Vanderbilt Law Review

Volume 19
Issue 3 *Issue 3 - June 1966*

Article 3

6-1966

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The increasing interest in civil rights today has made apparent the need for federal protection of those rights from private interference. In this article, Mr. Feuerstein focuses on present and proposed federal remedies in this area through an examination of the relevant statutory and case law, and concludes that Congress must enact legislation specifically enumerating the prohibited conduct.

I. Introduction

Participants in the current civil rights movement in the South have been subjected to countless acts of violence and intimidation committed by private individuals acting either on their own or as part of racist organizations. As a result of such acts of violence, new legislation has been introduced in Congress.[1] Yet, the federal system historically has placed strict limitations on the power of the national government to deal with the acts of private individuals. The time is therefore ripe for a re-examination of these limitations. In so doing, this article deals with acts of private individuals in the technical sense of persons not acting under color of law.

The starting point for any such study is section 241 of title 18 of the United States Code. That statute, enacted during the Reconstruction era, is the key to determining the need and permissible scope of future legislation. It has helped define those constitutional rights which the national government may protect from private interference; and through its own weaknesses, it has pointed the way toward legislative reform.

The present section 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege

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1. S. 2923, H.R. 13323, H.R. 14765, 89th Cong., 2d Sess. (1966).

> secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> 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 or privilege so secured—
>
> They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

Congress has made only minor changes in this section since it was originally enacted as section 6 of the Act of May 31, 1870.[2]

Three statutory limitations to the coverage of section 241 are immediately apparent: First, the section deals only with conspiracies; thus, acts of single individuals are not crimes under this section, and the section does not make a crime of the consummation of the object of the conspiracy. Second, the victim of the conspiracy must have been a citizen of the United States.[3] And, third, since the section is a conspiracy statute, it necessarily includes the element of specific intent to deprive a person of a federal right made definite by decision or other rule of law—thereby saving the statute from challenge on the ground of undue vagueness.[4] Beyond these limitations the statute covers infringements of all rights which are secured by the Constitution and laws of the United States and which are within the power of Congress to protect from private interference by criminal legislation.[5] Since the statute's coverage is cast in terms of constitutional reference, there is no doubt that it is constitutionally valid.[6]

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2. Ch. 114, 16 Stat. 141, as amended, 18 U.S.C. 241 (1964): "Sec. 6. *And be it further enacted,* That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this, or 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, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States."

The changes in the section are conveniently traced in a chart which is included as an appendix to the opinion of Mr. Justice Frankfurter in United States v. Williams, 341 U.S. 70, 83 (1951), and the congressional debates are attached as an appendix to the Court's opinion in United States v. Price, 86 Sup. Ct. 1152, 1163-70 (1966). None of the changes reflect a substantive change in the coverage of the section. See United States v. Williams, *supra* at 79. For convenience, all of the predecessor sections will be hereinafter referred to as "section 241," unless otherwise indicated.

3. Baldwin v. Franks, 120 U.S. 678 (1887).

4. See United States v. Guest, 86 Sup. Ct. 1170, 1175-76, 1193 (1966); United States v. Price, 86 Sup. Ct. 1152, 1163 n.20 (1966); United States v. Williams, *supra* note 2, at 93-95 (dissenting opinion). *Cf.* Screws v. United States, 325 U.S. 91 (1945).

5. See United States v. Price, 86 Sup. Ct. 1152 (1966) rejecting United States v. Williams, 341 U.S. 70, 71 (opinion of Frankfurter, J.).

6. See United States v. Price, 86 Sup. Ct. 1152, 1154 n.2 (1966); Motes v. United

II. The Implied Power of Governmental Self-Protection

The doctrine of implied or necessary and proper powers is firmly established in our constitutional law.[7] Indeed, it is largely responsible for the continuing vitality of the Constitution. Nowhere in the Constitution are any express rights given to individuals with a corresponding express power in Congress to pass criminal legislation in order to protect these rights from private interference. But the Constitution may well give an express right with an implied power in Congress to protect the right; or the Constitution may give an implied right with a corresponding implied power to protect that right. Moreover, the doctrine of "resulting powers" or "aggregate powers" states that an implied right or power need not be traceable to a particular one of the specified powers, but may be traced to more than one or all of the express powers combined.[8] These basic rules have served as a foundation for the use of section 241. The cases discussed below illustrate the role played by the implied power of governmental self-protection in the development of that section.

A. *Protection of Federal Prisoners*

In *Logan v. United States*,[9] the defendants were charged with a conspiracy in violation of section 241 to murder citizens who were prisoners in the custody of a United States marshal. The victims were being held for trial on a federal charge of larceny on an Indian reservation. While the victims were being transported to another jail by a deputy marshal and his assistants, the defendants attacked and killed some of the prisoners. Although there was evidence that a few of the guards may have been in collusion with the defendants, the indictment did not allege any such cooperation, nor did it allege that the defendants acted under color of law.

Although the Supreme Court reversed the convictions on procedural grounds, it held that the crime alleged in the indictment is within the reach of the constitutional powers of the United States and is covered by section 241. The Court observed that the necessary and proper clause of the Constitution[10] gives Congress the power to provide for punishment of all crimes and offenses against the United States and, to accomplish this end, the power to enact laws for the

States, 178 U.S. 458 (1900); United States v. Waddell, 112 U.S. 76 (1884); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

7. The leading case is McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). See also Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

8. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 534-35 (1871). Compare Prigg v. Pennsylvania, *supra* note 7.

9. 144 U.S. 263 (1892).

10. U.S. Const. art. I, § 8.

arrest and commitment of those accused of such crimes.[11] Having the power to hold such prisoners, the Court reasoned, the United States has an equal duty to protect them from any assault or injury while so held. Further, the existence of that duty necessarily implies a corresponding right of the prisoners to be so protected, a right which is secured to them by the Constitution and laws of the United States.[12]

Having found that there was a right to protection, the Court concluded that Congress had the power to pass criminal legislation to protect this right from interference by private individuals. The Court said:

> [E]very right, created by, arising under or dependent upon, the Constitution of the United States, may be proteeted and cnforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.[13]

The Court, however, distinguished these rights from those which are "recognized and declared, but not granted or created" in some of the amendments and which are "thereby guaranteed only against violation or abridgement by the United States, or by the States, as the case may be, and camot therefore be affirmatively enforced by Congress against unlawful acts of individuals."[14] In *Logan,* the prisoners' right did not depend upon any of the amendments, but arose "out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action."[15] Any government which has the power to indict, try, and punish for crime; and to arrest the accused and hold him in safekeeping until trial, must have the duty and power to protect him against unlawful interference.

Logan is a good example of the conceptual problems faced by a court when it tries to apply section 241. If the Constitution grants the national government penal powers,[16] clearly Congress has the power to pass laws protecting these penal functions. Because the necessary and proper clause confers upon the government the power of self-

11. 144 U.S. at 283-84.
12. *Id.* at 284.
13. *Id.* at 293.
14. *Ibid.* But is not any right which is "recognized and declared" also "granted" by the Constitution? It is difficult to see why the Court's reasoning in *Logan* would not apply to duties of protection imposed on the states by the fourteenth amendment. See text accompanying note 189 *infra.*
15. *Id.* at 294.
16. The Legal Teuder Cases, *supra* note 8, at 537 mentioned the penal powers as an example of a resulting power.

preservation, or self-protection,[17] the government may legislate to protect all its institutions and lawful functions from interference.

But section 241 requires more than a showing of federal *power* to legislate. To come within the section, the victim must have been exercising a federally secured *right*. To find such a right in *Logan*, the Court had to imply it from a governmental duty to protect the prisoner, which was in turn implied from the penal power. Since the opinion in *Logan* suggests that the section may be invoked regardless of the degree of care exercised by the government,[18] it might be more accurate to say that the prisoner's right is a right to be safe from governmental and private action while in custody, rather than merely a right to be reasonably protected by the Government. Nevertheless, it seems doubtful that such a broad right can be implied from the mere duty of the Government to protect the prisoner. More logically, this duty would only give rise to a right in the prisoner as against the Government—a right to be protected. Private individuals could not interfere with this right, unless they acted in concert with the Government.

Thus, while *Logan* is clearly sound insofar as it applies the implied power of governmental self-protection, its finding of an exercise of that power in section 241 as to the safety of federal prisoners is questionable.

B. *Protection of Federal Officers and Judges*

In re Neagle[19] involved state authority to prosecute a federal officer for killing a man who had tried to assault a federal judge. The Supreme Court observed that an act of violence against a federal judge while he is executing the laws of the United States is a breach of the peace of the United States; thus, there is a duty on the executive branch to protect federal judges from these dangers. Two years later in *Logan* the Court reiterated this duty and added that the United States is bound to protect "all persons in their service or custody in the course of the administration of justice."[20] Using the *Logan* approach, it would follow by implication that conspiracies to perform acts of violence or intimidation against these officers would be violations of section 241, and the lower courts have so held.[21]

The same reasoning leads to the conclusion that all federal officers

17. *Id.* at 533-34.
18. *Cf.* 144 U.S. at 285.
19. 135 U.S. 1 (1890).
20. 144 U.S. at 295.
21. United States v. Davis, 103 Fed. 457 (C.C.W.D. Tenn. 1900), *aff'd*, 107 Fed. 753 (6th Cir. 1901); see United States v. Patrick, 54 Fed. 338 (C.C.M.D. Tenn. 1893); *cf.* McDonald v. United States, 9 F.2d 506 (9th Cir. 1925).

are protected by section 241 while exercising their official duties.[22] Their right to be protected is implied from the governmental duty to protect them, which is in turn implied from the express or implied power which authorized the creation of the office. The power of Congress to protect these officers comes from the implied power of self-protection.

Again, it is doubtful that the right to be protected could be interfered with by private individuals. A better analysis would be to say that federal officers have a federal right to carry out their official duties, and anyone interfering with these duties infringes that right.

Section 372 of the criminal code specifically makes conspiring to impede or injure federal officers a crime.[23] This section, originally passed in 1861, has a maximum penalty of six years or 5,000 dollars, or both, compared to the 10 years, 5,000 dollars penalty in section 241.

C. *Federal Informers*

The defendants in *In re Quarles & Butler*[24] were convicted of violating section 241 by conspiring to assault, beat, and kill a citizen for having informed a United States deputy marshal that certain persons were running an illegal distillery. In denying the writ of habeas corpus, the Supreme Court held that it is the right and duty of every citizen to communicate to the executive officers any information he has of the commission of an offense against the laws of the United States. Relying on *Logan*, the Court concluded that the right to protection of an informer or a prisoner in custody are privileges and immunities "arising out of the nature and essential character of the national government, and granted or secured by the Constitution."[25]

It would be more accurate to say that the right is a right to inform, which arises from the creation of law enforcement machinery. The power to legislate, however, is implied from the nature and essential character of the national government—from its need to protect its functions. It is doubtful that the right of informers is peculiar to those informers who are citizens. Citizenship is only significant insofar as section 241 imposes this limitation in its exercise of congressional power.

22. *Ex parte* Yarbrough, 110 U.S. 651, 659-62 (1884) stated by way of dictum that Congress has the implied power and duty to protect federal officers while performing their services. State officers performing federally imposed duties are similarly protected. See Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956), discussed in text accompanying notes 159-61 *infra*.

23. 18 U.S.C. § 372 (1964).

24. 158 U.S. 532 (1895).

25. *Id.* at 536.

Five years after the decision in *Quarles*, the Supreme Court again had the same issue before it in *Motes v. United States*.[26] Without citing *Quarles* the Court held that it was the right of the informer, "in return for the protection he enjoyed under the Constitution and laws of the United States, to aid in the execution of the laws of his country by giving information to the proper authorities of violations of those laws."[27]

D. *Federal Litigants and Witnesses*

In *Terral v. Burke Construction Co.*,[28] the Supreme Court struck down a state statute as an interference with the right of a citizen of one state to resort to the federal courts of another state,[29] this right being secured under the judicial power of the United States[30] and section one of the fourteenth amendment. In 1890, a lower federal court upheld an indictment which charged a violation of section 241 for conspiring to prevent a litigant from applying to a federal court for a contempt order.[31] The court held that whenever a party has a right to litigate in the federal courts, he is exercising a right secured to him by the Constitution and laws of the United States.[32] In addition, the Ninth Circuit held in *Foss v. United States*[33] that this section also applies to a conspiracy to prevent a witness from testifying before a United States Commissioner.[34]

The rights to invoke the federal courts and to testify in federal litigation are clearly implied from the exercise of the judicial power granted in article III. No one would question the power of Congress to protect these rights under the implied power of self-protection. Section 241, however, appears to overlap with the present federal obstruction of justice statute, which has a less severe penalty than section 241.[35]

E. *Involuntary Servitude*

The thirteen amendment prohibition against involuntary servitude clearly applies to private individuals not acting under color of law.[36]

26. 178 U.S. 458 (1900).
27. *Id.* at 462-63; *accord*, Nicholson v. United States, 79 F.2d 387 (8th Cir. 1935).
28. 257 U.S. 529 (1922).
29. See Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867) (dictum).
30. U.S. CONST. art. III, § 2.
31. United States v. Lancaster, 44 Fed. 885 (C.C.W.D. Ga. 1890).
32. *Id.* at 892-93, citing U.S. CONST. art. III, § 2.
33. 266 F.2d 881 (9th Cir. 1920).
34. The court rejected United States v. Sanges, 48 Fed. 78 (C.C.N.D. Ga. 1891), *appeal dismissed*, 144 U.S. 310 (1892), which was contra, as being inconsistent with *Logan* and *Motes*.
35. 18 U.S.C. § 1503 (1964). The maximum penalty under section 1503 is $5,000, 5 years, or both.
36. See, *e.g.*, United States v. Gaskin, 320 U.S. 527 (1944); Clyatt v. United States, 197 U.S. 207 (1905).

Section 241 has been used in an involuntary servitude case on the theory that the right against enforced compulsory service is guaranteed by the thirteenth amendment.[37] Most prosecutions, however, are now brought under the peonage and slavery statutes.[38]

F. *Furnishing War Supplies*

In 1920, two federal courts of appeal reached opposite conclusions as to whether it is a violation of section 241 to conspire to prevent producers from fulfilling their contracts with the government to furnish munitions, ships, and supplies for war purposes.[39] In neither case was the discussion particularly enlightening. Clearly there is federal power to protect such suppliers, but it is questionable whether they are exercising a right secured by the Constitution or laws of the United States. Nevertheless, an analogy might be made to the right of protection of federal officers, since it might be said that the producers were exercising a federally imposed duty when performing federal contracts. Such an analysis might extend section 241 to all government contractors.

G. *Rights Secured by Federal Laws or Treaties*

Very few cases have arisen in which section 241 has been utilized to prevent interference with rights secured by a statute. The leading case, however, is *United States v. Waddell.*[40] The defendants were indicted under section 241 for conspiracy to deprive a citizen of his right under the Homestead Acts to establish a claim to lands of the United States. They had tried to prevent him from residing on and cultivating the land so as to perfect his claim. In an 1884 opinion by Mr. Justice Miller, the Court upheld this use of section 241. The victim was clearly exercising a right wholly dependent upon a valid act of Congress.[41] The Court held that whenever a conspiracy attempts to prevent the exercise of rights granted by statute or to oppress because of the exercise of them, the conspiracy comes within section 241 and the constitutional power of Congress.[42]

37. Smith v. United States, 157 Fed. 721 (8th Cir. 1907), *cert. denied,* 208 U.S. 618 (1908).

38. 18 U.S.C. §§ 1581, 1583, 1584 (1964).

39. Anderson v. United States, 269 Fed. 65 (9th Cir. 1920), *cert. denied,* 255 U.S. 576 (1921) (holding indictment sufficient); Haywood v. United States, 268 Fed. 795 (7th Cir. 1920), *cert. denied,* 256 U.S. 689 (1921) (holding no violation).

40. 112 U.S. 76 (1884).

41. The Constitution gives Congress the power to dispose of and make regulations concerning United States property. U.S. CONST. art. IV, § 3.

42. *Accord,* Nixon v. United States, 289 Fed. 177 (9th Cir.), *cert. denied,* 263 U.S. 703 (1928); Roberts v. United States, 283 Fed. 960 (8th Cir. 1922); Haynes v. United States, 101 Fed. 817 (8th Cir. 1900).

It seems, then, that section 241 on its face is applicable to any case of coercion of a person who has acquired personal rights under a federal statute, if the purpose of the coercion is to cause him to renounce his statutory benefits.[43] Most such applications of section 241 should pose no problems as to the power of Congress, provided the right is being exercised under a valid statute.[44] There is, however, one major limitation to applying section 241 to rights secured by statutes: where the particular statute was intended by Congress to carry no criminal penalty to protect its operation or to have its own remedial sections as exclusive remedies, then section 241 seemingly would not apply.

While many authorities feel that section 241 should apply to rights secured under the National Labor Relations Act and the Fair Labor Standards Act,[45] the case law remains unclear. Indictments filed in Harlan County, Kentucky, based upon rights secured by the National Labor Relations Act survived a demurrer, but the jury could not agree on a verdict.[46] In *United States v. Berke Cake Co.*[47] a district court dismissed an indictment based upon rights under the Fair Labor Standards Act on the ground that the FLSA has its own penalties which Congress intended to be exclusive. But the court alternatively based its decision upon the clearly irrelevant ground that the FLSA has nothing to do with rights deriving from the status of citizenship.[48] And in *United States v. Bailes*,[49] a district court dismissed a prosecution based upon rights under the National Labor Relations Act, concluding that Congress intended that the NLRA was not to have any criminal penalties. Again, the court relied upon a dubious alternative ground: the victims supposedly were not exercising a right wholly dependent upon the NLRA because the right to refrain from

43. See Schweinhaut, *The Civil Liberties Section of the Department of Justice*, 1 BILL OF RIGHTS REV. 206, 210 (1941) (author is the former chief of civil rights section of Department of Justice); *cf.* KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 44 (1947).

44. Where, however, the statute has been passed under the authority of the fourteenth or fifteenth amendments, the problem of reaching private action through those amendments arises.

45. See, *e.g.*, CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 186-88 (1947); Tom C. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 COLUM. L. REV. 175, 181 (1947); Schweinhaut, *supra* note 43, at 210-11. Prior to the NLRA clearly there was no federally secured right to join a union. See United States v. Moore, 129 Fed. 630 (C.C.N.D. Ala. 1904).

46. The case is unreported. United States v. Mary Helen Coal Corp., E.D. Ky., 1938. Further discussion of the case may be found in 1939 ATT'Y GEN. ANN. REP. 63; CARR, *op. cit. supra* note 45, 27-28; Schweinhaut, *supra* note 43, at 210-11.

47. 50 F. Supp. 311 (E.D.N.Y.), *appeal dismissed*, 320 U.S. 807 (1943).

48. See text accompanying notes 59-63 *infra*. The case is strongly criticized in CARR, *op. cit. supra* note 45, at 186-88. The Government appeal was apparently dismissed because of a technicality. *Ibid.*

49. 120 F. Supp. 614 (S.D.W. Va. 1954).

joining a union was a fundamental right prior to that act.

As early as 1947, Professor Milton Konvitz suggested that if Congress ever passed a Fair Employment Practice Act, section 241 might protect Negro workers in their rights to hold a job and to promotions.[50] Recently, in *United States v. Guest*,[51] the indictment alleged that the defendants conspired to intimidate Negroes in their rights to equal enjoyment of public accommodations. The Government contended that these rights are secured under title 2 of the Civil Rights Act of 1964.[52] The district court held that the indictment did not sufficiently allege discrimination based on race and that Congress did not intend the 1964 Civil Rights Act to impose criminal penalties other than those specifically provided in the act.[53] The Supreme Court declined to review either determination on the ground that the Court lacked jurisdiction to hear the appeal.[54]

While section 241 probably protects rights secured by treaties,[55] the Court in *Baldwin v. Franks*[56] dismissed such an indictment because the victim was not a citizen as required by the terms of section 241.

H. *Summary*

The *Legal Tender Cases*[57] observed that the necessary and proper clause was intended to confer upon the Government the power of self-preservation. Insofar as congressional power is concerned, then, the cases discussed above are within the implied power of governmental self-protection. The determination in many of these cases, that the victims were exercising rights secured by the Constitution and laws of the United States, seems strained. One cannot help but conclude that it would be preferable for these offenses to be punished exclusively by statutes more specifically tailored for them. In fact, such statutes as those dealing with obstruction of justice, protection of federal officers, and involuntary servitude might well be interpreted as superseding section 241, especially in view of the lighter penalties imposed by the more specific statutes.[58] General, catch-all criminal

50. KONVITZ, *op. cit. supra* note 43, at 45.

51. 9 RACE REL. L. REP. 1692 (M.D. Ga. 1964), *rev'd on other grounds*, 86 Sup. Ct. 1170 (1966).

52. 78 Stat. 241, 42 U.S.C. § 2000(a) (1964).

53. Section 207(b) of the act provides that the remedies of the act be the exclusive means of enforcing rights based on the act. 78 Stat. 241, 42 U.S.C. § 2000(a)-6(b) (1964). In *Guest* the Government argued that the act's civil remedies are made exclusive only as against proprietors of covered establishments. See Brief for the United States, pp. 66-72, United States v. Guest, 86 Sup. Ct. 1170 (1966).

54. 86 Sup. Ct. 1170-75 (1966).

55. *Cf.* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79-80 (1873) (dictum).

56. 120 U.S. 678 (1887).

57. *Supra* note 8.

58. See notes 35, 23 & 38 *supra*.

statutes should be discouraged unless there are strong reasons requiring such legislation.

Although a few lower courts have asserted that section 241 is limited to rights pertaining to or peculiar to citizenship as such,[59] the cases just discussed refute such a view. In *Logan*, the Supreme Court specifically held that the section is not limited to political rights of citizens;[60] and more recently, in *United States v. Williams*,[61] none of the Justices adopted the lower court view that section 241 is limited to rights of citizenship.[62] The limitation to citizens refers only to the person who was the object of the conspiracy, not to the particular right he was exercising. In fact, were it not for the statutory limitation to citizens, the rights discussed thus far would be likewise applicable to aliens.[63]

These rights discussed so far as being protected by section 241 are too narrow in scope to be of great import in protecting those who are working for or who are exercising the civil rights of Negroes. Nevertheless, it should be kept in mind that section 241, or the obstruction of justice statute, or both, protect persons who are filing complaints, informing of possible violations, or acting as witnesses in those federal proceedings which relate to civil rights. Particularly, the executive branch should keep in mind that it has a *duty* to protect these persons by using all the powers lawfully conferred upon it. Affirmative protection, in addition to after-the-fact prosecutions, is required.

III. The Elusive Rights of National Citizenship

The cases we are about to consider are sometimes classified as involving the rights of national citizenship. This classification, however, may not be entirely accurate. On closer reflection, some of these rights do not appear to arise from the status of citizenship as such, but arise instead from the creation of a republican form of government and from the need to protect that government by keeping open the channels of communication between the government and the governed.

Part of the confusion as to rights of national citizenship results from the indiscriminate interchange of cases involving section 241 and cases

59. See, *e.g.*, United States v. Guest, *supra* note 51; Haywood v. United States, *supra* note 39; United States v. Bailes, *supra* note 49; United States v. Berke Cake Co., *supra* note 47.

60. 144 U.S. 263, 293 (1892); *accord*, United States v. Patrick, *supra* note 21. See Brief for the United States pp. 20-25, United States v. Price, 86 Sup. Ct. 1152 (1966).

61. 341 U.S. 70 (1951), *affirming* 179 F.2d 644 (5th Cir. 1950).

62. See Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1348 (1952).

63. *But see* Meyers, *Federal Privileges and Immunities: Application to Ingress and Egress*, 29 Cornell L.Q. 489, 496-98 (1944).

involving the privilege and immunities clause of the fourteenth amendment, which provides: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." But some of the privileges under that clause may be inherently limited to privileges against state action, and thus not subject to section 241 protection against private invasion. Also, it is still not clear whether the privileges and immunities clause is limited to rights peculiar to the status of citizenship, or applies instead to all those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[64]

The net result is that cases decided under the privileges and immunities clause must be carefully scrutinized to determine their effect, if any, upon section 241.

A. *Right To Vote in Federal Elections*

In *Ex parte Yarbrough*,[65] the petitioners had been convicted of violating section 241[66] by conspiring to intimidate a Negro in order to prevent him, because of his race, from voting in a congressional election. In an 1884 opinion, the Supreme Court unanimously upheld the convictions. The Court stated that if the national government, whose essential character is republican in form, did not have the power to protect elections from open violence and insidious corruption, then it would be left helpless before the great historical enemies of all republics—violence and corruption.[67] Just as the national government has the implied power to protect the federal treasury and mails from theft and burglary, and the implied power to protect federal officers, so has it the power to protect those voting in national elections. This power, the Court held, arises out of the circumstance that the function which the voter is about to exercise is dependent upon the laws of the United States. The national government has the duty to protect the voter from violence in his exercise of this right:

> This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that . . . the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.[68]

64. Slaughter-House Cases, *supra* note 55, at 79. See generally McGovney, *Privileges or Immunities Clause, Fourteenth Amendment*, 4 IOWA L. BULL. 219 (1918).

65. *Supra* note 22.

66. The case also involved REV. STAT. § 5520 (1875), which specifically dealt with conspiracies to interfere with federal elections. This statute was repealed by the Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 37.

67. 110 U.S. at 657-58.

68. *Id.* at 662.

Although article I, section 4 gives Congress the power to alter the times, places, and manner of holding federal elections, the Court did not attempt to find the power to pass laws protecting the right to vote in any specific section of the Constitution. Instead, the Court relied upon the implied power of self-protection:

> It is . . . essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people . . . . In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by proper elections, the temptations to control these elections by violence and by corruption is a constant source of danger.[69]

But merely finding a federal power over elections is not enough; section 241 requires that the victim be exercising a right secured to him by the Constitution or laws of the United States. The Court held that the right of the people to vote in congressional elections is secured by the Constitution. Section 2 of article I, for instance, gives the people the right to vote for members of the House of Representatives, subject to certain qualifications. Thus, while the fifteenth amendment was designed to confer the right to vote on the Negro,[70] the right of all persons to vote in national elections is likewise secured by the Constitution.[71] The reliance on article I, section 2 indicates that the Court was not dealing with a right inherent in citizenship as such, but with a right secured to the people generally under specific provisions of the Constitution.[72]

Since the decision in *Yarbrough*, the protection of section 241 has been extended to the right to have one's vote counted once it has been cast[73] and to other election frauds.[74] In addition, primary elections are now covered.[75] Accordingly, section 241 has received its greatest

69. *Id.* at 666.

70. A recent article has read into the *Yarbrough* opinion the implication that the fifteenth amendment is not limited to state action. Note, 74 YALE L.J. 1448, 1454 (1964). *But see* James v. Bowman, 190 U.S. 127 (1903).

71. Thus the Court by implication rejected the contention made by the Court nine years earlier in United States v. Cruikshank, 92 U.S. 542, 555-56 (1875) that to be protected by section 241 the interference with the right to vote must be on account of race or color.

72. Article I, section 2 makes no reference to citizens. The seventeenth amendment likewise gives to the people generally the right to vote for Senators. In view of the electoral system, there might be some doubt as to whether *Yarbrough* applies to Presidential elections. It would seem, however, that since article II, section 1 requires the states to select the manner of choosing electors, the body or persons so selected by the state are exercising a federally secured right when they are choosing electors. *Cf.* Burroughs v. United States, 290 U.S. 534 (1934).

73. United States v. Mosley, 238 U.S. 383 (1915).

74. See, *e.g.*, United States v. Saylor, 322 U.S. 385 (1944).

75. United States v. Classic, 313 U.S. 299 (1941).

use in the voting area, although most of the prosecutions have dealt with election frauds rather than violence or intimidation.[76]

From the end of Reconstruction until about 1890, Negroes in the South were disenfranchised on a massive scale by means of threats of physical violence and economic coercion. During the 1890's Southern states changed to "legal" methods of keeping Negroes from the polls—such as the grandfather clause[77] and interpretation tests.[78] As the last of these "legal" barriers are removed by federal legislative and judicial action, it is reasonable to expect a return to intimidation. There are already ominous indications that this may be occurring.[79] Although civil remedies would be the most effective method of dealing with economic intimidation,[80] section 241 should be a valuable device for preventing physical violence. The limitation to federal elections is not a great handicap since most intimidation occurs in connection with registration, which usually qualifies a voter for both state and federal elections.[81]

B. *Free Speech and Assembly*

By way of dictum, the Supreme Court in the *Slaughter-House*

76. See 1 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 158 (1958). The Hatch Act, 18 U.S.C. § 594 (1964) specifically makes a crime the intimidation of voters in a federal election, but this section has been only rarely used. 1 *id.* at 159. Its punishment is only a maximum fine of $1,000, or imprisonment of not more than one year, or both. A civil action, which may be brought by the United States, is afforded by 42 U.S.C. § 1971(b) (1964). As to the criminal provisions of the 1965 Voting Rights Act, see note 200 *infra*.

77. See Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, 238 U.S. 347 (1915).

78. See Louisiana v. United States, 380 U.S. 145 (1965); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd mem.*, 336 U.S. 933 (1949).

79. See *e.g.*, United States v. Beaty, 6 RACE REL. L. REP. 201 (6th Cir. 1960), *additional injunction issued*, 288 F.2d 653 (6th Cir. 1961), *on remand*, 7 RACE REL. L. REP. 484 (W.D. Tenn. 1962); United States v. Deal, 6 RACE REL. L. REP. 474 (W.D. La. 1961); U. S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: THE FIRST MONTHS 35 (1965); PRICE, THE NEGRO AND THE BALLOT IN THE SOUTH, 21 (1959); Fleming, *Resistance Movements and Racial Desegregation*, 304 ANNALS 44, 48 (1956); Hamilton, *Southern Judges and Negro Voting Rights*, 1965 WIS. L. REV. 72, 91-98, 101-02; Comment, 71 YALE L.J. 537 (1962); *A Sequel to Segregation*, Life, Dec. 10, 1956, p. 77.

80. What is needed is a swift administrative remedy patterned after the relief afforded by the National Labor Relations Board. For a discussion of the present civil remedies see Note, 74 YALE L.J. 1462 (1965).

81. The rationale of *Yarbrough* should extend that decision to the entire registration and pre-registration process. See Note, *Supra* note 80, at 1470 n.45. A federal grand jury has returned an indictment charging a violation of § 241 by a conspiracy to interfere with the right to protest unlawful deprivation of the right of Alabama Negroes to vote and with the right to encourage Negroes to vote. United States v. Eaton, Crim. No. 11,736N, returned April 6, 1965 (M.D. Ala.). The case arises out of the murder of Mrs. Viola Liuzzo near Montgomery, Alabama, on March 25, 1965. See U. S. COMM'N ON CIVIL RIGHTS, LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH 111-12 (1965).

Cases[82] undertook to list some of the privileges and immunities of national citizenship which are protected by the fourteenth amendment. Included among these was the right to assemble peacefully in order to petition Congress for redress of grievances.[83] Two years later, in *United States v. Cruikshank*,[84] the Court passed on the validity of a complaint charging a violation of section 241 by a conspiracy to deprive certain Negroes of the right to assemble. After holding that the general right to assemble peaceably is not a right guaranteed by the Constitution against private interference, the Court stated this now-famous dictum:

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances or for anything else connected with the powers or the duties of the national government is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case.[85]

Until recently only one attempt had been made to use section 241 to carry out the Court's promise. In *Powe v. United States*,[86] the defendants had been convicted of violating section 241 by conspiring to injure a citizen in the free exercise of the right and privilege to speak and publish his views. The defendants allegedly used blackmail to prevent a newspaper editor from exposing illegal gambling and lotteries and from calling upon public officials to suppress these activities. In reversing the convictions, the Fifth Circuit stated that it did not doubt that Congress has the impiled power to protect directly its citizens in their right to assemble peaceably in order to petition the federal government for redress. But Congress may do so only because of the necessity to maintain a federal right in its integrity:

> Because the federal government is a republican one in which the will of the people ought to prevail, and because that will ought to be expressive of an informed public opinion, the freedom of speaking and printing on subjects relating to that government, its elections, its laws, its operations and its officers is vital to it.[87]

82. *Supra* note 55.
83. *Id.* at 79; *accord*, Twining v. New Jersey, 211 U.S. 78, 97 (1908) (dictum).
84. 92 U.S. 542 (1875).
85. *Id.* at 552-53.
86. 109 F.2d 147 (5th Cir.), *cert. denied*, 309 U.S. 679 (1940).
87. *Id.* at 151.

The court held, however, that Congress cannot legislate generally to preserve freedom in discussing religious affairs, social or artistic matters, or, as here, matters of purely state concern.[88]

In 1965, the Justice Department sought and obtained an indictment charging a violation of section 241 by a conspiracy to interfere with the right to petition the *state* government for a redress of grievances.[89] This allegation, of course, runs contrary to the holding in *Powe.*

The 1951 Supreme Court case of *Collins v. Hardyman*[90] involved a civil suit under what is now section 1985(3) of title 42.[91] The defendants combined to break up by force and threats a meeting called for the purpose of adopting a resolution to be forwarded to the appropriate federal officials on a matter under consideration by Congress. The Ninth Circuit had held that section 1985(3) reached all constitutionally secured rights and that under the authority of *Cruikshank*

> a representative government cannot function properly unless its officers are informed of the opinions and desires of the people whom they represent. To protect the right to assemble for the purposes alleged in this case is to keep open those vital channels of communication between government and the governed.[92]

The Supreme Court, however, reversed the Ninth Circuit on the ground that the civil statute does not protect all federally secured rights, but only the rights to equal protection and equal privileges and immunities under the fourteenth amendment. Thus, the majority of the Court did not reach the constitutional questions of "the first magnitude" raised by *Cruikshank.*[93] The three dissenting justices were convinced, however, that the plaintiffs were exercising a federally created constitutional right.[94]

Also of interest is *Hague v. CIO,*[95] which involved a suit to enjoin municipal officials from enforcing certain ordinances forbidding the distribution of printed matter. Of the seven Justices passing on the case, five were of the opinion that the ordinances were invalid. Those

88. The Government's unsuccessful petition for certiorari suggested that had the articles and editorials been allowed to continue, they might have had national significance in bringing to light violations of federal income tax laws, or other criminal action forbidden by federal law. See CARR, *op. cit. supra* note 45, at 104. Schweinhaut, *supra* note 43. This argument apparently was not made before the Fifth Circuit.

89. United States v. Eaton, *supra* note 81.

90. 341 U.S. 651 (1951).

91. 42 U.S.C. § 1985(3) (1964).

92. Hardyman v. Collins, 183 F.2d 308, 313 (9th Cir. 1950).

93. 341 U.S. at 659. The majority opinion is criticized in Comment, 46 ILL. L. REV. 931 (1952).

94. 341 U.S. at 663 (Burton, Black, and Douglas, J.J., dissenting).

95. 307 U.S. 496 (1939).

Justices constituting the majority could not agree as to whether the enforcement of the ordinances violated the privileges and immunities clause of the fourteenth amendment in addition to the due process clause. Mr. Justice Roberts, in an opinion in which Mr. Justice Black joined, stated that the plaintiff's purpose was to disseminate information concerning the provisions of the National Labor Relations Act and to assemble peaceably for discussion of the act and the opportunities and advantages offered by it.[96] Citing the *Slaughter-House Cases* and *Cruikshank,* he observed that the right to assemble and discuss matters growing out of national legislation is a privilege *inherent* in citizenship: "Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss naional legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom."[97] Thus he concluded that the plaintiff's activities were protected by the privileges and immunities clause from interference by the state.

Mr. Justice Stone, in an opinion joined in by Mr. Justice Reed, stated that freedom of speech and assembly are rights of personal liberty secured to all persons under the due process clause without regard to citizenship. Therefore, he concluded, there should be no occasion here to consider the application of the privileges and immunities clause.[98] But he went on to say that, assuming *Cruikshank* was correct when it said that the right of a citizen to assemble to petition Congress for redress is a privilege of United States citizenship, the step is long and by no means certain that the right to assemble to discuss advantages of the National Labor Relations Act is such a privilege.[99] In any case, he concluded that the record in *Hague* did not show that this was the objective of the plaintiffs. In still another opinion, Mr. Chief Justice Hughes agreed with Mr. Justice Roberts that the right under discussion was a privilege of a citizen, but he also agreed with Mr. Justice Stone that the record did not support such a factual determination in this case.[100] Nine years later a majority of the court indicated that they preferred the opinion of Mr. Justice Roberts.[101]

As in *Yarbrough,*[102] the emphasis of the court in *Powe,* and of the Ninth Circuit in *Collins,* was on the need to protect the republican nature of the national government. It is essential to the effective functioning of our national government that the channels of com-

96. *Id.* at 512.
97. *Id.* at 513.
98. *Id.* at 519.
99. *Id.* at 522. But see the text accompanying note 87 *supra,* quoting from Powe v. United States, *supra* note 86.
100. 307 U.S. 532 (dissent).
101. Saia v. New York, 334 U.S. 558, 560-61, 564 (1948).
102. 110 U.S. 651 (1884).

munication between the government and its people be kept clear and that the people be able to reach an informed opinion. So it is that Congress, under the implied power of self-protection, has the *power* to pass legislation protecting the freedom to speak and assemble concerning matters of national import. But section 241 requires that the citizen be exercising a *right* secured by the Constitution or federal laws. Perhaps *Powe* and *Collins* imply this right by the same reasoning which has been suggested in order to imply a right for federal officers, informers, and litigants: a republican form of government implies a duty and right in the people to participate in the governing process, for the government cannot function without such participation. This, I believe, is the proper approach to these cases. Preferably, Congress should save the Court the difficulty of such a complicated analysis by passing a statute specifically exercising this power.[103]

Under the *Powe* approach, then, the right is not peculiar to citizenship. Non-citizens are subject to numerous federal laws and regulations, and to effectively govern them the national government must be able to hear their suggestions and complaints. Section 241, however, does not exercise the congressional power to protect the rights of non-citizens.

Cruikshank referred to the right of seeking redress as an "attribute of national citizenship." But it went on to infer this right, not from the status of citizenship, but from the "very idea of a government, republican in form."[104] Thus *Cruikshank* is probably consistent with the analysis I have suggested. The reference to attributes of national citizenship no doubt came from the *Slaughter-House Cases* and the confusion over whether the privileges and immunities clause is limited to rights which stem from the creation of the status of citizenship. Indeed, *Hague,* decided under that clause, treated the rights in question as though they were derived solely from the status of national citizenship.[105] The significance of the *Hague* approach is that it could be an omen of an emerging concept of national citizenship which views the status of citizenship as being in itself a source of basic rights for the citizen.

Whatever the theory, the *Cruikshank* and *Powe* dicta afford a significant rationale for bringing many forms of private violence within reach of the federal criminal jurisdiction.[106] The absence of any effort on the part of the Department of Justice to utilize this

103. See text accompanying note 197 *infra.*
104. See text accompanying note 85 *supra.*
105. See text accompanying note 97 *supra.*
106. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 42 (1947); see comment, *Federal Power to Prosecute Violence Against Minority Groups,* 57 YALE L.J. 855, 870 (1948).

doctrine prior to 1965 is surprising.[107] The whole tenor of the civil rights movement in the South since 1954 has been intricately involved with efforts to procure new federal legislation, to obtain greater exercise by the executive of existing powers, or to inform Negroes of their rights under federal laws.

C. *Free Movement*

Perhaps the most confusing application of section 241 is in the area of free movement. In 1867, prior to the passage of the fourteenth amendment, the Supreme Court in *Crandall v. Nevada*[108] held unconstitutional a Nevada tax imposed on every passenger carried out of the state by railroad. The statute was not struck down because of the commerce clause, but because it was inconsistent with inherent rights conferred by the Constitution. The federal government, the Court held, has the right to bring citizens to its offices to perform services for it, and the citizen has certain correlative rights along with those of the national government:

> He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.[109]

Like the right to vote in national elections which was established in *Yarbrough,* the right to travel as expressed in *Crandall* is related to the need to protect the effective functioning of the national government.[110] In fact, Mr. Justice Miller wrote the opinion of the Court in both *Crandall* and *Yarbrough.*

In the *Slaughter-House Cases,*[111] the Court adopted the rights of travel listed in *Crandall* as being protected from state interference by the privileges and immunities clause of the fourteenth amendment. The Court added to these the right to become a citizen of any state by bona fide residence.[112] In 1908, *Twining v. New Jersey* summarized

107. See generally Note, *Discretion to Prosecute Federal Civil Rights Crimes,* 74 YALE L.J. 1297 (1965).
108. 73 U.S. (6 Wall.) 35 (1867).
109. *Id.* at 44.
110. *But see* Edwards v. California, 314 U.S. 160, 178-79 (1941) (opinion of Douglas, J.).
111. 83 U.S. (16 Wall.) 36, 79 (1873) (dictum). The opinions in both *Crandall* and the *Slaughter-House Cases* were written by Mr. Justice Miller.
112. *Id.* at 89.

by declaring that among the rights and privileges of national citizenship already recognized by the Court was "the right to pass freely from state to state."[113]

The first attempt to extend the right to travel so as to protect against private interference was in 1920 in the case of *United States v. Wheeler*.[114] The defendants in *Wheeler* were indicted under section 241 for conspiracy to seize certain citizens and forceably eject them from the state of Arizona, threatening to harm them if they tried to re-enter the state.[115] The Supreme Court invalidated the indictments. Most of the opinion revolves around article IV, section 2 of the Constitution, the original privileges and immunities clause, although the Government expressly disclaimed any reliance on that provision.[116] The Court erroneously assumed that if it found a federal right not to be ejected from a state, this holding would necessarily mean that there was an "absence of all state authority to deal with the individual wrongs complained of."[117] This, the Court reasoned, would violate the reserved power of the state to deal with free residence, ingress, and egress.[118]

Only in the last two paragraphs did the Court approach the real issues in the case.[119] The Court distinguished the *Crandall* case because that case involved the validity of state action and because the state statute there was held to directly burden governmental functions of the United States, thus limiting the rights of citizens growing out of such functions. For the same reasons, *Twining's* statement that the privilege of passing from state to state is an attribute of national citizenship was passed over as inapposite. The Court did warn that it was not implying a want of power to restrain acts involving ingress or egress to or from a state if those acts directly and necessarily interfere with the performance of the duties incumbent

113. 211 U.S. 78, 97 (1908) (dictum); *cf.* Williams v. Fears, 179 U.S. 270, 274 (1900) (dictum).

114. 254 U.S. 281 (1920) (Opinion by White, C.J.). Mr. Justiee Clarke dissented withont opinion. See generally Bowman, *The United States Citizen's Privilege of State Residence*, 10 B.U.L. REV. 459 (1930). *Wheeler* is criticized in Meyers, *Federal Privileges and Immunities: Application to Ingress and Egress*, 29 CORNELL L. REV. 489, 505-08 (1944). The author was a member of the Civil Rights Election of the Department of Justice.

115. There were apparently political overtones to the deportation, as the case is sometimes known as the Wobby Deportation Case. See CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 69 (1947). The incident has also been referred to as the Bisbee Deportation. See United States v. Cuest, 86 Sup. Ct. 1170, 1183 n.2 (1966) (Opinion of Harlan, J.).

116. 254 U.S. at 284 (argument for the United States).

117. *Id.* at 297. Clearly a right, such as the right to vote in federal elections, may be protected by both the state and national governments.

118. This reserved power in article IV, scction 2 was gleaned from article IV of the Articles of Confederation.

119. 254 U.S. at 299-300.

upon the United States to discharge, such as those duties listed in *Crandall.*

By 1941, some members of the Supreme Court began to express doubt as to the conclusions reached in *Wheeler.* In *Edwards v. California,*[120] the Supreme Court held unconstitutional a California statute which made it a misdemeanor to bring into the state an indigent nonresident. Five Justices concluded that the statute was in violation of the commerce clause and expressed no opinion as to other clauses of the Constitution. Mr. Justice Douglas' concurring opinion, in which Justices Black and Murphy joined, concluded, however, that the statute violated the privileges and immunities clause of the fourteenth amendment. Following *Twining,* Mr. Justice Douglas stated that the right to move freely from state to state is an incident of national citizenship protected against state interference by that clause.[121] He disagreed with *Wheeler's* conclusion that *Crandall* was limited to rights growing out of governmental functions.[122] Instead, the right to travel is an attribute of personal liberty, basic to any guarantee of freedom of opportunity.[123] In a separate concurring opinion Mr. Justice Jackson agreed that the right of a citizen to enter any state is a right of citizenship.[124] He pointed out that because citizenship carries with it the duty to render military service to defend every part of the United States, it follows that the citizen must have the right to migrate to any part of this land.[125] Neither opinion mentioned what effect *private* interference would have on this right of ingress and egress.

In 1964, Mr. Justice Douglas took his opinion in *Edwards* one step further. In a separate opinion in *Bell v. Maryland,*[126] in which he was joined by Mr. Justice Goldberg, he concluded that the right to be served in places of public accommodation is an incident of national citizenship which is protected against state action (or state inaction) by the privileges and immunities clause. He reasoned that a person's right to travel expressed in *Edwards* (including intrastate travel) shrinks in value when there is no accompanying right to eat in public places: "Certainly his right to eat in public restaurants is as important in the modern setting as the right of mobility. In these times that right is, indeed, practically indispensable to travel either interstate or intrastate."[127]

120. 314 U.S. 160 (1941).
121. *Id.* at 178.
122. *Id.* at 178-79.
123. *Id.* at 179, 181.
124. *Id.* at 181-86.
125. *Id.* at 185-86.
126. 378 U.S. 226, 249-52 (1964).
127. *Id.* at 255. See also his concurring opinon in Heart of Atlanta Motel, Inc. v.

The Supreme Court in 1966 finally resolved the right to travel issue in *United States v. Guest.*[128] In that case the indictment alleged a criminal conspiracy by private individuals[129] to violate section 241 by injuring, oppressing, threatening, and intimidating Negro citizens in the free exercise and enjoyment of: "The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia."[130] The district court dismissed the indictment, and the Government appealed.

The majority of the Supreme Court, in an opinion by Mr. Justice Stewart, held that the indictment alleged a violation of a federally secured right to travel from one state to another.[131] The opinion states that the right to interstate travel "has long been recognized" as a basic right under the Constitution and that, although there have been differences within the Court as to the source of the constitutional right, "all have agreed that the right exists."[132] The majority saw itself as merely "reaffirming" that right.[133]

The difficulty with the majority's analysis, however, is that all but one of the cases cited in the opinion dealt with *state* interference with interstate travel. The only exception was *United States v. Moore,*[134] in which the Circuit Court for the Northern District of Alabama held that the right to establish a union was not guaranteed by the Constitution, and accordingly dismissed a conspiracy indictment against private individuals under section 241. The case was decided in 1904 prior to federal labor legislation.[135] In the course of his opinion, the district judge undertook to list some of the rights and privileges secured to citizens of the United States. The majority of the Supreme Court in *Guest* was apparently impressed with the judge's inclusion of "the right to pass from one state to any other for any lawful purpose."[136] Yet, a closer inspection of the district judge's opinion shows that the dictum might well be limited to state

United States, 379 U.S. 241, 279 (1964) and in New York v. O'Neill, 359 U.S. 1, 12-14 (1959). See generally CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION 184-93 (1956), also discussing state action.

128. 86 Sup. Ct. 1170 (1966).

129. Actually, the Court's decision as to the right to travel free from *private* interference was dicta, since the Court found an allegation in the indictment of state action. *See id.* at 1187-88 n.1 (concurring opinion of Brennan, J.)

130. *Id.* at 1177.

131. Five Justices joined in this portion of the opinion. Mr. Justice Harlan dissented, and Justices Brennan, Douglas, and Chief Justice Warren reached the same result as the majority, but for other reasons.

132. 86 Sup. Ct. 1170, 1179 (1966).

133. *Id.* at 1179.

134. 129 Fed. 630 (C.C.N.D. Ala. 1904).

135. See generally text accompanying notes 45-49 *supra.*

136. United States v. Moore, *supra* note 134, at 633.

interference with the right to travel, for the right to travel was listed between the right to equal protection of the laws and the right of a nonresident not to be subjected to taxes which are not also imposed on citizens of the taxing state. In short, the majority in *Guest* was able to cite no authority clearly supporting its holding that the right to travel is protected against private interference.

The majority disposed of the Wheeler case in a footnote.[137] Mr. Justice Stewart distinguished *Wheeler* on the ground that it involved a conspiracy to compel residents to move out of a state; thus the right of interstate travel was not directly involved. Nevetheless, he added:

> Whatever continuing validity *Wheeler* may have as restricted to its own facts, the dicta in the *Wheeler* opinion relied on by the District Court in the present case have been discredited in subsequent decisions. *Cf. Edwards v. California,* 314 U.S. 160, 177, 180 (Douglas, J., concurring); *Williams v. United States,* 341 U.S. 70, 80.[138]

In another footnote, Mr. Justice Stewart answered the dissent by admitting that the prior cases involved governmental interference with the right to travel:

> The right to interstate travel is a right that the Constitution itself guarantees, as the cases cited in the text make clear. Although these cases in fact involved governmental interference with the right of free interstate travel, their reasoning fully supports the conclusion that the constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private.[139]

In conclusion, the majority opinion indicated that the prosecution must prove specific intent—that is, that the predominant purpose of the conspiracy was to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right. Racial motivation, of course, is not required.

In a carefully documented dissent, Mr. Justice Harlan traced the cases dealing with the privileges and immunities of national citizenship, the commerce clause, and the due process clause. He concluded:

> This survey of the various bases for grounding the "right to travel" is conclusive only to the extent of showing that there has never been an acknowledged constitutional right to be free from private interference, and

137. 86 Sup. Ct. 1170, 1179 n.16 (1966).

138. *Ibid.* Of course, *Edwards* involved state interference and the criticism of *Wheeler* was joined in by only three justices. There is nothing in *Williams* which is critical of *Wheeler*. *Wheeler*, however, was criticized by Meyers, *supra* note 114, and its overruling was predicted in CARR, *op. cit. supra* note 115, at 64 n.19, 188. *Contra*, Note, 53 HARV. L. REV. 1031, 1039 (1940).

139. 86 Sup. Ct. 1170, 1179 n.17 (1966).

> that the right in question has traditionally been seen and applied, whatever the constitutional underpinning asserted, only against governmental impediments.[140]

From a policy standpoint, Mr. Justice Harlan concluded that the few constitutionally created rights which private individuals have against other private individuals include only those rights which concern important relationships with the federal government. While he recognized that one can argue that private interference with free movement interferes with important federal interests, he could not agree that private interference is a sufficient impediment to free movement to be analogous to state interference or to sustain a criminal indictment.

After reviewing the right-to-travel cases, one can reach several conclusions. First, there is no doubt that Congress has the power to pass legislation protecting interstate travel from private interference. Second, it is likewise clear that there is a right to interstate travel free from state interference. Third, such cases as *Logan*, *Quarles*, and *Cruikshank* would indicate that anyone traveling on federal business or in connection with the search for federal redress is exercising a federally protected right.[141] The difficult question is whether there is a general right to interstate travel free from private interference. While there is much that can be said for the conclusion reached in Mr. Justice Harlan's dissent, it is also true that interstate travel today plays an important role in the functioning of the nation as a whole. Certainly it cannot be said that the majority opinion in *Guest* is clearly wrong.

There are, however, two important defects in that majority opinion. The first is the Court's apparent retroactive application of a new rule of law to a crime requiring specific intent. *Guest* is the first case holding that the right to interstate travel applies as against private interference. In *Screws v. United States*, the Court held that specific intent under section 242 means specific intent to deprive a person of a right "which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions in-

140. *Id.* at 1185. The only exeeption might be *In re* Debs, 158 U.S. 564 (1895), decided under the commerce clause, which permitted an injunction against union members to prevent them from obstructing interstate commerce and the passage of the mails. The majority opinion did not rely on *Debs*.

141. See *In re* Quarles & Butler, 158 U.S. 532 (1895). Logan v. United States, 144 U.S. 263 (1892); United States v. Cruikshank, 92 U.S. 542 (1875). The indictment in *Guest* could have been based on this ground since the victim was leaving the state after having gone there pursuant to military duty. Such an indictment, however, would have presented a serious problem in showing specific intent to interfere with this right.

terpreting them."[142] Since the same requirement of specific intent applies to section 241,[143] there could have been no specific intent by the defendants in *Guest* to interfere with the newly-defined right to travel.[144] It may well be that the Court did not wish to pass upon this issue at the pleading stage.[145]

The other weakness of *Guest* stems from the failure of the majority opinion to specify the source and basis of the right to be free from private interference with interstate travel. One might well conclude that this right comes not so much from the need to protect the functions of the national government, but from the fundamental nature of the right itself. If such an interpretation is correct, then *Guest* may be the beginning of the most significant development in constitutional law since the passage of the fourteenth amendment, for it leads directly to the fundamental rights theory of national citizenship.

D. *The Fundamental Rights Theory of National Citizenship*

Once one accepts the premise that there are certain rights against private acts which are inherent in and which arise solely from the status of national citizenship, then the problem of defining and locating these rights arises. Since the emphasis is placed upon the right of the individual, it is not surprising that some authorities have predicted and advocated that eventually the Court will and should recognize that all fundamental rights are rights of national citizenship. These authorities are far too eminent and the proposition suggested far too important to be left unanswered.

In 1947, Professor Robert Carr suggested in his book *Federal Protection of Civil Rights* that the Supreme Court should read into the Constitution the principle that our basic civil rights are federal rights, entitled to protection by the federal government:

> It is neither a distortion of constitutional principles nor a perversion of the purposes of our Constitution to say that in a democratic society citizens must enjoy basic rights such as freedom to discuss public affairs, and that the central government must possess sufficient power to protect these rights —particularly when local governments are unable or unwilling to protect them.[146]

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142. 325 U.S. 91, 104 (1945); see United States v. Williams, 341 U.S. 70, 93-95 (1951) (Opinion of Douglas, J.); United States v. Guest, 86 Sup. Ct. 1170, 1193 (1966) (opinion of Douglas, J.).

143. United States v. Price, 86 Sup. Ct. 1152, 1163 n.20 (1966); United States v. Guest, 86 Sup. Ct. 1170, 1179 (1966).

144. See James v. United States, 366 U.S. 213, 221-22 (1961).

145. *Cf.* United States v. Guest, 86 Cup. Ct. 1170, 1193 (1966) (opinion of Douglas, J.).

146. CARR, *op. cit. supra* note 115, at 204.

While recognizing that many technical difficulties stand in the way of such a holding, he felt that the main step forward should be taken soon and unequivocally.

That same year Professor Milton Konvitz reached a similar conclusion in his book *The Constitution and Civil Rights*:[147]

> The time may come when the Supreme Court will consider all the personal rights protected against federal or state invasion as essential attributes of national citizenship to be protected against invasion by private individuals conspiring together, and thus subject to protection under Section 51 [now section 241]. Such a development would be as natural as has been the reading into the Fourteenth Amendment, against *state* infraction, of the Bill of Rights.[148]

The most comprehensive presentation of this position has been made by Professor Ralph Newman.[149] Professor Newman concludes that the Constitution omitted to define citizenship because the framers believed that:

> [I]t was not necessary to state that citizens of a nation acquire by such citizenship certain fundamental rights, so broad as to be perhaps incapable of any closer definition than the statement in the Declaration of Independence that all men are entitled to life, liberty and the pursuit of happiness. . . . The wisdom of the Founding Fathers may have forged a mightier weapon than we knew; ready at hand to make possible the satisfaction of society's changing needs.[150]

Professor Newman does not agree that section 241 should be limited to rights which relate directly to the needs of the functioning of the federal government: "Rights of citizenship, it would seem, should be regarded as more than grease for the wheels of the machinery of government."[151]

Professor Newman is undoubtedly correct when he states that, if there are any rights of national citizenship, Congress has the implied power to protect these rights. He is also correct in asserting that the Constitution may not only give rise to implied powers, but also implied rights such as certain rights of citizenship. The difficulty is in implying such sweeping rights from the mere creation of citizenship. Did not the Founding Fathers assume (perhaps too optimistically) that the

147. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 42-44, 87-88 (1947).

148. *Id.* at 42.

149. See NEWMAN & NEWMAN, THE ROLE OF LAW IN SOCIETY 307-13 (1958); Newman, *A Forgotten Right of United States Citizenship*, 39 ILL. L. REV. 367 (1945).

150. NEWMAN & NEWMAN, *op. cit. supra* note 149, 307. Some of the fundamental rights he lists are the right to life or property, vote for local officials, education, economic or social security, health, decent housing, and work for a living. *Id.* at 309.

151. Newman, *supra* note 149, at 377.

states would adequately ensure these fundamental rights for their own citizens?

Professor Newman presents strong policy reasons for unlimited federal power in this area. The national government, he reasons, already has virtually unlimited power through the commerce clause and other powers. Using the power based upon rights of national citizenship permits greater sincerity in the method by which our national goals may be pursued. Modern society, he concludes, requires full power in the nation to assist in the attainment of our social goals.

It is important to note that Professor Newman is not reviving the argument that the privileges and immunities clause creates new rights of national citizenship, including those formerly protected only against the national government in the Bill of Rights; instead, he believes the fundamental rights of citizenship were created at the time of the founding of the nation. Nor does he believe that these rights exist solely as against state action—that is, he would say that a citizen has a right to be safe as to his person, not that a citizen merely has a right to be protected by the state as to his person. The proposition that the Constitution grants to national citizens the right to be free from *state* interference with fundamental rights would not be surprising, for today it poses no new infringement to our federal system. The due process clause has already granted this right to all persons, whether citizens or not. But Professor Newman wants federal power over individual interference, although he admits that this national power need only be invoked as a supplement to state protection when the state protection is unsatisfactory. This limitation, however, is only a voluntary one. Section 241, as it now reads, would invoke the full federal power in all instances of conspiracies to deprive citizens of life, liberty, or property. In short, punishment of all criminal conspiracies could accrue to the federal authorities.

Despite the desirable efficiency of federal control in these areas either now or in the future, would it be proper for the Supreme Court to make this significant change in our federal system? It would seem that the present situation is not so drastic as to require the circumventing of the amending process. Presently-existing powers, if persistently and vigorously employed, should be adequate. It is doubtful that the *Guest* case indicates an immediate acceptance of the fundamental rights theory; rather the trend will probably be toward a broader interpretation of the fourteenth amendment.

IV. The Fourteenth and Fifteenth Amendments

We now turn to the question of when can the fourteenth and

fifteenth amendments serve as a basis for the use of section 241 to punish acts of private individuals who are not state officers.

In *United States v. Williams*,[152] decided in 1951, the Supreme Court was evenly divided on the question of whether, as a matter of statutory construction, section 241 applies rights secured by the fourteenth amendment. Mr. Justice Frankfurter wrote the opinion which concluded that Congress did not intend section 241 to apply to conspiracies by persons acting under color of law for the purpose of denying rights guaranteed under the fourteenth and fifteenth amendments.[153] Mr. Justice Douglas wrote the dissenting opinion.

The question was again before the Court in the recent case of *United States v. Price*,[154] in which the Court unanimously rejected Mr. Justice Frankfurter's opinion in *Williams*. Relying on the plain language of the statute and its legislative history, the Court concluded that section 241 applies to all constitutional rights, including those guaranteed by the fourteenth and fifteenth amendments. The Court's conclusion is clearly correct.

A. *Direct Interference With the State's Performance of Fourteenth and Fifteenth Amendment Duties*

Many cases state that as a general proposition the fourteenth and fifteenth amendments do not reach wrongful acts of individuals.[155] Even within the generally accepted view that these amendments impose duties only upon the states, this proposition is not entirely correct. Not only are private persons sometimes considered as acting under color of law,[156] but there are instances when these amendments furnish the power to reach acts of persons who need not be acting under color of law.

The due process and equal protection clauses create a right-duty relationship between the individual and the state.[157] The individual

152. 341 U.S. 70 (1951). Justices Frankfurter, Vinson, Jackson, and Minton were against the application of the section. Justices Douglas, Reed, Burton, and Clark favored the use of the section. The deciding vote was cast by Mr. Justice Black on res judicata grounds without reaching the merits.

153. The Frankfurter opinion is criticized in Gessman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1348-49 (1952).

154. 86 Sup. Ct. 1152 (1966).

155. See, *e.g.*, Hodges v. United States, 203 U.S. 1, 14 (1906); Civil Rights Cases, 109 U.S. 3, 17 (1883); United States v. Harris, 106 U.S. 629 (1883).

156. See, *e.g.*, Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946); Note, 61 HARV. L. REV. 344 (1948).

157. It is asserted in 43 VA. L. REV. 255 (1957), that the fourteenth amendment imposes no duty upon the states to desegregate or provide equal protection of the laws, but merely provides the national government with a negative check on the states. Such a limited interpretation of that amendment is surely contrary to such cases as Cooper v. Aaron, 358 U.S. 1 (1958).

has a federally secured right that the state will not deprive him of life, liberty, or property without due process of law nor deprive him of equal protection of the laws. No private person, unless acting under color of law, can deprive an individual of these rights by acting directly against him. But we have already seen how the implied power of self-protection gives Congress the power to protect against all interference with federally secured rights and duties. Insofar as private persons act directly on the *state* by means of encouraging, intimidating, threatening, or coercing the state to breach its fourteenth and fifteenth amendment duties to the people, the national government has the implied power to prevent this interference.[158]

Brewer v. Hoxie School District[159] supports the suggested analysis. In that case, school officials brought suit for an injunction against private parties to prevent them from interfering with the plaintiff's desegregation of schools. The Eighth Circuit granted the injunction:

> Plaintiffs are under a duty to obey the Constitution. Const. Art. VI, cl. 2. They are bound by oath or affirmation to support it and are mindful of their obligation. It follows as a necesary corollary that they have a federal right to be free from direct and deliberate interference with the performance of the constitutionally imposed duty. The right arises by necessary implication from the imposition of the duty as clearly as though it had been specifically stated in the Constitution.[160]

The existence of a Constitutional duty, the court continued, presupposes a correlative constitutional right in the person for whom the duty is exercised—a right to be free from direct interference with the state's performance of the duty. The Court pointed out that the right does not arise solely from the interest of the parties, but from the necessity of the government itself. Although the fourteenth amendment is concerned with state action, the court reasoned that if the defendants' illegal conduct should succeed in coercing the school

158. See 70 HARV. L. REV. 1299 (1957). Not only is the necessary and proper clause applicable to the fourteenth and fifteenth amendments, but sections 5 and 2, respectively of these amendments give Congress additional enforcement power. A bill recently introduced in Congress would punish the intimidation of a public official for the purpose of discouraging him from affording equal protection of the laws to others. S. 3296, 89th Cong., 2d Sess. § 501 (c) (1966).

159. 238 F.2d 91 (8th Cir. 1956); 70 HARV. L. REV. 1299 (1957).

160. Brewer v. Hoxie School District, *supra* note 159, at 99. In United States v. Harris, 106 U.S. 629 (1883), the Supreme Court struck down a statute (REV. STAT. § 5519 (1875) which made it a crime for private persons to conspire to deprive others of equal protection of the laws. Although another clause punished the preventing or hindering of state authorities from giving or securing equal protection, the Court did not discuss this seemingly valid clause. Since most Reconstruction statutes were considered unseverable, the Court probably saw no reason for discussion. *Cf., e.g.,* United States v. Reese, 92 U.S. 214 (1875).

board to rescind its desegregation order, such rescission could be accomplished only through "state action."

This doctrine is significant in the civil rights area. It permits section 241 to be used to prevent members of such racist organizations as the Ku Klux Klan from attempting to control the actions of local officials.[161] Even an indirect attempt to control the local government may be sufficient, for the majority of the Supreme Court in *Collins v. Hardyman*[162] noted:

> We do not say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws, or of equal privilege and immunities under the laws. Indeed, the post-Civil War Ku Klux Klan, against which this act [42 U.S.C. § 1985(3)] was fashioned, may have, or may reasonably have been thought to have done so. It is estimated to have had a membership of around 550,000, and thus to have included "nearly the entire adult male white population of the South." It may well be that a conspiracy, so farflung and embracing such numbers, with a purpose to dominate and set at naught the "carpetbag" and "scalowag" governments of the day, was able effectively to deprive Negroes of their legal rights and to close all avenues of redress or vindication, in view of the then disparity of position, education and opportunity between them and the Ku Klux Klan. We do not know.[163]

B. *Conspiracies Consisting of Both Private Individuals and State Officers*

Conspiracy cases present an interesting application of the theory that private persons acting against the state may be punished through the implied power of Congress to protect fourteenth and fifteenth amendment rights. A number of cases, including the *Price* case, have held that private persons who conspire with state officers are punishable by the federal government.[164] *Price* treated the private persons

161. This was probably one of the major objectives of section 241. See historical materials cited in United States v. Williams, 341 U.S. 70, 76-77 nn.3 & 4, 90-91 n.3 (1951) and the appendix to United States v. Price, 86 Sup. Ct. 1152, 1163-70 (1966).

162. 341 U.S. 651 (1951).

163. *Id.* at 662. Compare Powe v. United States, 109 F.2d 147 (5th Cir.), *cert. denied*, 309 U.S. 679 (1940). Pointing to article IV, section 4, which provides that the United States shall guarantee to every state a republican form of government, the Court in *Powe* observed: "Should a tyranny be set up in a State accompanied by a suppression of free speech and press, conceivably the Congress might be called on, temporarily in the execution of this guaranty, to pass a law securing against individual violence free speech in such state; but the section before us is not such a law." *Id.* at 151.

164. See United States v. Price, 86 Sup. Ct. 1152 (1966); Brown v. United States, 204 F.2d 247 (6th Cir. 1953); Cnlp v. United States, 131 F.2d 93 (8th Cir. 1942); United States v. Lynch, 94 F. Supp. 1011 (N.D. Ga. 1950), *aff'd on other grounds*, 189 F.2d 476 (5th Cir.), *cert. denied*, 342 U.S. 831 (1951); United States v. Trierweiler, 52 F. Supp. 4 (E.D. Mich. 1943).

as acting "under color of law."[165] Other cases, however, have indicated that the private parties are not themselves acting under color of law, but are nevertheless liable as abettors.[166] In *Price,* the Court did not reach the question of whether the private individuals might also be abettors.[167]

C. *Due Process: Lynchings*

The idea that the fourteenth amendment applies to acts of private individuals which interfere with a state's furnishing of due process was the subject of considerable discussion during the 1940's because an effort was being made to find some way of dealing with the then-prevalent lynchings. Victor Rotnem, a former chief of the Civil Rights Section of the Department of Justice, suggested that a state prisoner has a due process right to a fair trial and to have the state court's determination reviewed by the federal courts in light of the due process clause.[168] Therefore, when a mob takes a state prisoner from custody and lynches him, they deprive the prisoner of his federally secured right to a fair trial and interfere with the administration of federal justice, constituting a violation of section 241.[169]

The first case to reach the Supreme Court involving the lynching of a state prisoner was *United States v. Harris.*[170] But the Court there was merely concerned with whether private individuals can deprive others of equal protection of the laws; there was no discussion of due process or the peculiar facts before the Court.[171] In *Ex parte Riggins,*[172] a section 241 prosecution for a lynching conspiracy, a district judge applied the reasoning suggested by Mr. Rotnem. The judge observed that when the state seeks to punish a citizen for a crime, it must afford him the opportunity to appear before a lawful tribunal. To do so, the state must safely keep him, and any state officer so en-

165. 86 Sup. Ct. 1152, 1156-57 (1966); *accord,* United States v. Lynch, *supra* note 164; Hoffman v. Halden, 268 F.2d 280, 298 (9th Cir. 1959) (applying civil section 1983(3)); Baldwin v. Morgau, 251 F.2d 780 (5th Cir. 1958) (same).

166. See Brown v. United States, *supra* note 164; Culp v. United States, *supra* note 164; United States v. Price, *supra* note 164; United States v. Trierweiler, *supra* note 164.

167. 86 Sup. Ct. 1152, 1158 (1966). The Government argued both theories in the alternative. Brief for the United States, pp. 28-36.

168. Rotnem, *The Federal Right "Not to be Lynched,"* 28 WASH. U.L.Q. 57 (1943).

169. *Accord,* CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 165-73 (1947). KONVITZ, *op. cit. supra* note 147, at 84-88; Coleman, *Freedom from Fear on the Home Front,* 29 IOWA L. REV. 415 (1944) (author Special Assistant to the Attorney General); Note, 2 GEO. WASH. L. REV. 498, 501-02 (1934). *Contra,* Note, 34 VA. L. REV. 944 (1948); Comment, 57 YALE L.J. 855, 870-71 (1948).

170. 106 U.S. 629 (1883).

171. See note 160 *supra;* Fraenkel, *The Federal Civil Rights Laws,* 31 MINN. L. REV. 301, 318 n.100 (1947).

172. 134 Fed. 404 (C.C.N.D. Ala. 1904), *rev'd on other grounds,* 199 U.S. 547 (1905).

gaged is performing a function which the fourteenth amendment commands him to perform. Only three years later, however, the same district judge had a similar case before him in *United States v. Powell*,[173] and he felt compelled to dismiss the indictments because he believed that dicta in the intervening Supreme Court case of *Hodges v. United States*[174] constituted a rejection of his opinion in *Riggins*. Oddly enough, *Hodges* was not a lynching case and was primarily concerned with the thirteenth amendment. The only statement in that opinion relevant to the fourteenth amendment was one sentence of dictum to the effect that the amendment relates to state action.[175] The Supreme Court affirmed *Powell*[176] without opinion, merely citing *Hodges*.

The weakness of *Riggins* and the Rotnem approach is the assumption that a prisoner, validly in custody and awaiting trial, has an already accrued constitutional right to a trial. The due process clause provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." A state does not breach this clause when it releases a validly held prisoner before trial, because it has already furnished due process of law for the pre-trial detention and has no obligation to furnish a trial unless it intends to further deprive the accused of life, liberty, or property. Without a deprivation of life, liberty, or property by the State, there is no obligation to provide due process of law. By the same token a mob does not interfere with any constitutionally accrued right to a fair trial unless that mob can be said to be acting as the state itself.

By the substitution of one simple step in the reasoning process, however, the *Riggins* and Rotnem approach has some validity. One merely need conclude that due process requires that, for any state to incarcerate an accused, whether before or after trial, it must make every reasonable effort to protect him from private persons who seek to take the law into their own hands.[177] Surely due process requires this much of the custodian of a person who is thereby made helpless to defend himself. If due process requires the state to protect the prisoner, then the doctrine of *Brewer* would say that if members of the lynch mob act against state officers and hinder them in their performance of this duty, those members of the mob have violated section 241.

The number of lynchings—that is, the forceable taking of a suspected

173. 151 Fed. 648 (C.C.N.D. Ala. 1907), *aff'd per curiam*, 212 U.S. 564 (1909).
174. 203 U.S. 1 (1906).
175. *Id.* at 14.
176. 212 U.S. 564 (1909). Another attempt was made to employ the *Riggins* approaeh in a 1942 Sikeston, Missouri, lynching case, but the grand jury failed to issue any indictments. CARR, *op. cit. supra* note 169, at 169-70; Coleman, *supra* note 169; See Rotnem, *supra* note 168.
177. See Recent Statute, 38 COLUM. L. REV. 199, 203-04 (1938).

criminal or a prisoner who is in police custody and killing him under the pretext of serving "justice"—have steadily declined to the point where there have been few reported lynchings in recent years.[178] Unfortunately, this does not mean that racial violence has decreased. On the contrary, in the past few years there has been an alarming increase in the number of civil rights related killings[179] and acts of violence[180] in the South. Absent state involvement, however, the due process clause as utilized in section 241 would seem to offer little help in these cases.

D. *Equal Protection: The "Guest" Case*

In *United States v. Guest*,[181] the defendants, all private individuals, were indicted for conspiring to injure, oppress, threaten, and intimidate Negro citizens in the free exercise and enjoyment of:

> The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof.[182]

Mr. Justice Stewart, writing for the majority, held that section 241 is merely remedial and incorporates no more than the equal protection clause itself. He reaffirmed that "rights under the equal protection clause itself arise only where there has been involvement of the State or of one acting under the color of its authority."[183] The involvement of the state, he added, may be peripheral, and need be neither exclusive nor direct.

The majority, however, saw no reason to explore the threshold level of state action. One of the means of accomplishing the object of the conspiracy, according to the allegations of the indictment, was by "causing the arrest of Negroes by means of false reports that such

178. See U.S. COMM'N ON CIVIL RIGHTS, LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH 11-12 (1965); 1 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 6 (2d ed. 1958). Between 1881 and 1960 some 3,441 Negroes were lynched in the United States. U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* at 11.

179. On Jan. 30, 1966, the Southern Regional Council released the following statistics on civil rights related killings of both Negroes and whites in the South during the past decade: 1956–7; 1957–3; 1958–9; 1959–4; 1960–6; 1961–3; 1962–4; 1963–13; 1964–14; 1965–17. Civil Liberties, March 1966, p. 6.

180. See UNITED STATES COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 178, at 12-13. In the summer of 1964 alone, reports were received of racial violence in Mississippi totaling 35 shootings, 30 bombings, 35 church burnings, 80 beatings, and at least 6 murders. *Id.* at 13.

181. 86 Sup. Ct. 1170 (1966).

182. *Id.* at 1175.

183. *Ibid.*

Negroes had committed criminal acts."[184] Contrary to the argument of the litigants, the majority held that this allegation was broad enough to cover a charge of active connivance by state officers, and thus upheld the indictment.

Justices Stewart, White and Harlan declined to express any opinion as to what legislation Congress might be empowered to enact under section 5 of the fourteenth amendment. Mr. Justice Clark, in an opinion in which Justices Black and Fortas joined, agreed with Mr. Justice Stewart's disposition of the equal protection issue, but felt compelled to add by way of dictum that "there now can be no doubt that the specific language of section 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."[185] Mr. Justice Clark did not elaborate on what these rights may be, but he did indicate that one such right is "the right to utilize public facilities."[186]

Mr. Justice Brennan, in an opinion in which Chief Justice Warren and Mr. Justice Douglas joined, indicated that he would uphold the indictment on different grounds than did the majority. In his view, the equal protection clause creates a right to use state facilities without discrimination based upon race, although the terms of the clause protect that right only as against state action. Section 5 of the amendment, however, empowers Congress to pass legislation protecting that right from private interference. Up to this point, Mr. Justice Brennan's approach seems to be the majority view of the Court, since Mr. Justice Clark's opinion expresses apparent agreement. Mr. Justice Brennan was in the minority, however, in concluding that section 241 is such legislation under section 5 of the amendment.

The majority view, as expressed by the opinions of Justices Brennan and Clark, is based upon the assumption that the fourteenth amendment creates a "right to equal utilization of state facilities"; thus section 5 of the amendment grants Congress power to protect that right from private interference. The closest Mr. Justice Brennan comes to defining the source of the right is in the following statement:

> The Fourteenth Amendment commands the State to provide the members of all races with equal access to public facilities it owns or manages, and the right of a citizen to use those facilities without discrimination on the basis of race is a basic corollary of this command.[187]

But the majority assume their conclusion as part of their basic

184. *Id.* at 1177.
185. *Id.* at 1180. Section 5 of the fourteenth amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
186. *Ibid.*
187. *Id.* at 1190.

premise. They start with the proposition that there is a right to use state facilities without discrimination based upon race, when actually they are saying that there is a right to use state facilities without racial discrimination from any quarter—state or private. The traditional view of the equal protection clause is that it creates a right to be free of discrimination by the state. So defined, the right can only be infringed by state action, and legislation under section 5 must be directed at that infringement. Unfortunately, neither the Brennan nor the Clark opinion directly confronts this traditional approach.

The majority could have found support in the *Logan* case.[188] In that case, the Court found that a governmental duty to protect a person gave rise to a right in that person as against private individuals, although in *Logan* there was no problem as to congressional power.[189]

The majority view has particularly broad implications if carried over into the due process area. Reasoning by analogy, the due process clause grants a right not to be denied life, liberty, or property without due process of law, although the clause itself only protects that right from state interference. Section 5 would give Congress the power to protect the right to life, liberty, and property from private interference —that is, Congress could pass an entire criminal code extending to all crimes. It is doubtful, however, that a majority of the present Court would consent to such a sweeping change in the federal system.

The majority also left unanswered the problem of congressional power under section 5 to deal with racial discrimination in privately owned facilities. Both the opinion of Mr. Justice Douglas and the Brief of the United States recognized the significance of the fact that the facilities in *Guest* were state facilities.[190] Although the trend toward establishing federal power over discrimination in privately owned facilities may already be in the making, the Court will have to afford a more lucid discussion of the problem than it did in *Guest* if it is to find such a power.

V. Legislative Proposals

Section 241 has proved to be an important tool in the development of American constitutional law. It has helped crystallize the implied power of self-protection, and has brought to light individual rights which otherwise might have remained unrecognized. But the section—hurriedly passed[191] as part of a comprehensive legislative

188. 144 U.S. 263 (1892).
189. See text accompanying notes 11-18 *supra*.
190. 86 Sup. Ct. at 1190; Brief of the United States, pp. 20-21.
191. See United States v. Williams, 341 U.S. 70, 74-75 (1951) (opinion of Frankfurter, J.).

plan, the rest of which has long been repealed—is in dire need of revision.

The only substantial improvement to the section in the last 95 years has been the removal of the penalty of disqualification from public office, which had proven to be an obstacle to obtaining convictions.[192] Other relatively minor changes which have been suggested are the imposition of liability on one person who is not acting as part of a conspiracy, and the expansion of the protection to all persons, whether citizens or not.[193] Both of these recommendations are commendable.

Section 241 requires more substantial changes, however, if it is to become an effective weapon against civil rights crimes. Change is particularly needed in the section's penalty provisions. The present statute makes no distinction between various types of intimidation—murder calls for no greater penalty than does economic coercion. The result is that there is too light a penalty for the more severe acts of violence, and so great a penalty for the subtler means of intimidation that Southern juries are reluctant to find the defendants guilty. Any revision of section 241, then, should include a graded scale of penalties.[194]

A broad criminal statute whose coverage is vague and unclear is never desirable, even though its constitutionality is protected by a requirement of specific intent. Lack of specificity undermines the deterrent effect of the statute and hinders officers charged with its enforcement. The statute should be sufficiently clear that an agent of the Federal Bureau of Investigation can determine whether he is witnessing a federal crime without having to obtain a legal opinion from the Department of Justice.[195] Moreover, in its present form section 241 is saved from being void for vagueness only because of a stringent requirement of specific intent. The United States Commission on Civil Rights has concluded that the most serious limitation

192. The change was made at the time of the 1948 revision of the Code (Act of June 25, 1948, ch. 645, 62 Stat. 696) at the suggestion of the President's Committee on Civil Rights. See U.S. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 156 (1947).

193. *Ibid.* See CARR, *op. cit. supra* note 169, at 208; Comment, 57 YALE L.J. 855, 867 (1948). Bills which would have made these improvements have apparently failed because of the Southern block. See, *e.g.*, S. 508, 85th Cong., 1st Sess. (1957).

194. Such a revision is included in S. 3296, H.R. 14765, 89th Cong., 2d Sess. §§ 501, 502 (a) (1966). See also the President's message which accompanied the introduction of these bills, H.R. Doc. No. 432, 89th Cong., 2d Sess. (1966), reprinted in 112 CONG. REC. 8955, 8956 (daily ed. April 28, 1966).

195. When complaints are made to the FBI of section 241 crimes, the agents currently are under standing instructions to transmit them to the Civil Rights Division of the Justice Department for evaluation. Agents are not permitted to make on-the-scene arrests. See UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 178, at 114-15, 160-61.

on the effectiveness of section 241 is the specific intent requirement.[196] In his concurring opinion in the *Guest* case, Mr. Justice Brennan likewise recognized this defect and suggested that Congress make the statute more definite in scope.[197]

The time has come for Congress to repeal section 241 and replace it with a statute specifically enumerating categories of criminal conduct.[198] Congress should exclude from this list rights which are adequately protected by other criminal statutes,[199] or rights which are no longer of sufficient importance to warrant protection by criminal laws.[200] Added to the list should be activities not previously covered by section 241, but which are within the federal criminal powers. Perhaps the most difficult problem Congress will face in drafting new legislation will be the problem of specific intent. A lack of any intent requirement might well extend the statute's coverage far beyond what Congress considers the federal interest. On the other hand, the difficulty of proving a particular intent could destroy the usefulness of the statute. Balancing these considerations will be a difficult task.

Some of the provisions which might be included in a statute replacing section 241 are listed below:

1. *Protection of Federal Prisoners.*—Congress should consider making a federal offense any act of violence against a person in federal penal custody, if the act occurs on other than government property. Crimes on federal property should already be covered by present legislation. Of course, there should be no requirement of specific intent in this provision.

2. *Informers.*—It should be a crime to intimidate any person to prevent him from giving information to federal authorities of violations of federal laws, or to intimidate him because of his having done so. In this instance, the requirement of specific intent is clearly justified.

3. *Labor Relations.*—The courts have never decided whether section 241 applies to rights under the National Labor Relations Act or Fair Labor Standards Act. On repealing section 241, Congress should reconsider whether those acts ought to be amended to provide criminal sanctions.

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196. *Id.* at 110-12, 175-76.

197. *Supra* note 181, at 1192-93.

198. *Accord,* CARR, *op. cit. supra* note 169, at 206-07. *Contra,* Comment, 57 YALE L.J. 855, 867 (1948).

199. For instance, protection against involuntary servitude and protection of federal officers, litigants and witnesses are all adequately covered by other criminal statutes. See notes 23, 35 & 38, *supra.*

200. Congress might well omit protection of furnishers of war supplies and protection of homesteaders.

4. *The 1964 Civil Rights Act.*—Congress should definitely amend the Civil Rights Act of 1964 in order to establish criminal penalties for intimidation of any person in his exercise of, or because of his having exercised, rights granted in the public accommodations and equal employment titles of the act. Congress would be justified in exempting from these criminal sanctions nonviolent acts of the owners and operators of the particular business involved, on the theory that civil remedies will provide more effective enforcement of the statute. Attempts, however, to coerce businessmen to violate the act might well be made subject to the criminal provisions.

5. *Voting.*—Unfortunately, the criminal section of the Voting Rights Act of 1965[201] was poorly drafted and there is a great deal of confusion over its scope.[202] Congress could replace section 241 with a provision aimed at federal elections, or it might attempt to reach both federal and state elections under the powers conferred by section 2 of the fifteenth amendment. The latter would be a logical extension of the dictum of the majority in *Guest* relating to section 5 of the fourteenth amendment.[203]

6. *Free Speech and Assembly.*—Legislation is definitely needed making it a crime to interfere with the freedom to assemble, speak, and print about subjects relating to the national government, its elections, laws, operations, and officers. Such legislation is particularly desirable in view of the strong feelings presently being generated by United States foreign policy.

7. *State Officers Performing Constitutionally Required Duties.*—It should be a crime to interfere with or impede any state officer in the carrying out of his constitutional duty to (a) desegregate public schools and facilities, (b) protect prisoners in his custody, and (c) otherwise provide equal protection of the laws. The statute should require specific intent in view of the narrow purpose of the

201. Sec. 11 (b): "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10 or 12(c)."

202. *Compare* Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 19 (1965), *with* Note, 74 YALE L.J. 1448, 1459-60 n.79 (1965).

203. See also Note, *The Strange Career of "State Action" Under the Fifteenth Amendment*, 74 YALE L.J. 1448 (1965). An administration sponsored bill now pending in Congress would remove the criminal penalties from section 11 (b) of the Voting Rights Act, *supra* note 201, and would substitute instead a penalty for any racially motivated interference with voting in either federal or state elections. S. 3296, H.R. 14765, 89th Cong., 2d Sess. §§ 501 (a) (1), 502 (c) (1966).

section (and in order to avoid any problem of vagueness as to the latter provision).

8. *Interstate Commerce.*—One of the most important sections, as far as civil rights crimes are concerned, would be the one based upon the commerce clause. This section would cover acts of violence upon any person who is directly or indirectly using the facilities of or traveling in interstate commerce, or whose assailant uses any facility of interstate commerce or anything which has moved in interstate commerce. The difficult problem is in finding a way to limit the operation of the section to civil rights connected crimes without imposing too onerous a burden of proof as to specific intent. The United States Commission on Civil Rights has recommended that there be no requirement of specific intent and that the statute apply to acts against a person engaging in certain protected activities, such as

> the lawful exercise (or attempted exercise) of any right created or secured by a Federal statute relating to equal or civil rights, or any peaceful and orderly activities which is protected by the amendment, when undertaken for the purpose of obtaining equality for individuals of a particular race or color.[204]

To provide effective coverage, however, the statute should apply to persons who have engaged in or intend to engage in the protected activities. Thus the statute would apply to numerous non-civil rights connected crimes. One bill which has been introduced would apply criminal sanctions when "the purpose or reasonably foreseeable effect" of the violence is to prevent any person or class of persons from exercising or advocating equal rights or opportunities free from discrimination on grounds of race or color, or to intimidate them in these activities.[205] This provision likewise has some overlap in coverage since any killing, whether racially motivated or not, of a person active in civil rights matters would have the "reasonably foreseeable effect" of preventing future activities. A compromise might be to make the statute applicable to an assailant whose motive, in whole or in part, was related to the victim's race or to the victim's attitudes or activities with respect to such rights or opportunities.[206] Hopefully, this requirement of specific intent would not be too difficult to meet.

9. *Equal Use of Public Facilities.*—Either instead of or in addition to the section based upon the commerce clause, Congress could take advantage of the invitation of a majority of the Supreme Court in

204. *Supra* note 178, at 177-78.

205. S. 2923, 89th Cong., 2d Sess. § 207 (a)(3) (1966).

206. This is the approach taken by H.R. 13323, 89th Cong., 2d Sess. § 201 (1966), and S. 3296, H.R. 14765, 89th Cong., 2d Sess. § 501 (1966).

Guest in order to pass legislation based on section 5 of the fourteenth amendment.[207] This section would protect equal use of public facilities. The problem of specific intent would be the same as in the section based upon the commerce clause.

At the time of this writing the proposed Civil Rights Act of 1966 is pending before Congress.[208] Title V of that bill deals with private interference with civil rights:

> Sec. 501. Whoever, whether or not acting under color of law, by force or threat of force—
>
> (a) injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with any person because of his race, color, religion, or national origin while he is engaging or seeking to engage in
>
> (1) voting or qualifying to vote in any primary, special or general election;
>
> (2) enrolling in or attending any public school or public college;
>
> (3) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States or by any State or subdivision thereof;
>
> (4) applying for or enjoying employment or any prerequisites thereof, by any private employer or agency of the United States or any State or subdivision thereof, or of joining or using the services or advantages of any labor organization or using the service of any employment agency;
>
> (5) selling, purchasing, renting, leasing, occupying, or contracting or negotiating for the sale, rental, lease, or occupation of any dwelling;
>
> (6) serving or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States or of any State;
>
> (7) using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;
>
> (8) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or
>
> (9) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment, or of any other establishment which serves the public and which is located within the premises of

207. This new power should eliminate the necessity of some of the wilder schemes which were previously drawn up in order to obtain federal jurisdiction. One such bill provided prosecution in and "removal" to federal courts of certain criminal cases. Much like the Voting Rights Act of 1965, jurisdiction would have been based upon various denials of equal protection by the state to members of the victim's race, along with conclusive presumptions in some circumstances. The Attorney General would have had complete and unreviewable discretion as to when to prosecute and jurisdiction could not have been questioned in post-conviction proceedings. See S. 2923, 89th Cong., 2d Sess. §§ 201-04 (1966).

208. S. 3296, H.R. 14765, 89th Cong., 2d Sess. (1966).

any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments; or

(b) injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with any person (1) to discourage such person or any other person or any class of persons from participating or seeking to participate in any such benefits or activities without discrimination on account of race, color, religion, or national origin, or (2) because he has so participated or sought to so participate, or urged or aided others to so participate, or engaged in speech or peaceful assembly opposing any denial of the opportunity to so participate; or

(c) injures, intimidates, interferes with, or attempts to injure, intimidate, or interfere with any public official or other person to discourage him from affording another person or any class of persons equal treatment in participating or seeking to participate in any of such benefits or activities without discrimination on account of race, color, religion, or national origin, or because he has afforded another person or class of persons equal treatment in so participating or seeking to so participate—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more thau $10,000 or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Amendments

Sec. 502. (a) Section 241 of Title 18, United States Code, is amended by striking out the final paragraph thereof and substituting the following:

'They shall be fined not more than $10,000 or imprisoned not more than 10 years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.'

(b) Section 242 of Title 18, United States Code, is amended by striking out the period as the end thereof and adding the following: '; and if death results shall be subject to imprisonment for any term of years or for life.'

(c) Subsections (a) and (c) of section 12 of the Voting Rights Act of 1965 (79 Stat. 443, 444) are amended by striking out the words 'or (b)' following the words '11(a).'

The bill is commendable in that it specifically enumerates the protected activities and offers a graded scale of penalties. In addition, it skillfully meets the problem of specific intent. Subsection 501(a) merely requires racial motivation; there need be no intent to interfere with the protected activities. Presumably, these activities were selected to provide a constitutional basis for punishing as many racially motivated crimes as possible—for example, clause (4) protects all persons who are enjoying employment, clause (5) protects all persons who are occupying a dwelling, clauses (3) and (8) protect those participating in federal programs. There may be some problem, however, in determining whether the bill is intended to apply to all victims who are employed or live in dwellings, or instead is intended to be limited to crimes connected with the employment or dwelling.

As an alternative, subsection 501(b) requires specific intent to interfere with the particular rights.

Despite the lack of attention this title has received, it raises several important constitutional issues. Clause (5), like title IV of the bill, applies to all dwellings; clause (4) applies to all employments, not just those affecting interstate commerce; and clause (9) applies to all restaurants and places of entertainment, whether or not they affect commerce. Thus, clauses (4) and (9) would greatly expand the coverage of the Civil Rights Act of 1964 by way of criminal remedies, while leaving that statute intact insofar as its administrative procedures are concerned. Besides this inconsistency, these clauses also raise constitutional problems. As already discussed in this article, the *Guest* case did not pass on whether Congress can use the fourteenth amendment to enact legislation dealing with private facilities. Accordingly, if passed, the bill and its ensuing litigation might well forge significant new ground in this country's constitutional development.

One final criticism: subsection 502(a) leaves intact the present section 241, presumably as a companion conspiracy statute to section 501 of the bill. Thus the problems presented by the vague, uncertain coverage of section 241 would remain with us.

Of course, there are inherent limitations on the effectiveness of any criminal remedy.[209] In those areas of the country where there is the greatest likelihood of racial violence against Negroes or civil rights workers, there is the greatest difficulty in obtaining convictions against the perpetrators. But this does not mean that no such prosecutions should be brought.[210] There is good reason to believe that the mere attempt to obtain a conviction tends to have a sobering influence on local attitudes and practices,[211] and that the national publicity accompanying such a trial has a further deterrent effect. Moreover, such prosecutions indicate to the Negro federal concern over his welfare, encouraging him to face the physical and economic hazards barring the exercise of his rights. Not only should the Government make full use of whatever criminal remedies are available, but it should also attempt to prevent these crimes before they are committed.

Despite the problems the 1966 Civil Rights Act might raise if passed, that act, if given vigorous enforcement and conscientious jurors, would go a long way toward ending one of the most frightening and shameful chapters in American history. That end has been a long time in coming—too long for those who have already given their lives.

209. See Schweinhaut, *The Civil Liberties Section of the Department of Justice*, 1 BILL OF RIGHTS REV. 206 (1941).

210. See generally Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297 (1965).

211. See U.S. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, *op. cit. supra* note 192, at 126; CARR, *op. cit. supra* note 169, at 171, 175-76.