FOR RELEASE ON DELIVERY

CIVIL RIGHTS AND THE FEDERAL LAW

A Lecture Delivered by

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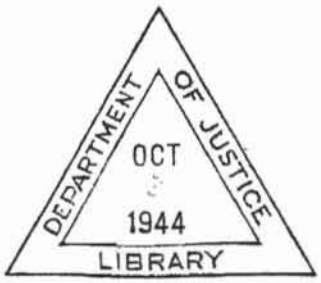
at



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The theme of this paper is not the definition of "civil rights" or the discussion of the philosophy underlying them or of the history of the struggle of men to achieve their civil liberties, but rather the story of their crystallization in Federal law, especially in the guarantees of the Federal Constitution and statutes.

To understand the temper and approach of the colonists as they declared their independence, fought for it and then said what was to be in their new government, we must examine the Declaration of Independence and the Articles of Confederation. We think of the Declaration, rightly enough, as a charter of freedom. But it is also a passionate indictment by the men of the thirteen states, now united in a common cause, of the evils they had suffered at the hands of their sovereign. These were Englishmen telling another Englishman across the seas that he had acted like a tyrant, and treated them like slaves. Men had a right to be free, they declared, to abolish their government when it became destructive, and to institute a new government. Prudence should be exercised before such action. Yet there was a point when men should no longer suffer. "But when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security."

These were bitter men who would no longer be patient, and their bitterness was expressed in specific complaints against the King. "Let the facts," they said, "be submitted to a candid world." The enumeration of their grievances comprises what might be called a great Bill of Wrongs.

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It is important for our purposes, I think, to remember the temper in which the Declaration was framed, a temper of the angry and bitter resentment of men who had known for generations a system of their own laws and a parliamentary government under those laws, and fiercely hated what they regarded as the present tyranny of the Crown.

This resentment and fear of government is reflected in the "Articles of Confederation" adopted two years after the Declaration, in 1778. The distrust of sovereignty was so great that there could be nothing more than "a firm league of friendship." Today the Articles read not unlike a hesitant League of Nations. The votes of nine States were needed to make war, coin, borrow or appropriate money, and admit other States. But civil liberties did not have to be considered, as they were obviously a matter for the States to deal with.

The "Ordinance for the government of the territory of the United States northwest of the river Ohio" was adopted by the Confederate Congress on July 13, 1787, nine years after the signature of the Articles of Confederation. It expressed a compact between the States and the people, the first two Articles of which protected civil liberties, providing that no person should "ever be molested on account of his mode of worship;" that the inhabitants should be entitled to the benefit of habeas corpus and trial by jury; that all persons should be bailable unless for capital offenses; that no cruel or unusual punishment should be inflicted; that property should not be taken except for full compensation. Article III directed that: "The utmost good faith shall always be observed towards the Indians." Article VI outlawed slavery and involuntary servitude.

The delegates to the Constitutional Convention assembled in Philadelphia in the very year that the Northwest Ordinance was adopted. It followed closely John Dickinson's advice: "Experience must be our only guide, reason may mislead us". They avoided abstract statements as to the rights of man, and soberly limited constitutional protection of individual rights to those for which Englishmen had fought throughout English history. Provision was made that the writ of habeas corpus should not be suspended, that there should be no bills of attainder or ex post facto laws. Trial by jury was guaranteed. Constructive treason, which might be considered the English equivalent of lèse majesté, was abolished. Religious tests for public office were prohibited. No provision was made for the protection of the great personal rights of freedom of speech, of religion, of the press and of assembly.

Bills of rights giving positive protection to these freedoms and guaranteeing the security of person and property, and even the right of revolution, had already been adopted in many of the States. When the Constitution was submitted to the States for ratification at once a great popular demand arose that there should be similar guarantees against governmental interference with these rights in the Federal Constitution. Massachusetts even drafted proposed amendments which she later submitted to the National Government before she ratified the Constitution. In the First Congress in 1789, the first ten amendments, our present Federal Bill of Rights, were passed by Congress and submitted to the people practically as a part of the original Constitution.

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These amendments forbade Congress to make any law interfering with the freedom of religion, of speech, or of the press, or with the right of assembly and petition. They gave protection against unreasonable searches and seizures, provided for due process, and prohibited the taking of private property without compensation- all the fundamental safeguards of the individual against abuses by his National Government. These guarantees were for the most part negative, directed against the Federal Government only, and giving that Government no power to protect fundamental personal rights by legislation against infringement either by the States or by individuals. It was the violation of liberties by government that the citizens of those days feared, and especially the power of a great Federal Government which might meddle unduly with the affairs of their States, with which the citizens felt a closer tie.

From the foundation of our government until 1865, the citizen looked not to the nation but to his State, as the source of his rights and liberties, and for their protection.

Immediately following the Civil War, new problems made necessary a new approach to the question of protection of individual rights. The defeat of the South carried with it for a time a weakening of the old doctrine of States rights. The National Government rather than the States became at that time the proponent of liberal doctrine. The immediate problem of the Nation was the establishment of genuine freedom for the Negro who had only been released from chattel slavery by the Emancipation Proclamation.

The first step in the program was the adoption in 1865 of the Thirteenth Amendment, which abolished both slavery and involuntary servitude throughout the nation, and gave Congress the power to make its provisions effective by appropriate legislation. As the Supreme Court has said in the present term, this amendment guaranteed that there should not only be an end to slavery but that a system of completely free and voluntary labor should be maintained throughout the United States. It was soon clear that such a guarantee would not be self-enforcing.

In the Dred Scott case, Chief Justice Taney had declared that a free Negro had no standing in the Federal courts since he was not a citizen of the United States and could not become one by virtue of his citizenship in any one State. At the time of the adoption of the Constitution, the Justice contended, all Negroes were "articles of merchandise", not part of the sovereign people or inheritors of the "blessings of liberty" and "had no rights which the white man was bound to respect". Freedmen, having "been subjugated by the dominant race. . . remained subject to their authority and had no rights or privileges but such as those who held the power and the government might choose to grant them". Acting on these principles, the Southern States immediately after the War proceeded to pass legislation, known as "Black Codes", directed specifically at the freedmen with the purpose of organizing them into subservient agricultural laborers. Special labor, apprentice, and vagrancy statutes were enacted which resulted in penalizing any Negro who was not continuously

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industrious, preferably working for a white employer. In some cases the Negroes were forbidden to cross county or parish lines without a permit, and were required to be able to show that they were working for a white employer.

The first Civil Rights Act of 1866 was passed, under the authority of the Thirteenth Amendment, to do away with these practices. In the same Congress the Freedmen's Bureau was established. The power of Congress to pass the Act was sharply challenged, and two months later the Fourteenth Amendment, which raised to the level of a constitutional mandate certain sections of the first Civil Rights Act, was submitted to the States. The first section of this amendment provided, "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States; and of the States wherein they reside. 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." The Southern States refused to ratify this amendment, and as a result, Congressional reconstruction was instituted. The first Reconstruction Act was passed on March 2, 1867. Three others followed in rapid succession. The whole South was put under the control of military commanders. The whites were disfranchised and the Negroes enfranchised; new elections were held by a hand-picked electorate under the supervision of the Army; constitutional conventions composed of "scalawags", "carpetbaggers" framed new constitutions which put all political power in the hands of the group

who would support the more radical Northern policies, and the Fourteenth Amendment was ratified. Seven reconstructed States were then readmitted to the Union under strenuous suffrage regulations.

Resistance by the white Southerners took the form of an underground revolutionary movement. The Ku Klux Klan, which was organized in 1866, originally as a social club of young men who could find no occupations in the post-war South, was disbanded in 1869. But the Klan movement continued until Reconstruction ended in 1876. Resistance to the exercise of the suffrage by the freedmen was particularly strong. To help meet this resistance, the Fifteenth Amendment, which forbids the denial of the right to vote on grounds of race or previous condition of servitude, was adopted in 1870. Shortly thereafter Congress passed the Civil Rights Act of 1870, popularly known as the Force Act, which reenacted the first Civil Rights Act of 1866, but concerned itself particularly with the protection of the right to vote.

Under the authority of this Act and of the Reconstruction Act, the troops policed the polls at election time, a practice which appears to have been continued in some places long after the formal end of Reconstruction. In 1880, we find a rider to an Army Appropriation Act to the effect that none of the money appropriated by the Act should "be paid for the subsistence, equipment, transportation, or compensation of any portion of the Army of the United States to be used as a police force to keep the peace at the polls at any election held within the States". (Fleming, II Documentary History of Reconstruction, 431.)

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Apparently this direction was ignored by the Army so far as the troops in Beaufort County, South Carolina, were concerned. Local officials there report that the troops patrolled the polls until 1909, when they were specifically forbidden to do so any longer, and that until that time Negroes held local office in the county.

The Southern Rebellion continued to be effective and on March 23, 1871, President Grant sent a message to Congress in which he stated "A condition of affairs now exists in the Southern States * * * rendering life and property insecure and the carrying of the mails and the collection of revenue dangerous". He stated that the power to correct these evils was beyond the control of the State authorities, and he recommended legislation to secure life, liberty, and property and the enforcement of law in all parts of the United States. In response a Joint Congressional Committee of Inquiry into the Conditions in the Southern States reported the Klan to be the most dangerous element involved (S. Rep. No. 41, Pt. I, 42nd Cong., 2nd Sess.), and the Act of April 20, 1871, entitled "An Act to enforce the provisions of the Fourteenth Amendment . . . " was passed. In substance, this Act amounted to a Federal anti-lynching statute.

Another drastic statute, the Anti-Peonage Act, had been adopted under the authority of the Thirteenth Amendment, on May 2, 1867. It resulted from practices found to prevail in the Territory of New Mexico, and inherited from the days of Spanish rule, but went beyond the particular situation and prohibited the holding of anyone in involuntary servitude anywhere in the United States. This is still a living statute, used

to eliminate the various indirect methods by which many persons of low economic status in many of the States have been forced to labor for a particular employer against their will. In the current term, the Supreme Court said that by this statute "Congress thus raised both a shield and a sword against forced labor because of debt".

Finally, in March 1875, the last Civil Rights Act extended the prohibition against racial discrimination to service in inns, public conveyances, and places of public recreation.

The changes brought about by such legislation were drastic, for they not only affected underlying social relations but provided at the level of government for Federal supervisory control over acts that had heretofore been in the exclusive jurisdiction of the States. The balance of State and Federal power was materially altered. Taken together, the three amendments and the five statutes, all adopted over a period of eleven years for the express purpose of freeing the slaves, making them citizens, and giving them the right to vote, constitute an important chapter in the history of the theory and practice of equality before the law, an equality essential for the achievement of freedom. Today, they constitute the sole source of the power of the Federal Government to protect individual rights against encroachment by the States and, in some instances, by individuals.

I propose to examine the Civil Rights Acts in some detail. The first one, adopted in 1866, was entitled "An Act to protect all persons in the United States in their civil rights, and furnish the means of their vindication". It undertook to overrule the Dred Scott decision

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by declaring, as does the Fourteenth Amendment, that all persons born in the United States thereby acquire a national citizenship. It provided that all citizens of the United States should be equally entitled to certain rights, the absence of which had hitherto been the badge of servitude. The rights declared to belong to all citizens alike included the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property"; and the right to "be subject to like punishment, pains, and penalties and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

It was the theory of the proponents of the Act that Congress had the power to pass it under the authority of the Thirteenth Amendment, since it had been proven that State laws were gradually imposing on the Negroes the very restrictions which had existed at the time of slavery. As Senator Stewart said: "It strikes at the renewal of any attempt to make those whom we have attempted to make free, slaves or peons. That is the whole scope of the law." (70 Cong. Globe 1785.) Jurisdiction of all offenses under the Act was placed in the Federal courts, an extreme extension of Federal jurisdiction. There were added special facilities for enforcement; the President was empowered to establish tribunals to prevent or punish offenses, and to use the land or naval forces "to prevent violation and enforce the due execution of this Act". The Act provided for a direct appeal to the Supreme Court of the United States on all questions of law.

The constitutionality of the bill was bitterly challenged in Congress, but in spite of opposition it passed by a large majority in both Houses. It was then vetoed in a long message by Andrew Johnson. (70 Cong. Globe, 2, 1679.) Eleven out of thirty-six States, he pointed out, were not represented in the Congress. Were the newly enfranchised slaves prepared to exercise the responsibilities of citizenship? Congress, said the President, had no power to deal with citizenship, a State prerogative. The Act would create Federal supervision over the administration of the law by local judges and other officials, and might penalize them even when they acted in accordance with the State statutes. Congress replied that that was indeed the very purpose of the Act, and promptly passed it over the President's veto. There seems little doubt that the Fourteenth Amendment was introduced two months later partly to solve the constitutional questions raised by the Act of 1866, and that Justice Field was historically correct when he said in his dissent in the Slaughterhouse Cases that the rights, privileges, and immunities of citizens of the United States referred to in the first section of the Fourteenth Amendment included the very rights enumerated in the first section of the Civil Rights Act of 1866.

On May 31, 1870, after the promulgation of the Fifteenth Amendment, the second Civil Rights statute was enacted.

The guarantees of the Act of 1870 and the Amending Act of February 28, 1871, were very far-reaching. Penalties were included for any interference with an inhabitant in his right to qualify as a voter; interference with registration or with the exercise of the right of suffrage

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was made a crime: and there was introduced for the first time a conspiracy section. This related to conspiracies to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States. The conspiracy was made a felony punishable by fine not to exceed five thousand dollars, and by imprisonment up to ten years, and carried disability from thereafter holding any office of trust with the Government. The penalties are extremely severe as applied to certain cases. The section, unaltered in substance, is now the famous Section 51, Title 18, of the United States Code, and forms the basis of a large number of the criminal actions brought by the Department of Justice to punish the violation of civil liberties.

The law of 1871 further provided that if in the act of depriving a citizen of Federal rights or privileges, any other felony, crime or misdemeanor should be committed, the offender should be subject to the same penalty in the Federal courts for such crimes as he would under State law.

In addition, the Act specifically penalized election frauds in connection with the election of a Federal official. Election officials were to be punished for their failure to enforce State laws as well as Federal laws; and any person who believed that he had lost an election because citizens had been denied the right to vote on account of race or color was given the right to bring suit to recover possession of the office in either the Federal or the State courts.

The Act of April 20, 1871, "to enforce the provisions of the Fourteenth Amendment to the Constitution . . ." was the reply of Congress to the activities of the Ku Klux Klan and other lawless groups, referred to in President Grant's message of March 23. It provided civil as well as criminal remedies for the deprivation of rights under color of law. Its provisions, spelled out in great detail, covered a broad field, and included a clause that if the State authorities were unable or unwilling to prevent the deprivation of a constitutional right, and violence resulted, the President was empowered to take appropriate measures to suppress the violence. Senator Frelinghuysen of New Jersey, in support of the section, said in Congress:

> "A State denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A state denies protection as effectively by not executing as by not making laws. It is a poor comfort to a community that has been outraged by atrocities for the officials to tell them 'We have excellent laws on our statute books.' It is the citizens right to have laws for his protection, to have them executed and it is the constitutional right and duty of the general government to see to it that the fundamental rights of the citizens of the United States are protected."

The person whose civil rights were injured was given a civil cause of action against the person who should have protected him and did not, up to the sum of $5000.00. This was specifically directed against lynching and other forms of mob violence.

Finally, on March 1, 1875, an act was passed "to protect all citizens in their civil and legal rights." The preamble to this act reads as follows:

> "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law. . ."

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Section 1 of the Act required all inns, public conveyances, theaters, and other places of public amusement to open their accommodations to all persons regardless of race, color, or previous condition of servitude; and Section 2 made a violation of this requirement a misdemeanor, and gave the injured party a right to civil damages. All cases under the Act were to be reviewable by the Supreme Court regardless of the sum of money involved.

The pendulum, following the carpet bag days and the rise of the Klan, had swung very far in one direction, carrying this great expanse of Federal legislation, implemented by minute instructions for Federal administrative machinery. In the first test case in the Supreme Court of the United States, four years after the ratification of the Fourteenth Amendment, the swing began in the other direction. Faced with the prospect of the drastic extension of federal power implicit in the three constitutional amendments and the civil rights act, the Supreme Court sided with Andrew Johnson rather than with Congress.

The Slaughterhouse Cases,[2] did not involve any of the civil rights statutes, but a construction of the Fourteenth Amendment - the first - which in effect greatly impaired the broad application to the statutes of that Amendment. The State of Louisiana created by statute a monopoly in a single corporation for slaughtering animals over a very wide territory. The Court, dividing five to four sustained the constitutionality of the grant, which removed from all others the right to engage in this business, on the ground that it was within the appropriate exercise of the State's police power to protect in this way the health of the community. With that decision we are not concerned; and it would now seem to follow that if the power was properly exercised, no consideration of the Fourteenth Amendment was involved. But the argument was vigorously pressed that

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2. 83 U.S. 36 (1872).

the Amendment had made the citizens of Louisiana also citizens of the United States; and had provided that no State could abridge their privileges and immunities - here the privilege to engage in this lawful business. The majority opinion, delivered by Justice Miller, pointed out that there were two kinds of citizenship - State and Federal; and construed the Fourteenth Amendment to protect only those rights springing from Federal citizenship. The rights claimed here sprang from State citizenship, and were therefore not "privileges and immunities of citizens of the United States," protected by the Amendment. The majority could not conceive that the purpose of the Amendment was to "bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States."

Field, dissenting, said that was the very purpose of the amendment. Calhoun had preached the doctrine that there was no such thing as citizenship, independent of the citizenship of the State. The Dred Scott case had held that citizenship in the United States was dependent upon citizenship in the several states. But the Amendment settled the old dispute, had swept it aside, making all persons born in the United States citizens, and placing the common rights of American citizens under the protection of the National government. "The privileges and immunities designated are those which of right belong to the citizens of all free governments." (97) There are two other vigorous dissents. Bradley thought "it was the intention of the people of this country in adopting /the/ amendment to provide National security against violation by the States of the fundamental rights of the citizen." Swayne pointed out that the three amendments were new departures, marking a new "epoch in the constitutional history of the country" by trenching directly on the power of the States. "Fairly construed," he added, "these amendments may be said to rise to the dignity of a new Magna Charta (125)".

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The effect of the decision was to remove from the purview of the criminal sections of the Statutes the very rights which are enumerated in the first section of the Act of 1866 as the proper subject matter of the criminal guaranties.

A few years later the court declared that sections 3 and 4 of the Act of May 31, 1870, which related to the right to qualify to vote, were unconstitutional because they were not limited to interference on account of race; and in 1882, in U.S. v. Harris, 106 U.S. p. 629, decided that the section intended to prevent lynching and which penalized conspiracy to interfere with the state in securing the equal protection of the laws, was unconstitutional because it penalized individual action.

But the pendulum was swinging, and the passion and power behind the great amendments were being cooled by the breath of judicial construction.

In 1882, the Supreme Court decided in the Civil Rights Cases, 109 U.S. 3, that Sections 1 and 2 of the Act of 1875 were unconstitutional. Five test cases were involved. Stanley and Nichols had been denied accommodations at an inn; Ryan and Singleton at a theatre, and criminal actions followed. Robinson sued the Memphis and Charleston R.R. Company to recover the penalty for refusing to allow his wife to ride in the ladies' car on account of her African descent. The Court, speaking through Justice Bradley, held the sections unconstitutional because he construed the Fourteenth Amendment to prohibit State not individual action, and to give the Federal Government no power to pass protective legislation. A contrary interpretation "would be to make Congress take the place of State legislatures and to supersede them. Civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals unsupported by State authority." In a word, innkeepers, railroads and theatres could admit whites and exclude negroes so long as the states had not by statute approved the discrimination!

Harlan vigorously dissenting, felt the distinction to be tenuous and metaphysical: "I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism." The purpose of the first section was to prevent race discrimination. He cited Section 5 of the Fourteenth Amendment - "That Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Could any legislation be more appropriate? Under Article IV, Section 2, of the Constitution, providing that an escaping slave could not be discharged by reason of any law existing in the state to which he had escaped, but should be delivered up, the Congress had passed the fugitive slave law of 1793, and the far more drastic law of 1854, which "placed at the disposal of the master seeking to recover his fugitive slave, substantially the whole power of the nation." The dissenting Justice asks eloquently: "Was it the purpose of the nation simply to destroy the institution, and then remit the race, theretofore held in bondage, to the several states for such protection, in their civil rights, as those states, in their discretion might choose to provide?" And finally: "I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this Court, for the protection of slavery and the rights of the masters of fugitive slaves."

Following the narrow path to which the Slaughterhouse Cases and the Civil Rights Cases pointed the Federal courts continued to limit the scope of the civil rights statutes. The meaning of the privileges and immunities clause was whittled away until the present Chief Justice could refer to it as the "almost forgotten" clause of the Fourteenth Amendment. (Colgate v. Harvey, 296 U.S. 404) Similarly, while the due process clause was being extended by the courts to cases involving

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the protection of property, it was limited by them in its application to personal rights by decisions that the terms liberty and property did not include certain fundamental rights, such as the right to vote in state elections (Green v. Mills, 69 F. 852 (C.C.A.)), or the right to run for state office (Taylor and Marshall v. Beckham (1), 78 U.S. 548, cited in Snowden v. Hughes, 321 U.S. 1). Following one or the other of these lines of reasoning, the Court decided that the conspiracy section of the Civil Rights Act could not constitutionally be invoked to protect citizens from interference with the right of peaceful assembly by individuals (United States v. Cruikshank, 92 U.S. 542 (1875)); the right to be protected from lynching by individuals (i.e. not "officials") (United States v. Powell, 212 U.S. 564); the right to organize for purposes of collective bargaining (United States v. Moore, 129 F. 630); the rights of Negroes to perform a contract of employment (Hodges v. United States, 203 U.S. 1); or the right to remain within a State (United States v. Wheeler, 254 U.S. 281). It held unconstitutional the sections of the Act of 1870 which protected the right to vote in state as well as in Federal elections on the ground that their scope was not limited to discrimination on account of race (United States v. Reese, 92 U.S. 214). In short, the application of the criminal sanctions to the protection of civil rights has come to be restricted mainly to cases in which State officials participate, or misuse their power, or to situations involving rights granted directly to individuals and guaranteed against individual infringement by the Federal Constitution or laws. For many years, such rights were few in number, limited for the most part to those granted by the Thirteenth Amendment, and to rights under such laws as the Homestead Acts and other Federal land laws.

Even before the congressional program was completed by the Act of 1875, a congressional weakening of the civil rights statutes had begun which paralleled that by the Courts. The rearrangement which the acts underwent in the Revised

Statutes of 1873 effectively concealed the whole scheme for the protection of rights established by the three amendments and five acts by separating their provisions under unrelated chapters of the Revised Statutes. The Act of 1894 and the codification of 1909 repealed most of the sections protecting the franchise.

As a result we now have on the statute books only fragments of the original acts, arranged under four titles of the United States Code. Under Title 8, "Aliens and Nationality," are gathered parts of the original statutes providing against discrimination in voting, and for equal protection in civil proceedings. A chapter entitled "Elective Franchise" contains the section which declares it to be the right of all citizens to vote at any election from Federal to school district without discrimination on account of race, the basis of the recent decision of Smith v. Allwright,[3] which declared that Negroes had the right to vote in a Texas primary. The right to recover damages for wrongs resulting in deprivation of civil rights is preserved and still runs against any person who has knowledge of a conspiracy and fails to aid in preventing it; and there are on record cases in which this section has been used by the widows of victims of lynching to recover against officials who were responsible. Under the Criminal Code (Title 18) appear five sections of which the first two (§ 51 and § 52) deal respectively with conspiracy to injure persons in the exercise of civil rights, and depriving persons of civil rights under color of State laws. It is under these two sections, and the peonage section, that substantially all the indictments concerned with criminal violations of civil rights are brought by the Department of Justice.

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3. 321 U.S. 649

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For many years after the repealing act of 1894, these sections were little used and, like the privileges and immunities clause, were almost forgotten. Another section makes it a crime to prevent a United States officer from performing his duties (§ 54). The other two sections deal with the unlawful presence of troops at the polls, and the intimidation of voters by members of the army and navy (§ 55, § 56). Sections of the statutes having to do with jurisdiction and procedure are found in the Judicial Code (Title 28); and under "War" (Title 50, § 203, § 204) lurk two sections empowering the President to employ the armed forces to suppress violence or conspiracy to deprive "any portion, or class of the people of their constitutional rights". The present codification, therefore, remains as fragmentary and confusing as under the earlier codes.

In the second quarter of this century the field of the rights of individuals protected by Federal law has been considerably broadened by legislation and the Supreme Court has generally not felt it necessary to yield to the temptation to substitute its views of federal-state relations for those of Congress where such statutes were before it for constitutional construction. Thus, under the National Labor Relations Act collective bargaining is a right secured in most instances by the Federal Government. The right to wages under the Fair Labor Standards Act, rights under the Agricultural Adjustment Administration Act and the Social Security Acts, rights to the use of housing projects constructed under the Lanham Act, the rights of returning soldiers to reemployment under the Selective Service Act, and,

if implemented by appropriate legislation, the rights of minority groups (particularly Negroes) not to be discriminated against in employment - all these are rights now secured by Federal legislation directed against individual as well as against State interference. They do not, of course, involve any of the civil rights statutes that we are here particularly discussing.

With the broadening of the field of Federal civil rights there has come a quickened sense of their importance. One response in this country to the challenge of the ideals of democracy made by the new idealogies of Fascism and Communism has been a deepened realization of the values of a government based on a belief in the dignity and rights of man. The Supreme Court has reflected this attitude in the attention it has given in recent years to the application of the due process clause to the protection of the personal rights of individuals. The bar too has awakened to a consciousness of the importance of civil rights, and to the realization that even in a democracy such rights are not self-enforcing. The American Bar Association and the National Lawyers Guild have recently established civil rights committees and have participated in cases affecting those rights. Both associations now admit Negroes to their membership.

In February, 1939, a Civil Liberties Unit (now the Civil Rights Section) was established in the Criminal Division of the Department of Justice. Its directives were to be found principally in the conspiracy section (51), the color of law section (52) and the Antipeonage law. Its task was to reestablish those sections as effective instruments for the protection of individuals rights.

Even before the establishment of the Unit, the Department had begun to test the application of the Civil Rights Statutes to the newly created Federal rights.

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The long bitter struggle between employers and miners in Harlan County, Kentucky, was finally ended when the Court sustained an indictment of the offending employers and their accomplices for interference with the right of the miners to organize, a right guaranteed by the National Labor Relations Act (the case resulted in a mistrial so that the decision never got to the Supreme Court). Similarly, shortly after the organization of the unit, the violent opposition of a southern textile operator to unionization was ended by indictment under the civil rights statutes. Since the decisions in those two cases protected employees' rights under the National Labor Relations Act when local officials have connived, violations have several times been checked simply by a reminder from the United States Attorneys that there is a federally guaranteed right to organize, and that interference with it may constitute a Federal crime.

Once the Section was established and its existence known, many complaints began to pour in. It is interesting to note that the large number of complaints in the war years, with the possible exception of those concerning the mistreatment of Jehovah's Witnesses, has not been due to the impact upon personal liberties of either the exercise of Federal war powers, or of the mob spirit which is so often a by-product of the war. Rather they appear to reflect the general awakening of the nation to the importance of the protection of civil rights. Complaints come not only from the victims and from the groups organized for the specific purpose of protecting civil liberties, but from fellow townsmen and neighbors of the victims, and, in many instances, from local law enforcement officials who find themselves powerless to deal with the situations which they report. Though the Federal rights created in recent statutes have provided the Section with some of its most interesting problems of law, a very small proportion

of the complaints relate to their violation. The great body of complaints are concerned with exactly the problems with which Congress sought to deal when it first enacted the civil rights statutes; that is, the general protection of the right to vote and of the other civil rights of the Negro.

And the denial of these rights - often merely of the right to live in peace - touches tragic irony when committed in the midst of a war fought to defend them elsewhere. A few months ago a young Negro soldier sent this letter to the President, who forwarded it to the Justice Department for investigation:

"I am a corporal in the U. S. Army. I have been in the Army for 17 months and in England for 11 months. I am a Negro with an American heart, and has been doing my duties as an American soldier. I consider myself as one of the best. I have never had a punishment. I have been awarded the "good conduct medal," good driving medal and sharp shooting with a 30 - 30 rifle and carbine, and a key man with a 50 calibre machine gun.

"I was sent some papers from the states a few days ago. And I read where colored people in my home, New Iberia, La., were being beaten up and chased out of town. Encluded in them my sisters husband . . . who is a teacher in a local school and was the Chairman of a war bond drive and raised over $5000 from the colored people in that city. They are being beaten up because they succeeded in getting a welding school for the colored. So they could build the tanks and ships we need so badly.

"They forced them to leave their homes, and also beat up the colored doctors and ran them out of town. The colored people that remains behind is without medical care and my family is there. God knows what will happen to them.

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"I thought we were fighting to make this world a better place to live in. But it seems as though we colored boys are fighting in vain, and that offers little encouragement to me. I am giving the U. S. A. all I got, and would even die, but I think my people should be protected. I am asking you, Sir, to do all in your power to bring those people to justice and punish the guilty ones."

The first case handled by the new Section which was sufficiently important to reach the Supreme Court, (United States v. Classic, 313 U. S. 299) involved interference with the right to vote and arose from the turbulent election in Louisiana in which the Huey Long machine was defeated. Section 51 and 52 of Title 18 were invoked to penalize the miscounting and destruction of ballots in the primaries. The Court held that the right to vote in Federal elections and to have one's vote counted as cast extended to voting at primaries which were an integral part of the election process, and that the civil rights statutes were appropriately used to penalize violations of that right even though the primary had been unknown the statute was enacted. In a second test case, United States v. Saylor, decided May 22, 1944, which was the result of wholesale ballot box stuffing in Harlan County, Kentucky, the Supreme Court decided that such practices amounted to interference with the right to have one's vote counted as cast, which is implicit in the right to vote, and were punishable under Section 52. By these two cases, the power of the Federal government to punish election frauds, which appeared to be lost with the repeal of the Enforcement Act of 1894, has been restored. It has not been decided whether the government, through the use of the civil rights statutes, may establish Federal protection of the right to register and to

qualify as a voter in connection with Federal elections. In the current term of court, a civil rights damage suit, Smith v. Allwright, decided on April 3, 1944, has resulted in the vindication of the right of Negroes to vote in the primaries. Whether this decision can be made effective will depend largely on public opinion on which convictions for the violation of civil rights ultimately rests. The Department of Justice has now almost completed the investigation of a number of alleged violations occurring in State primaries since the decision.

Cases brought under the Thirteenth Amendment and the Anti-Peonage statute on both the civil and criminal side since the establishment of the Section have substantially strengthened the federal guaranty of freedom from involuntary servitude. In Taylor v. Georgia, 315 U. S. 25, and Pollock v. Williams, decided April 10, 1944, the labor contract statutes of Georgia and Florida were respectively declared unconstitutional. The latter case has placed the right to freedom from involuntary servitude on so broad a base that the way has been opened to an attack on the "enticing labor" and "emigrant agent" statutes, and some of the vagrancy statutes and "work or fight" orders which experience has proved to be in reality indirect means of enforcing involuntary servitude, especially against Negro farm hands and laborers.

After an interval of many years, a number of prosecutions have been instituted for violations of the peonage statutes. This year the drive of the Section against peonage culminated in the first prosecution in many years against a large plantation owner. Albert Sydney Johnson, who farmed some 10,000 acres in the rich black belt of Arkansas, had consistently terrorized

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both the Negro and white laborers on his plantation, threatening to kill them if they left his place, and lending color to these threats by always carrying a gun, a revolver, and a pair of brass knuckles. White men as well as black so feared him that they would slip away from his farm at night, leaving behind their possessions, including their standing crops. Finally, a deputy sheriff reported the case to the Federal government and local officials and neighboring landowners as well as victims gave statements to the F. B. I. investigators which made it possible for the government to develop a water-tight case against Johnson. An indictment was readily obtained from the Federal grand jury. The news spread abroad and the large news agencies sent reporters to cover the trial. Johnson tried to bluster his way out by intimidating and bribing witnesses, but the government's case was so strong that once it was in, Johnson pleaded guilty and was promptly sentenced to two and a half years, and sent to jail. The conviction received favorable notice in many Southern papers and there seems little doubt that this case, following a series of convictions of lesser fry, has been effective in breaking up at least the direct practice of peonage.

In one case, the peonage statute was put to a novel use. The keeper of a small roadhouse in Georgia was convicted of peonage because he held in involuntary servitude the girls who came voluntarily to accept employment as waitresses, forcing them also to serve as prostitutes. This man had openly boasted that no one could penalize him for his activities since the local officials would not dare to prosecute him and he had been very careful never to cross a State line with a girl so that the Mann Act would not apply. He is now serving a ten-year sentence in a Federal penitentiary.

The Department has attempted to use the civil rights criminal statutes for a purpose for which they were no doubt originally intended, namely, the punishment of lynching. In one case where the jailor was involved with the lynching mob, an indictment was obtained but the defendants were acquitted. In another which involved a manhunt by a sheriff and his posse in Illinois, a demurrer to the indictment was overruled and the trial will be held soon. As most lynchings occur after the arrest of the victim, it should be possible, in spite of United States v. Harris, mentioned earlier, to punish both mob members and delinquent officials whenever there is any form of official connivance or participation.

Probably the most important work of the Section, however, both because of the number and the variety of violations and the legal questions involved, has been the revitalizing and clarifying of the meaning and application of Section 52, which forbids the deprivation of rights under color of law. Prosecutions under this section have been instituted against sheriffs, police officers, justices of the peace, and even judges who have misused the power of office to deprive individuals either of due process of law or of equal protection of the law. The section was first invoked for this purpose in the case of a policeman who tortured a young Negro boy in an attempt to force from him a confession of a theft of which he was later acquitted (United States v. Sutherland. 37 F. Supp. 344). A demurrer to the indictment was overruled.

Section 52 was invoked with the general conspiracy statute to indict a group composed of a sheriff, a jail "trusty", and a shyster lawyer, who worked together through the operation of a notorious "kangaroo court" to

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extort sums of money from prisoners in the county jail (United States v. Culp, 131 F. (2d) 93). This long-forgotten power of the government to use the civil rights statutes to penalize delinquent local officials seems to be fully reestablished by a case involving abuse of members of the sect of Jehovah's Witnesses (United States v. Catlette, 131 F.(2d) 902). In this case, representatives of the group called upon a deputy sheriff and the chief of police to ask for protection against threatened violence by the townspeople. They were ushered into the police office and, after the sheriff had removed his badge in an effort to disassociate himself from his office, were forced to swallow large quantities of castor oil while the police officer looked on, and were then tied together with a rope and paraded through the streets of the town. The Court decided that the defendants in this case had acted under color of a law even though the sheriff derived his powers from the common law and not from any statute, and that they were guilty of denial of equal protection of the laws by refusing to intervene to save the victims from violence in accordance with the ordinary duty of police officers, a decision which reaffirmed the "inaction" theory of denial of equal protection which had been advanced by Senator Frelinghuysen and made the basis of Section 3 of the Act of May 20, 1871.

As a result of this case there could no longer be any doubt of the power and duty of the Federal Government to prosecute cases of police brutality, and a number of such prosecutions were instituted in South Carolina, Mississippi, and Georgia, most of which involved brutality of jailors towards Negro prisoners for the purpose of obtaining confessions. Local public opinion has become aroused against this type of official cruelty

as a result of these cases. Many complaints were submitted to the Department by local officials, and, in some cases, pleas of guilty were obtained.

From these decisions it would logically appear that all cases of third degree or other police brutality or criminal inaction fall under the scope of the civil rights statutes. The Supreme Court has held on a number of occasions that confessions unlawfully obtained by State or local officials violate the due process clause of the Federal Constitution, so as to render the trial illegal. It would seem reasonably to follow that in such cases the civil rights statutes, based on such violation, would be applicable. But the growth of our law is not exclusively or perhaps chiefly logical, particularly where considerations of Federal and State authority and jurisdiction are involved. The imponderables of balance and degree play a part. The Federal Courts will probably not incline to open their doors wide to review every unlawful act of local officials. Justice Frankfurter, in his concurring opinion in the recently decided case of Snowden v. Hughes, 321 U. S. 1, suggested a doubt, a limitation of degree, springing from the old problem of the United States and State relationship, which has so long plagued the courts. The plaintiff had charged the misuse of power by local officials exercised under election statutes of the State of Illinois. (Here state the facts of the case). Justice Frankfurter, in concurring in the result, expressed this warning:

> "The question as to whether or not there has been a denial of equal protection of the laws within the meaning of the Fourteenth Amendment is not to be resolved by abstract considerations such as the fact that every official who purports to wield power conferred by the State is pro tanto the State. Otherwise every illegal discrimination by a policeman on the beat would be State action for purposes of suit in a federal court."

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An appeal, perhaps taken on the strength of this statement, is now pending in the Supreme Court from a conviction of a sheriff, deputy sheriff, and town police officer, all of whom were convicted and sentenced for acts of horrible brutality against a Negro, committed under color of law. The Negro had complained to the grand jury that the sheriff had wrongfully taken away from him and kept his pearl-handled revolver. The sheriff, enraged and after heavy drinking, issued a false warrant charging the Negro with a crime he had not committed, beat the Negro so severely that he died almost at once after he had been dragged to and thrown in the yard outside the jail. The case, on account of the shocking circumstances from which it arose, and because of the direct evidence of the abuse of legal process, will be an excellent one on which to test the theory and program of the Department of Justice in prosecuting crimes under the civil rights statutes.

Like all programs operating in a new field, each step must be taken with caution and judgment. The success of the Department in obtaining convictions from local juries, after establishing the law by a series of appeals, is in my belief owing to the care which has been used in refusing to bring cases where the evidence was not convincing, or the offense serious. Gradually, throughout the country a respect for and fear of the certainty of Federal justice to punish crimes of this nature is being built up. Federal statutes should not be invoked where the States act vigorously and sincerely to indict and to try. In most of these cases, particularly in the one to which I have just referred, the defense is now calculated to meet the government's facts, but to play on the prejudice of a local jury against Federal interference with states' rights, and "Yankee" interference from Washington. It has been our policy, therefore, to have the local

United States Attorney try such cases, or where it seems advisable, some leading lawyer in the locality to represent the Government. Handled in that way, and particularly with the support of the local newspapers, the community can be made to feel that it is their government invoking their law, to vindicate the good name of their city.

It is interesting that in this and many other cases the local sentiment and the local newspapers are supporting the government's stand. In the case just referred, the Atlanta Journal said in commenting on the result: "Georgia's justice must become a synonym for equal justice for all, colored or white, humble or mighty." The editorial concluded that the decision "lends a new and encouraging stand against mob violence and brutality in the South."

There are not many who openly oppose this program, except in the election cases, which have created passionate resentment in some of the Southern States. There are those who skeptically invoke the half-baked platitude that you cannot change human nature by law. Perhaps, in the short run, you can't. But the National Labor Relations Law, though doubtless it has not changed human nature, has certainly changed human behavior; and, at a long last, men who work can, and what is more increasingly have organized themselves in to unions of their own choosing to enable them to bargain collectively. So crimes of mob violence would occur less frequently where swift and certain retribution, whether under Federal or State authority would automatically follow.