JUSTICE AND PROTECTION

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The problem of law enforcement in the South, or in a current and not inaccurate phrase, "Jim Crow justice," has come to be symbolized by a number of well-publicized killings in recent years. Medgar Evers, head of the NAACP in Jackson, Mississippi, was shot from ambush in the spring of 1963. Lemuel A. Penn, a Washington, D.C., Negro, was killed while driving through Madison County, Georgia, in July 1964. That same summer saw the brutal murder of three civil rights workers, Michael Schwerner and Andrew Goodman, both white Northerners, and James Earl Chaney, a local Negro, in Philadelphia, Mississippi. In the spring of 1965, Mrs. Viola G. Liuzzo of Detroit was shot to death in Lowndes County, Alabama, on the highway between Selma and Montgomery. Some months later in Hayneville, the seat of Lowndes County, Jonathan M. Daniels was killed, and his companion, a Catholic priest, badly wounded, by a shotgun blast fired in the street, in daylight, before witnesses.

There have been no state-court convictions in any of these cases, nor even a state prosecution in the Schwerner-Goodman-Chaney case. One Byron de la Beckwith was twice tried for the Evers killing in a Mississippi court, and twice there was a hung jury. The shooting of Mrs. Liuzzo was seen by an F.B.I. informer riding in the murder car. A first trial in Hayneville of Collie LeRoy Wilkins, whom the F.B.I. informer identified as the killer, resulted in another hung jury. A second trial ended in acquittal. Thomas L. Coleman, also tried in Hayneville, admitted that he shot Daniels. His defense was that Daniels and his companion were armed and threatening him. He was acquitted. Men accused in the Penn killing were acquitted in Danielsville, Georgia, in September 1964.

It is necessary to resist the temptation to feel certain that each of these cases was a miscarriage of justice. Individual guilt is simply not to be determined—not in any circumstances, even for purposes of public action or private judgment—on the basis of newspaper reports of trial proceedings, or of police or prosecution charges. But quite aside from the question of individual guilt, which is properly left open, one may be troubled by the frequency of these acquittals and hung juries and by their similarity. A coincidence of innocents cannot be all there is to it. Moreover, the South has produced a remarkable number of unsolved cases, all of a particular kind. The murders men-

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tioned above are merely the tip of the iceberg. In a report on equal protection in the South released on November 14, 1965, the United States Commission on Civil Rights records the estimate that between January 1955 and January 1959 there were 225 incidents of racially motivated violence in the South, including 6 killings, 73 shootings, beatings, and stabbings, and 74 bombings and burnings of homes, schools, and churches.[1] "The number of incidents," the Commission continues, "increased greatly in 1961 as a result of organized civil rights activity."[2] In Mississippi alone in the summer of 1964—the summer of the Philadelphia murders—there were some 6 murders, 35 shootings, 65 bombings and burnings, and 80 beatings. And no arrests or prosecutions, let alone convictions, to speak of.[3] These statistics are translated into people, places and events—quite literally into flesh and blood—in the transcript of hearings held by the Commission in Jackson, Mississippi, in February of this year. The transcript makes bad reading and demonstrates beyond question that the criminal writ has not run in parts of the South against certain kinds of violence.[4]

If convictions were obtainable in cases of this sort, which is to say, if the criminal law of the state were normally enforced, there would, no doubt, be some deterrent effect. No one can say how much. No one has any real quantitative idea of the deterrent force of the criminal law. But there would, we may assume, be some. And the criminal law would at any rate play its symbolic and supportive role as vindicator of the moral order. But the criminal law is, at best, a blunt and primitive instrument for controlling behavior. It works best when it bespeaks and confirms the virtually unanimous moral indigation of the community—which, sadly but plainly enough, it cannot be said to do in civil rights cases in such a place as Lowndes County, Alabama. Even in ideal circumstances, however, the criminal law does not get at the roots of vicious acts and is incapable of absolutely preventing their recurrence. This much is as true in Lowndes County as on the streets of northern cities. Therefore, no matter what effective measure might be taken to visit criminal punishment on the perpetrators of racial killings and assaults who now so often go free, a substantial problem of affording protection against racially motivated violence would remain to be dealt with by additional, more direct means.

"Jim Crow justice" has two other, quite separate aspects as well. One, emphasized and illuminated in *Southern Justice*, is the administra-

[1] UNITED STATES COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT 12-13 (1965).

[2] *Id.* at 13.

[3] *Ibid.*

[4] See UNITED STATES COMMISSION ON CIVIL RIGHTS, ADMINISTRATION OF JUSTICE (1965) (hearings held in Jackson, Mississippi).

tion of the criminal law against Negroes and their white allies, which in the Deep South is generally discriminatory and often brutally unjust in individual cases. Here we come around full circle. The question is not how to activate a criminal process that will in some measure tend to protect the victims of racial outrages, but how to protect people from racial outrages committed by a perverted criminal process. Finally there is the other side of this coin, which may be observed also in northern cities: the evil practice, on the part of police and other law enforcement officers, of acquiescing in, and indeed encouraging, the demoralization of the Negro community by failing to apply to it the moral standards embodied in the general criminal code. A different and laxer law often governs with respect to assaults and even homicides in the Negro ghetto (always provided the victim is not white), and certainly with respect to other, less grave offenses.

> The "negro law" of Mississippi is a law of many parts. . . . From the letter of our statutes, a stranger might justifiably infer they applied to all persons within this state. . . . The judges, lawyers, and jurors all know that some of our laws are intended to be enforced against everybody, while others are to be enforced against the white people, and others are to be enforced only against the negroes; and they are enforced accordingly. . . . There are some things . . . that a negro may do with impunity . . . while a white man . . . would get ten years. . . .[5]

This passage—perhaps there is some tacit rue in it, but no apparent embarrassment—is taken from an article published in a legal magazine of high standing and national circulation by a Mississippi lawyer named S. F. Davis in 1913. A great deal of evidence can be adduced to show that in Mississippi and elsewhere things remain much the same.

The search for solutions naturally begins with the Southern jury, which is what it is because it is almost invariably all-white. The Supreme Court has, of course, held unrelentingly since 1880 that the fourteenth amendment forbids racial discrimination in the selection of juries.[6] In pursuance of this principle, however, the Court has done no more than occasionally reverse criminal convictions upon proof that there was discrimination in the selection of the jury that rendered the verdict. A different sort of attack on the all-white jury proved successful in a recent case with the wonderful allegorical title of *Gardenia White v. Bruce Crook*[7] (Gardenia White being a Negro plaintiff

[5]See Davis, *The Negro Law of Mississippi*, 20 CASE AND COMMENT 329 (1913).

[6]Eubanks v. Louisiana, 356 U.S. 584 (1958); Avery v. Georgia, 345 U.S. 559 (1953); *Ex parte* Virginia, 100 U.S. 339 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880); Gordon v. Breazeale, 246 F. Supp. 2 (N.D. Miss. 1965); Smith v. Breazeale, 245 F. Supp. 978 (N.D. Miss. 1965).

[7]Civil Action No. 2263-N, D. Ala., Feb. 7, 1966.

and Bruce Crook a member of the Jury Commission of Lowndes County, Alabama). The decree in this case ordered abandonment of the existing jury roll and enjoined discrimination in making up a new one. Thus it circumvents the tedious method of enforcement through reversals in individual criminal cases, which have often left the system virtually unaffected, since the occasional reversal of a conviction is a price that many Southern counties have been willing to pay for continued discrimination.

But it would be altogether too sanguine to look for spectacular results from this line of attack, worthwhile as it is to pursue it. If there is local resistance, abetted in some measure by unsympathetic Southern federal district judges—and it would be foolish to expect otherwise—injunctions will no more solve the jury problem than they solved the voting problem. Unless there is unexpected surge of voluntary compliance, a solution will ultimately have to follow the analogy of the Voting Rights Act of 1965. Congress will have to establish some federal criteria for jury selection, suspending the local ones, and perhaps send down federal officials—the counterparts of the federal examiners now registering voters in the South—to supersede county jury commissioners for the time being. These would be radical measures, as are their equivalents, embodied in the Voting Rights Act of 1965. But Congress has the power to go to these lengths in enforcing the fourteenth amendment, since with respect to the composition of juries as with respect to the right to vote, discrimination has not yielded to more moderate approaches and persists on a massive scale. As in the voting legislation, local control would merely be suspended, not permanently displaced.

It will take, however, very large numbers of Negro names on jury lists to ensure that some Negroes survive challenges and other customary privileges extended in the process of forming the trial jury, and actually wind up in the box.[8] And it will take a willingness on the part of Negroes to serve and not ask to be excused. Negroes on juries can then, perhaps, conduce to fairer trials for Negro and other civil rights defendants. In all cases they will have some beneficial effect on the atmosphere in the jury room—they are likely, as Mr. Charles Morgan, Jr. points out,[9] at least to clear it of racial jokes. Yet they cannot secure convictions, which require a unanimous vote.

To the extent that the problem is failure to prosecute, and that acquittals, when there is a trial, are caused by the frequent lack of zeal, if not worse, of investigative and prosecuting officials—to that extent, federal trials might take up the slack. But the relevant federal

[8]See Swain v. Alabama, 380 U.S. 202 (1965).

[9]Morgan, *Segregated Justice* in SOUTHERN JUSTICE 155, 164 (Friedman ed. 1965).

criminal statutes are nearly a hundred years old; they were poorly drafted to begin with, and they are in a state of grave disrepair.[10] The Supreme Court has just rehabilitated them in some measure in the cases involving the federal prosecutions for the Schwerner-Goodman-Chaney[11] and Lemuel Penn[12] murders. The solution, however, such as it can be, of the difficulties with these statutes, lies not in revised judicial interpretations, but in revised statutes.

In the exercise of its power under the fourteenth amendment, Congress can define more specific offenses committed "under color of law," and thus avoid some of the need for proof of subjective intent.[13] And it can declare that certain classes of crimes committed in circumstances that indicate racial motivation (*e.g.*, crimes against civil rights workers, or against Negroes who have tried to exercise their constitutional rights) are not being punished locally, and that this constitutes a denial of equal protection by the state. Congress can then undertake to make such crimes punishable under federal law, whether perpetrated by private or official persons, with or without official knowledge and connivance. The Civil Rights Commission has recommended enactment of a statute of this sort.[14] Congress would be walking extremely close to the limit of federal power here, but a skillfully drafted statute might carve out a valid new area of federal authority, even if a relatively narrower one than the problem really calls for. But such a statute would in any event bring on no millennium.

Federal criminal cases must also be tried by Southern juries—*federal* Southern juries, but Southern nevertheless. Even assuming that Negroes sit on federal juries, they cannot secure convictions, anymore than on state juries. For this reason, and owing also to the general limitations of the criminal law as a method of preventing anti-social acts, a task of protection against violence will remain to be faced by the federal government.

There is no such thing as absolute security, but in the Deep South as much as on the subways of New York, substantial protection against a rash of violence will be afforded not by new laws or by criminal convictions, but by law enforcement officers on the scene. The President's power to put men on the scene is remarkably extensive and independent. It is not, of course, boundless, or in some circumstances free from legal doubts. But there is, the Supreme Court once said, "a

[10]See, *e.g.*, 18 U.S.C. §§ 241, 242 (1952); United States v. Williams, 341 U.S. 70 (1951).

[11]United States v. Price, 34 U.S.L. WEEK 4313 (U.S. March 28, 1966).

[12]United States v. Guest, 34 U.S.L. WEEK 4323 (U.S. March 28, 1966).

[13]*Cf.* Screws v. United States, 325 U.S. 91 (1945).

[14]UNITED STATES COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT 177-78 (1965).

peace of the United States,"[15] which is inherently in the President's keeping. There is also considerable statutory authority, particularly in a section that derives from an 1871 law known as the Ku Klux Act.[16] This section may be no better a job of draftsmanship than other Reconstruction measures, but its interpretation is at least initially the independent function of the President himself, and he is under no obligation to take a restrictive view of it.

It would be irresponsible to suggest a pervasive police or military occupation of even a portion of the South. Hence difficult decisions are obviously called for in choosing places to which to send federal marshals and, in a pitched crisis, military police. But a vigilant F.B.I. can presumably provide some intelligent guesses about the places where violence threatens, and as to some areas no more need be known than that civil rights workers are there. Questions will also arise concerning the extent of police authority that federal marshals should be instructed to exercise, once they have been dispatched. But even if they are instructed not to make arrests without warrants and to use force only to repel attacks, their conspicuous armed presence as bodyguards, so to speak, for American citizens exercising in the South their federal rights to move and speak freely is bound to nip a great deal of violence in the bud. Their presence in the right place on the right occasion may perhaps also shame local leaders into reassuming their own responsibility for law and order. The Civil Rights Commission has recommended that the President use federal marshals in this fashion, and also that they be authorized to make arrests when federal crimes are committed in their presence.[17]

Of course these suggestions carry some risks, signally the possibility of ugly incidents between marshals and local officers, and of the injudicious use of force by the marshals against private individuals. No one should wish to give occasion for cries of police brutality or repeat the not very successful experience of Reconstruction. But incidents and excesses can be guarded against, and the suggestion is not that an extensive police force be sent to the South to displace, or clash with, the local force. The number of places where the need for protection is acute, and the times when it is, are after all quite limited, and the suggestion is merely that a few well-marked, armed federals should be in evidence. Had they been present, for example, in the mob milling around that wretched store in Hayneville where Coleman killed Jonathan Daniels, there might possibly have been no killing.

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[15] *In re* Neagle, 135 U.S. 1, 69 (1890).

[16] 10 U.S.C. § 333 (1952).

[17] UNITED STATES COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT 180-81 (1965).

Protection against harassment of Negroes and civil rights workers by the perverted use of local criminal laws is as inescapably a judicial function as physical protection on the streets is ultimately an executive one. Judicial protection is assured in the end by appeal from local convictions to the Supreme Court, or by habeas corpus petitions in lower federal courts. But these methods often come too late and do not avoid the burdens and expenses of litigation. A more effective method is the removal of state prosecutions at their inception to a federal court, or the issuance of a federal injunction against them. Federal courts have naturally been reluctant thus to interfere with the state criminal process, and the applicable federal statutory law has hardly invited them to do so.[18] The safe course for a federal district court has been to allow state prosecutions to run their course, and until recently decisions to this effect by federal district judges were not reviewable. Congress in the Civil Rights Act of 1964, however, made such decisions reviewable by courts of appeal,[19] and the Court of Appeals for the Fifth Circuit has shown increased willingness to look into charges of harassment and of groundless prosecution.[20] Congress could by statute encourage the federal courts to do so, although care would have to be taken not to insert the federal judiciary, as a normal procedure, into the initial stages of the state criminal process. The object, after all, is not to take it over, but to induce the state criminal process to purge itself of abuses.

There is thus only one aspect of "Jim Crow justice" which could not be usefully addressed by federal legislative, judicial, and executive action, and that is the demoralizing administration by law enforcement officers in Negro communities of a different and laxer criminal and moral code than is enforced in the white community. Here the solution lies in the change of attitudes toward the Negro, which we must hope will follow from the exercise of the franchise and from the general drive to desegregate all state and many private activities. This ultimate development will, of course, also render obsolete all other intermediate expedients aimed at abolishing "Jim Crow justice."

Until then, the federal government has it in its power only to control the disease, not to cure it. For generally valid constitutional reasons, it cannot assume the basic criminal jurisdiction, nor administer criminal justice without recourse to local juries. If it could, the result would not be instant racial peace, because the criminal law is incapable of eradicating crime. The realization that this is so ought to moderate

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[18]See, *e.g.*, 28 U.S.C. §§ 1441-47 (1952); New York v. Galamison, 342 F.2d 255 (2d Cir. 1965).

[19]28 U.S.C. § 1447(d) (Supp. 1965).

[20]Rachel v. Georgia, 342 F.2d 336 (5th Cir.), *cert. granted*, 34 U.S.L. WEEK 3014 (U.S. Oct. 11, 1965).

one's impatience—in the South as much as on Northern streets—with the restraints the Constitution imposes on the so-called war against crime. But the things the federal government can do will cleanse Southern justice of some of its present corruption and will save some lives. These things are therefore very much worth doing, and worth doing with the utmost zeal.