

FEDERAL PROTECTION OF CIVIL RIGHTS—QUEST FOR A SWORD.

By Robert K. Carr.* Ithaca: Cornell University Press, 1947. Pp. 284. \$3.00.

TO SECURE THESE RIGHTS: REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS.** New York: Simon and Schuster, 1947. Pp. 178. \$1.00.

Professor Carr was the Executive Secretary of the President's Committee and chief author of its report. His book is an excellent account of the work of the "Civil Liberties Unit," now called the "Civil Rights Section," a unit of the Criminal Division of the Department of Justice. This unit was created on February 3, 1939, by Attorney General Murphy for "the aggressive protection of fundamental rights inherent in a free people" and "to pursue a program of diligent action in the prosecution of infringement of these rights." To state it another way, the Section's purpose is "The protection of the people by the government" as distinct from "protection of the people *against* government."¹

In his opinion in *Pollock v. Williams*, Mr. Justice Jackson stated that the individual is protected against slavery and involuntary servitude by "both a shield and a sword."²

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** The members of the Committee were: Charles E. Wilson, Chairman, President, General Electric; Sadie T. Alexander, Assistant City Solicitor of Philadelphia; James B. Carey, Secretary-Treasurer, CIO; John S. Dickey, President, Dartmouth College; Morris L. Ernst, New York attorney and author; Roland B. Gittelsohn, Rabbi, Rockville Centre, L. I., former Marine Chaplain; Frank P. Graham, President, University of North Carolina; The Most Reverend Francis J. Haas, Bishop of Grand Rapids Diocese; Charles J. Luckman, President, Lever Brothers, President, Citizens Food Committee; Francis P. Matthews, attorney, Omaha, Neb., former Supreme Knight, Knights of Columbus; Franklin D. Roosevelt, Jr., New York attorney, Chairman, Housing Committee, American Veterans Committee; The Right Reverend Henry Knox Sherrill, Presiding Bishop, Protestant Episcopal Church; Boris Shishkin, economist, American Federation of Labor; Dorothy Tilly, Secretary, Department of Social Relations, Woman's Society of Christian Services, The Methodist Church; Channing Tobias, Former Senior Secretary, National Council, YMCA, Director, Phelps-Stokes Fund.

1. Preceding the Preface, Professor Carr quotes from Chief Justice Marshall in *Marbury v. Madison*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."
2. 322 U. S. 4, 8 (1944).

The shield referred to in the *Pollock* case is the Thirteenth Amendment, which prohibits slavery and involuntary servitude, and the sword is the Peonage Abolition Act³ passed by Congress in 1867. This metaphor is a useful approach to analysis of the functions of government in the protection of civil rights.

The federal shield consists of constitutional provisions—the Bill of Rights, and the Thirteenth, Fourteenth, and Fifteenth Amendments. Professor Carr reviews briefly the unsuccessful attempts to persuade the Supreme Court to extend the proscriptions of the Bill of Rights to actions of state and local governments as well as those of the national government to which it is held that it exclusively applies. State constitutions contain similar proscriptions, but Professor Carr points out that their implementation has left much to be desired. Section 1 of the Fourteenth Amendment does prohibit state action in certain respects. While, beginning with the *Slaughter-House Cases* in 1873,⁴ the Supreme Court has refused to regard the liberties enumerated in the Bill of Rights as “privileges or immunities of citizens of the United States,” it now holds that the due process clause of that Amendment does include “those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions.”⁵

The sword technique of the Federal Government in the protection of civil rights is shown by the Attorney General's order creating the Civil Liberties Unit. “The function and purpose of this unit,” the order provides, “will be to make a study of the Constitution of the United States and Acts of Congress relating to civil rights with reference to present conditions, to make appropriate recommendations in respect thereto, and to direct, supervise and conduct prosecutions of violations of the provisions of the Constitution or Acts of Congress guaranteeing civil rights to individuals.”

The execution of this simple order obviously presented problems of the most difficult sort. The first was to determine the constitutional limits of the power of the Federal Government to protect civil rights. The second was statutory:

3. REV. STAT. § 5526 (1873), 18 U. S. C. § 444 (1946).

4. 16 Wall. 36 (U. S. 1873).

5. *Palko v. Connecticut*, 302 U. S. 319, 328 (1937), quoting from *Hebert v. Louisiana*, 272 U. S. 312, 316 (1926).

(a) to determine what new legislation within the constitutional powers of Congress was required; and (b) to ascertain the meaning and usefulness of existing statutes,⁶ to establish their constitutionality, and to persuade the courts that they applied to the particular cases being adjudicated. The third was to develop administrative techniques and procedures, for example in the procurement of evidence in civil rights cases.

The Civil Rights Section has limited facilities with which to carry out its task. A small governmental agency, it has only four to five modest office rooms in the Justice Department. It has never had more than eight or ten lawyers and professional workers on its staff. It is forced to publicize its existence and its program, and thus stimulate the filing of complaints. For this publicity it has relied heavily upon professional civil liberty organizations and the Negro and labor press. It has no field offices of its own. It has followed the policy of waiting for complaints to come to its office before taking action. The most important public sources of complaints are the Federal Bureau of Investigation and United States District Attorneys. Others are congressional committees, congressmen, the White House, and administrative agencies. Private sources are the American Civil Liberties Union, the National Association for the Advancement of Colored People, The Workers' Defense League, the Jehovah's Witnesses, newspapers, particularly the Negro press, foreign embassies and consulates, and occasionally local police. During the fiscal year 1944 the Civil Rights Section received approximately twenty thousand complaints. About three-fourths of all complaints are outside of federal jurisdiction or contain no possibility of action by the Section.

When a complaint is received, the Section first conducts a preliminary investigation through the Federal Bureau of Investigation or a District Attorney by securing the victim's statement. If the victim is unwilling to make a statement or if the information secured does not indicate a violation of the civil rights statutes, the case is dropped. If the complaint is thought to be justified, a thorough investigation is made by interviewing witnesses. The next stop is to procure an indictment, which must be cleared in advance by the De-

6. 18 U. S. C. §§ 51, 52, 444 (1946).

partment of Justice. Great care is taken in conducting investigations and many complaints are found to be unjustified.

The difficulty of discovering cases suitable for prosecution by the Section is illustrated by the fact that only sixty-four of twenty thousand complaints received in 1944 resulted in prosecutions. Less than one percent of all complaints have resulted in prosecutions.⁷

Frequently the Section, in lieu of prosecuting meritorious cases, seeks to stop the offensive practices by contacting the proper officials and pointing out the possibility of prosecution. The Section also encourages prosecutions under state statutes wherever possible, since many offenses violate both federal and state laws.

Once the Civil Rights Section has determined to prosecute, it often has great difficulty in securing an indictment. The victim usually belongs to an unpopular minority group, and local prejudice often favors the person or persons sought to be indicted. There is also prejudice against federal action which is conceived to be outside interference with matters of purely local concern.

Even in the strongest cases the Section has experienced great difficulty in securing convictions before juries. The reasons stated by Professor Carr for this, in addition to those influencing grand juries, are: incompetent handling by some United States Attorneys; the tendency of government witnesses "to go bad" on the stand; and the adverse reactions of juries to the vague and curious language of the civil rights statutes and to the severe penalties which some of them carry. There is not much that the Section can do, in these cases, except to give full assistance at all stages of the trial.

In addition to the prosecution of cases, the Section files briefs *amicus curiae* in civil litigation involving federal civil rights, and in state criminal cases where federal civil rights are in issue. It also carries on extensive research in the civil rights field.

Professor Carr does not attempt to evaluate the work

7. However, in these few cases the Civil Rights Section has done important and often pioneering work. *E.g.*, *Screws v. United States*, 325 U. S. 91 (1945) (police brutality); *United States v. Gaskins*, 320 U. S. 527 (1944) (peonage and involuntary servitude); *United States v. Classic*, 313 U. S. 299 (1941) (election irregularities).

of the Civil Rights Section. From his study he concludes that the main issue is not whether there should be federal activity in this area but how to make such activity broader and more effective. He thinks three needs must be met if the program is to have a normal and desirable development, *viz.*, (1) A stronger and broader constitutional basis by amendment of the Constitution or by Supreme Court decision⁸ extending federal authority to protect all fundamental civil rights against governmental and private interference; (2) An adequate congressional program of comprehensive civil rights legislation protecting civil liberties; (3) Adequate administrative techniques to enforce civil rights legislation.

Professor Carr concludes his book as follows:

This new role of government is seen to be inescapable; that is the great achievement of the CRS. No similar administrative agency in our history has developed a more significant program of governmental activity on such a limited basis of improvisation and experimentation. Certainly no other agency, within a period of less than a decade, has forced a greater change in our constitutional philosophy. The most revered section of our Constitution, the Bill of Rights, is at last seen for what it is: a shield fashioned by a democracy for safeguarding individual freedom against government encroachment. Now another instrument has been fashioned, a sword, for which little or no express constitutional sanction exists. But it has been fashioned and its usefulness decisively indicated. Now that usefulness must be exploited, for we are living in troubled and uncertain times. Eventually we may establish so well ordered a society that no man will have cause to fear for his freedom. But the economic and social dislocations of the present day, not to mention continuing international unrest, offer serious threats to civil liberty. The sword is a tested and useful weapon for the protection of this liberty. Let us not hesitate to use it.

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The President's Committee was authorized by Executive Order "to inquire into and to determine whether and in

8. Presumably such a decision would involve a construction of Section 5 of the Fourteenth Amendment. In the Civil Rights Cases the Supreme Court announced, *per* Bradley, J., that the "abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied" by that Amendment. 109 U. S. 3, 18 (1883). It has been difficult to maintain a compartmentalization between state and individual action. However, it is probable that the Court will be content with dilution and will not, by judicial action, erase this dividing line.

what respect current law-enforcement measures and the authority and means possessed by Federal, State and local governments may be strengthened and improved to safeguard the civil rights of the People." The Committee held public hearings and heard some witnesses in private. A number of staff studies were prepared and hundreds of communications were received from interested persons and organizations.

The first task of the Committee was to define the historic civil rights goal of the American people. It then examined our record in this area and found that in many respects we have fallen short. But before recommending to the nation the steps which it should take to reach the goal, the Committee asked the question: What is the Government's responsibility for its achievement? The Committee concluded that the Federal Government must take the lead in safeguarding the civil rights of all Americans.

The Committee believes, however, that leadership by the Federal Government does not mean exclusive action. There is much that states and local communities can do, and indeed, much that only they can do. Further, the Committee believes that governmental action alone cannot provide complete protection, that great responsibility will always rest upon private organizations and individuals who are in a position to educate and shape public opinion, and that educational and legislative approaches are both valid and essential to each other.

The Committee believes that national leadership is entirely consistent with American constitutional traditions. It enumerates many constitutional powers of Congress which can form the basis of a broad civil rights program, *viz.*, the power to protect the right to vote; the freedom from slavery and involuntary servitude; the rights to fair legal process, to free speech and assembly, and to equal protection of the laws; the war power; the interstate commerce power; the taxing and spending powers; the postal power; the power over the District of Columbia and the territories; the power derived from the Constitution as a whole to protect rights essential to national citizens in a democratic nation; the treaty-making power as exercised in the United Nations Charter, which pledges members to take joint and several action to achieve its purposes (among which are "universal respect for, and observance of, human rights and fundamen-

tal freedoms without distinction as to race, sex, language, or religion"); and the power, derived from the republican form of government clause, to protect rights essential to state and local citizens in a democracy.

The Committee reviews the various sanctions used and useable by the Federal Government in the protection of civil rights. In addition to the traditional criminal and civil sanctions, it notes cease-and-desist orders of an administrative body and conditions attached to grants-in-aid. It believes the nation's program should move forward on three fronts—legislative, executive and judicial.

The Committee recognizes that new legislation, the implementation of laws, and the development of new administrative policies and procedures cannot by themselves bring full civil rights. Necessary also is a climate of public opinion which will outlaw individual abridgements of personal freedom—a climate of opinion as free from prejudice as we can make it. For the infringements of civil rights are only symptoms. They reflect the imperfections of our social order, and the ignorance and moral weakness of some of our people. The Committee believes, however, that the enactment of broad civil rights legislation will go far toward ending prejudice. The Committee states that we have come to a time for a third re-examination⁹ of our civil rights situation and for a sustained drive ahead. It believes that, for moral, economic, and international reasons, the time to act is now.

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Professor Carr's book and the Committee's report raise the question of why, at this period in our history, the civil rights issue should attain such national importance. There are many reasons. The New Deal, with its policy of improving the lot of the underprivileged and its appeal for their votes, undoubtedly was of prime importance. The war years not only emphasized the importance of minority groups in the war effort, but the issues of the war were framed in language of democracy and freedom. The United Nations Charter itself is based upon ideals of democracy and liberty. This emphasis in our national policy on democracy as a way

9. The first was from 1776 to 1791, from the drafting of the Declaration of Independence to the writing of the Constitution and the Bill of Rights. The second was the Civil War period.

of life, added to internal and external criticism that our domestic practices do not always correspond to our democratic preachments, have led to an examination of these practices with a resulting twinge of conscience at many things found. It is strange that the current demand for extension of civil rights and for new protective measures should occur in a period in which substantial progress is being made. The report of the Committee recognizes this progress in numerous instances, as for example in the decline of lynchings. Were it not for our present position of leadership in world affairs, where democratic ideals have such importance, it is probable that the steady growth in the correction of defects in our civil rights situation would have continued on an evolutionary basis unless a political party of the underprivileged should, in another depression, secure power.

While neither the book nor the report so states, it is evident from what is said in both, that the civil rights problem primarily concerns the Negro and his status in the South. (This is demonstrated by the Dixiecrats who use "states' rights" as camouflage for "white supremacy.") Yet the report of the Committee does not indicate that it heard evidence relating to, or gave any consideration to, the white supremacy position or the capabilities of Negroes to enjoy full civil rights and to carry the full burdens of citizenship. The whole tenor of the report seems to be that legally Negroes and other minorities are entitled to full civil rights, and therefore they should have them, irrespective of the consequences.

There can be no doubt that Negroes have the same fundamental legal rights as white persons. The difficulty is that, particularly in the South, some of their rights are not recognized and the exercise of these rights is positively prevented, one way or another, with the majority support of the white population. Were new rights to be created on the basis of Northern public opinion, further difficulty would ensue because of the lack of comparable Southern opinion. Failure to recognize this factor taints many recommendations of the Committee with compulsion, itself an undemocratic procedure.

Account must also be taken of the American past. The Civil War freed the slaves, but it did not prepare them to enjoy—or benefit by—the rights and privileges, or to assume the responsibilities of free men. Freedom is a bundle of

rights with correlative duties. It depends upon the recognition of these rights and respect for them by other free men. Hence it was only natural that the whites, who had fought a bloody war because of their disbelief in the social pattern which would result from the recognition of these rights, should not readily comply therewith. In addition, their attitude was shaped by awareness that cooperation pointed toward the loss of political power in some areas. Modification of this attitude has been retarded by the difficulty of educating the Negro, in an economically prostrate South, to enjoy the rights and carry the responsibilities of citizenship.

The Report does not attempt to draw any line beyond which legislation should not go. The Committee's recommendations are founded on those evils which came to its attention.¹⁰ The Committee's approach is a collectivist one as well as revolutionary. It would solve civil rights problems by governmental action rather than by individual action within the framework of existing law. It would solve them immediately rather than by the slow process of evolution, not awaiting the clear support of public opinion, particularly in the areas most concerned. It would have a federal anti-lynching law, although the ready solution for the lynching problem is the enforcement of local laws, lynchings have greatly declined, and the sentiment against them has steadily increased.

The Report concedes the necessity for a climate of public opinion favorable to outlawing the practices it finds to exist. In so doing it admits the probable ineffectiveness of many of its proposals. In a sense, the Report relies on the legislative mesasures recommended to create this favorable climate, contrary to the usual democratic approach that a favorable public opinion precedes the enactment of legislation. Granted that the Committee's recommendations with respect to

10. For example, it does not mention state statutes prohibiting marriage between white persons and Negroes. (Indiana has a statute prohibiting marriage between a white person and a person having one-eighth or more of Negro blood. Ind. Stat Ann. (Burns 1933) § 44-104). These statutes are undoubtedly discriminatory against Negroes, their purpose being to preserve the purity of the white race and not that of the Negro. The freedom to marry would seem to be as important a freedom as most. Nor does the Committee recommend removal of discrimination against Negroes in the refusal to permit them to join the white religious congregations of our churches. There seems no limit to possible legislation to regulate the conduct of whites toward Negroes and vice versa, including a code of manners for all occasions.

strengthening the right to equality of opportunity are most laudable in their objectives, it does not follow that governmental action is the remedy. The Committee seeks to abolish by governmental action all discriminations and all segregation based on race, color, creed, or national origin. The evils against which the Committee's recommendations are directed had best be left to custom, manners, and education for solution when they involve pure personal relationships. On the other hand, the denial of the right to vote by official or private action is something that should be the subject of governmental action. It is difficult to draw the line, to state a principle or principles which should mark the limits of governmental action in the civil rights field, but the writer strongly feels that legal compulsion of relationships which are not desired by at least one party to them have no place in our jurisprudence.

Had the Committee determined that legislation was essential in some areas it then should have considered whether such legislation is a federal or a state obligation. The Committee's recommendations indicate its belief that state action should be principally limited to those things which the Federal Government cannot constitutionally do. But state action may also cover fields in which the Federal Government has acted or can act. The problem of defining the respective spheres of action in the field of civil rights is in many respects difficult. In one aspect, civil rights are strictly a national concern. That is, all persons wherever they may reside, should have the same civil rights. We cannot be a truly democratic nation when only part of our citizens enjoy full civil rights. However, the application of this principle runs head-on against the white public opinion of the South and the issue cannot be compromised on any states' rights basis. The lines of demarcation must necessarily be drawn by the Federal Constitution. In the light of contemporary interpretation that question would eventually resolve itself into an inquiry as to how far the Federal Government should exercise the powers which it has in this field. This requires the consideration, as to each proposed measure, of the extent to which it can be enforced or evaded, matters which the Committee, from its report at least, did not weigh.

One feels that if the actual situation in the South were considered, a compromise between principle and expediency

would have been necessary. The accomplishment of the Committee's objectives would thus be left primarily to local and evolutionary development, which may be speeded by the rapid industrialization of the South. For the most part, the Committee's report presents an idealistic, theoretical goal, impracticable of attainment in the near future.¹¹

Ernest R. Baltzell†

11. There are many steps which might hasten the attainment of the Committee's projected goal. Civil rights should be the subject of continuous study and discussion in our federal and state governments. They should be the subject of a volume by the American Law Institute, giving us as far as possible a definitive statement of what the law is. A code of uniform laws should be prepared on the subject to secure as much uniformity as possible throughout the states. Above all, civil rights should be the subject of courses in schools and colleges and should be given intensive study in our law schools. Civil rights should be divorced from politics as much as possible, and the activities of these suggested agencies would serve that purpose.

† The Board of Editors deeply regrets the passing of Ernest R. Baltzell, member of the Indiana Bar and good friend of the Journal.

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