CONSTITUTIONAL LAW-PROTECTION OF CIVIL LIBERTIES-FEDERAL CRIMINAL PROSECUTION OF STATE POLICE OFFICERS-CONSTITUTIONALITY AND CONSTRUCTION OF SECTION 20 OF CRIMINAL CODE

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Constitutional Law—Protection of Civil Liberties—Federal Criminal Prosecution of State Police Officers—Constitutionality and Construction of Section 20 of Criminal Code—In *United States v. Classic* the Civil Liberties Unit of the Department of Justice resurrected the long dormant section 20 of the United States criminal code to prosecute successfully election officials in Louisiana for altering and falsely counting ballots cast in a Louisiana primary for representatives to Congress. Although the acts of the defendants were also in violation of state law the court asserted that "misuse of

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1 For a discussion of the jurisdiction of the federal court in civil rights cases generally, see 39 Mich. L. Rev. 284 (1940).
2 313 U.S. 299, 61 S. Ct. 1031 (1941).
3 The Civil Liberties Unit (now called the Civil Rights Section) was established within the Department of Justice in 1939. For a discussion of this unit, see Biddle, "Civil Rights and the Federal Law," *Safeguarding Our Civil Liberty* 134 (1945).
5 Section 20 [18 U.S.C. (1940) § 52] dates back to 1866. At that time it took shape in 14 Stat. L. 27 (1866). Its stated purpose was to "protect all Persons in the United States in their Civil Rights and Furnish the Means of their Vindication." Its legality was hotly debated and this was a factor in the subsequent adoption of the Fourteenth Amendment. Changes were made in 1874 [Rev. Stat. § 5510 (1878), 18 U.S.C. (1940) § 52] and it finally reached its present form in 1909. The word "wilfully" was first inserted in 1904. Justice Rutledge is of the opinion that this word would have been implied even if it had not been added, for "Congress in this legislation hardly can be taken to have sought to punish merely negligent conduct or honest error of judgment ...." 325 U.S. 91 at 130, note 32, 65 S. Ct. 1031 (1945). For the complete text of this section of the statute in its present form, see, infra, not 7. For a comprehensive history of this period see Flack, *The Adoption of the Fourteenth Amendment* (1908).
power possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken under color of state law" and therefore within the specific prohibition of the statute. In the wake of this decision this section was used frequently with telling effect to punish unauthorized acts of state officials that deprive persons of "rights, privileges and immunities secured and protected by the Constitution and laws of the United States." But section 20 had hardly become an established and potent weapon for the protection of individual rights when an obscure Georgia sheriff and his aides forced the court in the case of Screws v. United States to consider at greater length the implications of federal power resident in the statute. The result of the deliberation of the court seems to have curtailed seriously the efficacy of section 20.

The defendants in the Screws case (the aforementioned Georgia sheriff and two aides) arrested one Hall, a negro citizen of Georgia, on the charge of stealing a tire and took him by car to the county courthouse. As Hall alighted from the car upon its reaching its destination, defendants beat him with their fists and with a solid bar blackjack until he was unconscious. He was then dragged into the jail and later removed to a hospital where he died from the beating. In view of the State of Georgia's failure to take any action with respect to this "shocking and revolting episode in law enforcement" the Department of Justice secured an indictment against the defendants for violating section 20 by depriving Hall of his life without due process of law, and of a conspiracy to violate section 20, contrary to section 37 of the criminal


7 18 U.S.C. (1940) § 52. "Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects, or causes to be subjected, any 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 $1000 or imprisoned not more than one year, or both."

It should be noted that "... the qualification with respect to alienage, color and race, refers only to differences in punishment and not to deprivations of any rights or privileges secured by the Constitution. ..." See Classic v. United States, 313 U.S. 299 at 326, 61 S. Ct. 1031 (1941).


9 18 U.S.C. (1940) § 51. "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 shall be fined ... or imprisoned. ..." Since the validity of section
They were convicted after a jury trial and the conviction was upheld on appeal by the circuit court of appeals. The case then came to the Supreme Court on a writ of certiorari. The defendants argued (1) that inasmuch as their conduct was violative of state law they were not acting within "color of law" within the meaning of section 20, and (2) that section 20 is unconstitutional under the due process clause of the Fifth Amendment insofar as it makes criminal any act resulting in deprivation of rights protected by the Fourteenth Amendment, inasmuch as that amendment provides no ascertainable standard of guilt.

In view of the court's decision in the Classic case, the striking dissonance within the court induced by the Screws case may have been rather unexpected. But whereas in the Classic case the court was primarily concerned with the restrictive scope of Article 1, Sections 2 and 4, dealing with the protection of the right to vote, spread before it now was the fluid concept of due process dependent for its meaning, to a great extent, upon judicial exposition. Grasping the implications of federal power that would have arisen had it summarily rejected the defendants' contentions, the court searched for a way to uphold the constitutionality of the statute and at the same time to reduce the potential scope of its operation. That the solution was not an amicable one is readily evident from the marked division within the Court. Four separate opinions were written with no one view actually commanding a majority. It was only because Justice Rutledge thought it undesirable for the Court to remain deadlocked, especially in a criminal case, that he voted with four of his colleagues and thereby enabled the Court to hand down a decision, even though the disposition of the case was not in accord with views stated by him in a separate opinion.

The contention of the defendants that their conduct, since it was proscribed by state law, was not within the "color of law" concept of section 20, caused the Court the least difficulty. All but Justices Rob-

37 charging conspiracy to violate section 20 depends upon the validity of the latter, section 37 will not be discussed separately.

10 (C.C.A. 5th, 1944) 140 F. (2d) 662.

11 The pertinent part of the Fourteenth Amendment for the purposes of this discussion is the phrase that reads "nor shall any state deprive any person of life, liberty, or property, without due process of law." The contention that this clause provides no ascertainable standard of guilt is based on the fact that this clause is often said to prevent state action which "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97 at 105, 54 S. Ct. 330 (1934).

12 Since Justice Rutledge was of the opinion that the conviction should be sustained and since this result would have been achieved if he had not voted with Justice Douglas et al, the approach taken by Justice Rutledge seems open to question. A desire that courts should always decide a case is understandable, but to take a position contrary to personal belief to achieve this result seems to be an undesirable and unnecessary concession to form at the expense of substance.
erts, Frankfurter and Jackson agreed that this defense had no merit. The divergent attitudes within the Court took shape about the contention that section 20 as applied to the deprivation of rights protected under the due process clause of the Fourteenth Amendment does not adequately define the crime. Both Justices Murphy and Rutledge, writing separate opinions, expressed the belief that, as applied to the facts of this case, the statute was immune to such attack and that the conviction should be upheld. Justices Roberts, Frankfurter and Jackson, failing in their primary objective of restrictively interpreting the "color of law" clause of the statute and thereby destroying the government's case, now argued that defendant's contention on this second point should be sustained and the conviction reversed. Justice Douglas, who handed down the judgment of the court and delivered an opinion concurred in by Justices Black, Stone and Reed, although impressed with this contention, nevertheless took the view that the statute was constitutional if construed to require proof of a specific intent to deprive a person of a federal right. Since the trial court's charge to the jury did not fully conform to this interpretation, the conviction was reversed and the defendants remanded for a new trial.

I. "Color of Law"

The primary objective of Justice Roberts' dissenting opinion was to limit the scope of section 20 so as to apply only to state officials acting pursuant to state law. If the statute is so interpreted and if at the same time it is realized that it "condemns something more than error of judgment, made in an honest effort ... to apply and follow the law" the impotence of the statute becomes readily apparent. To sustain this thesis he brings to bear the following arguments.

a. Historical Approach. Justice Roberts relies heavily upon extracts from the congressional records to show that it was not the intent of Congress to include unauthorized official conduct. Admitting, at most, that the records are susceptible to that interpretation, it is still doubtful

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18 325 U.S. 91 at 103, 65 S. Ct. 1031 (1945).
14 On the question of intent, the trial court charged that "... if these defendants, without its being necessary to make the arrest effectual or necessary to their own personal protection, beat this man, assaulted him or killed him while he was under arrest, then they would be acting illegally under color of law, as stated by this statute, and would be depriving the prisoner of certain constitutional rights guaranteed to him by the Constitution of the United States and consented to by the State of Georgia." The Court quoted, id at 94.
15 See note 40, infra.
17 Cong. Globe, 39th Cong. 1st sess., p. 1759 (1866); also, id., 41st Cong. 2d sess., p. 3663 (1870).
whether Congress did not intend to reach conduct such as the Court was dealing with here. It must be remembered that this legislation was a product of the reconstruction period and was nurtured in an atmosphere of hostility and recrimination. The accompanying confusion in men's minds easily gave rise to statements that may now be cited to support any view. 18 When it is further recalled that this is the same period that produced the civil rights acts, 19 aimed at controlling the conduct even of private individuals, it does not tax credulity to assert that Congress did intend to reach state officials even in cases where their conduct was contrary to state law. When it is further realized that law-makers dealing with concrete problems are fully cognizant that a state acts only through its designated officials 20—that state action is not a philosophic abstraction—; that if they did intend to reach only action pursuant to state law a happier phrase than "color of law" could have been chosen; and that the practical effect of the interpretation urged by the dissent would be to make this section a nullity, it is difficult to ascribe such an interpretation to the congressional will. And all this combined with the recognized principle of statutory construction that when two interpretations are possible that one should be chosen that will give the statute an operative effect and the further fact that the present dissenters joined in the opinion in United States v. Classic 21 leads to but one conclusion—that any action by state officers in their official capacity, whether authorized or not, is state action within the meaning of section 20.

b. Analogy to Section 33 of the Criminal Code. The reliance of the dissent upon judicial interpretation of section 33 of the criminal code, which provides for removal from state to federal courts of criminal proceedings started in a state court against a federal revenue officer "on account of any act done under color of his office or of any such [revenue] law," as authority to support their construction of section 20 in the principal case, seems equally unimpressive. In Maryland v. Soper 22 the court did say that in a petition for removal the petitioner must show "that the prosecution of him for whatever offense has arisen out of acts done by him under color of federal authority and in enforcement of federal law." Whatever other distinctions can be made, it is sufficient to point out that sections 33 and 20 are in no way related,

18 Flack, The Adoption of the Fourteenth Amendment (1908).
19 The Civil Rights Act, 18 Stat. L. 335 (1875), declared unconstitutional in the Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18 (1883).
20 Ex Parte Commonwealth of Virginia, 100 U.S. 339 at 347 (1879). "... And as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning."
22 270 U.S. 9, 46 S. Ct. 185 (1926).
that they were enacted to serve distinct and separate purposes and that therefore section 33 cannot logically be used as controlling precedent in the interpretation of section 20. In cases arising under section 33, if the petition for removal is granted, the petitioner is thereafter immune to state prosecution. Its effect is to "wrest from the state courts power to try offenses against their own laws." It is an exceptional procedure and the rules permitting removal should be strict. But under section 20 there is no question of loss of state power. Federal prosecution creates no immunity against subsequent state action. 23 In fact, as a matter of policy, the Department of Justice, wherever possible, seeks to promote state action.

c. Barney v. City of New York as Precedent. Finally the dissent relies upon the authority of Barney v. City of New York. 24 In this case the complainant sought to enjoin the construction of a tunnel by the Rapid Transit Railroad Commission on the ground that it deprived him of property without due process of law. The United States Supreme Court, in upholding the decree of the federal district court denying injunctive relief, declared that since the action of the commission was unauthorized it did not come within the Fourteenth Amendment. Inasmuch as the court also indicated that the complainant had an adequate remedy in the state court, it was really unnecessary for the purpose of the decision to decide whether such unauthorized action was or was not state action within the meaning of the Fourteenth Amendment. Although it is true that Barney v. City of New York has never been expressly overruled, its value as precedent is doubtful when subsequent holdings by the Supreme Court are taken into consideration. Any assertion that it is precedent can have reference to form and not substance when put along side the statement of the court in Home Telephone and Telegraph Co. v. Los Angeles 25 that Barney v. City of New York "is now so distinguished or qualified as not to be here authoritative or even persuasive." The rationale of this decision has been impaired by judicial erosion. Furthermore, it was at the time "a metaphysical denial of the actual facts." Moreover, it reached a desired result by unnecessary circumvention. Barney v. City of New York was a civil suit. The complainant had an adequate remedy in the state courts whose decisions were subject to review by the United States Supreme Court. In keeping with the declared policy of the federal courts to refrain from encroaching upon state sovereignty when state procedure provides adequate

remedies, the refusal of the federal court in that case to take jurisdiction was understandable and desirable. But section 20 is concerned with a criminal proceeding and the question of whether the conduct of the defendants is state action must be faced squarely, free from the distinctive features present in the Barney case.

2. Ascertainable Standard of Guilt

The contention that the statute is unconstitutional as applied to deprivation of Fourteenth Amendment rights because this amendment does not provide an ascertainable standard of guilt offers more serious difficulty than the first contention discussed above. For if the act would "incorporate by reference a large body of changing and uncertain law" it would lack the basic specificity necessary for a criminal statute and accordingly would be invalid under the due process clause of the Fifth Amendment. A classic illustration of a statute condemned because lacking this specificity was a provision of the Food Control Act passed during World War I prohibiting the wilful charging of "unjust and unreasonable prices for necessaries:" In United States v. Cohen Grocery this statute was held invalid since it left open "the widest conceivable inquiry, the scope of which no one can foresee... or adequately guard against." That this statute provided no knowable criteria for determination of conduct can be conceded without condemning section 20. Nor is section 20 as applied to the deprivation of due process rights synonymous with the following hypothetical statute as Justice Roberts would have us believe: "Whoever wilfully commits any act which the Supreme Court of the United States shall find to be a deprivation of any right, privilege or immunity secured or protected by the Constitution shall be imprisoned." Here there has been no attempt to apply section 20 to conduct that has been judged to be violative of due process rights subsequent to the commission of such conduct. While it is necessary that a statute have an ascertainable standard of guilt, there is no requirement that the legislature spell out all conduct that comes within its scope at any one time: it is enough that the conduct in question in a given case comes within its purview. The crux of the problem is succinctly stated by Justice Murphy when he says that the pertinent question is "whether section 20 by its reference to the Fourteenth Amendment guarantees that no state shall deprive any person of life without due process of law, gives fair warning to state officials that they are criminally liable for violating this right to life." His answer, that "It is difficult to believe that such an obvious and necessary right

28 Id. at 136.
is indefinitely guaranteed by the Constitution or is foreign to the knowledge of local police officers...,” is irrefutable. To subject a state police officer to punishment under section 20 for such an act is not to penalize him without fair and definite warning. That this approach was not taken by the Court seems regrettable, the more so since the opinion by Justice Douglas in which he attempted to merge these conflicting views, reaches an illogical result. Justice Douglas starts with the premise that generally, in order to convict a defendant of a statutory crime, it is necessary only to prove that the accused did the proscribed act intentionally. He concedes that if that approach is used in the instant case, section 20 would be unconstitutional because of its vagueness and uncertainty. But he then contends that if the word “wilfully” present in the statute is construed to require a showing of a specific intent to deprive a person of a federal right, it can escape the charge of constitutionality and “would not become a trap for law enforcement agencies acting in good faith.” The fallacy of this approach is brought into sharp focus by Justice Roberts when he says, “It is as novel as it is an inadmissible principle that a criminal statute of indefinite scope can be rendered definite by requiring that a person ‘wilfully’ commit what Congress has not defined but which, if Congress had defined, could constitutionally be outlawed.” Perhaps in answer to this assertion Justice Douglas adds that it must be a “specific intent to deprive a person of a federal right made definite by decision or other rule of law...” This addendum leads to further confusion, for the forced construction of “wilfully” was undertaken to provide certainty, but if there already is certainty in terms of “decision or other rules of law” why require other than the usual intentional conduct? The certainty seemingly obtained does not arise from the kind of intent required but from the fact that each kind of intent is applied to a different fact situation. When applying intentional conduct as a standard of guilt, Justice Douglas does so in terms of rights to be determined at some future time and concludes that there is no ascertainable standard of guilt. His criteria of “specific intent,” however, is applied to “decisions

29 Id. at 135.
30 Ellis v. United States, 206 U.S. 246, 27 S. Ct. 600 (1907).
31 Justice Douglas, here, relies on the following cases for authority: Omaechevarria v. Idaho, 246 U.S. 343, 38 S. Ct. 323 (1918); Hygrade Provision Co. v. Sherman, 266 U.S. 407, 45 S. Ct. 141 (1925); United States v. Ragen, 314 U.S. 513, 62 S. Ct. 374 (1942). That these cases are authority for Justice Douglas’s position is doubtful, for in each case not only was the specific wording of the statute controlling but also the certainty challenged was resolved on other grounds.
33 Id. at 153.
34 Id. at 103.
35 Id. at 98. Here Justice Douglas asserts that a state officer can be convicted of violating section 20 if mere intentional conduct is the test “if he does an act which some court later holds deprives a person of due process.”
and rules of law" that have been previously determined.\textsuperscript{86} It seems clear that the certainty or uncertainty thus obtained is not derived from the statute but results only from the standard used, i.e., whether the rights involved have been determined by prior or by subsequent decisions.\textsuperscript{87} Since intent merely describes the state of mind which is required to accompany a proscribed act, a statute must be certain or uncertain, not in terms of the intent required, but in terms of itself. Failure to accept the view propounded by Justices Rutledge and Murphy seems to lead either to the exaggerated concreteness demanded by Justice Roberts or the illogical and unnecessary confusion created by Justice Douglas.\textsuperscript{38}

3. Policy Considerations

Whatever else may be said, it is apparent that the wide divergences within the Court arose out of a compelling desire to mould legislation to conform to predilections having to do with conceptions of national policy. The fixing of power relationships between the federal government and the states is a matter for legislative determination within the boundaries of the Constitution. The Fourteenth Amendment circumscribed the power of the states and at the same time authorized the federal government to impose sanctions for the violation of such prohibitions.\textsuperscript{89} Federal legislation in keeping with this constitutional mandate should be given its full effect. The fear of misuse of power is understandable, but such fear does not call for the denial of power by judicial fiat.\textsuperscript{40} Consonant with this approach the opinions of Justices Murphy and Rutledge offer the most persuasive and satisfying interpretation. Section 20 should extend to conduct of state officers acting under the authority of their office although their acts are also contrary

\textsuperscript{86} Id. at 103. Here he speaks of "A Federal right made certain by decision or other rule of law..."

\textsuperscript{87} See notes 34 and 35, supra.

\textsuperscript{38} It is interesting to note that before the Classic case it was thought on the authority of Newberry v. United States, 256 U.S. 232, 41 S. Ct. 469 (1921), that primaries were not elections and therefore did not fall within the sphere of federal power. In a sense, therefore, the defendants in the Classic case had no warning that they were depriving anyone of a federally protected right.

\textsuperscript{89} The power to provide sanctions for conduct violative of the Fourteenth Amendment is given by Section 5 of that amendment which provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The pertinent part of the amendment, for our purpose, is quoted in note 11, supra.

\textsuperscript{40} See Tyson and Brother v. Banton, 273 U.S. 418 at 446, 47 S. Ct. 426 (1927), where Justice Holmes in his dissenting opinion says appropriately, "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."
to state law. Any other interpretation seems to lead to the conclusion that Congress intended to pass a statute that would have no operative effect. Section 20, as applied to conduct prohibited by the Fourteenth Amendment, provides an ascertainable standard of guilt depending upon the fact situation in each particular case. If a prosecution is based upon the infringement of a right of doubtful status, the element of doubt should not serve to void or confine the statute, but merely give reason to invalidate the particular charge. To declare a statute unconstitutional or to confine it by questionable construction because not all rights protected by it can be spelled out at the moment, is an avoidance of reality. The cases in this category do not yield a rigid formula. Specificity must yield to the practical requirements of legislation. The alternative suggested by the dissent of codifying every federally protected right is an impracticable solution. The fear of rampant federal prosecutions seems illusory, if prosecutions are limited, as a construction of the act permits, to violations of constitutional right in bad faith or in reckless disregard of duty. No undue hazard would be placed on state officials honestly seeking to perform their duty. The position adopted by the Court seems to make more difficult the task of bringing to justice those who, in the name of law enforcement, flagrantly flaunt the law.41

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41 Upon retrial of the case in the federal district court, the defendants were acquitted. The retrial of the case began October 5, 1945. (Letter from the Office of the Clerk, United States District Court, Middle District of Georgia).