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THE FEDERAL CIVIL RIGHT "NOT TO BE LYNCHED"

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INTRODUCTION

Prior to January 25, 1942, Cleo Wright, a Negro citizen of the State of Missouri and of the United States, had been arrested by the local police officers of Sikeston, Missouri, was being held under arrest in the local jail, and was facing charges of assault and attempted rape under the criminal laws of the State of Missouri. On January 25, 1942, in broad daylight, a mob broke into the jail, seized and removed Cleo Wright, tied his feet to the rear of an automobile, dragged him through the Negro section of the town, and then poured gasoline on his body and burned him to death.[1]

Within forty-eight hours thereafter, the German and Japanese short wave radio broadcasters featured discussions of the "Sikeston Affair" in all its sordid details. These broadcasts were relayed to the peoples of the Dutch East Indies and India at a time immediately preceding the fall of Java; and listeners were told, in effect:—

> "If the democracies win the War, here is what the colored races may expect of them!"

Thus the lynching at Sikeston, Missouri, became a matter of international importance and a subject of Axis propaganda.

On February 13, 1942, Assistant Attorney General Wendell Berge requested the Federal Bureau of Investigation to make a

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1. St. Louis Post-Dispatch, January 26, 1942.

full inquiry into the lynching at Sikeston to determine whether there was any basis for prosecution by the federal government of the members of the mob, or other persons concerned. In authorizing the federal investigation, Attorney General Biddle indicated the significance of the incident to war morale, for he stated:—

> "With our country at war to defend our democratic way of life throughout the world a lynching has significance far beyond the community, or even the state, in which it occurs. It becomes a matter of national importance and thus properly the concern of the federal government."[2]

Although it is a matter of national importance, yet, under our system of government, there must be found constitutional power for federal legislation before the federal government can concern itself through official action;[3] and before an act can be made the basis for federal prosecution, even where there is constitutional power to legislate, applicable federal legislation must in fact exist.[4]

Attorney General Biddle directed that evidence on the lynching at Sikeston be presented to a federal grand jury. The session of the federal grand jury to hear this evidence began in St. Louis on May 13, 1942. On July 30, 1942, the United States Department of Justice made public the grand jury's report. The grand jury returned no indictments but made an advisory report to the United States District Court. This report recommended both state legislative and executive action, but it made no recommendation for a federal statute to make the lynching of a person *in custodia legis* of the state a federal crime. Nor did the grand jury find that a federal crime had been committed.

Describing the lynching as "a shameful outrage," and censuring the Sikeston police for having "failed completely to cope with the situation," the federal grand jury report nevertheless concluded, "with great reluctance," that the facts disclosed did not constitute a federal crime under existing laws. Still, the grand jury report stated:—

> "In this instance a brutal criminal was denied *due process*. The next time the mob might lynch a person entirely innocent. But whether the victim be guilty or innocent, the

2. Dept. of Justice Press Release, April 12, 1942.
3. Kansas v. Colorado (1907) 206 U. S. 46.
4. United States v. Hudson & Goodwin (U. S. 1812) 7 Cranch 32.

blind passion of a mob cannot be substituted for *due process of law* if orderly government is to survive."[5]

Since there is reason to suppose that the maintenance of due process of law within the states is a matter of federal concern under the Fourteenth Amendment of the Constitution of the United States, it is the purpose of this article to re-examine the question of whether, under already existing federal laws, lynching a person in the legal custody of a state may not now be a federal crime. No disrespect for the conclusions of the federal grand jury is intended. However, the determination of a grand jury that the facts disclosed do not constitute a federal crime under existing laws is not conclusive. A final determination of that question can be had only when an appeal presents to the United States Supreme Court the opportunity to hear and decide the issue.

Lynching and State Law Administration

The lynching of persons believed by a mob to be guilty of a crime has been characterized by the Attorney General as "a matter of national importance" especially in war-time and properly the "concern of the federal government." Yet, were the states in these cases sufficiently vigilant in fostering the survival of "orderly government" there would not be the necessity or the pressure for federal action.

Lynching is, of course, a state crime whether or not the victim is a person accused of crime by the state and whether the lynching results in death or in injury short of death. At the very least there is an assault in the course of a lynching; if the victim is a person accused of crime, and especially if he is in the legal custody of the state, there is as well an obstruction of justice; and at most there is murder if the death of the victim results. But, while the greatest of these offenses, measured in terms of the penalty that could be imposed, is murder, the greatest offense to the peace and dignity of the state is the obstruction of its justice—its due process of law.

Yet in the states where lynchings most frequently occur, and especially when the victims are Negroes accused of crime, there is little likelihood that the mobsters will be subjected to state

5. Report of Grand Jury. (Unpublished). Filed, July 30, 1942. (Italics ours.)

prosecution. The action taken by the state officials of Missouri in the Sikeston affair is illustrative.

The offense against the peace and dignity of the State of Missouri was committed without any attempt at secrecy. It was perpetrated in broad daylight in a town with a population of under eight thousand inhabitants. Indeed, dragging the victim's body through the streets of the Negro section was apparently designed to give the whole affair a publicity sought by the mobsters. Both state and local police officers were present, attempting, so they said, to reduce the possible extent of the outbreak.[6] Yet, the state's grand jury, sitting at Benton, Scott County, Missouri, reported on March 10, 1942, that it had been unable to find sufficient evidence upon which to base an indictment of anyone.[7]

Because of such typical inaction in most of the states where Negro lynchings are frequent, there has in recent years been pressure in Congress for a specific bill to make lynching a federal crime[8] or to provide for exacting a financial penalty from the subdivision of the state where the offense might be committed;[9] but Congress has not enacted such legislation. A federal inquiry in cases of lynching, such as at Sikeston, Missouri, is based upon opinions that the action of the mob or the state and local police officers, or both falls within the purview of existing federal criminal statutes.

Applicable Federal Statutes

It is conceded that the lynching of a person who does not stand in some relation to the federal government—other than his being merely a private citizen of the United States—has not been constituted specifically a federal crime.[10] Therefore, it might be argued that the lynching of a person not yet accused of a crime,

6. St. Louis Post-Dispatch, January 26, 1942.
7. St. Louis Post-Dispatch, March 10, 1942.
8. See *infra* footnote 10.
9. See *infra* footnote 10.
10. Considerable doubt has been expressed as to whether it is normally within the power of Congress to legislate against lynchings as such, when no aspect of federal authority or due process is involved, except in the indirect way of exacting a financial penalty of the local subdivision which fails to enforce the peace.

It is possible, of course, in time of war to find federal power to legislate in areas that would be denied in peace-time; but here the power, while not *created* by the emergency, would come into existence—and presumably terminate with—the emergency. But there is no sound reason why federal

or not yet taken into the legal custody of the state, is not a federal crime where no other relation to the federal government appears. But it is argued in many quarters that once a person has been accused of a state crime—and especially when he is in the legal custody of the state—because he has been accused or is under arrest for the commission of a crime—he has the *right,* under the Constitution of the United States, to a fair and impartial trial in the criminal courts of the state; that a mob in lynching him deprives him of this federally-secured right; that this deprivation of another's constitutional right is, in effect, an obstruction of federal justice; and that there now are—besides the general federal statutes prohibiting under penalty the obstruction of justice[11]—specific federal statutes making the lynch mob's deprivation of its victim's constitutional right a federal crime.

Section 19 of the United States Criminal Code (18 U. S. C. A. §51) 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 secured to him by the Constitution or laws of the United States, or because of his having exercised the same, or if two or more persons go in disguise upon 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 $5000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Section 20 of the United States Criminal Code (18 U. S. C. A. §52) provides:

"Whoever, under color of any law, statute or ordinance,

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prosecution for lynchings occurring during the failure of a state's administration of justice should be predicated on so unusual a situation as the current war and the adverse propaganda effects of such lynchings; and many would question whether legislation designed merely—or mainly—to offset adverse propaganda effects would be commendable.

11. United States Criminal Code §§125-146, 18 U. S. C. A. §§231-251. And see, especially §136, 18 U. S. C. A. §242 which provides:—

> "If two or more persons conspire to deter by force, intimidation, or threat, any party or witness in any court of the United States, * * * from attending such court or examination, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, * * * $5,000 or imprisoned not more than six years, or both."

> regulation, or custom, willfully subjects, or causes to be subjected, an inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

Section 37 of the United States Criminal Code (18 U. S. C. A. §88) provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Section 332 of the United States Criminal Code (18 U. S. C. A. §550) provides:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

A mere reading of Section 19 would seem to authorize the prosecution of the members of a mob which lynches a person accused of a state crime while he is in the legal custody of the state, because he is thus prevented from exercising and enjoying his right to a fair and impartial trial in the criminal courts of the state. But this contention has been disputed on the ground that the guarantee of a fair and impartial trial, secured to such an accused in the Fourteenth Amendment, is secured only against deprivation by the state and that the action of the members of the mob is *private* and not *official,* or state, action.[12]

That lynching cannot be tolerated in a land engaged in carrying the Four Freedoms abroad is hardly arguable; and that state inaction exists, and will continue to exist, is scarcely subject to doubt. It therefore is important to reconsider the federal authority to prosecute the private members of a lynch mob directly under Section 19.[13]

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12. United States v. Harris (1882) 106 U. S. 629. But see the discussion of this case *infra* p. 71.

13. This article, as its title indicates, is confined to the applicability of Section 19 to the conspirative action of individuals in lynching cases. Be-

A RE-APPRAISAL OF SECTION 19

The argument that the acts of the private members of a lynch mob come within the purview of Section 19 runs as follows: The Fourteenth Amendment to the Constitution of the United States provides:

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

It is admitted that in lynching cases, the state as such has not made or enforced any law which has abridged "the privileges or immunities of citizens of the United States" and that neither has the state denied to "any person within its jurisdiction the equal protection of the laws"; and it may be admitted that the state has not deprived "any person of life, liberty, or property, without due process of law." But merely the obvious is insisted on. The victim, where he has been accused of state crime and is in the legal custody of the state, has a "right * * * secured him by the Constitution * * * of the United States * * *,[14] under the Fourteenth Amendment's due process clause, to have a fair and impartial trial in the criminal court of the state wherein the crime was duly charged to have been committed. It is also submitted that the word "trial" is not to be confined to the actual proceedings in court but that the right to a fair and impartial trial attaches, in analogy to the privilege against self-incrimination,[15] at least from the very moment of arrest.[16] When, then, a

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yond its scope, therefore, are those cases where Section 20 might be applied to punish willful action or inaction by state or local officers (cf. Catlette v. United States (C. C. A. 4, 1943) 132 F. (2d) 902) cases where Section 19 might be applied to punish conspiracy between the officers and the individuals; or cases where, as will be true in many instances of mob violence, the factual situation warrants application of Sections 37, 332, and 20 to punish a conspiracy of individuals to "counsel, command, induce, or procure" a violation of Section 20 by the state or local officer. To these charges, the Constitutional objections to the applicability of Section 19 are not pertinent. The pending Federal indictments growing out of a recent lynching in Mississippi are drawn upon these theories of prosecution, as well as upon Section 19.

14. The language of Section 19 of the United States Criminal Code, 18 U. S. C. A. §51.

15. Willis, *Constitutional Law* (1936) 519.

16. And that the analogy has, in effect, been applied, see Brown v. Mississippi (1936) 297 U. S. 278; Chambers v. Florida (1940) 309 U. S. 227; McNabb v. United States (1943) 63 S. Ct. 608, 87 L. Ed. (Adv.) 579; Anderson v. United States (1943) 63 S. Ct. 599, 87 L. Ed. (Adv.) 589.

prisoner in the custody of the state is taken from such custody and lynched by a mob, he does not exercise or enjoy the right secured to him by the Constitution. This is to be sure not a denial of due process of law by the *state,* which denial alone is proscribed by the Constitution operating *ex proprio vigore,* but that is unnecessary to the argument. It is not the invalidation of state action in the federal courts on review which is being discussed; it is the fault and liability of private persons under a federal statute for preventing completely and forever a person from asserting, first, in the criminal courts of the state and, later, if need be, in the federal courts on review, a right secured to him by the Constitution of the United States. Operating *ex proprio vigore,* the Fourteenth Amendment secures a person accused of state crime due process of law in the state courts; implemented by the federal statute such an accused person is secured against being prevented by private persons from exercising a right that the state itself could not constitutionally deny him. Support for the federal statute may be found in Section 5 of the Fourteenth Amendment, which provides:

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

In opposition to this argument this objection is raised:

While it is not denied that the Fourteenth Amendment secures the right to a fair and impartial trial in the state courts and that this right attaches from the moment of arrest, it is asserted not only that the proscription of the Fourteenth Amendment is against state and not private action, but also that Section 5 of the Fourteenth Amendment does not confer power on Congress to regulate the conduct of individuals to induce the enforcement of the "due process," "privileges or immunities," or "equal protection of the laws" clauses.

It is submitted, however, that the proposition that Congress has no power to regulate the conduct of private individuals in this respect is too broadly stated. The leading decision for this proposition is the *Civil Rights Cases.*[17] In these cases there was involved the constitutionality of an Act of Congress which sought to make it a federal misdemeanor for anyone to deny to any citizen:

"The full and equal enjoyment of the accommodations, ad-

17. (1883) 109 U. S. 3.

> vantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."[18]

The proprietors of certain hotels had been sued for the statutory penalty or had been indicted for refusing to comply with the statute at the request of colored persons. The statute was held invalid by the Supreme Court because (1) the full and equal enjoyment of hotels, etc., was not a privilege or immunity of national citizenship[19] and (2) because the acts complained of were not state action and the Fourteenth Amendment did not operate *ex proprio vigore* on individual action nor did Section 5 thereof authorize congressional legislation directed against individuals.

On this latter point the Court said:—

> "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process or law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen,* the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. *It does not authorize Congress to create a code of municipal law for the regulation of private rights;* but to provide modes of redress against the operation of state laws, and the action

18. Act of Congress of March 1, 1875 (known as the Civil Rights Act), 18 Stat. 335, c. 114.

19. On the narrower scope of the "privileges or immunities" clause, see *infra* footnote 21.

of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment."[20]

It is submitted that the general language in the *Civil Rights Cases*, as it would be applied to the problem at hand, is not controlling. In the first place, it was unnecessary to the decision of the *Civil Rights Cases* and should be regarded as dictum. If the enjoyment of equal accommodations in hotels, etc., is not a "privilege or immunity" of national citizenship under the Constitution, Congress cannot make it so. In the next place, that decision was under the much narrower "privileges or immunities" clause and not under the "due process" clause.[21] The two clauses are different in purpose, scope, and operation; and federal power to legislate under them would conceivably also differ accordingly. Finally, the federal legislation involved in the *Civil Rights Cases* did invade the area of state governmental power; it sought to create rights as between individual citizens that were neither established as federal privileges and immunities nor established unequally between citizens of the several states as a matter of state law; it required positive social and business conduct of private individuals on a higher plane of equality than was required by state law in the states affected; in brief, it did not, as would Section 19 if applied to lynching cases, merely require that private persons abstain from denying another the due and equal course of established state law that would other-

20. (1883) 109 U. S. 3, 11. (Italics ours).

21. In the Slaughter-House Cases (U. S. 1873) 16 Wall. 36, it was held that a Louisiana statute conferring on some citizens of the United States a monopoly to maintain and operate slaughter houses in designated Louisiana parishes did not abridge the "privileges or immunities" of other citizens of the United States who were thereby precluded from engaging in this occupation, because the "privileges or immunities" of national citizenship are only such as relate to a United States citizen's functioning with the federal government. (Citing the right to egress out of and ingress into the several states in order to reach the seat of the national government or its various official centers established in Crandall v. Nevada (U. S. 1868) 6 Wall. 35). Among other such "privileges or immunities" peculiar to national citizenship recognized are: The privilege of expatriation, Talbot v. Jansen (U. S. 1795) 3 Dall. 133; protection of the government in foreign countries and on the high seas, Neely v. Henkel (1901) 180 U. S. 109; protection from violence while in the custody of the federal government, Logan v. United States (1892) 144 U. S. 263.

This narrow construction of the "privileges or immunities" of national citizenship was departed from only briefly in Colgate v. Harvey (1935) 296 U. S. 404, 102 A. L. R. 54, which was expressly overruled in Madden v. Kentucky (1940) 309 U. S. 83, 125 A. L. R. 1383.

The scope of the "due process" and "privileges or immunities" clauses is strikingly compared in Hague v. The C. I. O. (1939) 307 U. S. 496.

wise be accorded in the state courts or be required on review in the federal courts. Had the Court in the *Civil Rights Cases* denied the validity of the congressional act involved merely on the ground that the scope of congressional legislation might not embrace the creation of new social and business rights in private intercourse—that Section 5 of the Fourteenth Amendment does not "authorize congress to create a code of municipal law for the regulation of private rights"—that would have been sufficient to sustain the decision.[22] It was not necessary to invalidate the act in question, then, as well on the broad ground that the *direction* of permissible legislation under the Fourteenth Amendment may not in any case be against individual action or conduct.

The different scope and operation of the "due process" and "privileges and immunities" clauses can perhaps be illustrated in this way. Nearly all the state constitutions have due process clauses, or clauses of similar content or construction. Therein their citizens are guaranteed a fair and impartial trial in the state courts. This guarantee is to safeguard against official action denying due process of law. But quite apart from such constitutional clauses, a private person's interference with the state's administration of justice is in every state, by statute or common law, a state crime. Still, before the adoption of the Fourteenth Amendment, it would never have been claimed that Congress had the power to make an interference with a state's administration of justice a federal crime.

Similarly, the due process clause of the Fifth Amendment of the Constitution guarantees to citizens of the United States a fair and impartial trial in the federal courts. This guarantee again is against official action denying due process of law; and again, while the due process clause of the Fifth Amendment is not the source of this power, Congress has made interference with the due administration of federal justice a federal crime.[23]

Since the adoption of the Fourteenth Amendment, however, the measure of due process of law in the administration of the state's courts is a federal question, reviewable in the federal courts. The Fifth Amendment, operating *ex proprio vigore,* is no less a prohibition against official action only than is the Fourteenth; yet there can be no doubt that federal legislation making

22. See the language italicized in the quotation from the Court's opinion, *supra* p. 65.
23. See supra footnote 11.

it a crime to deprive a person of due process in the federal courts could be sustained, despite the specious argument that such a great fundamental right runs in favor of the person to whom it is secured only as against governmental and not as against private action.

If this is true under the Fifth Amendment, it would seem to follow that, since the adoption of the Fourteenth Amendment, there is similar power in the federal government to make the obstruction of justice, even in the state courts, a federal crime.

A person tried in the state courts has a theoretical right to have the state court's determinations reviewed in the light of the due process clause under the federal judicial power; and, if there is a denial of due process of law *by the state,* this right to review in the federal courts is very real and effective. To deprive a person of the opportunity for a reviewable trial, then, is to deprive him of a right that is not only secured to him by the Federal Constitution but enforceable and enforced in the federal courts,—in brief, it is to interfere with the administration of federal justice, in this sense, itself.

In this view of the matter, there is not only federal "concern" when "our country is at war to defend our democratic way of life throughout the world" but there is both federal power to legislate and existing federal legislation implementing that power in peace as well as war. When the state itself denies due process of law in a criminal trial, the federal government grants relief to the injured person through its courts in review, without the aid of any statute,—the Fourteenth Amendment operating *ex proprio vigore.* When the functioning of due process of law in a state criminal action is prevented by private persons, is there not congressional power to make such interference with due process of law a federal crime? Or, is this the one area of federal constitutional government in which the individual is to be set above the state? Even to ask that question should startle American ears!

While the question may be startling, it is one which has been authoritatively asked and answered previously with diverse results. In 1904, one Maples, a Negro citizen, was confined in jail in Huntsville, Alabama, to answer the charge of murder under the laws of Alabama. Apparently, a mob forcibly removed Maples from the custody of the Sheriff and a detachment of the Alabama National Guard, and lynched Maples by hanging him.

Thereafter, certain of the conspirators who were members of the mob were indicted by a federal grand jury under sections 19 and 20, previously set out herein. The same essential factual elements appeared there as in the Sikeston lynching. On a petition by one of the defendants for discharge on *habeas corpus* on the ground that the indictment did not charge any offense against the laws of the United States, the trial court, Hon. Thomas Goode Jones, rendered an exhaustive opinion,[24] sustaining the validity of the indictment. In the course of his opinion, the court stated:

> "When a private individual takes a person charged with crime from the custody of the state authorities to prevent the state from affording him due process of law, and puts him to death to punish the crime and to prevent the enjoyment of such right, it is violent usurpation and exercise, in the particular case, of the very function which the Constitution of the United States itself, under this clause, [the 14th Amendment] directs the state to perform in the interest of the citizen. Such lawlessness differs from ordinary kidnapping and murder, in that dominant intent and actual result is usurpation and exercise by private individuals of the sovereign functions of administering justice and punishing crime, in order to defeat the performance of duties required of the state by the supreme law of the land. The inevitable effect of such lawlessness is not merely to prevent the state from performing its duty, but to deprive the accused of all enjoyment, or opportunity of enjoyment of rights which this clause of the Constitution intended to work out for him by the actual performance by the state of all things included in affording due process of law, which enjoyment can be worked out in no other way in his individual case. Such lawlessness defeats the performance of the state's duty, and the opportunity of the citizen to have the benefit of it, quite as effectually and far more frequently than vicious laws, or the partiality or the inefficiency of state officers in the discharge of their constitutional duty. It is a great, notorious, and growing evil, which directly attacks the purpose which the Constitution of the United States had in view when it enjoined the duty upon the state.[25]
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> "* * * A state officer in attempting to afford due process in a particular case is discharging a duty imposed upon him, as the representative of the state, by the Constitution of the United States, for the benefit of its citizens. The prisoner also, while confined and being protected against lawless violence, that he may have a trial according to the law

24. Ex parte Riggins (C. C. N. D. Ala., 1904) 134 Fed. 404.

of the land, is in the exercise or enjoyment of a right given him by the Constitution. Congress may protect the right by protecting the performance of the duty, and the rights which flow from it, by declaring that violations of state laws on the subject constitute *offenses* against the United States."[26]

This opinion was rendered in the face of *United States v. Harris*,[27] hereinafter discussed.[28]

THE PRECEDENTS ARE NOT NECESSARILY THE "LAW"

Support for the suggested present applicability of Section 19 to cases of lynching persons *in custodia legis* of the state was given in 1941 by the Supreme Court itself in the case of *United States v. Classic*.[29] In that case, certain election commissioners of the State of Louisiana were indicted under Section 19 for having improperly and dishonestly counted the ballots in a congressional party primary. A demurrer to the indictment was overruled on the ground that the defendants had injured voters and candidates in the party primary by depriving them of the right, secured to them by the Constitution, to have the votes properly and honestly counted. This right was found to derive from Section 2 of Article I of the Constitution, which provides:—

"The House of Representatives shall be composed of members chosen every second year by the people of the several states, * * *."

The position of Mr. Justice Douglas in dissent in the *Classic Case* would not deny the applicability of Section 19 to the lynching cases; for, in objecting to the application of Section 19 to party primary election frauds, he suggests that it might better apply to specific personal liberties guaranteed as such in the Constitution than to a right derived by implication from a section of the Constitution which simply provides for the organization of the lower house of Congress. Among these specifically personal liberties one would certainly include the safeguards of due process of law and equal protection of the laws.

It was on the theory herein advanced and thought to have been given recent judicial support in the *Classic Case*[30] that many people expected the federal grand jury investigating the Sikeston

25. *Ibid.*, pp. 409, 410.
26. *Ibid.*, p. 411.
27. (1882) 106 U. S. 629.
28. See *infra* p. 71.
29. (1941) 313 U. S. 299. See also, Walker v. United States (C. C. A. 8, 1937) 93 F. (2d) 383.
30. See comment (1941) 27 WASHINGTON U. LAW QUARTERLY 125, 127.

affair to act affirmatively. It appears incongruous to many lawyers to have the grand jury recognize that due process of law was denied,[31] and thus recognize the relatively recent development in this area of constitutional law, and yet, in failing to find that the facts constitute a federal offense, apparently to rely upon precedents—such as they are—that very considerably antedate the development of the modern due process of law concept.

Of Supreme Court cases our search has found but three that in any way support the view of the scope of Section 19 apparently taken by the grand jury. In *United States v. Harris,*[32] decided in 1882, a situation was presented on all fours with the Sikeston affair. A mob had taken a prisoner of the State of Tennessee out of the custody of the sheriff and severely beaten him. The victim died as the result of the assault. The members of the mob were indicted under Section 19, but a demurrer to the indictment was sustained on the ground that, under the Fourteenth Amendment, Congress had no power to legislate with reference to the conduct of private individuals, since the Fourteenth Amendment is directed by its terms only to state action. But it is submitted that Section 19, as it was sought to be applied in the *Harris Case,* did not come within the doctrine later accepted and embodied in the *Civil Rights Cases.* In the *Harris Case* the private individuals were not withholding from the victim business and social intercourse concerning which Congress may not legislate under the "privileges or immunities" clause; they were preventing the victim from exercising a right which he could, with the aid of the federal courts and through the federal jurisdiction provided in the Constitution, claim effectively against the state. The legislation sought to be applied in the *Harris Case,* unlike that in the *Civil Rights Cases,* would not have set up a code of civil conduct for individuals but would merely have punished individual interference with the state government which would otherwise provide, or be compelled in the federal courts to provide, due process of law.

The second case relied on to deny the applicability of Section 19 to members of lynch mobs is *Hodges v. United States,*[33] decided in 1906. Here certain private individuals were indicted for having intimidated Negroes into leaving private employment.

31. See *supra* pp. 58, 59.
32. (1882) 106 U. S. 629.
33. (1906) 203 U. S. 1.

A demurrer to the indictment was sustained by the Court on the ground that the right to be employed in private industry is not a right secured by the Constitution. It will be noted that the basis for this decision is quite different from the basis of the decision in the *Harris Case.* In the *Harris Case,* it was the operation of the federal statute upon individuals as such, that was found objectionable; in the *Hodges Case,* it was objected that the action complained of did not prevent the exercise of any right secured by the Constitution—in keeping with the *Civil Rights Cases* notion of the narrow scope of the "privileges and immunities" of national citizenship.[34] In the *Harris Case,* the victim was *in custodia legis* of the state; in the *Hodges Case* the victims were not accused of crime nor in the legal custody of the state. In brief, the *Hodges Case* of and by itself is not authority contrary to the views herein advanced as to the applicability of Section 19 to lynching cases.

But in the third case, *Powell v. United States,*[35] the precise issue here under consideration was presented. A federal grand jury indicted the members of a mob which had seized, taken from state custody, and lynched a state prisoner. The trial court sustained a demurrer to the indictment; and the Supreme Court, on the sole authority of the wholly distinguishable *Hodges Case,* and without reference to the *Harris Case,* affirmed the trial court in a decision without opinion! Such are the Supreme Court authorities opposed to the theory that members of the Sikeston mob were subject to federal prosecution under Section 19!

Moreover, it is significant to note that all three of these cases were decided long before the development of the idea that an appeal lies to the federal courts by virtue of the Fourteenth Amendment from a state court if it fails to provide due process of law.[36] This development dates only from the 1920's, while the *Harris Case* dates from 1882, the *Hodges Case* from 1906, and the *Powell Case* from 1909. Many of the rights we now regard as secured by the Constitution were at that time unrecognized; but, since they are now recognized, decisions denying that they are within the purview of a statute that makes prevention of their exercise a federal offense should no longer be

34. See *supra* footnote 21.
35. (1909) 212 U. S. 563.
36. See Green, J. R., "Liberty under the Fourteenth Amendment" (1942) 27 WASHINGTON U. LAW QUARTERLY 497.

controlling. As the concept of constitutional rights and privileges expands, so must—and should—the statute that provides a sanction against interference with them enlarge. And in this direction the Court pointed in *United States v. Classic*[37] in 1941.

CONCLUSION

A grand jury is not the final arbiter or even a persuasive voice of what comes within the purview of either the Constitution or the statutes of the United States. In view of the doubts shed upon the theory, if not the result, of the *Harris Case* in the *Hodges Case,* in view of the clear distinction between the facts of the *Hodges Case* and the *Powell* and Sikeston situations, in view of the unsatisfactory basis for the decision in the *Powell Case,* in view of the development of due process of law subsequent to all these cases, and in view of *United States v. Classic*—it would appear that the grand jury in the Sikeston matter should have overcome its "great reluctance," returned indictments, and left to the final arbiter in our constitutional system, the Supreme Court, the clarification of this important area of the law.

The evil of lynchings exists and doubt as to whether or not federal power now exists to remedy it can only adversely affect our national morale. Hence, it is highly desirable that whatever doubt that may exist be authoritatively resolved.

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37. (1941) 313 U. S. 299.

It is interesting to find that a South Carolina court in Kirkland v. Allendale County (1924) 128 S. C. 541, 545, 123 S. E. 648, 649, refused to interpret narrowly a State Anti-Lynching law on the ground that it was not dealing with an ordinary criminal statute where the rule of narrow construction would apply but with the statute intended to make effective the constitutional guarantees of due process. The court formulated the rules of construction for such cases as follows:

"Since the statute does not purport to cover any broader field than the self-executing provision of the Constitution, in so far as the question here involved is one of construction, it is to be resolved by applicable rules of constitutional construction. That it is a fundamental canon of construction that a Constitution should receive a liberal interpretation, especially with respect to provisions which were designed to promote the security and safeguard the liberty of the citizen, is well settled. 6 R. C. L., p. 49, §44. That the salutary object of this constitutional provision was to promote, through the means prescribed, the observance of certain other provisions of the constitutional charter, guaranteeing the citizen against deprivation of life, liberty, or property without due process of law, etc., is not open to question. See Brown v. Orangeburg, 55 S. C., 45; 32 S. E., 764; 44 L. R. A., 734. Another familiar general principle of interpretation of Constitutions is that a provision should be construed in the light of the history of the times in which it was framed, and with due regard to the evil it was intended to remedy, so as to give it effective operation and suppress the mischief at which it was aimed."