

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 99

JANUARY, 1951

No. 4

FEDERAL CIVIL RIGHTS ENFORCEMENT: A CURRENT APPRAISAL

HENRY PUTZEL JR.†

Lumber had been mysteriously disappearing from a Miami, Florida, lumber company. A private detective agency was retained to solve the crime. On the company premises was a shack, ordinarily used as a place for painting company signs. In the latter part of March 1947, it was employed for another purpose.

In the middle of the shack near a small desk was a chair upon which a bright light was trained. One by one, the suspects—four white employees—were taken into the shack and seated in the chair. The grilling commenced, followed by denials. Then came the beatings, with dowel sticks, fists, rubber hose. Each of the victims held out as long as he could in his disclaimer of guilt. Finally, after hours of torture and when he could abide the pain no longer, each “confessed.”

Four members of the detective agency were primarily responsible for the brutality. The head of the detective agency (the protagonist) and an associate were special Miami police officers. A member of the Miami police force and the company comptroller also participated.

The Federal Bureau of Investigation learned what had happened shortly after the incidents had taken place and promptly notified the Criminal Division of the Department of Justice. As soon as it was sufficiently established that officers acting under color of law were involved and that the Department thus had jurisdiction, a thorough investigation was instituted, which led, on October 22, 1948, to the return of an eight-count indictment in the Southern District of Florida, in which the individuals who had directly or indirectly taken part in

† Attorney, Civil Rights Section, United States Department of Justice. The views expressed in this article are those of the author and are not necessarily those of the Department of Justice.

the beatings were named as defendants.¹ Two counts applied to the incident involving each victim, one for the substantive offense² and the other for a conspiracy under the civil rights conspiracy statute.³

The case came to trial on January 17, 1949, and the jury on January 21, 1949, returned a guilty verdict on the substantive counts against the head of the detective agency, who, as has been noted, was also a special Miami police officer,⁴ but on those counts acquitted the others. It was unable to reach an agreement as to any of the defendants on the conspiracy counts, and on those a mistrial was declared.

During the trial, all but one of the individual defendants had testified under oath that there had not even been a beating. These defendants were thereupon indicted for perjury.⁵

Convinced that the jury's inability to agree upon a verdict in the case of the conspiracy counts in the first case merely reflected failure to comprehend the legal requirements of conspiracy, the Government prosecutor again tried the conspiracy case, and on April 22, 1949, the jury returned a guilty verdict as to all the defendants.⁶

1. This indictment was superseded about a month later by another indictment, which included the company as a defendant. One individual defendant was omitted from the superseding indictment since he had pleaded guilty to the substantive counts of the first indictment; the conspiracy counts were nolle prossed as to him.

2. Under §20 of the Criminal Code, 18 U.S.C. §52 (1946), now 18 U.S.C. §242 (1948). In the §52 counts the members of the detective agency and the Miami policeman were named as principals, the company and the comptroller as aiders and abettors.

3. Section 19 of the Criminal Code, 18 U.S.C. §51 (1946), now 18 U.S.C. §241 (1948). Use of the civil rights conspiracy statute instead of the general conspiracy statute (now 18 U.S.C. §371) has been frequent in recent years, apparently reflecting a preference on the part of the Government for employment of a statute felt to have been designed for the specific purpose. (That enforcement of the Fourteenth Amendment was among the purposes of the civil rights conspiracy statute, see CONG. GLOBE, 41st Cong., 2d sess. 3611-13 (1870); FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 225, 249; Rutledge, J., in *Screws v. United States*, 325 U.S. 91, 118-121 (1945).) However, the *Williams* case appears to be the first instance of a conviction under §51 for police brutality. In his article, *Unconstitutional Acts as Federal Crimes*, 60 HARV. L. REV. 65, 93 (1946), Professor Hale appears to chide the Department for not invoking §51 in the *Screws* case. Actually, one count in the indictment in the *Screws* case was under §51. That count was dismissed by the trial court without opinion. The Government went to trial on the remaining counts under §52 and the general conspiracy statute, then §88. Violation of the civil rights conspiracy statute is a felony. Since the 1948 revision of Title 18 of the United States Code, a conspiracy under the general conspiracy statute (§371) to violate the civil rights statute (§242) is a misdemeanor.

4. He received the maximum sentence under each of the four substantive counts, totaling four years' imprisonment.

5. Under 18 U.S.C. §1621 (1948).

6. The detective agency head received a two-year sentence, to run concurrently with the first two years of his sentence in the substantive case. The other individuals, in brief, received a year and a day sentence and three years' probation. The confinement sentence against the comptroller was suspended. Each individual defendant also was fined \$100 which was remitted. The company was fined a total of \$4,000. The company also made a substantial settlement of civil claims which were made against it.

The appellate phases of the three cases then commenced. The detective agency head appealed from the judgment in the substantive case. All but two defendants⁷ appealed from the conspiracy conviction. On January 10, 1950, the Court of Appeals for the Fifth Circuit unanimously affirmed the judgment in the substantive case,⁸ largely upon the basis of *Screws v. United States*,⁹ and reversed the judgment in the conspiracy case, one judge dissenting.¹⁰ Subsequently, the District Court dismissed the perjury indictment.¹¹

Petitions for writs of certiorari were filed with the Supreme Court in the substantive case¹² and in the conspiracy case,¹³ and these have been granted; and a notice of appeal was filed with the Court in the perjury case,¹⁴ and probable jurisdiction has been noted. The sordid events which occurred in the lumber company's paint shack have thus given rise to three cases which the Supreme Court will adjudicate.

THE CIVIL RIGHTS SECTION AND ITS STATUTORY WEAPONS

Behind the scenes of the *Williams* cases and all other civil rights matters involving a possible violation of Federal law is a unit, little¹⁵

7. The company and its comptroller.

8. *Williams v. United States*, 179 F.2d 656 (5th Cir. 1950).

9. 325 U.S. 91 (1945).

10. *Williams et al. v. United States*, 179 F.2d, 644 (5th Cir. 1950). The main points of the court's decision were: (1) Section 51 (now §241) did not apply to rights secured by the Fourteenth Amendment because the statute protected only those Federal rights "which appertain to citizens as such and not the general rights extended to all persons by the [due process] clause of the Fourteenth Amendment." (2) Even if §51 was intended to apply to rights secured by the Fourteenth Amendment, it would be unconstitutional under the Fifth Amendment for failure to provide a reasonably ascertainable standard of guilt, since the statute failed to require "willfulness," a deficiency which was not cured by the word "conspire." (3) Even if §51 was not void for vagueness, the failure of the trial court to charge "willfulness" as required by the *Screws* case constituted reversible error. (4) The meagerness of the direct evidence of conspiracy made failure to admit evidence concerning the previous acquittal for aiding and abetting the commission of the substantive offense reversible error. Judge Sibley wrote the opinion; a special concurring opinion was written by Judge Waller; and Judge Holmes wrote a dissenting opinion.

11. The Court held that the conviction of the detective agency head under §52 barred a perjury prosecution against him on the ground that such a prosecution would constitute double jeopardy and the acquittal of the three others indicted for perjury constituted *res judicata*. It also held that in view of the reversal of the conspiracy conviction under §51, in any event, the perjury charges could not lie. (The Court's order is unreported.)

12. *Williams v. United States*, No. 365, Oct. Term 1950.

13. *United States v. Williams et al.*, No. 26, Oct. Term 1950.

14. *United States v. Williams et al.*, No. 134, Oct. Term 1950.

15. The Civil Rights Section at present has only seven attorneys. The staff now is no larger than it was at its inception. See *Washington Notes*, New Republic, Mar. 8, 1939, p. 128, col. 2. As pointed out in an editorial in the N.Y. Times, July 24, 1949, §4, p. 6, col. 3, " * * * The [Civil Rights] Section is so small that private organizations in the civil rights field employ more people just to do their research." The President's Committee on Civil Rights reported, "At the present time the Civil Rights Section has a complement of seven lawyers * * *. This small staff is inadequate either for maximum enforcement of existing civil rights statutes, or for enforcement of additional legislation such as that recommended by this Committee." *TO SECURE THESE RIGHTS: REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS* 119-20 (1947).

and little known, the Civil Rights Section of the Department of Justice, which was created on February 3, 1939, as a part of the Department's Criminal Division by the then Attorney General Frank Murphy. In his order¹⁶ establishing the Section it was stated:

The function and purpose of this unit will be to make a study of the provisions of the Constitution of the United States and Acts of Congress relating to civil rights with reference to present conditions, to make appropriate recommendations in respect thereto, and to direct, supervise and conduct prosecutions of violations of the provisions of the Constitution or Acts of Congress guaranteeing civil rights to individuals.

The Federal criminal laws with which the Section is primarily concerned are the two statutes involved in the *Williams* cases, Sections 241 and 242 of Title 18 of the United States Code, and the laws proscribing peonage and involuntary servitude.¹⁷

Section 242 is aimed at public officers who abuse the constitutional or statutory rights of others. It is made a misdemeanor for anyone, acting under color of law, *willfully* to subject any inhabitant to the deprivation of rights secured by the Constitution or laws of the United States or to different punishments, pains or penalties than are prescribed for the punishment of citizens. The maximum punishment is a \$1000 fine, a year's imprisonment, or both. Section 241 is aimed at those who combine to interfere with these rights. It is made a felony for two or more persons to conspire to injure, oppress, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States, or because of his having exercised the same.¹⁸ Punishment is a \$5000 fine, ten years' imprisonment, or both.¹⁹

16. Order of the Attorney General No. 3204, February 3, 1939. The Section was originally denominated the Civil Liberties Unit. The name was changed in June 1941, largely to avoid confusion in the public mind with the American Civil Liberties Union. See CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS* 24, n. 35 (1947).

17. 18 U.S.C. §§ 1581(a), 1584 are the most important. In general on these statutory weapons see CARR, *op. cit. supra* note 16; Clark, *Civil Rights: The Boundless Responsibility of Lawyers*, 32 A.B.A.J. 453, 454 (1946). The Civil Rights Section also handles certain enforcement aspects of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1946), the Safety Appliance Act, 45 U.S.C. §§ 1-16 (1946), the Hatch Act, 18 U.S.C. §§ 594 *et seq.* (1948), Railway Labor Act, 45 U.S.C. §§ 152 *et seq.* (1946), and about a dozen other statutes.

18. The section also provides that if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right so secured, they shall be subject to the penalties provided therein. The "in disguise" language began the section in its original form and had its origin in "the doings of the Ku Klux [Klan]," *United States v. Mosley*, 238 U.S. 383, 387 (1915). The clause "has dropped into a subordinate place, and even there has a somewhat anomalous sound." *Id.* at 388.

19. In the 1948 revision of Title 18, the clause which had previously appeared, whereby a conspirator was made ineligible to hold office, was dropped. This relatively minor change is one of the very few instances in which the recommendations of the President's Committee on Civil Rights have been adopted by Congress. See

Upon these statutes, enacted directly after the Civil War, the Federal Government must rely in combating general deprivations of civil rights. Their inadequacy has often been stressed.²⁰ Section 242 (the substantive offense) does not by its very terms reach persons other than those acting under color of law. Where, however, a private person is involved along with a person in an official status, the former can be reached indirectly through § 242 by the aiding and abetting statute²¹ or the general conspiracy statute.²² An underlying infirmity of § 242 as a prosecutive weapon, moreover, is its small calibre.²³ As a consequence, some of the most revolting crimes by persons garbed with State authority are punishable only as misdemeanors under this statute.²⁴ The main difficulty with § 242, however, results from the great burden imposed upon the Government by the *Screws* decision itself, to which further consideration is given below.

In one respect § 242 is superior to its "companion" statute, § 241—the conspiracy offense. The former protects inhabitants, whereas the conspiracy provision is restricted to citizens.²⁵ Another limitation upon § 241 is that it cannot be employed to protect a fed-

TO SECURE THESE RIGHTS, *op. cit. supra* note 15 at 156. The Reviser's notes explain that "The experience of the Department of Justice is that this unusual penalty has been an obstacle to successful prosecutions for violations of the Act." NEW TITLE 18, UNITED STATES CODE 2468 (1948). In very few other instances is this penalty provided. See Holtzoff, *Loss of Civil Rights by Conviction of Crime*, 6 FED. PROBATION 18 (No. 2 1942).

20. In a statement announcing the establishment of his Committee on Civil Rights, President Truman emphasized that "the Federal Government is hampered by inadequate civil rights statutes." They have been elsewhere described as a "thin thread" (Address by then Attorney General Clark, 6 NAT. B. J. 1, 5 (1948)); "statutory fossils" (Bendiner, *Civil Rights—Fresh Start*, The Nation, May 10, 1947, p. 538, col. 1); "a dead letter" (Roberts-Frankfurter-Jackson dissent in *Screws* case, 325 U.S. 91, 139 (1945)); "feeble remnants" (Eliot, Book Review, 61 HARV. L. REV. 899, 902 (1948)).

21. 18 U.S.C. § 2(a) (1948). See Rotnem, *Clarification of the Civil Rights Statutes*, 2 BILL OF RTS. REV. 252, 259 (1942); CARR, *op. cit. supra* note 16, at 73-74. As has been noted above, in the first *Williams* case all defendants except the detective agency head (who was convicted) were acquitted either as principals or aids and abettors but were found guilty in a subsequent trial by another jury of conspiring.

22. 18 U.S.C. § 371 (1948). In *Culp v. United States*, 131 F.2d 93 (8th Cir. 1942) and *United States v. Trierweiler*, 52 F. Supp. 4 (E.D. Ill. 1943) only the general conspiracy statute was used.

23. It cannot be denied, however, that the meager penalty of § 242 is a factor which persuades some juries to convict which, in the presence of a more severe sanction, might not be inclined to do so. See CARR, *op. cit. supra* note 16, at 71-72.

24. *Screws'* conduct was described by Justice Douglas as "a shocking and revolting episode in law enforcement." 325 U.S. 91, 92. In *Crews v. United States*, 160 F.2d 746 (5th Cir. 1947), the court's opinion begins: "The beautiful Suwannee River—the mention of which calls to memory a plaintive melody of strumming banjos, humming bees, childhood's playful hours, a hut among the bushes, and a longing to go back to the place where the old folks stay—was the scene of the cruel and revolting crime that provoked the gesture of dealing out justice that is this case." Both cases involved brutal killings by law enforcement officers.

25. See *Baldwin v. Franks*, 120 U.S. 678 (1887).

erally-secured right as against deprivation by only one person.²⁶ The rights heretofore protected under § 241, except for the right of a qualified voter to participate in a Federal election²⁷ and to have his ballot honestly counted,²⁸ have been described as "relatively minor ones."²⁹ The scope of the provision will be greatly affected by the outcome of the *Williams* conspiracy case. It is the Government's contention in that case that § 241 is not confined to rights deriving from national citizenship (despite the fact that § 241 mentions "citizens" and § 242 mentions "inhabitants"). It argues that § 241 also embraces the great rights protected by the Fourteenth Amendment, the right not to be deprived by State action of life, liberty, or property without due process of law and the right not to be deprived by such action of the equal protection of the laws. Judge Sibley in the *Williams* conspiracy opinion presents the argument against this contention, holding that § 241 applies only to rights which derive from national citizenship.³⁰

26. A private individual who intimidates a Negro from voting in a primary election, for example, could presumably not be prosecuted by the Federal Government, unless the Hatch Act would be held to apply. But *cf.* *United States v. Malphurs*, 41 F. Supp. 817 (S.D. Fla. 1941), vacated on other grounds, 316 U.S. 1 (1942). See, however, *CARR, op. cit. supra* note 16, at 178-179.

27. *Ex parte Yarbrough*, 110 U.S. 651 (1884).

28. *United States v. Mosley*, 238 U.S. 383 (1915) (general election); *United States v. Classic*, 313 U.S. 299 (1941) (primary election). The latter case has been described as "the first important case handled by the Civil Rights Section after its creation in 1939." *CARR, op. cit. supra* note 16, at 85.

29. To SECURE THESE RIGHTS, *op. cit. supra* note 15, at 116-117. The point may be somewhat overstated. The right to be free from slavery and involuntary servitude, except as a punishment for crime, protected in *Smith v. United States*, 157 Fed. 721 (8th Cir. 1907), *cert. denied*, 208 U.S. 618 (1908), would not be in the category of a minor right, nor would the right to hold Federal office, upheld in *United States v. Patrick*, 54 Fed. 338 (M.D. Tenn., 1893). Other important rights which were enunciated, though not upheld on the facts presented, are the right to petition Congress for redress of grievances, see *United States v. Cruikshank*, 92 U.S. 542, 552 (1875); and right of freedom of the press to comment upon National matters, see *Powe v. United States*, 109 F.2d 147, 150 (5th Cir. 1940), *cert. denied*, 309 U.S. 679 (1940). Other rights to which the statute has been held applicable include the right to establish a claim to land under the Homestead Act, *United States v. Waddell*, 112 U.S. 76 (1884); the right to be protected against unlawful violence while in the custody of a United States Marshal, *Logan v. United States*, 144 U.S. 263 (1892); the right to inform an officer of the United States of the violation of Federal law, *Motes v. United States*, 178 U.S. 458 (1900), and *In re Quarles and Butler*, 158 U.S. 532 (1895); the right to furnish munitions, ships, and supplies to the Federal Government for war purposes, *Anderson v. United States*, 269 Fed. 65 (9th Cir. 1920), *cert. denied*, 255 U.S. 576 (1921); the right to enforce a decree of a Federal court by contempt proceedings, *United States v. Lancaster*, 44 Fed. 885 (W.D. Ga. 1890); the right to testify in a land title case, *Foss v. United States*, 266 Fed. 881 (9th Cir. 1920). And of course the implications of several of the foregoing cases are broader than the holdings on the facts involved. For example, the *Waddell* case, *supra*, is strong authority for the principle that § 241 may be employed in any case involving deprivation of a right created by Federal statute. But *cf.* *United States v. Berke Cake Co.*, 50 F. Supp. 311 (E.D.N.Y. 1943).

30. See 179 F.2d 644 at 647-648. This and other contentions are summarized in note 10 *supra*. But see Comment, 57 *YALE L. J.* 854, 859 (1948): "* * * The general statutory 'right' recognized under Section 19 [now Section 241] holds interpretive possibilities which the courts have merely begun to explore."

The principal laws dealing with peonage and involuntary servitude, practices which are much more prevalent than is ordinarily supposed,³¹ make it a crime, punishable by not more than a \$5000 fine, five years in prison, or both, to hold or return any person to a condition of peonage or to arrest any person with the intent of placing him in a condition of peonage or, as recently added, to hold or sell a person into a condition of involuntary servitude.^{31a} These provisions apply to private persons as well as State officials.³² Formerly, involuntary servitude could be effectively prosecuted only where the technical offense of peonage had been committed, which meant that it was necessary to prove that the victim was being held to work out a debt.³³ But a change made in the 1948 revision of Title 18 of the United States Code removes at least some of the difficulties which previously existed.³⁴ Under the new provision, § 1584, holding a person to a condition of involuntary servitude is made a crime apart from the existence of any debt. Although further clarifications are still in order,³⁵ this change constitutes a great step forward.

COMPLAINTS, INVESTIGATIONS, AND PROSECUTIONS

The Civil Rights Section is primarily responsible for the enforcement of the foregoing laws. Subject to the overall direction of the Attorney General and the Assistant Attorney General in charge of the Criminal Division, it determines the general policy to be applied in the handling of complaints, investigations, and prosecutions. It indicates to the Federal Bureau of Investigation the nature and extent of the investigations to be conducted. It prepares and authorizes in-

31. Reliable figures are unavailable. The Civil Rights Section had approximately 84 complaints of peonage and involuntary servitude during the fiscal year ending June 30, 1950, and half of these merited investigation. But, chiefly due to the fact that the victim in this type of case is handicapped by economic circumstances and is often ignorant, many more violations presumably occur than are ever reported.

31a. 18 U.S.C. § 1581(a), § 1584 (1948).

32. See *Clyatt v. United States*, 197 U.S. 207, 218 (1905); *Bailey v. Alabama*, 219 U.S. 219, 241 (1911); *United States v. Reynolds*, 235 U.S. 133, 143 (1914); *Taylor v. Georgia*, 315 U.S. 25 (1942); *United States v. Gaskin*, 320 U.S. 527, 528 (1944).

33. As stated in the *Clyatt* case, *supra* note 32 at 215, peonage is "a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness."

34. Previously 18 U.S.C. § 51 (1946) had been available, but only where a conspiracy was involved, and § 52 had been available, but only where "color of law" existed. Section 443 was also available but its archaic language presented prosecutive difficulties. Despite this factor, it was successfully employed in *United States v. Ingalls*, 73 F. Supp. 76 (S.D. Calif. 1947); *United States v. Sabbia* (S.D. N.Y. 1907) (unreported); and *United States v. Peacher* (E.D. Ark. 1937) (unreported). See *Folsom, A Slave Trade Law in a Contemporary Setting*, 29 CORNELL L. Q. 203 (1943); *CARR, op. cit. supra*, note 16 at 81-82.

35. For example, an arrest with the intent of placing a person in a condition of involuntary servitude (a frequent device) does not come under § 1581(a), which applies only to peonage, nor is it covered by § 1584.

dictments and guides and advises the United States Attorneys, who, except in special circumstances, conduct the prosecutions.

For about the first eight years of its existence, all complaints were referred directly to the Civil Rights Section, which then determined whether investigation by the Federal Bureau of Investigation should be conducted. Now, however, the Federal Bureau of Investigation may in appropriate cases also conduct preliminary investigations either upon its own motion or at the request of the United States Attorney. Full-scale investigations or prosecutive action are not made without prior clearance through the Civil Rights Section. This restriction remains in effect in order to maintain a uniform policy in a field which is still *sui generis*. A civil rights case in many areas is a rarity and even in those jurisdictions where civil rights complaints occur with relative frequency, the necessity still exists of having a central agency to insure maintenance of a uniform policy in a delicate and sometimes highly technical field.

The "complaint" is the beginning of a civil rights case. It may come from any quarter. As stated by a former Attorney General:

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.³⁶

Often complaints, some barely decipherable, are made directly to the President by the victim or a relative.³⁷ Since it is realized that the victim of a civil rights case may often be an ignorant and perhaps illiterate person,³⁸ particular stress is laid upon attaining a clear understanding of the nature of the complaint. "Administrative burial" of a poorly stated civil rights complaint simply does not occur. Where insufficient details are presented in the first instance additional information is elicited by correspondence or, if necessary, through a direct interview with the victim by the Federal Bureau of Investigation. For example, a chain gang prisoner's complaint of generally

36. Biddle, *Civil Rights and the Federal Law*, in SAFEGUARDING CIVIL LIBERTY TODAY 135 (1945). Also see Rotnem, *Enforcement of Civil Rights*, 3 NAT. B. J. 1, 8 (1945).

37. The following is typical: "Dear Mr. Presidnet Truman To whom this mae consuren I am enforming you of my son who was a prisoner at the City Stokage [stockade] in ———, Ga. Dan Smith age 25. So he was beat to death by cop Tom Sykes and died May the 12th in the city hospital. * * * So Mr. Truman please due your best for me. You know just how my pore hart feel * * *." [The actual names of the victim and policeman are altered.]

38. See TO SECURE THESE RIGHTS, *op. cit. supra* note 15, at 25.

bad conditions under which the prisoners were kept (which does not come within the jurisdiction of the Department) only incidentally mentioned actual mistreatment at the hands of the guards (which does). The doubts of the examining attorney were resolved, as is usually the case, in favor of further inquiry to establish the facts, which revealed far more extensive beatings than the original complaint had suggested.

Appraisal of a civil rights complaint by the examining attorney calls for the exercise of a mature judgment and thorough familiarity with the scope of the civil rights statutes. Complaints are often received which shock the conscience but as to which it is clear that no person acting under color of law is involved and that no Federal jurisdiction otherwise exists. Many complaints are of the "crackpot" variety, which can be readily identified as such. So can complaints, likewise numerous, where only private legal advice is sought. In the foregoing cases there is no alternative but to close the matter without investigation.

Investigations, as noted above, may be of a preliminary character, in which a limited number of interviews are made, or they may be full inquiries in which all phases of the case are explored. The nature of the initial complaint will, of course, be the determining factor. All investigations are conducted by the Federal Bureau of Investigation and as a general rule by agents who have had special training or experience in the civil rights field.

Investigations are particularly difficult where law enforcement officers are the reported offenders, for the FBI, with respect to other phases of its operations, necessarily must work closely with the local law enforcement agencies and resentment is sometimes expressed that investigation should be made of the conduct of a state officer. On the other hand, other local officers are often the complainants, and they are as shocked as most other citizens are when the standards of local law enforcement are debased by resort to brutality. Another factor which makes conduct of a civil rights investigation more difficult than that of more routine federal offenses is that the victims and potential witnesses often, because of fear of further intimidation or reprisal, withhold information. Frequently prisoners when asked to relate what they know about a fellow-inmate's beating at the hands of custodial personnel are reluctant to say anything that might in their view jeopardize their relationships with the guards. The prospect of "solitary" and revocation of "good time" are often deterrents to frank disclosure. In involuntary servitude cases, too, fear of reprisal frequently stills the tongues of indigent sharecroppers and makes them

refrain from revealing acts on the part of the landowner which violate the peonage or involuntary servitude laws. Only when due account is taken of these and other factors can the generally high standards of the investigative work of the FBI in the civil rights field be properly evaluated. Increase in the number of agents available for civil rights investigations and additional specialized training will, if greater appropriations become available, doubtless raise present standards of investigative work in this field even higher.

Upon completion of the investigation the case is ready for presentation to the Grand Jury if the facts developed are sufficiently strong. Although violations of § 242 can be presented by information instead of indictment, it is usually deemed advisable to have a Grand Jury pass upon the facts of a civil rights case and to prosecute under an indictment.³⁹ To some extent the inevitable defense cry of "Washington interference" in local affairs sounds less convincing where a local Grand Jury has decided that the facts presented to it warrant prosecution. However, the Grand Jury's failure to return a true bill in a case arising under § 242 will not necessarily mean that no prosecutive action will be taken. Although, generally speaking, failure of the Grand Jury to indict can be taken as a pretty good indication that a petit jury would not convict, that is not necessarily so, and in the case of a flagrant civil rights violation where the facts of the case are particularly shocking, the Government might not take the Grand Jury's "No" for an answer.⁴⁰ All cases under § 241 and the peonage and involuntary servitude statutes have to be presented to a Grand Jury since felonies are involved.

Prosecutions of civil rights cases are usually conducted by the United States Attorney in whose district the offense was committed. Throughout the course of the investigation he will have been receiving the FBI investigative reports along with the Civil Rights Section, and will have been exchanging views with the Civil Rights Section on the facts and the law. In special cases a member of the Civil Rights Section or of the Criminal Division trial staff will present the case to the Grand Jury and will handle the prosecution. Wherever possible, however, civil rights cases are tried by the United States Attorney. As a member of the community, he is conversant with local customs and knows the most effective approach to the local jury in this sensitive

39. The policy is not, however, an inflexible one. For example, in *United States v. Erskine* (W.D.S.C. 1943) (unreported), the United States Attorney prosecuted successfully on an information in the first instance.

40. That occurred in the notorious "castor oil" case, and the Government was successful in securing a conviction. *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943).

field.⁴¹ His participation also further dilutes the defense argument about "outside interference."⁴²

PRIOR PITFALLS AND NEW HORIZONS

Civil rights cases are hard cases to try. It is understandable that a much lower "batting average" exists in this field than in the case of more routine Federal criminal prosecutions.⁴³ Often even in a very strong case, the jury will not convict. Sometimes where a conviction is secured only a light sentence will be imposed.⁴⁴ In the South, where the majority of the cases occur, and where the very words "civil rights" may make the hackles rise, the defense will seek to exploit time-worn prejudices.⁴⁵ Though right-minded Southerners have as little patience as anyone else with the discriminatory conduct of "village tyrants,"⁴⁶ there will not infrequently be at least a few jurors who respond favorably to the familiar shibboleths and it takes only one juror to cause a mistrial for want of agreement. Also, civil rights victims, usually members of a minority group, are typically not the sort who occupy a heroic role in the eyes of the jury;⁴⁷ sometimes they are persons who themselves have been caught in the toils of the law.⁴⁸

41. Following the successful outcome of one civil rights case, the United States Attorney wrote to the Department, "I am sure I was right in the belief that if I did not personally conduct the trial as a local man and a citizen of the county myself I could not have expected a conviction."

42. Members of the Federal Bureau of Investigation and others participating in a civil rights case may be local citizens as well. "It is significant," one commentator has observed, "that the Judge [in the *Screws* case], the members of the jury, the United States Attorney and his staff, the Attorney General's special assistant detailed to help the United States Attorney, and even the Federal Bureau of Investigation agents who collected the evidence, were all native Georgians." Coleman, *Freedom From Fear on the Home Front*, 29 IOWA L. REV. 415, 424 (1944).

43. On the average, about 20 civil rights cases are prosecuted a year. Acquittals and convictions seem to be almost equally divided.

44. For examples see Maslow and Robison, *Civil Rights, A Program for the President's Committee*, 7 LAW. GUILD REV. 112, 115 (1947). In one of the cases mentioned there, the *Erskine* case, local citizens paid the defendant sheriff's fine, their spokesman stating, "Are we Southerners going to sit idly by while the federal government arrests, prosecutes, fines, and sends to jail our high sheriff?" Anderson County (S.C.) Independent, December 21, 1943. This type of reaction in recent years seems to be declining somewhat.

45. See Coleman, *op. cit. supra*, note 42 at 423.

46. "There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond the reach of the Constitution." Justice Jackson, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). The phrase is an apt one to describe the oppressor in a civil rights case. See Coleman, *op. cit. supra* note 42.

47. See Vanderbilt, 1 BILL OF RIGHTS REV. 41, 42 (1940); CARR, *op. cit. supra* note 16, at 133; Schweinhaut, *The Civil Liberties Section of the Department of Justice*, 1 BILL OF RIGHTS REV. 206, 216 (1941); Sabine, Preface to SAFEGUARDING CIVIL LIBERTY TODAY (1945).

48. "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." Justice Frankfurter, dissenting, in *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950).

A great obstacle to the successful outcome of a civil rights case is the burden imposed upon the Government by the *Screws* case.⁴⁹ Although a majority of the Court in that case agreed that § 242 is constitutional, there is no opinion of "the" court,⁵⁰ and the Court's rigid interpretation of "willfulness" has enabled some defense attorneys to persuade the jury that virtually none but a constitutional lawyer could violate the statute since others would not be capable of possessing the specific intent to deprive the victim of a known constitutional right. While this reasoning is not justified by the holding of the Douglas opinion, which states that one who acts in "reckless disregard" of a constitutional requirement acts "willfully" as the Court interprets the word,⁵¹ there is still language in the opinion which can make the defense attorney's argument appear persuasive that "all" the defendant had done was perhaps to violate the State law by assaulting or killing the victim.⁵²

The selection of civil rights cases for prosecution is a matter of basic importance. The fear that the Federal government through the powers conferred by the Fourteenth Amendment will usurp functions which are properly those of the State is the underlying motif of the Roberts-Frankfurter-Jackson dissent in the *Screws* case. It was foreshadowed by Justice Frankfurter's concurring opinion in *Snowden v. Hughes*.⁵³ There he expressed concern about the doctrine that the act of every official who purports to wield power conferred by the State is State action and said that in such a case "every illegal discrimination by a policeman on the beat would be state action for

49. The *Screws* decision has been the subject of wide comment in legal periodicals. See, for example, 46 COL. L. REV. 94 (1946); 31 CORNELL L. Q. 48 (1945); 8 GA. BAR J. 320 (1946); 40 ILL. LAW REV. 263 (1945); 44 MICH. L. REV. 814 (1946); 24 ORE. L. REV. 227 (1945); 55 YALE L. J. 576 (1946). The immediate effect of the decision, as pointed out by Clark, *op. cit. supra* note 17 at 455, was the defendant's acquittal upon retrial.

50. "Four separate opinions were rendered; no more than four justices concurred in any one of them; and one justice, although believing that the conviction should be affirmed, joined with the four who voted to order a new trial so that it would be possible for the Court to dispose of the case. * * * The uncertainty caused by the Court's interpretation of the statute has placed great obstacles in the path of the federal prosecutor. No matter how heinous is the conduct of the defendant, it is not easy to prove beyond a reasonable doubt that he acted for the purpose of denying the victim a federally-secured right." Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 COL. L. REV. 175, 182-183 (1947). See, also, Fraenkel, *The Function of the Lower Federal Courts as Protectors of Civil Liberties*, 13 LAW AND CONTEMP. PROB. 132, 142 (1948).

51. 325 U.S. 91, 105.

52. "In effect, the position [of the defendants] urges it is murder they have done, not deprivation of constitutional right. Strange as the argument is the reason. It comes to this, that abuse of state power creates immunity to federal power. * * * The defense is not pretty. Nor is it valid." Rutledge, J., in *Screws* case, 325 U.S. 91, 114 (1945).

53. 321 U.S. 1, 16 (1944).

purpose of suit in a federal court.”⁵⁴ But the fact remains that every such discrimination by the policeman on the beat *is* State action, though it does not follow in a civil rights case, any more than it does in any other kind of case, that the Government’s discretion will be abused by prosecution for every peccadillo. The Civil Rights Section, moreover, has consistently followed the policy of refraining from prosecution under the civil rights statutes if effective local action is taken against the offenders under applicable State law.⁵⁵

Aside from the foregoing policy, there is the usual consideration of strength of proof, which is present in any criminal case. Although beneficial results frequently accrue even if the Government is unable to secure a conviction in a civil rights case, the evidence to warrant prosecution must be sufficiently strong to offer at least a fair chance of conviction in the face of the local prejudice which often exists.

Though emphasis has been laid in the foregoing discussion upon the prosecutive aspect of the civil rights program, the Civil Rights Section often stresses the mediative approach as no less important. The President’s Civil Rights Committee has formally recommended resort to educational and mediation efforts in an effort to forestall chronic incidents of police brutality or persistent interferences with the right to vote.⁵⁶ Such techniques are used where appropriate and United States Attorneys have often reported favorably upon the outcome of conferences with persons who have been in violation of the civil rights laws but where the facts did not support prosecutive action.

54. As pointed out in the Government’s brief in the Supreme Court in the *Screws* case with respect to such apprehension, “Similar fears were expressed—unjustifiedly, as the subsequent history of the statute shows—when Section 2 of the Civil Rights Act of 1866 was being debated. Senator Garrett Davis of Kentucky said (Cong. Globe, 39th Cong., 1st Sess., p. 598) that ‘this short bill repeals all the penal laws of the States. * * * The cases of offense and misdemeanor that in these respects the honorable Senator’s bill would bring up every day in the United States would be as numerous as the passing minutes. The result would be to utterly subvert our Government; it would be wholly incompatible with its principles, with its provisions, or with its spirit.’” Pp. 45-46 Gov’t. Br. Similar fears were expressed when the operation of the Fourteenth Amendment was being considered in Congress. See *The Single Arbitrary Act of a State Official Directed Against a Single Individual, as a Violation of the Fourteenth Amendment*, (Note) 36 HARV. L. REV. 1020, 1025 n.24 (1923).

55. An interesting discussion of the problem of prosecutive policy where an offense violates both Federal and State law, which is of such peculiar importance in the civil rights field, is to be found in Professor Schwartz’ article, *Federal Criminal Jurisdiction and Prosecutors’ Discretion*, 13 LAW AND CONTEMP. PROB. 64 (1948). He points out, at 76, that the arguments in the *Screws* case “evoked one of the infrequent official disclosures of the role of the prosecutor’s discretion in the distribution of criminal business between federal and state courts.” He suggests that the Attorney General formally articulate the criteria which guide him in exercising his discretion not only in civil rights cases but in all offenses against “auxiliary” federal criminal laws. This is a laudable and perhaps attainable objective, though, as has been pointed out by a former Attorney General, “* * * 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.” Biddle, *op. cit. supra* note 36, at 142.

56. To SECURE THESE RIGHTS, *op. cit. supra* note 15, at 152.

Another highly important aspect of the Government's civil rights program, also recommended by the President's Civil Rights Committee, is its participation as *amicus curiae* in cases which involve important civil rights issues. The participation by the Department of Justice in the Racial Restrictive Covenant cases⁵⁷ both through filing a brief as *amicus curiae* and by the oral argument of the Solicitor General, constituted the first instance in which the Government has participated in a case to which it was not a party and where its sole purpose was the vindication of Fifth and Fourteenth Amendment rights.⁵⁸

Much has been accomplished by the Civil Rights Section in the relatively short period of its existence. But much more will have to be done before the "pervasive gap"⁵⁹ between democratic aims and non-democratic practices is finally closed. It is clear that additional legislation is essential to the attainment of this goal. A general civil rights bill⁶⁰ has been introduced in Congress by former Senator (now Attorney General) McGrath and Congressman Celler. Its enactment would in large measure obviate the difficulties discussed above and would, moreover, accord protection of individual rights its proper place in our government.

This bill would strengthen § 241 considerably by including within its coverage action by a single individual and would provide a civil remedy in such a case.⁶¹ The present provision would also be expanded by bringing inhabitants generally within the ambit of the protection of the section, which as has been noted is now confined to citizens.

The penalties of § 242, which otherwise remains unchanged in the bill, would be greatly increased where a civil rights deprivation by one acting under color of law results in the death or maiming of the victim. To remove the difficulties which are imposed by the *Screws* requirement that a specific intent to deprive the victim of a constitutional right is necessary and that a generally "bad" purpose on the part of the defendant will not satisfy the requirement of "willfulness,"

57. *Shelley v. Kraemer* and *McGhee v. Sipes*, 334 U.S. 1 (1948); *Hurd v. Hodge* and *Urciolo v. Hodge*, 334 U.S. 24 (1948).

58. Other cases involving civil rights issues in which the Solicitor General has filed briefs as *amicus curiae* are: *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948); *McLaurin v. Oklahoma State Board of Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950). The Civil Rights Section has prepared briefs as *amicus curiae* in two cases involving the voting rights of reservation Indians in New Mexico and Arizona, *Trujillo v. Garley*, Civil No. 1353, D.C., N.M., Aug. 11, 1948 (not reported); *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948).

59. *TO SECURE THESE RIGHTS*, *op. cit. supra* note 15, at 139.

60. S. 1725, H.R. 4682, 81st Cong., 1st Sess.

61. 8 U.S.C. § 47 (1946) already provides a civil remedy in the case of conspiracies.

a new section is proposed which contains a partial enumeration of specific rights to which the provision applies, each of which has been enunciated by the courts.⁶²

Certain clarifying changes in the provisions relating to involuntary servitude and peonage are also made in the bill, though as previously noted the 1948 revision of Title 18 has effected substantial improvement. The bill could be further strengthened by inclusion of a provision applicable to the practice of arresting a person with the intent of placing him in a condition of involuntary servitude not tantamount to peonage.⁶³

Amendment of the Hatch Act⁶⁴ to make that statute clearly applicable to the intimidation and coercion of voters in primary as well as general elections is also part of the bill. The proposed legislation contains additional features for the protection of the right to political participation, one of the most important of which is the creation of civil remedies which the Attorney General can invoke to forestall threatened denials of the right to vote. Thus for the first time in the civil rights field resort by the Government to civil sanctions would be provided.⁶⁵

The bill also contains provisions prohibiting discrimination or segregation in interstate transportation, violations of which are made subject to fine and civil suit.⁶⁶

In addition to the foregoing and other provisions designed to strengthen protection of the individual's rights, the bill would greatly improve the machinery of the Federal Government for the protection of civil rights by according divisional status to the Civil Rights Section within the Department of Justice and commensurate expansion within the Federal Bureau of Investigation for work in the civil rights field. It would also create a Commission on Civil Rights to assimilate information, appraise policies and make recommendations in civil rights matters, for which virtually no facilities presently exist within the Government. Creation of a Joint Congressional Committee on Civil Rights is also contemplated.

62. The proposed section is carefully worded to avoid confinement of its application to the rights listed. But an additional safeguard to forestall defense resort to the inevitable argument that *inclusio unius est exclusio alterius* would seem desirable and a "catch-all," based upon the language of the *Screws* decision is suggested: "Any other right which shall have been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them."

63. See note 35, *supra*.

64. 18 U.S.C. § 594 (1948).

65. The importance of the availability to the Government of civil remedies in civil rights matters was stressed by the first Chief of the Civil Rights Section. See Schweinhaut, *op. cit. supra* note 47, at 216.

66. See *Henderson v. United States*, 339 U.S. 816 (1950); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948); *Mitchell v. United States*, 313 U.S. 80 (1941).

Other bills introduced in conjunction with the so-called "omnibus civil rights bill" outlined above were an anti-lynching bill,⁶⁷ an anti-poll tax bill⁶⁸ and a Fair Employment Practice bill.⁶⁹

The proposed measures embody most of the legislative recommendations of the President's Civil Rights Committee. Though the report of that Committee was issued three years ago, virtually no action has been taken by Congress to give effect to the proposals. The safeguarding of the rights of the individual requires no justification beyond the moral principles upon which it is predicated. But our obligations as a member of the United Nations and the compelling need to demonstrate our ability in the face of communist challenge to do all in our power to make the individual secure against oppression, import additional urgency to the enactment of a really effective civil rights program.*

67. S. 1726, H.R. 4683, 81st Cong., 1st Sess. Several other bills are also pending.

68. S. 1727, H.R. 3199, 81st Cong., 1st Sess.

69. S. 1728, H.R. 4453, 81st Cong., 1st Sess.

* This article was completed in December, 1950.