Admittedly we have only recently held in connection with an unsuccessful attempt to remove a pending State *civil* proceeding to a Federal court that § 245 (b)'s interdiction of attempted injury, intimidation or interference "by force or threat of force" does not extend to a quo warranto action brought by the State of Mississippi to revoke the charter of a nonprofit corporation operating a free health service program for the benefit of poor people, primarily Negroes, in Jackson and Hinds County. Williams v. Tri-County Community Center, 5 Cir., 1971, 452 F.2d 221.[73] Whatever the merits of such an approach in those circumstances, it cannot legitimately be applied here to bar removal of a pending State *criminal* prosecution.

"Force Or Threat Of Force"

In the first place, apart from the fact that arrest, confinement and criminal prosecution are all inherently coercive in nature (and therefore invariably entail utilization of "threats of force"), Congress plainly did not intend for the courts to narrowly circumscribe the ambit of impermissible intimidation prohibited by the Civil Rights Act of 1968. Title I was the legislative response to a long, sordid history of violent and nonviolent harassment directed against civil rights workers, black and white, who spoke out against the national disgrace of racial segregation. No one who participated in its enactment could have been so naive as to believe that the official and unofficial techniques for silencing dissent were confined to physical brutality. The force employed assumed a variety of forms, from the sheriff's blackjack, cattle prod and tear gas to confinement for "investigation" followed by cold-blooded murder.[74] There were also more covert measures, including mass arrests on trumped-up charges, denial of bail, and convictions grounded on nonexistent evidence coupled with ridiculously severe sentences. We need undertake no exten-

full-time city-paid personnel hired as supervisors.")

Section (2) (C): "applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof * * *" ("We demand 30% of all employment in all business establishments as we are 30% of the buying population. We also call for employment of Black citizens in city hall, court house.")

Section (2) (F): "enjoying the goods, services, facilities, privileges, advantages or accommodations of any * * * restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises * * *" ("We demand the closing of all back-door cafes.")

73. In reaching this conclusion the Court incorporated into its opinion as *dictum* the Second Circuit's reasoning that "intimidation 'by force or threat of force,' * * denotes violent activity, not the ordered functioning of state legal processes, whatever the motivation." New York v. Horelick, 2 Cir., 1970, 424 F.2d 697, 703, cert. denied, 398 U.S. 939, 90 S.Ct. 1839, 26 L.Ed.2d 273. However, the abortive removal effort in *Horelick* involved a criminal rather than a civil action, a factor that might well have influenced the Court's attempt to decipher the Delphic pronouncements of § 245(b). The broad brush that the Second Circuit found adequate to paint the limits of permissible Federal intrusion into the administration of a State's criminal law need not necessarily prove sufficient to handle a problem of statutory construction in a civil context where, as Mr. Justice Stewart has pointed out, "for various reasons, the balance might be struck differently." Younger v. Harris, 1971, 401 U.S. 37, 55, 91 S.Ct. 746, 757, 27 L.Ed.2d 669, 682 (concurring opinion).

74. See, e. g., United States v. Price, 1966, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 and Posey v. United States, 5 Cir., 1969, 416 F.2d 545, cert. denied, Snowden v. United States, 1970, 397 U.S. 946, 90 S.Ct. 964, 25 L.Ed.2d 127, memorable cases involving three civil rights workers —Michael Schwerner, Andrew Goodman, and James Earl Chaney—who were murdered in the summer of 1964 by the Mississippi Ku Klux Klan in cooperation with a Neshoba County deputy sheriff. Earlier the sheriff had arrested Chaney for "speeding" (while he was fixing a flat tire) and had held the other two men "for investigation." See also Anderson v. Nosser, *supra*.

sive search for examples of the official misuse of criminal processes for the purpose of compelling meek subservience to the principle of white supremacy. Our cases are filled with them.[75]

Faced with a problem of this magnitude Congress might have responded with a law protecting proponents of racial equality against interference "by violence or threat of violence." Instead it chose the term "force or threat of force." No more than passing familiarity with the English language is required to discern the difference. The phrase that actually appears in § 245(b) is by far the broader of the two and comprehends not merely threatened or actual physical intimidation but *all* the possible modes of compulsion, official or unofficial, conceivable by the warped minds of those few who seek to discourage or eliminate individuals exercising Federally protected rights. In view of the events that prompted the statute, the prohibitory language could hardly have been less expansive. To exclude harassing criminal prosecutions from the scope of § 245(b)'s immunity simply because beatings and killings may have provided the primary impetus for its enactment is to pay homage to the right while eviscerating the remedy. The ultimate consequence of intimidation is the same, whether the victim is in jail, in the hospital or in the grave.

Stacked against these considerations we have as an alternative only the *ex cathedra* pronouncement that "force" means "violence" and not "force." Somehow the logic of this interpretation escapes me. Without debating the questionable proposition that a law designed to correct the abuses of a century should be strictly construed, I need only point out that Congress explicitly adopted statutory language broader than "violence or threat of violence" because it wished to accomplish a broader result. An aura of implausibility enshrouds any suggestion that despite its monosyllabic simplicity this purpose has somehow miscarried.

Moreover, even if we were nevertheless to conclude that the ordinary criminal prosecution does not constitute a "threat of force" depriving the defendant of equal civil rights, we could hardly reach the same result when the evidence conclusively establishes that the custodial treatment of the petitioners was not merely violent but devastatingly brutal. Under such circumstances the ensuing proceedings cannot be artificially segregated from the previous illegal force but must be considered as an integral part of one continuous course of action initiated exclusively for the purpose of intimidation. The trial, no less than the arrests themselves and the violence that accompanied them, is merely one more manifestation of an intention to utilize the threat of official force—whether by arresting, confining, and convicting the defendants or by beating them up—to effectively neutralize the lawful exercise of § 245(b) rights.[76]

"Rights" v. "Benefits"

Another objection that might be advanced against the use of § 245(b) as a vehicle for the exercise of removal jurisdiction is that since it is a criminal statute and by its terms does not explicitly confer substantive "rights" it is therefore not a law providing for "equal civil rights" within the meaning of § 1443(1) and *Rachel*.[77] Such a position is totally

75. See, e. g., Anderson v. Nosser, *supra*; United States v. McLeod, 5 Cir., 1967, 385 F.2d 734; N.A.A.C.P. v. Thompson, 5 Cir., 1966, 357 F.2d 831, cert. denied sub nom. Johnson v. N.A.A.C.P., 385 U.S. 820, 87 S.Ct. 45, 17 L.Ed.2d 58; Dilworth v. Riner, 5 Cir., 1965, 343 F.2d 226; Bailey v. Patterson, 5 Cir., 1963, 323 F.2d 201; Meredith v. Fair, 5 Cir., 1962, 328 F.2d 586; United States v. Clark, S.D.Ala., 1965, 249 F.Supp. 720 (3-judge court); see also the preceding footnote.

76. Cf. N.A.A.C.P. v. Button, 1963, 371 U. S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405, 418.

77. This possibility was suggested by the Second Circuit in *Horelick*, *supra*, note 73, 424 F.2d at 702, but the Court found

inconsistent with our well-entrenched policy of according full effect to the broadly remedial objectives underlying the Congressional authorization of Federal civil rights jurisdiction. We have consistently heeded the sweeping exhortation of 42 U.S.C.A. § 1988 to facilitate, rather than hinder, the vindication of those rights. See, e. g., Moreno v. Henckel, 5 Cir., 1970, 431 F.2d 1299; Hall v. Garson, 5 Cir., 1970, 430 F.2d 430; Gomez v. Florida State Employment Service, 5 Cir., 1969, 417 F.2d 569; Brown v. City of Meridian, 5 Cir., 1966, 356 F.2d 602; Lefton v. City of Hattiesburg, 5 Cir., 1964, 333 F.2d 280; Brazier v. Cherry, 5 Cir., 1961, 293 F.2d 401. We cannot retreat from that position now as a result of some ostensibly persuasive substantive difference between a Federal "right" and a Federal "benefit," unless the judicial interpretation and application of the Civil Rights Act of 1968 is to degenerate into a sterile exercise in verbal manipulation. The facts here are grim enough to repel such linguistic frivolity.

But there is an even more fundamental justification for rejecting the restrictive interpretation of § 245 that would limit its application to the *ex post facto* punishment of illegal coercion rather than the prevention of it by way of removal: neither § 1443(1) nor *Rachel* speaks in terms of a law *creating* Federal equal civil rights but of a law *providing* for them.[78] The "right" asserted within the context of this case is the prerogative to peacefully protest racial discrimination free of harassing, bad-faith prosecutions triggered exclusively by that activity. Such a right is, of course, provided for and guaranteed under the First Amendment.[79] While *Rachel* teaches that the broad protection afforded all citizens by the Constitution precludes the characterization of any of its provisions as a "law providing for equal civil rights" within the meaning of § 1443(1), § 245(b) (5) nevertheless provides unique, specific protection—phrased in terms of race—for the First Amendment right to protest segregation. Consequently it is a law *providing* for *equal* civil rights, satisfying the requirements of the civil rights removal statute.

Nothing in either § 245(a) (1) or § 245 (c), which the Court quotes in closing its opinion, suggests a contrary result. Obviously the first subprovision does no more than disclaim a Congressional intent to deprive the States of jurisdiction to prosecute otherwise criminal misconduct that also constitutes a violation of § 245,[80] while the other section merely provides police officers with immunity against possible Federal criminal prosecution for their otherwise *lawful* official acts. Neither of these provisions has any relevance to the facts revealed by the record of this case.

In both its purpose (preventing unwarranted interference with the exercise of Federally protected equal civil rights) and the scope of its prohibition (against attempted injury, intimidation or interference by force or threat of force) § 245(b) is indistinguishable from the relevant provisions of the 1964 Civil Rights Act held sufficient to support re-

it unnecessary to decide the question. Likewise *Tri-County, supra*, states that "§ 245 is a criminal statute that in terms confers no rights. It prohibits and provides penalties for certain types of conduct relative to protected activities enumerated therein." 452 F.2d at 223, n. 3.

78. See note 24, *supra;* Georgia v. Rachel, 384 U.S. at 792, 86 S.Ct. at 1790, 16 L.Ed.2d at 933–934.

79. See note 59, *supra.*

80. Even if by some tortuous construction we could somehow conclude that the term "offense" in this context ("Nothing in this section shall * * * prevent any State * * * from exercising jurisdiction over any *offense* over which it would have jurisdiction in the absence of this section * * *") refers to the conduct of the petitioners in a removal action rather than to the acts of those who violate § 245 (the obvious referent), there is still no impediment here. "Offense" means a criminal act. These petitioners committed no "offenses." They are merely the victims.

moval jurisdiction in *Rachel*. Unlike *Peacock* this case does not involve the petition's failure to invoke a specific Federal statute providing for equal civil rights in terms of race, either by failing to explicitly rely on such a statute or by neglecting to allege facts from which an exclusive purpose to prosecute protected conduct may be inferred.[81]

The only practical question remaining, then, is the adequacy of the District Court's finding that "no federal right * * * is being violated by a prosecution of these charges * * * whether groundless or not."

The District Court's Findings: "Fair Trial"

In its opinion accompanying the order remanding the prosecutions the District Court refers on two separate occasions to the absence of evidence establishing that the defendants will be denied a fair trial in the State courts.[82] The Court here concludes that the finding is "supported by the evidence" and also refers to it twice. We are all agreed on this point, because I too have absolutely no doubt that the defendants' trials would be fair and impartial and that the Supreme Court of Mississippi would ultimately redress any transgressions that might result.

Unfortunately this finding, however indisputable it may be, is nevertheless totally irrelevant under the present circumstances to the question of whether or not the prosecutions are removable under § 245(b) and *Rachel*. The Supreme Court,[83] like the Fifth Circuit,[84] has rejected the proposition that the defendant's ultimate acquittal in a criminal trial invariably constitutes a sufficient vindication of Federal rights and an adequate reason for denying anticipatory Federal relief. If the petitioner who seeks removal is able to allege and prove that the very act of bringing him to trial in the State court violates rights protected by a preemptive Federal law providing specifically for equal civil rights in racial terms, his plea for help must be answered with protection from a Federal court. No matter how true, the alternative answer that the defendant will receive a fair trial and eventually will be acquitted in the State courts if he is innocent is, as the Supreme Court has phrased it, "no answer." Georgia v. Rachel, 384 U.S. at 805, 86 S.Ct. at 1797, 16 L.Ed.2d at 941.

There is thus no civil rights removal "abstention doctrine." Cf. McNeese v. Board of Education, 1963, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622; Monroe v. Pape, *supra*, note 70. If the allegations and proof satisfy the requirements of § 1443(1)—that is, of *Rachel* and *Peacock*—removal jurisdiction *must* be exercised regardless of the prospective fairness or unfairness of the State's criminal proceedings.

81. See note 35, *supra*.

82. "There is no contention in this case and no evidence in this record to support any suggestion that these petitioners cannot and will not receive a perfectly fair trial of their cases in the state court." (App. 30.) Several paragraphs later the Court again repeats that "there is not one breath of evidence anywhere to be found in this record to support any suggestion [or] inference that every one of these petitioners will not receive a perfectly fair trial of his case in the state court." (App. 34.)

83. See note 38, *supra*; see also Zwickler v. Koota, 1967, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444; Dombrowski v. Pfister, 1965, 380 U.S. 479, 487, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22, 29.

84. Even justifiable reliance on State courts for the ultimate vindication of Federal constitutional or statutory rights "does not protect [defendants] from harassment and intimidation by the law enforcement agencies of the city, county, and State. It does not protect them from arrest *en masse* on frivolous or unfounded charges: it does not protect them from continued arrest and incarceration until bond could be deposited for their release; * * * it does not protect them from often expensive litigation until their rights are finally vindicated; it does not protect them from being frightened away from the lawful assertion of their rights and lawful protest against the continued denial of them." N.A.A.C.P. v. Thompson, 5 Cir., 1966, 357 F.2d 831, 838, cert. denied sub nom. Johnson v. N.A.A.C.P., 385 U.S. 820, 87 S.Ct. 45, 17 L.Ed.2d 58.

The District Court's Findings: "Probable Cause"

The District Court concluded that the defendants' Mendenhall protest activities and their subsequent arrests in adjoining Rankin County were entirely unrelated in a temporal, geographical or causal sense and that "they were not arrested by these officers for doing anything which they had a federal right to do." (App. 35).[85] As the foregoing discussion suggests, this is the pivotal finding upon which all else turns.

Ordinarily our review of such a determination by the Trial Judge would be sharply curtailed by the stringent requirements of the "clearly erroneous" test prescribed by F.R.Civ.P. 52. However, here it is abundantly clear that the District Court was under the misimpression that the only factual issue relevant to a determination of the motive for the prosecutions was the question of whether the initial arrests were supported by probable cause. Indeed, it is obvious from even a cursory reading of the District Judge's opinion that the finding of no "causal connection" between the exercise of insulated § 245(b) rights and the arrests was for the most part, if not entirely, the product of his findings that all of the arrests were made with probable cause.

In other words, the District Court mistakenly assumed that a finding of probable cause for the arrests was a sufficient predicate for denying removal relief *regardless* of whether other evidence —no matter how strong—suggested that the whole affair was exclusively the result of the Mendenhall protest demonstrations. Yet clearly the law is that the District Court in an evidentiary hearing on a removal petition must consider *all* the evidence relating to the purpose of the arrests and prosecutions, not simply the single question of probable cause.[86] The Judge here confined his inquiry to the issue of probable cause and overlooked everything else.

The legitimacy of this characterization is confirmed by the District Court's opinion. There are explicit findings that all of the arrests were made with probable cause, that the Highway Patrol maintained surveillance activities on the Mendenhall demonstrations, that Patrolman Baldwin knew none of the demonstrators before he arrested them and that he "apparently" was motivated by no "animosity," and that the protest activities and subsequent arrests were unrelated.

However, the Court made no explicit findings at all on the following relevant evidentiary issues and presumably declined to consider them:

(i) Whether the van was followed from Mendenhall by a Mississippi Highway Patrol car,

(ii) Whether Baldwin made the statements attributed to him by Huemmer (referring to the defendants as "niggers" and threatening them because of their Mendenhall protests),

85. The validity of this conclusion is somewhat tainted by other statements in the District Judge's opinion which suggest that he completely misconceived our holdings in *Achtenberg* and *Whatley*, *supra*. For example, he distinguished the present case from those the petitioners cited by pointing out that "the charges in every one of those cases not only related to, but actually stemmed from the enjoyment by those petitioners of a right positively given them by Congress under the public accommodations section of the Civil Rights Act." (App. 36).

Of course this is the discredited "scope of conduct" approach we have already rejected in *Achtenberg*. The District Court simply assumed the petitioners were "not arrested for doing anything they had a federal right to do" because they were not *charged* with what is under Mississippi law the criminal offense of protesting racial segregation (see note 95, *infra*). Such a finding is without any redeeming value.

86. The error here is precisely the same as that involved in Walker v. Georgia, 5 Cir., 1969, 417 F.2d 5 and the earlier unrelated case of Walker v. Georgia, 5 Cir., 1969, 405 F.2d 1191. In both of those instances the District Court had incorrectly assumed that its function was only to determine whether there was some evidence justifying the *arrests* of the defendants.

(iii) Whether Baldwin stated in his radio request for assistance, "I've got a truckload of niggers and there's a white with them,"

(iv) Whether Baldwin said to the students, "You niggers get back in the van,"

(v) Whether Huemmer was beaten by Officer Thames on the way to jail, and whether Thames had threatened Huemmer because of his Mendenhall civil rights activities,

(vi) Whether Thames had previously threatened Huemmer's life,

(vii) Whether Rev. Perkins swung at the sheriff,

(viii) Whether the sheriff beat Rev. Perkins with a blackjack,

(ix) Whether Rev. Brown had previously been arrested earlier in the day by one of the officers who was in the jail that night,

(x) Whether the prisoners in the jail were repeatedly referred to as "niggers," threatened or abused,

(xi) Whether the heads of two of the prisoners were shaved and moonshine whiskey poured on one of them,

(xii) Whether the sheriff or his deputies were drunk,

(xiii) Whether Sheriff Edwards said, "This is the smart nigger, and this is a new ball game, you're not in Simpson County now, you are in Brandon" (see note 18, *supra*),

(xiv) Whether Sheriff Edwards forced Rev. Perkins to read the demands of the Mendenhall demonstrators (see note 19, *supra*),

(xv) Whether the charges against the two leaders of the Mendenhall demonstrations and the circumstances surrounding the alleged offense justified the $5,000 bond,

(xvi) Whether there was any evidence to support the charge of reckless driving against Huemmer or the charges against the students for resisting arrest and carrying a concealed deadly weapon,

(xvii) Whether there was any evidence to support the charges against Rev. Perkins, Rev. Brown and Joe Paul Buckley for carrying concealed weapons, resisting arrest and inciting to riot.

In view of the evidence which the District Court failed to consider, his conclusion that the defendants "were not arrested by these officers for doing anything which they had a federal right to do" is not particularly surprising.

Throughout the hearing and its opinion the District Court repeatedly disclaimed any intention to determine the guilt or innocence of the defendants.[87] Certainly the Judge was correct in assuming that he was not required to try

87. "They may be innocent or guilty of these offenses but the only thing I want to find out [is] what federal right these state officers violated for them to be petitioners here. I don't believe the petitioners coming here have any right to speed or resist arrest or carry concealed weapons. Those are not federal rights * * *." (Tr. 164.)

"This court does not find it necessary in a proper discharge of its function to decide as to the guilt or innocence of any of these petitioners." (App. 32.)

The Court here falls into the same trap when it states that "if there is in fact no basis for the charges, that deficiency will be exposed by the evidence adduced and a directed verdict of acquittal will necessarily follow as a matter of law." Such a statement may be perfectly appropriate when there is *some* evidence advanced by the State to justify an inference of good-faith criminal prosecution. Cf. Cameron v. Johnson, *supra*, note 64, 390 U.S. at 621–622, 88 S.Ct. at 1341, 20 L.Ed.2d at 190–191. But it is not appropriate when there is *no evidence whatever* to support any of the charges and nothing at all in the record suggesting legitimate motives for the prosecutions. See notes 38, 58, 61 and 64, *supra*.

Moreover, despite suggestions to the contrary by the Court, we need hardly resolve credibility choices or conflicting inferences to reach my conclusion. The evidence compelling it is undisputed. In any event there can be no conceivable justification for leaving these supposed "credibility choices" to the District Court when the record is clear that with respect to seventeen material issues of fact the District Court declined to make any findings at all but instead viewed those issues as irrelevant to the most important question in the case. See text, *supra*.

State criminal charges in a Federal court on a petition for removal.[88] But he went further and assumed that he was not even obligated to consider the sufficiency of the evidence as one of the factors—not as the sole factor, but as one of them—in the ultimate determination of the purpose for the arrest and prosecutions. Instead he relied on his findings of probable cause.[89]

The inadequacy of this sort of approach to the problems of proof presented by a civil rights removal action is obvious. Since the testimony of the interested parties is almost invariably confusing and contradictory,[90] an utter absence of evidence to support a criminal charge becomes of critical significance to a determination of whether or not the arrest and prosecution are racially motivated. There can be no meaningful assessment of official motives when the ultimate consequences of official action have remained unexplored.[91] Particularly is this true when most of the defendants are black. It is no mere coincidence that Negroes have figured prominently in many of those cases in which the Supreme Court has reversed State convictions grounded on evidence so insufficient as to constitute a denial of due process of law. Barr v. Columbia, 1964, 378 U.S. 146, 84 S.Ct. 1734, 12 L.Ed.2d 766; Taylor v. Louisiana, 1962, 370 U.S. 154, 82 S.Ct. 1188, 8 L.Ed.2d 395; Garner v. Louisiana, 1961, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207; Thompson v. City of Louisville, 1960, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654; Cole v. Arkansas, 1948, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644; cf. Palmer v. City of Euclid, 1971, 402 U.S. 554, 91 S.Ct. 1563, 29 L.Ed.2d 98; Johnson v. Mississippi, 1971, 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed.2d 423; Bouie v. Columbia, 1964, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894.

Given the indisputable fact that the District Court's finding regarding the purpose for the arrests and prosecutions [92] is grounded on an inadequate assessment of the evidence resulting from the erroneous application of an improper legal standard, we are not bound in reviewing this record by the familiar restrictions of Rule 52.[93] The pertinent

88. Cf., my opinion for the Court in United States v. Holmes County, 5 Cir., 1967, 385 F.2d 145, 149.

89. In only a single case have we even suggested that a finding of probable cause, apart from a consideration of all the evidence produced in the hearing, is by itself a sufficient ground for concluding that the arrest was not undertaken for an illegitimate purpose. Presley v. City of Monticello, 5 Cir., 1968, 395 F.2d 675, 676. In that case, however, other testimony refuted the claim. While the petitioner contended that he had been arrested only for trying to use a "white only" restroom at a service station, there was independent evidence establishing that he was loud and had been drinking. There is no equivalent evidence here.

90. See, e. g., note 104, *infra*.

91. In connection with an equivalent problem involving the propriety of injunctive relief under the Voting Rights Act of 1965, Judge Wisdom has pointed out that "the Act does not exempt from its prohibition acts directed against persons guilty of crime. It does exempt acts done for purposes other than interfering with the right to vote. It is here that the probable guilt or innocence of the person arrested becomes relevant. If the person is clearly guilty, the probability that the police have acted for a legitimate reason is much greater than it is if the arrest is clearly baseless." United States v. McLeod, 5 Cir., 1967, 385 F.2d 734, 744.

92. Perhaps the single greatest shortcoming of the District Court's opinion is that, while holding that the purpose of the arrests was *not* to intimidate the exercise of Federally protected rights, it does not once suggest any other conceivable legitimate motive that might have prompted the State's action here. There can be no such suggestion, of course, because there are no legitimate motives underlying these arrests and prosecutions.

93. "When the fact-finder has failed to employ the proper legal standard in making its determination the finding may not stand." Ferran v. Flemming, 5 Cir., 1961, 293 F.2d 568, 571; United States v. Pickett's Food Service, 5 Cir., 1966, 360

testimony is almost wholly uncontradicted by the State of Mississippi. No one, least of all the District Judge who conducted the hearing, has yet suggested or could suggest that it does not accurately and extensively present the full picture of what transpired during the Mendenhall march on U. S. Highway 49 and at the Rankin County jail on the night of February 7, 1970. Our prior decisions point the way. "Where there has been an adequate hearing and the *undisputed facts* show an utter absence of evidence to support the state charge, the proper cause is for this court to remand to the district court with directions to dismiss [the charge]." Walker v. Georgia, 5 Cir., 1969, 417 F.2d 1, 11.

The Relevance of Circumstantial Evidence

Of course, when (as here) the conduct charged as a criminal offense is not the conduct immunized by Federal law against State criminal prosecution, the fact that there is not one shred of evidence to support the charges still does not automatically mandate a finding that the proceedings have been initiated exclusively for the proscribed purpose. As *Peacock* teaches, even false charges against individuals who have recently exercised equal civil rights are not removable on that showing alone. Moreover, if there is at least some evidence underlying the prosecutions, that fact may very well tip the balance in favor of the State, even though its action may have racially discriminatory overtones. The issue is the nebulous and evasive one of purpose or motivation, and in resolving it we must necessarily presume the legitimacy of the State's purpose and the purity of its motives.

But we must also take account of our own common experiences, not merely as Judges, but as men. When the Court states in its opinion that there is no testimony that Baldwin knew the identities of the van's occupants when he stopped it, and refers to his "undisputed testimony" that he made a "routine traffic arrest," it is surely by implication prescribing a completely unrealistic standard of proof that could seldom be met, confined as it is to the testimony of the officer himself. No one but Baldwin could possibly have offered direct testimony of his intentions that afternoon on Highway 49. If the purpose of the arrests was in fact to forcefully injure, intimidate or interfere with the petitioners because they had participated in the Mendenhall demonstrations earlier in the afternoon, Baldwin would have been rather unlikely to admit it, particularly since the maximum criminal penalties for such conduct under § 245 are a $1,000 fine and imprisonment for one year when bodily injury does not result. We cannot obliquely require self-incriminatory testimony as a precondition to the vindication of Federal rights.

In assessing the legitimacy of the motives underlying official action we have previously recognized that the "coercive purpose cannot be proved by direct evidence. We must look to circumstantial evidence and develop a standard to measure the adequacy of the * * * proof." United States v. McLeod, 5 Cir., 1967, 385 F.2d 734, 741. Were we now suddenly to demand in every removal case an admission from the officers who made the illegal arrests and filed the frivolous charges, § 1443(1) would obviously shrink to no more than a useless appendage on the body of Federal civil rights law, a "remedy" in name only. Such an alternative does not easily commend itself for serious consideration.

Instead, we must consider all the relevant evidence, including that offered by the police officers, to determine whether the purpose of the arrests and charges was to intimidate Mendenhall demonstrators, rather than to enforce conced-

F.2d 338, 341; Dilworth v. Riner, 5 Cir., 1965, 343 F.2d 226, 232; Mitchell v. Mitchell Truck Line, Inc., 5 Cir., 1961, 286 F.2d 721; Henderson v. Flemming, 5 Cir., 1960, 283 F.2d 882; United States v. Williamson, 5 Cir., 1958, 255 F.2d 512; Mitchell v. Raines, 5 Cir., 1956, 238 F.2d 186.

edly legitimate State criminal laws against reckless driving, resisting arrest and other varieties of impermissible conduct. The Court's opinion here makes a start in that direction by suggesting three factors tending to prove a lawful purpose: (i) Huemmer had never had any previous encounter with Officer Baldwin prior to his arrest on Highway 49, (ii) neither Huemmer nor any of the other demonstrators had previously been arrested in Mendenhall, and (iii) the second vehicle following the Huemmer van was not stopped.[94] The Court then finds that this evidence "supports the finding that these individuals were not arrested because of their exercise of First Amendment, or other, Constitutional rights."

But this analysis, correct as far it goes, does not go nearly far enough. In considering the circumstantial evidence we must also necessarily consider the circumstances.

Advocacy of social equality between the white and black races—the activity involved in the Mendenhall demonstrations and sheltered against prosecution by Title I of the Civil Rights Act of 1968—is a criminal offense in Mississippi.[95] On the date of the events in question all Mississippi law enforcement officers were under a statutory duty imposed by the State Legislature to "lawfully" prohibit any attempt to cause "a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly" in the State.[96] While that statute was in ef-

94. By implication the Court also suggests that the subsequent three arrests at the Rankin County jail were motivated by legitimate purposes because the act by three black men of parking a car containing firearms in front of a Mississippi jail on a Saturday night, while not illegal in itself, was nevertheless under the circumstances improvident, immoral or "belligerent." Even conceding all that, arrests for improvidence, immorality or belligerence are still not justified under State law and, in this case, under Federal law as well.

95. "Races—social equality, marriages between—advocacy of punished.

Any person, firm or corporation who shall be guilty of printing, publishing or circulating printed, typewritten or written matter urging or presenting for public acceptance or general information, arguments or suggestions in favor of social equality or of intermarriage between whites and negroes, shall be guilty of a misdemeanor and subject to a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both fine and imprisonment in the discretion of the court." Miss.Code Ann. § 2339.

96. "§ 4065.3. Compliance with the principles of segregation of the races.

1. That the entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor, the lieutenant governor, the heads of state departments, sheriffs, boards of supervisors, constables, mayors, boards of aldermen and other governing officials of municipalities by whatever name known, chiefs of police, policemen, highway patrolmen, all boards of county superintendents of education, and all other persons falling within the executive branch of said state and local government in the State of Mississippi, whether specifically named herein or not, as opposed and distinguished from members of the legislature and judicial branches of the government of said state, be and they and each of them, in their official capacity are hereby required, and they and each of them shall give full force and effect in the performance of their official and political duties, to the Resolution of Interposition, Senate Concurrent Resolution No. 125, adopted by the Legislature of the State of Mississippi on the 29th day of February, 1956, which Resolution of Interposition was adopted by virtue of and under authority of the reserved rights of the State of Mississippi, as guaranteed by the Tenth Amendment to the Constitution of the United States; and all of said members of the executive branch be and they are hereby directed to comply fully with the Constitution of the State of Mississippi, the Statutes of the State of Mississippi, and said Resolution of Interposition, and are further directed and required to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court of May 17, 1954 ([Brown v. Board of Edu-

fect this Court had occasion to consider at least one instance in which a deputy sheriff overzealously carried out his duty by conspiring with the Ku Klux Klan to murder three young civil rights workers.[97] And the law itself was no more than a pale reflection of what Judge Wisdom has termed Mississippi's "steel-hard, inflexible, undeviating official policy of segregation." United States v. City of Jackson, 5 Cir., 1963, 318 F.2d 1, 5, on rehearing, 320 F.2d 870.[98]

What the Record Reveals

This is the context. Now for a quick recap of the testimony offered by the petitioners: a vehicle carrying 18 blacks and 2 whites is stopped by a Mississippi Highway Patrolman a few hours after all of its occupants have participated in a peaceful march protesting racial discrimination in a nearby town. The Highway Patrol has kept the march under rigorous surveillance, and one of the vehicle's passengers notices a patrol car following them out of town.

After placing the driver of the vehicle in the patrol car, the officer asks him whether he and his passengers were participants in the demonstration. Upon receiving an affirmative answer, the patrolman threatens his subject, refers to the passengers as "niggers," and then radios for assistance. He calls to two of the vehicle's occupants who have gotten out, "You niggers get back in that van." They do.

A few minutes later between four and six patrol cars pull up, and the officers get out with drawn guns. Rather than ticketing the driver for a minor traffic offense, they arrest him and his passengers, handcuff them, and take them to jail. The driver claims that on the way

cation] 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873) and of May 31, 1955 ([Brown v. Board of Education] 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083), and to prohibit by any lawful, peaceful, and constitutional means, the causing of a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government, any person employed by the federal government, any commission, board or agency of the federal government, or any subdivision of the federal government, and to prohibit, by any lawful, peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state.

2. The prohibitions and mandates of this act are directed to the aforesaid executive branch of the government of the State of Mississippi, all aforesaid subdivisions, boards, and all individuals thereof in their official capacity only. Compliance with said prohibitions and mandates of this act by all of aforesaid executive officials shall be and is a full and complete defense to any suit whatsoever in law or equity, or of a civil or criminal nature which may hereafter be brought against the aforesaid executive officers, officials, agents or employees of the executive branch of State Government of Mississippi by any person, real or corporate, the State of Mississippi or any other state or by the federal government of the United States, any commission, agency, subdivision or employee thereof."

The Legislature repealed this statute on April 3, 1970. See S.B. 2380, Adv. Sheet, Gen.Acts, 1970 Sess., No. 7, p. 4. At the same time it also repealed criminal laws providing for racially segregated railroad cars, toilet facilities, and waiting rooms for common carriers. Laws, 1970, ch. 374, § 2.

97. See note 74, *supra*. The murders of Schwerner, Goodman and Chaney provided significant impetus for enactment of § 245 and were repeatedly mentioned during debate on the measure in Congress. See, e. g., 114 Cong.Rec. 9589–90 (1968) (remarks of Congressman Ryan).

98. "We find that terror hangs over the Negro in Mississippi and is an expectancy for those who refuse to accept their color as a badge of inferiority." Report of the Mississippi Advisory Commission to the U. S. Commission on Civil Rights, Administration of Justice in Mississippi 23 (1963).

he is beaten by a Highway Patrolman who has previously made threats to do precisely that, or worse, if he did not give up his civil rights activities.

Two of the Negro leaders of the protest march and a third black man, hearing of the arrests, go to the jail for the purpose of posting bond for those arrested. After parking in front of the jail and getting out of their car they are immediately arrested by 12 officers and taken inside. One of them is beaten on the way.

Once inside the jail two of the three prisoners and the driver arrested earlier are beaten with blackjacks, kicked, punched and verbally abused. During these proceedings the county sheriff forces the leader of the afternoon demonstration to read the demands made by his group, after telling him that he is a "smart nigger" and that his presence in the county constitutes "a whole new ballgame." The sheriff's son, who earlier participated in the Highway Patrol surveillance of the demonstration, is in the jail at the time, as are approximately 15 other law enforcement officers.

Subsequently two of the three organizers of the civil rights march have their heads shaved, and the sheriff himself pours moonshine whiskey over one of them. The prisoners are then kept in jail overnight and most are released the following day, although one—whose head has been split open with a blackjack—remains in jail all day Sunday and is finally released on Monday after posting the $5,000 bond demanded by the sheriff.

The State of Mississippi counters with the claim that it is all a coincidence and produces one witness—the sheriff—who denies that he struck anyone with a blackjack, a denial similar to one he has made six years earlier under similar circumstances. The sheriff says that after the civil rights leader swung at him he responded with two or three blows of his fist and that there was a general disturbance. Although he was in the room at the time, the sheriff cannot say "who hit who." The sheriff denies that any of his men were drinking because he doesn't allow it. The sheriff admits that he personally poured moonshine whiskey on one of his prisoners after ordering their heads shaved.

There are many other major and minor details, of course, but these are the highlights. My conception of a "routine traffic arrest" is at variance with the Court's. As a Judge I cannot be blind to what everyone else can see. United States v. Mississippi, S.D.Miss., 1964, 229 F.Supp. 925, 998 (dissenting opinion), reversed, 1965, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed. 2d 717.[99]

The Charges

Certainly no violation of Federally protected rights is involved simply because a vehicle is stopped for a routine traffic violation. Police officers enforcing the traffic laws of their State are not at all hampered by the coincidence that the driver they are ticketing may have happened at some time in the near or remote past to have taken part in activities that Congress has seen fit to immunize against official intimidation. Such collateral incidents do not by themselves show the intimidatory purpose requisite for removal relief.[100]

As I have pointed out, however, the petitioners here have shown much more. They have established that even though Patrolman Baldwin may not have known who they were prior to stopping the van, he was aware of their identities before

99. In N. A. A. C. P. v. Thompson, *supra*, note 84, the Court concluded on the basis of similar facts that Federal injunctive relief against the municipal officials of Jackson was warranted despite a holding by the District Court that it was not. "The record discloses a pattern of conduct on the part of the officials of the city of Jackson that leads us to the conclusion that defendants took advantage of every opportunity, serious or trivial, to break up these demonstrations in protest against racial discrimination, and that a large number of the arrests had no other motive, and some had no justification whatever, either under municipal, State, or Federal law." 357 F.2d at 838.

100. See note 50, *supra*.

he arrested them and took them all into custody with the assistance of the officers he had called.[101] They have demonstrated that Sheriff Edwards likewise knew before he beat them up that his three late arrivals included the two black leaders of the Mendenhall civil rights movement. They have presented abundant evidence that the sequence of events beginning on Highway 49 and ending in cells at the Rankin County jail was not simply an unforeseen coincidence arising only from a legitimate effort to enforce State traffic laws. To this extent they have gone far toward proving the necessary causal relationship between the afternoon protest demonstration and the subsequent mass arrests several miles and several hours later.

And yet, thus far, we have not even directly considered the most crucial fact of all: the undisputed and indisputable lack of any evidence whatever to support the criminal charges against the defendants. If there were some evidence—*any* evidence—tending to show that any of the petitioners committed a criminal offense, it might at least have some bearing on the otherwise uncontested inferences to be drawn from the circumstances previously described. We need not try the defendants here in order to consider the point. The question is not whether they are innocent or guilty. It is simply whether there are *any* facts in this record, no matter how tenuous or remote, suggesting that the criminal charges have been brought in good faith for the justifiable purpose of enforcing Mississippi law.

There is no such evidence. At the hearing in the District Court the petitioners presented overwhelming proof that all of the charges pending against them are totally without foundation. Rather than attempting to counter this massive barrage of testimony, the State of Mississippi stood virtually mute. Under such circumstances silence by itself constitutes evidence of the most convincing character. Interstate Circuit, Inc. v. United States, 1939, 306 U.S. 208, 226, 59 S.Ct. 467, 474, 83 L.Ed. 610, 620.

Considered from this perspective we must conclude that Douglas Huemmer and his 19 passengers were arrested and charged and now face prosecution in the State courts because—and *only* because—they had participated earlier in the day in the Mendenhall protests, activities immunized against official intimidation by the Civil Rights Act of 1968. Rev. Perkins, Rev. Brown and Buckley were similarly treated because—and *only* because—they had dared to exercise their Federally protected right to protest racial segregation in Simpson County. There is simply no other rational explanation to account for what happened.[102]

The Highway 49 Arrests

The pending State prosecutions against Huemmer's 19 passengers involve two charges: (i) resisting Huemmer's arrest, and (ii) possession of a concealed deadly weapon, which Baldwin's arrest ticket describes as a brick. Huemmer is charged with (i) resisting his own arrest, (ii) brick-carrying, and (iii) reckless driving.

Passive Resistance

The first charge is preposterous. The students testified that the group was

101. See note 13 and text, *supra*. For some inexplicable reason the Court has apparently assumed that the critical issue is whether Baldwin knew when he *stopped* the van that it contained the Mendenhall demonstrators. Of course, absence of knowledge at that point is irrelevant. The question is whether the defendants subsequently were arrested, taken into custody and prosecuted only because of their participation in the Mendenhall demonstration. Before any of that transpired the arresting officers knew their identities.

102. The conclusive character of the circumstantial evidence presented here is even stronger than that in United States v. McLeod, *supra*, note 91, where the Court concluded that "a baseless arrest and prosecution of a person prominently active in a voting drive compels the in-

quiet and orderly.[103] By Baldwin's own account none of the 19 did or said anything whatever that could rationally have been construed as resistance to Huemmer's arrest, nor did Huemmer. In fact, in his testimony Baldwin was unable to satisfactorily explain why he had arrested any of them at all,[104] other than by suggesting that "someone"—not everyone, or most of them, or even two, but *someone*—had requested the arrest.[105] Such a request, even if "someone" had

ference of an unlawful purpose to interfere with the right to vote." 385 F.2d at 744–745.

103. For example, Manorris Odom testified as follows:

"Q Mr. Odom, did you do anything at all to interfere with the duty of the highway patrolman on the scene?

A No I did not because when I was ordered to get out of the van there were at least four or five patrolmen out on the ground and who was going to do anything when the patrolmen had guns?

Q Did you hear any student make a threat or make any obscene gesture to the officers?

A No, I did not.

Q Was the group loud?

A No they weren't.

Q Did the group curse?

A No, they did not."

(Tr. 238.) This testimony was confirmed by Jacqueline Johnson, one of the other students. Neither Baldwin nor anyone else refuted it.

104. "Q Now Officer none of the people in the van actually resisted your arrest there at Plain, did they?

A No." (Tr. 153.)

* * * * *

"Q Now, why did you arrest these people that got out of the van, Officer?

A Well when they got out of the van I felt like they were putting my life in jeopardy.

Q When they got out of the van did they have any weapons in their hands?

A Not that I saw, but you couldn't look at anybody 10 feet and tell where they've got weapons or not.

Q Did they make any threats directly to you?

A Not directly, no."

(Tr. 148.)

* * * * *

BY THE COURT: Well I want to find out this. This man that was driving the car, did he resist arrest?

BY THE WITNESS: He did when we got him to jail.

BY THE COURT: He didn't resist when you stopped him?

BY THE WITNESS: No sir, I didn't have him charged with resisting arrest when I stopped him.

BY THE COURT: You just charged him with the traffic violation?

BY THE WITNESS: Yes, sir.

BY THE COURT: All right, as of that time, at the original time of this traffic violation, did anybody else, anybody referring to the passengers on that bus, did anybody else do anything toward resisting arrest?

BY THE WITNESS: No, nobody.

BY THE COURT: But nevertheless, you arrested all of them?

BY THE WITNESS: Yes, sir.

BY THE COURT: What did you arrest them for?

BY THE WITNESS: I arrested the ones outside for interfering with my duty, that's the only charge that I had at that time.

BY THE COURT: That's what I'm trying to find out. What were they doing? What were they doing to interfere with your duty?

BY THE WITNESS: Well they started coming out of the truck after I told them to get back in. Just the driver of the truck was out there and myself, and if more of them got out there was a chance that they put my life in jeopardy right there.

* * * * *

BY THE COURT: All of them, including these eight that got out last, didn't do anything at that time toward resisting arrest? Is that right?

BY THE WITNESS: Yes, sir.

BY THE COURT: But nevertheless, you charged them with resisting arrest?

BY THE WITNESS: I didn't charge them with that at the scene.

BY THE COURT: That's what I'm getting after. You did not charge them with resisting arrest at the scene. It was at the jail that you charged them with resisting arrest, is that what you're talking about?

BY THE WITNESS: At the jail, yes, sir."

(Tr. 159–62.)

The District Court concluded that "the patrolman was very vague and indefinite in his testimony about the participation of the nineteen students in resisting arrest * * *." (App. 29.)

105. See note 10, *supra*.

made it, could not have validated an otherwise illegal arrest of that person. Pierson v. Ray, 1967, 386 U.S. 547, 558, 87 S.Ct. 1213, 1219, 18 L.Ed.2d 288, 297.

Baldwin might have been attempting to advance the explanation that Huemmer and the others did not actually resist their arrests on the highway but waited until later, presumably for a more appropriate moment, until they were actually inside the jail.[106] This explanation is patently frivolous in view of the fact that the arrests obviously took place on the highway, not within the security of the Rankin County courthouse. If somehow the custody (including handcuffs) and restraint of the prisoners' liberty did not constitute an arrest until after the defendants were actually at the jail—and such a supposition is utterly incredible—resistance there *still* could not be characterized as "resisting arrest" if the prisoners were unlawfully confined or restrained in the first place. It is not a crime in Mississippi to resist an unlawful arrest but only to "obstruct or resist by force, or violence, or threats, or in any other manner, [a] *lawful* arrest or the *lawful* arrest of another person." Miss. Code Ann. § 2292.5 (emphasis added). "The offense of resisting arrest presupposes a lawful arrest. A person has a right to use reasonable force to resist an unlawful arrest." Smith v. State, Miss. S.Ct., 1968, 208 So.2d 746, 747 and cases cited therein. On the basis of this decision alone we may discount as absurdities all charges of resisting arrest.

The Concealed Deadly Brick

With regard to the concealed deadly weapon charge, I assume that the Mississippi Legislature has not yet resolved to characterize the simple possession of a brick as a criminal offense, or to stigmatize every bricklayer as a potential criminal. Certainly the State's concealed weapons statute,[107] which particularly enumerates a wide variety of prohibited items, does not mention bricks, either generally or specifically. If it did mention bricks there would still be no basis for concluding that merely riding as a passenger in a vehicle containing a brick constitutes actual or constructive possession of it. No one held a brick, or brandished one, or used one in a menacing manner to threaten any of the officers. There was simply a brick in the van—that's all.

The District Judge adopted a slightly different approach. He found that there was probable cause for the arrest of the 19 students "for resisting arrest and having a least constructive possession of a *shotgun* in the vehicle at the time when one or more of them announced their decision that all or none of them should be taken to jail; or stated that defiantly, that if one of them was arrested all of them would have to be arrested and it must be realized that this patrolman was alone and of a different race, on a country road and in the presence of a very hostile and disrespectful group who had the 'difference' with them in the form

106. Unfortunately, he also admitted that he had seen no one resisting arrest there (Tr. 167). Moreover, all of the charges against the students were returnable to the Justice of the Peace at Florence, who had jurisdiction over that point at Highway 49 where the van was stopped, and all of the arrest tickets showed Plain as the location of the alleged offenses.

When asked why he had charged John Smith with resisting arrest (see Appendix A), Baldwin could not remember and doubted whether he could even identify that individual (Tr. 164).

107. "Carrying of deadly weapons.

Any person who carries, concealed in whole or in part, any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, slingshot, pistol, revolver, or any rifle with a barrel of less than sixteen (16) inches in length, or any shotgun with a barrel of less than eighteen (18) inches in length, machine gun or any fully automatic firearm or deadly weapon, or any muffler or silencer for any firearm, whether or not it is accompanied by a firearm, or uses or attempts to use against another person any imitation firearm, shall upon conviction be punished as follows * * *." Miss. Code Ann. § 2079.

of a shotgun to back up their decisions." (App. 33) (emphasis added).

This statement is unusual in several respects. In the first place there was no direct testimony that the van contained a shotgun,[108] much less a shotgun the possession of which was unlawful under the Mississippi concealed weapons statute, and there was no evidence of any kind that such a shotgun (if it actually existed) was concealed or that it was in either the actual or constructive possession of any or all of the prisoners, or that Baldwin based his arrest on possession of a shotgun, or that any of the prosecutions involved possession of a shotgun rather than the brick referred to in Baldwin's arrest tickets as the basis for the arrests.[109]

Moreover, the District Court's characterization of the conduct of the group as "defiant," "hostile" and "disrespectful" finds no support whatever in the record. There is simply no testimony to justify the use of such adjectives. And I assume this Court would be unwilling to sanction a finding of probable cause based solely upon the fact that the officer was "alone and of a different race," particularly since the actual arrests were not made until after at least four to six of his fellow officers had arrived on the scene with their pistols drawn. Of course, they were all white.

The Reckless Driver

Baldwin allegedly *stopped* Huemmer for reckless driving. But by his own admission he *arrested* him and took him into custody (rather than simply giving him a ticket) not because of his driving but "because of his passengers" (Tr. 140). Yet Baldwin's testimony [110] by itself conclusively establishes that there was no foundation for the charge because Huemmer was not driving in the

108. Baldwin made no reference to the mythical shotgun on direct examination. On cross examination he testified in response to a leading question by the State that Huemmer had told him in the patrol car that the van contained a shotgun (Tr. 173). Judge Cox overruled the objection that the testimony was hearsay and not admissible, then proceeded to base his finding of probable cause on it. There is no other evidence to support the finding that there was a shotgun in the van. *But see* note 109.

109. There was apparently a mix-up in the Mississippi law enforcement backfield at this point. Sheriff Edwards' testimony was that "someone" with the Highway Patrol delivered to his office several items allegedly taken from Huemmer's van, including several knives, two forks with the middle tines turned down, and a pistol (rather than a shotgun) (Tr. 334). None of the defendants were arrested for or charged with possession of any of these items. The "knives" the sheriff referred to were silverware (Tr. 336). As for the forks, see note 18, *supra*.

110. "Q Well, I'm asking you what your testimony is. What are the facts of the situation? What did you see the van do in terms of the facts, what were the motions of the van?

A He was going from the right hand lane to the left lane and back and weaving.

Q Now, when you say weaving you mean he was going from the right hand lane to the left hand lane and back again, is that right?

A Not completely in the left hand lane but enough to take up both of the lanes, and back.

Q Now, how many times did you see the van do that?

A Several.

Q Several times, now could you give us the number on that?

A No.

Q Was it twice?

A Could have been.

Q Was it more than twice?

A It's possible.

* * * * *

Q Well you said you saw the van changing lanes several times, is that once?

A *No sir, he didn't change lanes.*

Q He didn't change lanes?

A I said he was weaving back and forth.

Q I believe it was your earlier testimony that the van was changing lanes?

A He didn't go completely in the left hand lane, he went far enough over to block both of the lanes.

* * * * *

A Well the white van crossed the center line and almost hit that car.

"reckless" manner proscribed by the statute.[111] As the Mississippi Supreme Court has held in a situation involving negligent collision:

> "The most favorable view that can be taken of the state's evidence is that the accused neglected to be on a constant lookout to see an approaching vehicle in time to stop his car before striking it. There is no proof that he was driving in a reckless manner or at a rate of speed such as to indicate a wilful or wanton disregard for the safety of persons or property. * * * At most, he was shown to be guilty of mere negligence, and liable only in a civil action. It was evidently not the purpose of the statute here involved to punish as criminal such acts of simple negligence, or even where gross negligence is shown, in traffic accidents unless it is of such character as to evince a wilful or wanton disregard for the safety of persons or property on the highways."

Sanford v. State, 1944, 195 Miss. 896, 16 So.2d 628, 629; see also One 1948 Pontiac Automobile v. State, 1954, 221 Miss. 352, 72 So.2d 692, 696; Gause v. State, 1948, 203 Miss. 377, 34 So.2d 729, 730. If an actual collision, standing alone, is not sufficient to establish the offense, Huemmer could hardly have committed the offense by merely *almost* having a collision, particularly when Baldwin admitted that Huemmer was not drunk and was not speeding (Tr. 121, 141).[112]

The Rankin County Jail Arrests

Rev. Perkins, Rev. Brown and Joe Paul Buckley were charged with three offenses: (i) inciting to riot, (ii) resisting their own arrests at the jail, and (iii) possesson of a concealed deadly weapon. Their mission was a peaceful one—to post bond for those who had already been arrested and who were inside the jail. Of course one might assume, as the Court apparently does, that the mere fact of even lawfully carrying weapons in an automobile to a parking space in front of a Mississippi jail on a Saturday night somehow justifies the arrests of the three men who drove the car and rode in it as passengers. But I believe we may safely discount any implication here that Rev. Perkins—the father of eight children, an ordained

> Q All right, could you see how far across the center line the white Dodge van went?
>
> A His left two wheels crossed the center line.
>
> * * * * *
>
> Q Now does the Highway Patrol have any written instructions or policies as to when to take the driver of a vehicle to jail or when to give him a ticket and let him go on?
>
> A I don't know of any.
>
> Q Now, what is your policy, Officer Baldwin?
>
> A I don't particularly have a policy on it.
>
> Q Is it highly in your own discretion as to when to do that?
>
> A Yes."
>
> (Tr. 129, 130, 138, 139–40.) (Emphasis added.)

1. Miss.Code Ann. § 8175 defines the offense as the driving of "any vehicle in such a manner as to indicate either a *wilful* or a *wanton* disregard for the safety of persons or property" (emphasis added).

112. By citing Barnes v. State, 1964, 249 Miss. 482, 162 So.2d 865 for the proposition that Huemmer's arrest was supported by probable cause, the Court here falls into the same error that the District Court committed by assuming that a finding of probable cause is conclusive, or almost conclusive, on the issue of removability. The question is *why* Huemmer was arrested, not whether the arrest was technically legal. The Civil Rights Act of 1968 does not exempt arrests made with probable cause from the scope of its prohibition if their only purpose is to interfere with the exercise of Federally protected rights.

Significantly, however, the *Barnes* case does not even support a finding of probable cause because the opinion contains no explicit statement of the facts involved there. Whatever the term "wobbling and swaying" meant on the record before the Mississippi Supreme Court, it obviously entailed much more than simply crossing a lane divider "several times" over a distance of four or five miles, which was the only evidence of Huemmer's "recklessness."

minister and the acknowledged leader of the civil rights movement for an entire Mississippi county—had any unlawful purpose in mind.

While the opinion of the District Court states that the men "sought in an attitude of belligerency to extricate [the prisoners] from their custodian" (App. 30), this is merely one more assertion that finds no support whatever in the record. It is contradicted by the testimony of one of the arresting officers (see note 117, *infra*).

The District Court also found that Rev. Perkins, Rev. Brown and Buckley were advised by the sheriff that a black attorney was coming from Jackson to make bond for the prisoners and that Sheriff Edwards "requested that such matters be allowed to follow their regular course by awaiting the arrival of this attorney with these bonds." (App. 30–31.) The relevant testimony by the sheriff on this point is as follows:

> "* * * During the time that these were being booked I was advised by one of the patrolmen that there was a second bus load that had arrived outside, I asked some of the officers if they were under arrest and if they were in custody and they said they weren't. I called one of my deputies and told him for him and one or two of the State's boys to go out there and tell these people that they weren't charged with anything and that the attorney knew that we had these other subjects there, for them to advise them to leave, *they couldn't make them leave*, but I told them to advise them to leave, that they had no business here at this time of the night. * * * So they were advised and then I was advised that they had gone * * *." (Tr. 324–25.) (Emphasis added.)

From these statements alone the Trial Judge apparently inferred (i) that the sheriff "told" Rev. Perkins, Rev. Brown and Buckley that an attorney (who actually did not arrive until the next morning) was on the way, and (ii) that the three men knew before they were arrested that an attorney had been notified. Obviously neither of these inferences is warranted.[113]

Inciting to Riot

This charge comes closest to describing what actually happened inside the jail when the sheriff and his deputies employed "rather violent force" against their prisoners. Under Mississippi law a riot is defined as "any use of force or violence disturbing the public peace, or any threat to use such force and violence, if accompanied by immediate power of execution, by two (2) or more persons acting together and without authority of law."[114] "Inciting to riot" is "the urging or instigating or leading [of] others to riot by *organizing* or *promoting* or *encouraging* others to participate in a riot."[115] Needless to say, there is no evidence whatever that any of the defendants "organized" or "encouraged" or "promoted" a riot while in the Rankin County jail. Although he was in the room during the entire period Sheriff Edwards could not even accurately describe the incidents that transpired after Rev. Perkins allegedly swung at him.[116]

113. The foregoing testimony by Sheriff Edwards is also the only basis in the record for this Court's assumption that the three men went to the parking place in front of the jail "after visiting hours." There is no other evidence even remotely suggesting what the jail's visiting hours (or the visiting hours for its parking places) were.

114. Miss.Code Ann. § 2361.5–01(A). Enacted in 1968, this felony statute apparently has not yet been judicially construed.

115. Miss.Code Ann. § 2361.5–01(B) (emphasis added).

116. "BY THE COURT: Who do you refer to as a melee breaking out?
BY THE WITNESS: That's when the fight broke out and the officers came on out when the licks were passed between Perkins and me Judge, and the officers came out and there was some hitting. I didn't see who hit who but there was a fracas." (Tr. 340–41.)

Resisting Arrest

All three of the defendants were arrested outside the jail and then taken inside. The alleged offense of resisting arrest therefore must have taken place at Rev. Perkins' car, since once inside the building the prisoners had already been arrested and confined in the custody of between seven and twelve law enforcement officers. Yet the uncontradicted testimony of everyone,[117] including the sheriff,[118] is that no one resisted arrest before the trouble inside broke out. And if the three men were through some oversight not actually "under arrest" until they were inside the jail, Mississippi law still gave them "a right to use reasonable force to resist an unlawful arrest." Smith v. State, *supra*. On any theory this charge is thus totally groundless.

The Shotgun

Rev. Perkins and the other two defendants were also charged with carrying a concealed weapon, described in the charging affidavit of the arresting officer as a 12-gauge shotgun (see Appendix B). Carrying an ordinary shotgun, whether concealed or not, is not a crime in Mississippi,[119] and there was no evidence suggesting that the barrel of Rev. Perkins' shotgun was sawed off so as to bring it within the State's concealed weapons statute. In any event the uncontradicted testimony is that the weapons in the car were not concealed,[120] and there is likewise no dispute that when the men got out of the automobile the weapons remained inside until after they were arrested. Neither Rev. Brown nor Buckley was ever in either actual or constructive possession of any firearm, having merely been passengers in the vehicle, and under Mississippi law Rev. Perkins was entitled to carry even a *concealed* weapon because of previous threats to his life.[121] There is grim irony in the fact that the Mississippi Supreme Court has held that a complete defense

117. Officer Lloyd Jones of the Highway Patrol, who observed the Mendenhall march in the afternoon and then showed up at the Rankin County jail in time to help arrest Rev. Perkins and his associates, testified as follows:

"Q Now did any of these three give you any trouble at the time they were arrested?

A Not me, no sir.

Q They came along with you all right?

A Yes sir." (Tr. 181.)

Rev. Perkins testified that during the first Mendenhall march in December he and Jones had a "long conversation" in which "he did most of the talking because I was afraid, and he said a lot of things to me, things I wouldn't want to repeat in this court because of the ladies here." (Tr. 297.) Jones admitted that he had been given a copy of the Mendenhall protest demands and that he had read them (Tr. 99–100).

"Q And there had been no trouble prior to [the fight]?

A That's right.

Q No resisting of arrests?

A Up until that time there had been no trouble, that's right." (Tr. 341.)

See note 107, *supra*; cf. United States v. Pearson, 5 Cir., 1971, 448 F.2d 1207, 13 ("One quick glance at these bolt-ion full barrel rifles would have been enough to inform an officer that their possession was not prohibited under Mississippi law.").

120. Rev. Brown testified that earlier he had told Inspector Jones and a local FBI agent that the men were carrying guns for their own protection "up behind the back seat" in open view (Tr. 281).

121. Miss.Code Ann. § 2081(a) provides that a person charged with carrying a concealed deadly weapon may establish as a defense "that he was threatened, and had good and sufficient reason to apprehend a serious attack from any enemy, and that he did so apprehend." Rev. Perkins testified that he "had received many phone calls, threats, and it was widely known in Mendenhall that there were people offering thousands of dollars to kill me." (Tr. 301.)

Of course, Rev. Perkins did carry a pistol in his car, but he was neither arrested nor charged for that. As Sheriff Edwards testified (Tr. 325), all three men were arrested for the indisputably lawful possession of a shotgun and two rifles. Moreover, even if the pending prosecutions do in some way relate to the actual possession of a concealed weapon, the defendants obviously had "good and sufficient reason to apprehend a serious attack." The subsequent events inside the jail prove it.

to a charge of carrying a concealed weapon is made out by proof that the defendant was traveling or setting out on a journey taking him "beyond the circle of his friends and acquaintances." Morgan v. Town of Heidelberg, 1963, 246 Miss. 481, 150 So.2d 512, 516.

"Routine Arrests"

The District Court made no explicit findings with respect to the credibility of any of the witnesses. The only factual issues that were really disputed—whether Rev. Perkins or the sheriff swung first and whether the officers were drinking—were never resolved. Instead, relying entirely upon findings of probable cause for the arrests, without referring specifically to any of the petitioners' testimony regarding their treatment on Highway 49 and at the Rankin County jail, and by-passing entirely the allegations in the removal petition that the prosecutions were groundless and instituted solely for the purpose of intimidating the defendants because of their previous exercise of § 245(b) rights,[122] the District Court simply remanded on the basis of a general conclusory finding that the defendants "were not arrested by these officers for doing anything which they had a federal right to do." The fact that there is no evidence at all to support any of the charges was never even considered.

This Court is not required to sanction a finding so obviously the product of the District Court's misapprehension of the appropriate legal standard to be utilized in making it. The proper course would be to direct dismissal of the prosecutions since "there has been an adequate hearing and the undisputed facts show a valid case for removal." Walker v. Georgia, 5 Cir., 1969, 417 F.2d 1, 5. But at the very least the Trial Court should be required to make new findings based upon a correct application of the law to the facts.

Epilogue

Like Screws v. United States, 1945, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, "this case involves a shocking and revolting episode in law enforcement." It also provides us with still another classic example of the misuse of State criminal procedures for the sole purpose of intimidating the exercise of equal civil rights,[123] precisely the situation that § 1443(1) and *Rachel* were designed to correct. Yet somehow, for reasons not quite comprehensible to me, the Court concludes that civil rights removal jurisdiction should not be exercised and suggests that the appeal is wholly without merit.

Such a result is unfortunate enough on the facts now before us, but the precedent we set is even more ominous. Apparently any arrest that is "geographically and temporally remote" from the activities protected by § 245(b), no matter how plainly and exclusively motivated by the antecedent exercise of the Federal right to protest racial segregation, will automatically insulate the subsequent spurious criminal prosecution against a quick and painless death by removal to a Federal court, thereby encouraging the repetition of incidents like the present one. Our decision here is not merely incorrect. It is fundamentally inconsistent with the letter and spirit of the removal statute, the Civil Rights Act of 1968, and the constitutional guarantees underlying them.

I dissent. I would vacate the District Court's order and remand all of these prosecutions with instructions to dismiss the charges.

122. See note 68, *supra*.

123. See note 75, *supra*.

APPENDIX A — THE HIGHWAY 49 ARRESTS

Petitioner	Offenses Charged in Arrest Tickets of Patrolman D. O. Baldwin (Plaintiffs' Exhibit P-4)	Offenses Charged in Charging Affidavits of Patrolman D. O. Baldwin (R. 99-116; Pls. Ex. P-5)
Douglas B. Huemmer	Reckless driving; concealed weapon; resisting arrest	Reckless driving; resisting his arrest; possession of concealed, deadly weapon
Alfonso Todd, Jr.	Interfering with duty of law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer
Manorris Odom	Interfering with duty of law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
Ira Phil Freshman	Interfering with the lawful duty of a law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
Larry L. Lowe	Interfering with duty of law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
Roy L. Irons	Interfering with duty of law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
David Lee Nall	Interfering with duty of law officer resisting arrest; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
Rhonda Eulene Crisler	Interfering with lawful duty of law officer; concealed weapon (brick)	
Eugene M. Calhoun	Interfering with duty of law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon

[A4900]

(Continued)

Benay Anne Garrett	Interfering with duty of law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
Stanford R. Love	Interfering with duty of law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
Lynda Eloise Smith	Interfering with lawful duty of law officer; concealed weapon (brick)	Possession of concealed, deadly weapon
John Wesley Smith	Interfering with duty of law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
Charity Louise Shaw	Interfering with law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
Wilmer Standfield	Interfering with lawful duty of a law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
Jacqueline Johnson	Interfering with lawful duty of a law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
Loistine Hines	Interfering with duty of law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
Peggy Jo Hampton	Interfering with a lawful duty of law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon
Patricia Ann Wheeler	Interfering with the duty of law officer; concealed weapon (brick)	Possession of concealed, deadly weapon
Beverly P. Williams	Interfering with the duty of law officer; concealed weapon (brick)	Resisting arrest of Douglas B. Huemmer; possession of concealed, deadly weapon

[A4902]

APPENDIX B — THE RANKIN COUNTY JAIL ARRESTS

Petitioner	Offenses Charged in Charging Affidavits of Deputy A. B. Martin (R. 117-123; Pls. Ex. P-5
Rev. John M. Perkins	Inciting to riot; resisting his own arrest; possession of concealed, deadly weapon, a 12 gauge automatic shotgun
Rev. Curry Brown	Inciting to riot; resisting his own arrest, possession of a concealed, deadly weapon
Joe Paul Buckley	Inciting to riot; resisting his own arrest, possession of a concealed, deadly weapon
John Wesley Smith	Resisting his own arrest
Alfonso Todd, Jr.	Resisting his own arrest; possession of a concealed, deadly weapon
David Lee Nall, Jr.	Resisting his own arrest
Douglas B. Huemmer	Resisting his own arrest

[A4903]

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before JOHN R. BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

It is ordered that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

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