Justice Harlan's words:

> In effect, this Court, by its construction of § 1982, has extended the coverage of federal "fair housing" laws far beyond that which Congress in its wisdom chose to provide in the Civil Rights Act of 1968.

88 S. Ct. 2186, 2222 (1968).

51. Pub. L. No. 90-284, 82 Stat. 73, § 803(a)(2) (1968).

52. *Id.* at § 804(a).

53. The provisions of the Act may be enforced by an administrative proceeding in the Department of Housing and Urban Development, *id.* at § 810(a)-(f), an individual civil action in either state or federal courts, *id.* at § 812(a), or a civil action instituted by the Attorney General, *id.* at § 813(a).

54. Pub. L. No. 90-284, 82 Stat. 73, § 803(b)(2) (1968):

> [R]ooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other; if the owner actually maintains and occupies one of such living quarters as his residence.

55. *Id.* § 802(b).

56. *Id.* § 803(b)(1).

57. *Id.*

58. *Id.* § 807.

59. Jones v. Alfred H. Mayer Co., 88 S. Ct. at 2190.

60. Pub. L. No. 90-284, 82 Stat. 73, § 812(c) (1968).

61. *But see* Hanna v. Home Ins. Co., 281 F.2d 298 (5th Cir. 1960), *cert. denied*, 365 U.S. 838 (1960), where the Court held the failure of 42 U.S.C. § 1981 (1964) to specifically

light of the newly found illegality of private discrimination, some toughening of present federal regulations regarding construction financing[62] can be expected.

Jones v. Alfred H. Mayer Co. will, of course, draw no commendation from those who judge a decision by the degree of judicial restraint therein. Yet, the realization that it goes far to attack that which spawns segregated housing—so debilitating to the Negro and his quest for equality—earns for this case a mark high in "the jurisprudence of a nation striving to rejoin the human race."[63]

MARTIN ENGELS

CONSTITUTIONAL LAW—STATE INTERFERENCE WITH PRIVATE, CONSENSUAL MARITAL SEXUAL RELATIONS

Cotner pleaded guilty to his wife's charge that he had committed "the abominable and detestable crime against nature"[1] with her[2] in violation of the Indiana sodomy statute.[3] Neither the wife's affidavit nor the statute

provide for compensatory damages—which is true for § 1982—prevented a court from awarding them.

62. *E.g.*, 24 C.F.R. § 200.315 (1968) (FHA); 38 C.F.R. § 36.4331 (1968) (VA).

63. Jones v. Alfred H. Mayer Co., 88 S. Ct. 2186, 2208 n.6 (1968) (Douglas, J. concurring).

1. The "crime against nature" in more common parlance is termed "sodomy." Sodomy historically and medically refers to anal intercourse, or buggery, but the statutes on sodomy include all manner of sexual activity conceived by someone, somewhere, at one time or another, to be "unnatural"; and this means, of course, in this sexually repressed society, almost every variety of sexual activity other than "natural" coitus. Sodomy laws thus cover, in one state or another, not only buggery, but fellatio (oral-genital contact with the male), cunnilingus (oral-genital contact with the female), homosexual behavior, bestiality (sex contact with animals), necrophilia (sexual contact with the dead) and even mutual masturbation. Hefner, *The Legal Enforcement of Morality*, 40 U. COLO. L. REV. 199, 210 (1968) (footnotes omitted).

In Fine v. State, 153 Fla. 297, 300, 14 So.2d 408, 409 (1943), the Supreme Court of Florida lamented that:

> We have experienced some difficulty in determining precisely what unnatural sexual acts do, and what do not constitute the crime. This is largely due to the reluctance legal authors have shown to detail the facts they were considering, because they are always so shocking. This aversion was voiced by Blackstone in his Commentaries over one hundred and fifty years ago: "I will not act so disagreeable a part, to my readers as well as myself, as to dwell any longer upon a subject the very mention of which is a disgrace to human nature." A similar attitude has been expressed about even particularizing in the formal charge . . . .

For general understanding of sodomy laws, *see* Comment, *Sodomy Statutes—A Need for Change*, 13 S.D.L. REV. 384 (1968); Hefner, *The Legal Enforcement of Morality*, *supra*, at 210-20; Note, *Sodomy—Crime or Sin?*, 12 U. FLA. L. REV. 83 (1959); and Spence, *The Law of Crime Against Nature*, 32 N.C.L. REV. 312 (1954).

2. The court held that he had standing to complain of unconstitutional state invasion of marital privacy even though his wife was the complainant. Cotner v. Henry, 394 F.2d 873, 875 n.2 (7th Cir. 1968), *cert. denied*, 37 U.S.L.W. 3123 (1968).

3. BURNS' IND. STAT. ch. 169, § 10-4221 (1965), quoted *id.* at n.3. The Florida statute, FLA. STAT. § 800.01 (1967), is substantially similar. Other Florida statutes prohibit "any unnatural and lascivious act," FLA. STAT. § 800.02 (1967), lewd and lascivious behavior, FLA.