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CLEANSING MOMENTS AND RETROSPECTIVE JUSTICE

*Margaret M. Russell**

I. INTRODUCTION: “RE-TRYING” RACE

We live in an era of questioning and requestioning long-held assumptions about the role of race in law, both in criminal prosecutions specifically and in the legal process generally. Certainly, the foundational framework is not new; for decades, both legal literature and jurisprudence have explored in great detail the realities of racism in the legal system.¹ Even among those who might prefer to ignore the role of race discrimination in more than two centuries of American law, denial is no longer a viable or intellectually defensible option. Rather, debate now centers upon whether or not the extensive history of American jurisprudential race discrimination should affect the way we interpret or resolve current doctrinal dilemmas.

Perhaps the most well-known example of this requestioning is the burgeoning innocence movement, which emerged primarily from scientific DNA research that established the factual innocence of long-

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1. See, e.g., DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (2001); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (2000); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995); *CRITICAL RACE THEORY: AN INTRODUCTION* (Richard Delgado & Jean Stefancic eds., 2001); GEORGE M. FREDERICK, *RACISM: A SHORT HISTORY* (2002); LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002); IAN F. HANEY LOPÉZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS* (1978); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1998); JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2000); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1990); ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999).

incarcerated (including Death Row) defendants.² The extraordinary impact of the innocence movement lies in the compelling simplicity of its theoretical underpinnings: If innocent people have been and continue to be incarcerated and even executed, upon what claims of legitimacy does our criminal justice system rely? Moreover, if innocent people continue to serve out sentences (and even to await execution on Death Row), is there not a moral as well as legal imperative to reopen their cases and correct the past? To the extent that individual innocence cases may also reveal racial discrimination in the prosecution, conviction, and post-conviction phases, additional attention must be accorded to the impact of such prejudice upon racial communities and upon the credibility of the justice system as a whole.³

In a sense, the flip side (yet conceptual companion) of the innocence movement is the drive to reopen long-dormant, 1960s civil rights era prosecutions in an effort to correct both the individualized injustices and the broad community harms that flowed from those unresolved investigations and trials. These cases include the murders of: civil rights leader Medgar Evers; four girls killed in the Sixteenth Street Baptist Church bombing in Birmingham; and civil rights workers James Chaney, Michael Schwerner, and Andrew Goodman.⁴ In these cases, the racism of the era resulted in the failure either to pursue white supremacists — sometimes because those culpable were state actors — or to prosecute cases fully and vigorously. As a consequence of such malfeasance, white supremacists escaped prosecution or conviction, and remained at liberty well into old age — sometimes gloating publicly about the murders. The opportunity to bring these individuals to trial and possibly to correct the historical record represents what Myrlie Evers, widow of murdered civil rights leader Medgar Evers, has termed “cleansing moments” — the use of present-

2. For in-depth consideration of the rise of innocence movements, see BARRY SCHECK & PETER NEUFELD, *ACTUAL INNOCENCE* (2000). For examples of leading innocence projects, see Benjamin N. Cardozo School of Law Innocence Project, at <http://innocenceproject.org> (last visited June 2, 2003); California Western School of Law Innocence Project, at http://www.cwsl.edu/icda/I_Innocence.html (last visited June 2, 2003); Northwestern University School of Law Center on Wrongful Convictions, at <http://www.law.northwestern.edu/depts/clinic/wrongful/> (last visited June 2, 2003); and Santa Clara University School of Law Innocence Project, at <http://ncip.scu.edu> (last visited June 2, 2003).

3. In January 2003, stating that his state’s capital system was “haunted by the demon of error,” particularly with regard to the treatment of racial minorities and poor people, Governor George Ryan of Illinois commuted the sentences of 164 Death Row inmates to life in prison without possibility of parole. See Maurice Possley & Steve Mills, *Clemency for All: Ryan Commutes 164 Sentences to Life in Prison Without Parole*, CHI. TRIB., Jan. 12, 2003, at 1.

4. See, e.g., J.K. Dineen & Peter De Marco, “Mississippi Burning” Murders: Second Chance for Justice; Case Building in 1964 Civil Rights Killings, N.Y. DAILY NEWS, May 3, 2001, at 1; Emily Wagster, *Civil Rights Killings Haunt Mississippi*, CHI. TRIB., May 27, 2002, at 6.

day procedures to accomplish retrospective justice.⁵ As with innocence cases, these unfiled or failed prosecutions deserve close scrutiny for what they may reveal about the illegitimacy of the criminal justice system, not only for the individuals involved but also for the broader society that the system is supposed to serve. If racial injustice is discovered, can it be retried or reopened? Are there extralegal considerations that militate in favor of reopening the investigations of such cases if constitutional double jeopardy or speedy trial objections are properly addressed?⁶ Regardless of the outcome of such retried or reopened race cases, are there broader ameliorative benefits that communities may experience as a result of the reinvestigation of such cases? This Essay shall address these questions in the context of several civil rights era murder prosecutions of the 1960s. It is beyond the scope of this Essay to address fully the range of complex procedural, substantive, and tactical concerns underlying the decisions to reopen (or not to reopen) particular cases. Rather, the goal is to examine both the concept of reopening such cases in the search for racial justice and the broader meanings underlying the impetus to reopen them.

II. CIVIL RIGHTS ERA MURDERS

A. *The Context: Civil Rights Advances and Supremacist Backlash*

To comprehend the enormity of the hate crimes discussed in this Essay — and the magnitude of efforts to reopen such cases — it is instructive to recall the tenor of the momentous, tumultuous times in which they occurred. In the 1950s and 1960s, insurgent social protest movements — particularly the civil rights movement — propelled consideration of race and class oppression into public debate nationwide.⁷ Thousands of people of all races and backgrounds were inspired

5. Ed Vulliamy, *Deep South Confronts Murderous Past*, OBSERVER (London), Nov. 14, 1999, at 1. For further discussion of Myrlie Evers and the murder of Medgar Evers, see *infra* notes 50-57 and accompanying text.

6. Reopening cases can raise thorny problems with regard to the U.S. Constitution's Double Jeopardy Clause, see U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .”), and speedy trial guarantees, see U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”). For discussion of these considerations in the context of reopening civil rights era cases, see *infra* notes 121-139.

7. Richly detailed accounts of this era include: JACK BASS, UNLIKELY HEROES (1981); TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 (1988); SEPTIMA CLARK, ECHO IN MY SOUL (1962); JAMES FARMER, LAY BARE THE HEART: AN AUTOBIOGRAPHY OF THE CIVIL RIGHTS MOVEMENT (1985); DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986); DAVID J. GARROW, THE FBI AND MARTIN LUTHER KING, JR. (1981); DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965 (1978); VINCENT HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA (1981); MARTIN LUTHER KING, JR., STRIDE

by the leadership of individuals such as Martin Luther King, Jr., Rosa Parks, Ralph Bunche, Thurgood Marshall, Constance Baker Motley, and others who brought the scourge of race discrimination to the forefront of national discussion. Organizations such as the Congress of Racial Equality (“CORE”), the National Association for the Advancement of Colored People (“NAACP”), the Anti-Defamation League (“ADL”), the Southern Christian Leadership Conference (“SCLC”), and the Student Nonviolent Coordinating Committee (“SNCC”) energized anti-racist activism in the form of boycotts, sit-ins, pickets, vigils, and litigation; these organizations and others developed specific agendas and targeted strategies for breaking through barriers to access in the areas of voting, education, employment, and public accommodations.⁸ These strategies and agendas unfolded over a period of many years in order to achieve their intended objectives. The most famous example is the architecture of the long-term strategy of the NAACP Legal Defense and Educational Fund (“LDF”) to secure the end of *Plessy v. Ferguson*’s “separate but equal” doctrine of racial segregation.⁹ The culmination of LDF’s efforts was the *Brown v. Board of Education* decision and its desegregation of public education, but in fact LDF had begun to lay the groundwork for the *Brown* litigation decades earlier in cases seeking the admission of blacks to state law schools in Maryland and Missouri.¹⁰ Both literally and figuratively,

TOWARD FREEDOM: THE MONTGOMERY STORY (1958); GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983); ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT (1984); HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY, 1954-1992 (1993); JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954-65 (1987); HARRIS WOFFORD, OF KENNEDYS AND KINGS: MAKING SENSE OF THE SIXTIES (1980).

8. Key biographies, autobiographies, memoirs, and organizational histories of this era include: CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S (1981); LEWIS H. FENDERSON, THURGOOD MARSHALL: FIGHTER FOR JUSTICE (1969); FANNIE LOU HAMER, TO PRAISE OUR BRIDGES: AN AUTOBIOGRAPHY (1967); CHARLES FLINT KELLOGG, NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (1967); DAVID L. LEWIS, KING: A CRITICAL BIOGRAPHY (1970); AUGUST MEIER & ELLIOTT RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT (1973); ANNE MOODY, COMING OF AGE IN MISSISSIPPI (1968); CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW (1998); PAT WATTERS, DOWN TO NOW: REFLECTIONS ON THE SOUTHERN CIVIL RIGHTS MOVEMENT (1971); SHEYANN WEBB ET AL., SELMA, LORD, SELMA: GIRLHOOD MEMORIES OF THE CIVIL RIGHTS DAYS (1980); ROY WILKINS & TOM MATHEWS, STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS (1982); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998); and HOWARD ZINN, SNCC: THE NEW ABOLITIONISTS (1965).

9. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

10. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The Maryland and Missouri decisions are, respectively, *University of Maryland v. Murray*, 169 Md. 478 (1936), and *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). For a more detailed description of *Brown* LDF strategies and cases, see MOTLEY, *supra* note 8, at 61-96. See also JACK GREENBERG, CRUSADERS IN THE COURT: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY (1975).

these legal and political approaches to integration set forth a road map that — it was hoped — would lead to deep systemic reform; they envisioned a late twentieth century in which full equality was supposed to be thorough, inevitable, and unstoppable.¹¹

Racial supremacists had a far different road map in mind. Even a brief chronology of pivotal events of the mid-1950s to mid-1960s conveys an extraordinary cycle of civil rights progress and violent supremacist backlash. Each major step in the movement for racial equality was accompanied by massive white resistance. This resistance, already firmly embedded in American history through the thousands of lynchings of blacks between the 1880s and the 1950s, continued even as the numbers of lynchings declined; the Ku Klux Klan and other white supremacist groups routinely used threats, beatings, bombings, and murders to ensure that their message of intimidation and terror endured.¹² As Anthony Alfieri has noted, throughout U.S. history the pattern of federal prosecutorial response to racial violence generally has been “characterized by inaction and spare enforcement.”¹³ During this era, a lack of presidential leadership, combined with intermittently interventionist federal law enforcement and rare federal litigation, reinforced white supremacists’ sense of superiority and control.¹⁴

11. The failure of American society to progress significantly toward this goal has led many to doubt the gains of the civil rights era, particularly with respect to test case litigation. The past decade has seen the emergence of a significant body of literature that questions the meaning of the *Brown* legacy, given the persistence of de facto segregation, educational crises, and racial inequities in public schools. See, e.g., JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 49-57 (1991); WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001).

12. See Beth Klopott, *Historical Chronology*, in BRIDGES AND BOUNDARIES: AFRICAN AMERICANS AND AMERICAN JEWS 245, 245-58 (Jack Salzman et al. eds., 1992) [hereinafter Klopott, *Historical Chronology*]. *Bridges and Boundaries* traces a pattern of racial progress accompanied by racial violence. See BRIDGES AND BOUNDARIES, *supra*. For comprehensive accounts of the role of lynchings in the antebellum and new South eras, see DICKSON D. BRUCE, JR., *VIOLENCE AND CULTURE IN THE ANTEBELLUM SOUTH* 114-60 (1979); W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930* 4-16 (1993). For narratives about massive, violent resistance to racial progress in the 1950s and 1960s, see generally NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE* (1969); HENRY HAMPTON & STEVE FAYER, *VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S* (1990).

13. Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1199 (1999). Alfieri’s analysis of present-day racial violence — for example, the highly-publicized 1997 assault of Abner Louima — is deeply rooted in his examination of lynchings and mob violence extending back to the Reconstruction Era. *Id.* at 1185-92.

14. See EARL OFARI HUTCHINSON, *BETRAYED: A HISTORY OF PRESIDENTIAL FAILURE TO PROTECT BLACK LIVES* (1996). Hutchinson attributes these failures to political expediency and notes that federal intervention occurred only when black leaders pressured the federal government to respond “when a violent act triggered a major riot, generated mass protest, or attracted press attention.” *Id.* at 214. For further background about the role

Civil rights activists knew that the potential for violent retaliation was a constant risk, particularly in the South. They knew that self-defense was a key part of their training and that death might result from their efforts. As a result, the racial climate in which the killings this Essay focuses on occurred was one in which each murder bore a distinct, contextual message: hatred of black progress and defense of racial hierarchy.

A major springboard for this backlash occurred in 1954 when the U.S. Supreme Court decided *Brown v. Board of Education*. To the black community and other supporters of civil rights, the landmark *Brown* decision was lauded with “the status of a Magna Carta”¹⁵; to segregationists, it was a rallying cry for massive resistance. As the *Brown* mandate was extended to other contexts,¹⁶ the segregationist response remained one of steadfast defiance, usually defended with the rationale of “states’ rights.” Constance Baker Motley, one of the LDF’s leading litigators during this period, recalls:

In response to *Brown* in 1954, the Southern states had resurrected the basic political themes that guided the South during the Civil War — that is, nullification and interposition, which affirmed that a state had the constitutional right to nullify the effectiveness of any federal law or federal court decision with which it disagreed and to interpose its sovereignty between the decision or law and the federal government. Every Deep South state had enacted massive resistance laws. The North, East, and West were too far removed from the bitter afterglow of the Civil War fully to comprehend this threat to national unity. In some state capitals in the Old South, the Confederate flag was still flying or had been raised anew.¹⁷

of presidential leadership in civil rights history, see generally ROBERT FREDERICK BURK, *THE EISENHOWER ADMINISTRATION AND BLACK CIVIL RIGHTS* (1984); VICTOR S. NAVASKY, *KENNEDY JUSTICE* (1971); and ARTHUR M. SCHLESINGER, JR., *A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE* (1965).

15. MOTLEY, *supra* note 8, at 108.

16. See, e.g., *Watson v. City of Memphis*, 373 U.S. 526 (1963) (ending segregation in municipal parks); *Johnson v. Virginia*, 373 U.S. 61 (1963) (ending segregation in state court-houses); *Gayle v. Browder*, 352 U.S. 903 (1956) (ending segregation in intrastate transportation facilities), *aff’g* 142 F. Supp. 707 (M.D. Ala. 1956); *Dawson v. City of Baltimore*, 350 U.S. 877 (1955) (ending segregation in municipal beaches), *aff’g* 220 F.2d 386 (4th Cir. 1955); *Holmes v. City of Atlanta*, 350 U.S. 879 (1954) (ending segregation in municipal golf courses), *vacating* 223 F.2d 93 (5th Cir. 1953); *Muir v. Louisville Park Theatrical Ass’n*, 347 U.S. 971 (1954) (ending segregation in municipal amphitheatres), *vacating* 202 F.2d 275 (6th Cir. 1953).

17. MOTLEY, *supra* note 8, at 134-35. For an interesting analysis of the post-*Brown* South, asserting that certain moderate southern communities (e.g., Charlotte, North Carolina) chose a strategy of controlled accommodation of integration demands to preserve business interests, see Davison M. Douglas, *The Quest for Freedom in the Post-Brown South: Desegregation and White Self-Interest*, 70 CHI.-KENT L. REV. 689 (1994). Notes Douglas:

Fearing the negative impact of racial strife on the city’s strong economic climate, Charlotte’s white business elite, closely allied with the city’s elected officials, took action to fend off black protest by engaging in voluntary but token integration in advance of most other south-

Further examples of this massive resistance include the refusal of state universities to enroll black students who were entitled by law to attend, the refusal of state courts to order those universities to comply with *Brown* when admissions policies were challenged, and the mob violence that often accompanied black students' attempts to enroll.¹⁸

In August 1955, Emmett Till, a fourteen-year-old black youth from Chicago, was lynched in Mississippi for flirting with a white girl.¹⁹ That same year, Rosa Parks was arrested for refusing to surrender her seat to a white man on a Montgomery, Alabama, city bus.²⁰ The ensuing year-long Montgomery Bus Boycott, led by twenty-six-year-old Martin Luther King, Jr. and others, ultimately resulted in a 1956 U.S. Supreme Court decision striking down Alabama's intrastate bus segregation laws.²¹ Along the way, boycotters and random bystanders endured an exceptional amount of violence: beatings (including that of a fifteen-year-old girl), dynamite explosions, shotgun snipers (including the shooting of a pregnant woman); and church and home bombings.²² In February 1956, the third month of the boycott, the Mississippi and Alabama White Citizens' Councils chose Montgomery as the site of what they described as "the largest segregation rally of the century."²³ Before a crowd of ten thousand people, Montgomery city commissioners and other local officials exalted segregation and exhorted the crowd to defend their state: "I am sure that you are not

ern cities. What distinguished Charlotte and its moderate counterparts like Atlanta and Dallas from more obstreperous southern communities like Birmingham and New Orleans was not so much a philosophical embrace of racial integration but rather a calculated understanding that controlled desegregation could serve broader economic interests.

Id. at 692.

18. MOTLEY, *supra* note 8, at 112-18 (regarding LDF's litigation to integrate the University of Florida Law School); *see also* WILLIAMS, *supra* note 7, at 210-18. In Mississippi, the state constitution was amended to allow state officials to close schools to avoid desegregation. *Id.* at 210.

19. MOTLEY, *supra* note 8, at 163; WILLIAMS, *supra* note 7, at 39-57. The lynching of Emmett Till — and the acquittal by an all-white, all-male jury of the two white men accused of murdering him — provoked world-wide shock and condemnation. Despite detailed eyewitness testimony and an identification of Till's mangled corpse by his own mother, the jury acquitted the two defendants after about an hour of deliberations; the jury foreman later asserted, "I feel the state failed to prove the identity of the body." *Id.* at 52. Williams states: "Some compared events in Mississippi to the Holocaust of Nazi Germany; one writer called Till America's Anne Frank." *Id.* In her autobiography, Anne Moody noted: "Before Emmett Till's murder, I had known the fear of hunger, hell and the Devil. But now there was a new fear known to me — the fear of being killed just because I was black." *Id.* at 56 (quoting MOODY, *supra* note 8, at 107).

20. BRANCH, *supra* note 7, at 128-29; WILLIAMS, *supra* note 7, at 66-67.

21. *Gayle v. Browder*, 352 U.S. 903 (1956). For further background regarding the pivotal role of the Montgomery Bus Boycott in modern civil rights history, *see generally* KING, *supra* note 7, and WILLIAMS, *supra* note 7, at 70-89.

22. BRANCH, *supra* note 7, at 197-200.

23. *Id.* at 168.

going to permit the NAACP to control your state,' declared the star speaker, Senator James Eastland of Mississippi, whose 'one prescription for victory' was for Southern white people to 'organize and be militant.'²⁴ That same month, whites at the University of Alabama rioted in protest against the court-ordered admission of Autherine Lucy, the first black student in the school's history; the University responded to the violence by suspending Lucy "for her own safety"; it took no action against the rioters. Eventually, Lucy withdrew from the University and from her litigation because of the failure of federal authorities (the federal district court, the Court of Appeals, and the President) to take steps to enforce the courts' orders and to ensure her physical safety.²⁵

In 1957, the SCLC was established by King, Bayard Rustin, and Stanley Levinson to organize activities for nonviolent civil rights groups. That same year, Arkansas used its own state guard to defy implementation of *Brown*. After a federal district judge ordered the admission of black students to Central High School in Little Rock,²⁶ Governor Orval Faubus prevented the "Little Rock Nine" from enrolling, claiming that he had called up the guard to protect the public order.²⁷ Faubus's open defiance of federal law encouraged mob rule to surround the school as angry whites jeered the students and cheered on the troops. When the federal district court again ordered the school to admit the black students, Faubus ordered all schools closed for a year. Faubus's assertion of local control over federal mandate, perceived at the time to be "the most severe test of the Constitution since the Civil War,"²⁸ resulted in an emergency session of the U.S. Supreme Court in August 1958. The Court ruled against Faubus and ordered the students admitted.²⁹ Local white groups again surrounded the school to prevent its integration until President Dwight Eisenhower finally ordered a thousand federalized troops to Little Rock to enforce the integration order.³⁰

24. *Id.*

25. MOTLEY, *supra* note 8, at 121-24. The decisions in Autherine Lucy's court challenges are: *Lucy v. Adams*, 134 F. Supp. 235 (N.D. Ala. 1955), *aff'd*, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1956) (injunction ordering the University to admit Lucy); 228 F.2d 620 (5th Cir. 1955) (decision that defendant had not violated earlier court order to admit Lucy).

26. *Aaron v. Cooper*, 156 F. Supp. 220 (E.D. Ark. 1957).

27. MOTLEY, *supra* note 8, at 130.

28. BRANCH, *supra* note 7, at 223.

29. *Cooper v. Aaron*, 358 U.S. 1 (1958).

30. For detailed accounts of the Little Rock crisis, Faubus's intransigence, and Eisenhower's reluctance to intervene, see BRANCH, *supra* note 7, at 222-24. See also DAISY BATES, *THE LONG SHADOW OF LITTLE ROCK: A MEMOIR* (1962); ELIZABETH HUCKABY, *CRISIS AT CENTRAL HIGH: LITTLE ROCK, 1957-58* (1980); WILLIAMS, *supra* note 7, at 90-119. One scholar notes that a 1958 Gallup Poll listed Orval Faubus as one of the ten most

As the 1950s ended, watered-down, ineffectual civil rights legislation began to emerge from Washington and white supremacist violence continued to flourish throughout the South.³¹ In 1959, Mack Charles Parker, a black man, was lynched in Mississippi after being abducted by a group of hooded men from the Mississippi jail cell where he awaited trial for the rape of a white woman. An FBI investigation established the probable complicity of a local law enforcement official, but local prosecutors and juries refused to follow up on the case.³² In 1960, the year that John F. Kennedy was elected president, CORE sponsored “sit-ins” around the country, beginning with a sit-in to integrate a Woolworth’s lunch counter in Greensboro, North Carolina.³³ That same year, SNCC and the Negro American Labor Council were established, joining groups such as CORE, the NAACP, and SCLC in the nonviolent pursuit of social change.³⁴

In 1961, President John F. Kennedy issued Executive Order 10925, which barred discrimination among contractors doing business with the federal government and required that “affirmative steps” be taken to recruit and promote minorities.³⁵ That same year, CORE sponsored an ambitious set of “Freedom Rides” — a term coined to describe the activities of multiracial groups of nonviolent activists who traveled on public buses throughout the South to test compliance with the Supreme Court mandate to desegregate interstate bus facilities. The Freedom Rides were scheduled to arrive in New Orleans on May 17, 1961, the seventh anniversary of the *Brown* decision.³⁶ Despite their optimistic name, the trips were in fact “life-and-death” rides because of the brutal violence encountered by the riders along the way. For example, one bus of Freedom Riders was chased down the highway by approximately fifty cars containing a total of two hundred men:

admired Americans. James T. Patterson, *The Troubled Legacy of Brown v. Board*, in *BROWN V. BOARD: ITS IMPACT ON EDUCATION, AND WHAT IT LEFT UNDONE 2* (Phillipa Strum ed., 2002).

31. For a history of the behind-the-scenes evisceration of civil rights protections in the Civil Rights Act of 1957, see BRANCH, *supra* note 7, at 220-22.

32. *Id.* at 257-58.

33. The organizers of the sit-ins intended for them to be a persistent, disciplined, non-violent method of immediately integrating places of public accommodation, public transportation facilities, and other public services; nevertheless, because of segregationist backlash and resistance, the sit-ins usually resulted in mass arrests, trials, and convictions. As Motley notes, those who participated in the earliest sit-ins relied upon a “frail legal position” in their efforts to integrate privately owned facilities, but by the mid-Sixties their efforts were vindicated through key U.S. Supreme Court decisions, and through the passage of civil rights statutes such as the Civil Rights Act of 1964. MOTLEY, *supra* note 8, at 131-32, 196-200 (discussing the sit-ins and LDF victories in five lunch-counter sit-in cases).

34. Klopott, *Historical Chronology*, *supra* note 12, at 250.

35. BRANCH, *supra* note 7, at 413.

36. Patterson, *supra* note 30, at 5.

[T]he mob used bricks and a heavy ax to smash the bus windows one by one, sending shards of glass flying among the passengers inside. The attackers ripped open the luggage compartment and battered the exterior again with pipes, while a group of them tried to force open the door. Finally, someone threw a firebomb through the gaping hole in the back window. As flames ran along the floor, some of the seats caught fire and the bus began to fill with black, acrid smoke.³⁷

In the fall of 1962, white supremacists continued literally to wage war against integration. Over a period of eleven days, James Meredith, a twenty-nine-year-old black veteran, sought several times to enroll at the University of Mississippi (“Ole Miss”) in Oxford; each time, he was besieged by hateful mobs.³⁸ Defying a federal court order to admit Meredith³⁹ and the intervention of the Kennedy Justice Department, Mississippi Governor Ross Barnett physically blocked Meredith from entering the University. The Mississippi Legislature supported Barnett by naming him the “emergency university registrar” in an attempt to evade a court order compelling the regular registrar to admit Meredith.⁴⁰ The local press supported Barnett as well; the *Jackson Daily News* announced that thousands were ready to “Fight for Mississippi” and published a “fight song” entitled “Never, No Never.”⁴¹ Former Major General Edwin Walker, who had been disciplined for insubordination and had resigned from the U.S. Army in protest against what he called the Kennedy Administration’s “collaboration and collusion with the international Communist conspiracy,” flew to Mississippi to join forces with Barnett.⁴² He urged Mississippians, “Bring your flags, your tents and your skillets! It is time! Now or never!”⁴³ Barnett and his Lieutenant Governor Paul Johnson refused to capitulate and were cited for contempt by the Fifth Circuit Court of Appeals.⁴⁴ Finally, offered a face-saving strategy by the Kennedy Administration, Barnett formally pretended to accede

37. BRANCH, *supra* note 7, at 418. For further details about the violence encountered by Freedom Riders, see JAMES PECK, *FREEDOM RIDE* (1962), and WILLIAMS, *supra* note 7, at 144-46, 147-61.

38. These facts are drawn from the following narratives of Meredith’s integration of Ole Miss. See BRANCH, *supra* note 7, at 633-72; MOTLEY, *supra* note 8, at 162-93; see also RUSSELL H. BARRETT, *INTEGRATION AT OLE MISS* (1965); JAMES H. MEREDITH, *THREE YEARS IN MISSISSIPPI* (1966); WILLIAMS, *supra* note 7, at 213-18.

39. *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962). Meredith’s legal challenge to secure admission to Ole Miss began in May 1961 with Motley and LDF as counsel; the torturous path of litigation is described in detail in MOTLEY, *supra* note 8, at 162-92.

40. BRANCH, *supra* note 7, at 647.

41. *Id.* at 653.

42. *Id.* at 656.

43. *Id.*

44. *Meredith v. Fair*, 313 F.2d 532, 533 (5th Cir. 1962) (finding Barnett in contempt); *Meredith v. Fair*, 313 F.2d 534, 535 (5th Cir. 1962) (finding Johnson in contempt).

and allow Meredith to register.⁴⁵ In reality, Barnett allowed unruly crowds to storm the campus with bulldozers, tear gas, and gunfire; at least two people died.⁴⁶ The riot finally subsided after Kennedy ordered between twelve and sixteen thousand federal troops to restore order.⁴⁷ Meredith pursued and completed his college degree with U.S. marshals accompanying him to class and keeping watch in his dormitory room at night.⁴⁸

B. *The Victims: Lives Lost in the Battle for Racial Supremacy*

In this Section, I shall focus primarily on three infamous cases of the civil rights era: the Evers assassination; the Sixteenth Street Baptist Church bombing; and the Chaney/Schwerner/Goodman murders. These cases are of looming historical significance for several reasons. First, they are widely viewed as emblematic of the pervasive racial hatred and backlash of the era.⁴⁹ Second, they are cases in which relatively recent high-profile political and legal efforts resulted in the reopening of investigations and revival of prosecutions. Finally, the mixed results of these efforts to “re-try” race provide a useful opportunity to examine the benefits and drawbacks of reopening cases decades after the underlying crimes occurred.

It may be difficult, from the detached complacency of current experience, to comprehend the reign of terror inflicted by white supremacists on civil rights workers and on black people in general during this period. Quite literally, black people and their antiracist allies of all races risked life and limb to help secure such basic fundamental rights as the right to vote, to obtain an education, to obtain a job, and to have access to public accommodations. Some of the individuals described below lost their lives in the course of purposeful civil rights activism; others — for example, the four little girls in the Sixteenth Street Baptist Church firebombing — died in the course of pursuing everyday, nonpolitical activities. In recalling the circumstances of their murders, one can better understand efforts in subsequent decades to reopen their cases and to seek retrospective justice.

45. BRANCH, *supra* note 7, at 656-65.

46. *Id.* at 666-70.

47. *Id.* at 668-70.

48. MOTLEY, *supra* note 8, at 183.

49. For analyses of the phenomenon of racist terror following racial progress, see HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE* (1988), and Michael Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81-118 (1994).

1. *Medgar Evers (June 12, 1963, Jackson, Mississippi)*

I love the land of my birth. I do not mean just America . . . but Mississippi. The things I say . . . will be said to you in hopes of the future when it will not be the case in Mississippi and America, when we will not have to hang our heads in shame or hold our breath when the name Mississippi is mentioned . . . But instead, we will be anticipating the best.⁵⁰

At the time of his murder in 1963, Medgar Wylie Evers was one of the most prominent and well-respected leaders of the civil rights movement in the South.⁵¹ Like his contemporary, Martin Luther King, Jr., Evers advocated persistent, nonviolent means to dismantle racial segregation; much of his work involved recruiting new NAACP members and organizing them to engage in economic boycotts, picket lines, marches, and prayer vigils. His assassination, which occurred in his front yard as he returned home to his wife and three young children, in many ways epitomizes the brutal racism and violence the Old South used to crush the civil rights movement.

Born on July 2, 1925, near Decatur, Mississippi, Evers was one of six children of James and Jessie Evers. His father worked in a sawmill and was deacon for the local church; his mother did laundry for white families and was also active in church affairs. Inducted into the Army in 1943, Evers served in England and France, where according to some accounts his exposure to Europe and experience of fighting against Nazi supremacism made a deep impression upon his personal and career goals. After returning home, he finished high school and under the GI Bill attended Alcorn A & M College in Mississippi. While at Alcorn A & M, he met and married Myrlie Beasley of Vicksburg, Mississippi. After Evers's graduation in 1952, they moved to Mound Bayou, Mississippi, where Evers took a job with Magnolia Mutual Insurance, one of Mississippi's few black-owned businesses.

Through his work selling insurance policies in rural Mississippi, Evers saw firsthand the deep poverty of the region's black population and was inspired to join the NAACP. Soon thereafter, his insurance work merged with his political activism as he sold insurance policies and recruited new NAACP members throughout the Mississippi Delta. Evers worked to establish local NAACP chapters and organ-

50. BOBBY DELAUGHTER, NEVER TOO LATE: A PROSECUTOR'S STORY OF JUSTICE IN THE MEDGAR EVERS CASE 155-56 (2001) (quoting speech of Medgar Evers).

51. The biographical information in this Section is drawn from the following sources about Medgar Evers's life and career: BRANCH, *supra* note 7, at 813-16; MYRLIE B. EVERS WITH WILLIAM PETERS, FOR US, THE LIVING (1967); ADAM NOSSITER, OF LONG MEMORY: MISSISSIPPI AND THE MURDER OF MEDGAR EVERS 25-63 (1994); MARYANNE VOLLERS, GHOSTS OF MISSISSIPPI 9-13, 38-40, 126-47 (1995); WILLIAMS, *supra* note 7, at 218-25. For further information about Evers, see WILLIE MORRIS, THE GHOSTS OF MEDGAR EVERS (1998). A popular film about the Evers case, also entitled GHOSTS OF MISSISSIPPI and directed by Rob Reiner, was released in 1996.

ized boycotts of gasoline stations and other facilities that refused to allow blacks to use their restrooms. After the *Brown* decision in 1954, Evers tested the waters of the all-white law school of the University of Mississippi, the state's oldest public university, by applying for admission. His application was rejected. By that time, however, his political work had attracted the attention of the NAACP's national office. In 1954, the NAACP decided to hire "field secretaries" to coordinate their work in the Deep South, and hired Evers to be their full-time field secretary in Mississippi.

After his appointment as field secretary, Medgar and Myrlie Evers moved to Jackson, Mississippi, where they both worked to establish a NAACP office. Evers's unique role in Jackson was to bridge the gap between the younger student generation of civil rights protesters and the NAACP establishment: "Evers straddled the divide. In his speeches, he mixed the NAACP's tactics ('Don't shop for anything on Capitol Street!') with the spirit of the students ('We'll be demonstrating here until freedom comes.')."52 Two of Evers's major tasks in his new role were to recruit new members and to investigate and publicize racist violence against blacks. Both challenges proved to be enormously difficult in the terrorized atmosphere of the Deep South in that era. It is hard to overstate the intimidation inflicted by white supremacists against blacks who sought to join or even listen to the NAACP and other civil rights organizations. Today, the NAACP's moderate, nonviolent approach to integration would hardly be described as revolutionary; however, in Mississippi in the 1950s and 1960s (and, of course, before that time), the NAACP was viewed by many to be a radical organization, membership in which could lead to severe reprisals. Despite the constitutional protections recognized by the Supreme Court in such cases as *NAACP v. Alabama*⁵³ and *NAACP v. Button*,⁵⁴ the reality for blacks was that Mississippi was a state with more recorded lynchings than any other in the country. Judicial pronouncements of First Amendment freedoms of expression and association were virtually meaningless in the face of assault, harassment, and even murder for any kind of political action. For civil rights activists and anyone who dared listen to them, it was a war zone.

Given this climate of terror, Evers faced even more obstacles as he sought to research Mississippi's history of lynchings and to organize opposition to racist violence. He was stalked, threatened, and physi-

52. BRANCH, *supra* note 7, at 815.

53. 357 U.S. 449 (1958). In *NAACP v. Alabama*, the U.S. Supreme Court held that the state of Alabama could not compel the NAACP to disclose its membership lists because such enforced disclosure would violate the First Amendment right to freedom of association.

54. 371 U.S. 415 (1963). In *NAACP v. Button*, the U.S. Supreme Court ruled that the NAACP's sponsorship of civil rights litigation was expressive activity protected by the First Amendment.

cally assaulted as he traveled throughout Mississippi. Organizations both private (the White Citizens' Council) and public (the Mississippi Sovereignty Commission) spied on him. Nevertheless, Evers persisted in organizing against Jim Crow segregation in restaurants, gas stations, and movie theaters, as well as public libraries, parks, and pools. His pivotal role in a boycott against Jackson merchants garnered national attention in the early 1960s, as did his efforts on behalf of James Meredith in the battle to integrate the University of Mississippi in 1962.

The much-admired Evers was bitterly hated as well. Threats of violence to Evers were so common that in May 1963, a month before he was murdered, the garage to his home was bombed. Medgar and Myrlie Evers had trained their three children to "drop and hit the floor" if they heard a gunshot or other violent activity in their vicinity.

Just before midnight on June 11, 1963, Evers returned home from a NAACP strategy session. As he stepped out of his Oldsmobile, carrying a stack of NAACP shirts stenciled with the message "Jim Crow Must Go," he was shot by a killer who hid in nearby bushes. In *Parting the Waters*, a landmark chronicle of the early civil rights movement, historian Taylor Branch describes the event:

His own white dress shirt made a perfect target for the killer waiting in a fragrant stand of honeysuckle across the street. One loud crack sent a bullet from a .30-'06 deer rifle exploding through his back, out the front of his chest, and on through his living room window to spend itself against the kitchen refrigerator. True to their rigorous training in civil rights preparedness, the four people inside dived to the floor like soldiers in a foxhole . . . [T]hey all ran outside to find him lying facedown near the door. "Please Daddy, please get up!" cried the children . . . The victim said nothing until neighbors and police hoisted the mess of him onto a mattress and into a station wagon. "Sit me up!" he ordered sharply, then, "Turn me loose!" These were the last words of Medgar Evers, who was pronounced dead an hour later.⁵⁵

The accused lone gunman, a white supremacist named Byron De La Beckwith, stood trial twice in state court in 1964 for Evers's

55. BRANCH, *supra* note 7, at 825. Ironically, even before Evers's murder, June 11 had already marked a pivotal moment in national affairs regarding race relations. That evening, President Kennedy had delivered a nationally televised speech in response to unfolding civil rights crises and to Martin Luther King's plea that the Administration speak out on racial justice as a "just and moral issue." Kennedy's speech included the following:

We preach freedom around the world, and we mean it. And we cherish our freedom here at home. But are we to say to the world — and much more importantly, to each other — that this is the land of the free, except for Negroes, that we have no second-class citizens, except Negroes, that we have no class or caste system, no ghettos, no master race, except with respect to Negroes? . . . Now the time has come for this nation to fulfill its promise. . . . We face, therefore, a moral crisis as a country and a people. . . . A great change is at hand, and our task, our obligation, is to make that revolution, that change, peaceful and constructive for all.

Id. at 824 (internal quotation marks omitted).

murder. In both state prosecutions, the all-white juries had hung verdicts.⁵⁶ Throughout the next three decades, Byron De La Beckwith remained free, reportedly during this time gloating to random individuals that he had “gotten away with” Evers’s murder. In 1990, the case was reopened based on new evidence. In 1994, Beckwith was tried a third time; this time, the prosecution resulted in a conviction, and Beckwith was sentenced to life in prison.⁵⁷

2. *Addie Mae Collins, Denise McNair, Carole Robertson, Cynthia Wesley (September 15, 1963, Birmingham, Alabama)*

Unlike Medgar Evers, the four murder victims in the Sixteenth Street Baptist Church bombing were not outspoken civil rights activists. They had not recruited NAACP members or organized boycotts or stood on picket lines or investigated lynchings. They were children. Addie Mae Collins, Cynthia Wesley, and Carole Robertson were fourteen at the time of their deaths; Denise McNair was eleven.⁵⁸ Still, the retaliatory message conveyed by the bomb that killed them was quite clear. The Birmingham public schools had been desegregated only five days before, and bombs were the Klan’s quick response. Birmingham was a city that had become so violent with racist resistance that it was nicknamed “Bombingham.”⁵⁹ One area of the city was nicknamed “Dynamite Hill” because of the number of blacks’ homes that had been blown up by dynamite sticks attached to bricks and thrown through windows or placed in letterboxes.⁶⁰ On April 12, 1963 (Good

56. The two 1964 *State v. De La Beckwith* trials were conducted in the Circuit Court of the First Judicial District of Hinds County, Mississippi. For more extensive discussions of the first and second trials, see DELAUGHTER, *supra* note 50, at 201-02; NOSSITER, *supra* note 51, at 105-09, 132-34; and VOLLERS, *supra* note 51, at 160-84, 203-08. In interviews, Myrlie Evers has stated that during her testimony in the first trial, Mississippi Governor Ross Barnett entered the courtroom, looked at her, and walked over to Beckwith to shake his hand. She also recalls: “This man was accorded a major parade along the route of the highway on his way home [after the hung jury decision]. People had banners that were waved, welcoming the hero home. The accused killer also made a statement to the press that he was glad to have gotten rid of ‘varmints.’ ” WILLIAMS, *supra* note 7, at 224.

57. The third *State v. De La Beckwith* trial was conducted in the Circuit Court of the First Judicial District of Hinds County, Mississippi in 1994. See William Booth, *Beckwith Boasted of Killing, Jury Told; Witnesses Recall Words of Defendant Accused in 1963 Evers Slaying*, WASH. POST, Feb. 1, 1994, at A3; Mike Smith, *Around the South Region in Brief: Surprise Witness Cites Beckwith Boast*, ATLANTA J.-CONST., Feb. 2, 1964, at A3; *Jury Deliberates in Beckwith’s Third Trial*, FT. LAUDERDALE SUN-SENTINEL, Feb. 5, 1994, at 8A. For a detailed account of the 1994 trial, see NOSSITER, *supra* note 51, at 249-57, and VOLLERS, *supra* note 51, at 328-86. The disposition of Beckwith’s final appeal may be found in *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997).

58. Emma Lindsay, *Observer Magazine: Dispatches*, OBSERVER (London), Sept. 8, 2002 (Magazine), at 31. Addie Mae’s younger sister Sarah, also in the church basement that day, survived but lost an eye in the blast. *Id.*

59. *Id.*

60. *Id.*; see also BRANCH, *supra* note 7, at 793-96, 888-92.

Friday), Martin Luther King was arrested for leading a demonstration in defiance of a court order, and while incarcerated wrote “Letter from Birmingham Jail,” a lasting epistle about the necessity for nonviolent resistance to segregation.⁶¹ In the midst of this turmoil, the Sixteenth Street Baptist Church had become a focal point for political as well as religious activity. Like other churches, it thus became a desirable site for the Klan’s bombs and burnings.

Taylor Branch recounts this critical moment in civil rights history:

Sunday [September 15] was the annual Youth Day at the Sixteenth Street Baptist Church. Mamie H. Grier, superintendent of the Sunday school, stopped in at the basement ladies’ room to find four young girls who had left Bible classes early and were talking excitedly about the beginning of the school year. . . . They were engaged in a lively debate on the lesson topic, “The Love That Forgives,” when a loud earthquake shook the entire church and showered the classroom with plaster and debris. . . . McNair searched desperately for her only child until she came upon a sobbing old man and screamed, “Daddy, I can’t find Denise!” The man helplessly replied, “She’s dead, baby. I’ve got one of her shoes.” He held a girl’s white dress shoe, and the look on his daughter’s face made him scream out, “I’d like to blow the whole town up!”⁶²

The murder of the four young girls in the Sixteenth Street Baptist Church marked the nadir of the early 1960s civil rights movement and galvanized the nation to respond. Despite the fact that the Federal Bureau of Investigation (“FBI”) identified four Klan members as suspects within days of the bombing, however, federal prosecutors did not bring charges. In 1977, fourteen years later, a state prosecution and conviction of one of the bombers occurred: Robert “Dynamite

61. See WILLIAMS, *supra* note 7, at 187-89 for the full text of King’s famous letter. See also MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* (1964). For a more extensive description of the volatile nature of events in Birmingham in the spring and summer of 1963, see WILLIAMS, *supra* note 7, at 179-95.

Events in Birmingham that year served as both symbol and rallying cry for white supremacists throughout the South. For example, a June 9, 1963 advertisement — sponsored by the “Dallas County Citizens’ Council” — in the *Selma Times-Journal* recruited members with the following language:

ASK YOURSELF THIS IMPORTANT QUESTION: WHAT HAVE I PERSONALLY DONE TO MAINTAIN SEGREGATION? . . . Is it worth four dollars to prevent a “Birmingham” here? That’s what it costs to be a member of your Citizens Council, whose efforts are not thwarted by courts which give sit-in demonstrators legal immunity, prevent school boards from expelling students who participate in mob activities and would place federal referees at the board of voter registrars. . . . Is it worth four dollars to you to prevent sit-ins, mob marches, and wholesale Negro voter registration efforts in Selma?

J.L. CHESTNUT, JR. & JULIA CASS, *BLACK IN SELMA: THE UNCOMMON LIFE OF J.L. CHESTNUT, JR.* 167 (1990) (internal quotation marks omitted).

62. BRANCH, *supra* note 7, at 889. In 1997, Spike Lee produced and directed a documentary entitled *Four Little Girls* about the Birmingham church bombing. *FOUR LITTLE GIRLS* (HBO 1997).

Bob” Chambliss died in jail in 1985.⁶³ A second suspect, Herman Cash, was never charged; he died in 1994.⁶⁴ The case lay dormant through the 1980s and 1990s; it was reopened by state prosecutors in 2001. The last two suspects, Thomas Blanton, Jr. and Bobby Frank Cherry, were convicted in 2001 and 2002, respectively — nearly forty years after the four girls’ deaths.⁶⁵

3. *James Chaney, Michael Schwerner, Andrew Goodman (June 21, 1964, Philadelphia, Mississippi).*

A discernible trajectory of white supremacist violence links the murders of Medgar Evers in June 1963, the children of the Sixteenth Street Baptist Church bombing in September 1963, and a trio of civil rights workers — James Chaney, Michael Schwerner, and Andrew Goodman — in June 1964. As each tragedy sparked a more determined wave of civil rights activism, white Southern backlash continued to grow as well. The familiar pattern of brutal terror, civil rights progress, and even more brutal terror was epitomized in the lynchings of Chaney, Schwerner, and Goodman, carried out under the leadership of government officials who were members of the Ku Klux Klan.⁶⁶

Chaney, Schwerner, and Goodman met through their work with the Mississippi Summer Project, which was conceived in 1963 by the Council of Federal Organizations (“CFO”), a statewide coalition of

63. Vulliamy, *supra* note 5, at 1. In 1977, the *State of Alabama v. Chambliss* trial was conducted in the Jefferson Circuit Court. The final disposition on appeal may be found in *Chambliss v. State of Alabama*, 373 So. 2d 1185 (Ala. Crim. App. 1979).

64. Bob Johnson, *Church Bomber’s Attorney Asks for New Trial*, CHATTANOOGA TIMES, July 9, 2002, at B8; *Justice in Birmingham*, HERALD (Rock Hill, S.C.), May 26, 2002, at 2E; see also Lindsay, *supra* note 58, at 32; *Church Bombing Trial in Birmingham, Alabama, and Civil Rights Era Hate Crimes* (National Public Radio broadcast, May 21, 2002). For further background on the significance of this case, see GLENN T. ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* (1997).

65. See Philip Delves Broughton, *Klansman Given Life for 1963 Killings*, DAILY TEL. (London), May 2, 2001, at 15; Gregory Kane, *Conviction in Bombing of Church Brings Only a Measure of Justice*, BALTIMORE SUN, May 26, 2002, at 3B; Lindsay, *supra* note 58, at 32; *Morning Ku Klux Klan Member Thomas Blanton Jr. Convicted of Killing Four Girls at 16th Street Baptist Church in 1963* (National Public Radio broadcast, May 2, 2001). The final appeal of Blanton may be found at *Ex Parte Blanton*, 836 So. 2d 1013 (Ala. Crim. App. 2001) (decision without published opinion).

66. The following account of the murders is drawn from Douglas O. Linder, *The Mississippi Burning Trial (U.S. vs. Price et al.): A Trial Account*, at <http://www.law.umkc.edu/faculty/projects/ftrials/price&bowers/Account.html> (last visited June 2, 2003). For a full account of this case, see SETH CAGIN & PHILIP DRAY, *WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER, AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI* (1988). See also WILLIAMS, *supra* note 7, at 230-32, 234-36; Klopott, *Historical Chronology*, *supra* note 12, at 222-23. In 1988, Orion Pictures released *Mississippi Burning*, a Hollywood drama based on this case. *MISSISSIPPI BURNING* (Orion Pictures 1988).

CORE, SNCC, NAACP, and SCLC. The Project's goal was to recruit several thousand northern college students to Mississippi in the summer of 1964 to engage in a "Freedom Summer" of voter registration and other civil rights work. The Project's leadership thought that the large numbers of young white northerners would attract national attention and thereby help protect local blacks against harassment by the police and local whites. Michael Schwerner, a white, Jewish twenty-four-year-old from New York, and James Chaney, a black twenty-one-year-old from Meridian, Mississippi, were CORE staff members heavily involved in planning for the Summer Project. As the Project's planning intensified in the early months of 1964, so did the Klan's response; in February 1964, the White Knights of the Ku Klux Klan held a founding meeting, and on one day in April the Klan burned crosses at sixty-one separate locations throughout Mississippi.

In May 1964, Sam Bowers, the Imperial Wizard of the Klan in Mississippi, embarked on a plan to kill Michael Schwerner, who as the first white civil rights worker based outside of Jackson had gained particular notoriety with the Klan. Schwerner, nicknamed "Goatee" and "Jew-Boy" by Bowers and his followers, had helped to organize a black boycott of white-owned businesses in Meridian and had also spearheaded a voter registration drive there. On Memorial Day in 1964, Michael Schwerner and James Chaney visited the black Mount Zion Methodist Church in Neshoba County to urge voter registration and to ask the congregation's permission to use the church as the site of a "Freedom School" that summer.

The Klan first attempted to kill Schwerner on June 16, 1964, when it expected Schwerner to return to Mount Zion Methodist Church for a business meeting. Late that night, ten black church leaders left Mount Zion and found thirty Klan members lined up in military formation with rifles and guns; more Klan members formed a barrier at the rear of the church. When the Klan members discovered that Schwerner was not at the church that night, they went on to beat the church leaders and to burn the church to the ground. The Mount Zion Methodist Church was one of twenty Mississippi black churches firebombed in the summer of 1964; when the FBI began its investigation of the firebombing, it adopted as its codename "MIBURN," for "Mississippi Burning."

The Klan's initial assassination attempt was unsuccessful because at the time of the church firebombing, Schwerner and Chaney were in Oxford, Ohio, at a training session for the Mississippi Summer Project. Among the new trainees was Andrew Goodman, a twenty-year-old Queens College student from New York; Schwerner persuaded Goodman to return with him and Chaney to Meridian for Summer Project work. On June 20, Chaney, Schwerner, and Goodman drove back together to Meridian and then on to Neshoba County to inspect the remains of the Mount Zion Methodist Church. On June 21, the

three visited the burned-out church and interviewed several congregation members to learn more about the incident. While visiting the home of one congregation member, they were warned that a group of white men was looking for them. The three decided to leave Neshoba County at 3 p.m. Prepared for the worst, Schwerner told a worker in the Meridian CORE office to expect the three back by 4 p.m. and to start making telephone calls about their whereabouts if they did not return by 4:30 p.m. Expecting a possible ambush on one of the two routes back to Meridian, they decided to take the less direct route west through Philadelphia, the county seat.

Just inside the Philadelphia city limits, Chaney, Schwerner, and Goodman encountered Neshoba County Deputy Sheriff Cecil Price. Both Price and the Neshoba County Sheriff, Lawrence Rainey, were Klan members; as police officers, both had reputations for being tough with blacks and others who tried to “meddle” with the segregationist status quo. Price arrested the three on suspicion for having been involved in the church arson and took them to the county jail. Price then contacted Edgar Ray Killen, the “kleagle” (or recruiter) for the Neshoba County Klan. According to Douglas O. Linder:

Some of what happened over the next seven hours in the Neshoba County jail is known. . . . We know that shortly after 10 p.m., Cecil Price showed up at the jail, telling the jailer, “Chaney wants to pay off — we’ll let him pay off and release them all.” Price led them to their parked car, then tailed them as they headed east out of town on Highway 19.

The three civil rights workers by then no doubt suspected that they were being led into a trap, and in fact they were. Since receiving word from Price that Schwerner had been captured, Edgar Ray Killen, the Klan kleagle and an ordained Baptist minister, had been busy recruiting members of the Neshoba and Lauderdale County klaverns for some “buttripping,” as he put it. An afternoon meeting at the Longhorn Drive-In in Meridian with local Klan bigwigs was followed by a later meeting at Akin’s Mobile Homes with eager, younger members who would participate in the actual killings. Killen told the dozen or more recruits to buy rubber gloves and to be in Philadelphia by 8:15 p.m. After offering the Klan men a drive-by tour of the Neshoba County jail and going over the details of the planned release, Killen headed off to see a departed uncle at the local funeral home and to thereby establish his alibi.⁶⁷

Despite the efforts of Chaney, Schwerner, and Goodman to elude Price and the cars full of young Klan members who pursued them on Highway 19, they eventually stopped their car and surrendered. According to Linder’s account:

Soon three cars, Price’s and two full of Klan members, were traveling in a procession down an unmarked dirt turnoff called Rock Cut Road.

67. Linder, *supra* note 66.

It is not known whether the three were beaten before they were killed. What is known is that a twenty-six-year-old dishonorably discharged ex-marine, Wayne Roberts, was the trigger man, shooting first Schwerner, then Goodman, then Chaney, all at point blank range. . . . The bodies of the three civil rights workers were taken to a dam site at the 253-acre Old Jolly Farm. The farm was owned by Philadelphia businessman Olen Burgence, who reportedly had announced at a Klan meeting when the impending arrival in Mississippi of an army of civil rights workers was discussed, "Hell, I've got a dam that'll hold a hundred of them." The bodies were placed together in a hollow at a dam site and then covered with tons of dirt by a Caterpillar D-4.⁶⁸

Within days of the first reports of the disappearance of Chaney, Schwerner, and Goodman, there was an unprecedented response on a national level. On June 22, the FBI began an investigation; in the next month, they would go on to interview about 1,000 Mississippians, including 500 Klan members. On June 23, President Lyndon Baines Johnson met with Attorney General Robert F. Kennedy and others to discuss the possibility of a formal Administration role in the Mississippi crisis. On June 24, national black leaders James Farmer, John Lewis, and Dick Gregory met in Philadelphia with Neshoba County officials. By June 25, the federal military had arrived; busloads of sailors and divers worked their way through Mississippi swamps and woods in search of the three bodies. On July 10, J. Edgar Hoover arrived in Jackson to open an FBI office.

After several weeks of investigation and a promise of \$30,000 in reward money, the FBI learned the probable location of the bodies on July 31. On August 3, the FBI obtained a search warrant to look for the bodies in an earthen dam at the Old Jolly Farm; on August 4, the bodies of Chaney, Schwerner, and Goodman were unearthed.⁶⁹

There was an extraordinary difference between the national attention accorded the disappearance of Chaney, Schwerner, and Goodman and that given to the murders of Medgar Evers and the Sixteenth Street Baptist Church victims. The tragic irony of the Summer Project's aim to attract white northerners to the South to conduct voter registration was that it was all too astute. The presence of white northerners drew more attention to the Summer Project, and the deaths of white northerners finally drew sustained attention to the reign of racist terror in the South. Ella Baker, a founder of SNCC and executive director of the Mississippi Freedom Democratic Party's Washington office, noted:

The unfortunate thing is that it took this kind of symbol to make the rest

68. *Id.*

69. *Id.* For further background on the role of the FBI in investigating this case, see DON WHITEHEAD, *ATTACK ON TERROR: THE FBI AGAINST THE KU KLUX KLAN IN MISSISSIPPI* (1970).

of the country turn its eyes on the fact that there are other bodies lying under the swamps of Mississippi. Until the killing of a black mother's son becomes as important as the killing of a white mother's son, we who believe in freedom cannot rest.⁷⁰

Rita Schwerner, Michael Schwerner's widow, agreed:

It's tragic as far as I'm concerned that white northerners have to be caught up in the machinery of injustice and indifference in the South before the American people register concern. I personally suspect that if Mr. Chaney who is a native Mississippian Negro had been alone at the time of the disappearance that this case like so many others that have come before would have gone completely unnoticed.⁷¹

Despite the attention accorded to the Chaney, Schwerner, and Goodman killings, the state of Mississippi never brought a murder prosecution in the case. In 1967, eighteen individuals, including Deputy Sheriff Price, Klan kleagle Killen, and Klan Imperial Wizard Sam Bowers, were charged in a federal civil rights conspiracy trial. Price, Bowers, and five others were convicted. There were hung jury verdicts on Killen and two others; eight were acquitted. With half of the original eighteen defendants still alive in 2002, there is still a strong movement among Chaney/Schwerner/Goodman family members and supporters to reopen the murder investigation before it is too late.⁷²

4. *Other Victims, Named and Unnamed*

Unsurprisingly, the reign of terror did not end with the deaths of Chaney, Schwerner, and Goodman. As just one example, authorities searching for the three men's bodies in the summer of 1964 discovered the decomposing bodies of two others, Charles Moore and Henry Dee, in a Louisiana swamp. Both cases were dormant until 1999.⁷³ In February 1965, Jimmie Lee Jackson, a young black civil rights activist, was shot and killed by a state trooper at a voting rights march in Marion, Alabama.⁷⁴ That same year in Alabama, Viola Gregg Liuzzo, a thirty-nine-year-old white homemaker and activist from Detroit, was shot to death on U.S. 80 during the Selma-to-Montgomery Freedom

70. Klopott, *Historical Chronology*, *supra* note 12, at 223 (internal quotation marks omitted).

71. *Id.* (internal quotation marks omitted).

72. Jerry Mitchell, *Families Still Seek Justice*, CLARION-LEDGER (Jackson, Miss.), June 21, 2002, at 1A. The federal civil rights convictions were upheld in *United States v. Price*, 383 U.S. 787 (1966).

73. Tatsha Robertson, *Righting Our Uncivilized Wrongs: Reopened Race Murder Cases May Yet Add Justice to an Era*, BOSTON GLOBE, May 6, 2001, at E1; Vulliamy, *supra* note 5, at 1.

74. CHESTNUT & CASS, *supra* note 61, at 204; Mae Gentry, *Witness to Terror: Pastor's Daughter Remembers Friends Killed in '63 Bombing*, ATLANTA J.-CONST., Feb. 20, 2003, at 1JA.

March led by Martin Luther King, Jr.⁷⁵; Jonathan Daniels, a twenty-six-year-old white Episcopal seminary student from New Hampshire, was shot during a voter registration drive in Lowndes County, Alabama;⁷⁶ James Reeb, a thirty-eight-year-old Unitarian minister, was beaten to death in Selma.⁷⁷

Civil rights activists were not the sole targets of white supremacist violence; sometimes blacks lost their lives simply for exercising basic human rights such as pursuing a job or walking down the street in white neighborhoods. In April 1970, Rainey Pool, a black sharecropper, died from a brutal beating in Midnight, Mississippi — apparently just for being black in the wrong place at the wrong time.⁷⁸ In September 1968, Carol Jenkins, a twenty-one-year-old black woman, died from stab wounds on a street in Martinsville, Indiana; she had been trying to sell encyclopedias door-to-door after a strike closed the factory where she worked. After decades of dormancy, police finally made an arrest in the Jenkins case in the fall of 2000 after a forty-year-old woman came forward and disclosed that as a little girl she had seen her father and another white man chase Jenkins down the street and stab her in the chest with a screwdriver. According to the daughter, her father and the other man had laughed after the incident, claiming that Jenkins “got what [she] deserved.”⁷⁹ The state dropped murder charges in the case after the defendant died from cancer in 2002.⁸⁰

It is not known exactly how many more murder victims of white supremacists in this era remain unidentified or are simply lost to

75. See MARY STANTON, *FROM SELMA TO SORROW: THE LIFE AND DEATH OF VIOLA LIUZZO* 5 (1998). After two state court acquittals of the defendants charged in her murder, federal criminal civil rights prosecutions resulted in convictions of Robert Creel, William Orville Eaton, Eugene Thomas, and Collie Leroy Wilkins. See Frank Judge, *Slaying the Dragon*, AM. LAW., Sept. 1987, at 83, 87.

76. CHESTNUT & CASS, *supra* note 61, at 121; Tim Unsworth, *Murder in Black and White; 1967 Shooting of Two Clergy in Lowndes County, Alabama*, U.S. CATH., Mar. 1998, at 35; *Youths Remember Civil Rights Hero*, BOSTON GLOBE, Aug. 15, 1999, at G18. In 1965, an all-white jury acquitted Thomas Coleman, a deputy sheriff, of manslaughter charges in ninety minutes. Coleman died from cancer in 1997.

77. Jonathan L. Entin, *Viola Liuzzo and the Gendered Politics of Martyrdom*, 23 HARV. WOMEN'S L.J. 249 (2000) (reviewing STANTON, *supra* note 75). Three men — Elmer Cook, O'Neal (Duck) Hoggle, and Stanley Hoggle — were tried and acquitted in 1965. See *Breach of Faith: Murder in Selma* (CNN television broadcast, Mar. 5, 2000, Transcript # 00030500V55).

78. Vulliamy, *supra* note 5, at 1. In 1999, the reopened case resulted in the convictions of James Caston, Charles Caston, Hal Crimm, and Joe Oliver Watson, and the acquittal of Dennis Howell Newton. Two others charged in the crime died before being brought to trial. Timothy R. Brown, *Three on Trial in Decades-Old Murder of Black Man*, COM. APPEAL (Memphis, Tenn.), Nov. 10, 1999, at A16. The convictions of Caston, Caston, and Crimm were upheld in *Caston v. State*, 823 So. 2d 473 (Miss. 2002).

79. Sara Rimer, *After Arrest, Town Shamed By '68 Killing Seeks Renewal*, N.Y. TIMES, May 17, 2002, at A18.

80. Bruce C. Smith, *Judge Dismisses 1968 Murder Case*, INDIANAPOLIS STAR, Oct. 1, 2002, at B2.

history entirely. In May 2002, Mark Potok, Director of the Southern Poverty Law Center's Intelligence Project, estimated that there are approximately twenty cases of such murders that are either still open or are ripe for reopening.⁸¹ As for the unknown bodies in swamps, ditches, and dams, Potok paraphrases a local saying that he had heard: "[W]hen the Archangel Gabriel blows his trumpet . . . so many people will rise up out of the rivers from those years that you'll be able to walk from one side to the other dry-footed."⁸²

III. WHY REOPEN? BENEFITS AND BARRIERS

A. *Legal Accountability*

As the foregoing discussion suggests, the murders of Evers, Collins, Wesley, Robertson, McNair, Chaney, Schwerner, and Goodman were not just individual acts — nor were the murders of Parker, Jackson, Liuzzo, Jenkins, Moore, Dee, Pool, Penn, Till, or the thousands of others victimized by racial supremacists over the course of this nation's history. Rather, they were part of a larger mosaic of violent acts against blacks, Jews, and others who threatened the so-called "white Christian republic." Although these murders were not formally linked, the connections between them and widespread racial hatred were neither vague nor attenuated. The pattern of supremacist lawlessness in defiance of civil rights progress sent a clear message that the price of equality would be death, torture, and dismemberment. This message continues today in the form of race-based hate crimes throughout the nation.⁸³

Given the continuing reality of racially-motivated violence and hatred in this country, reopening long-dormant cases may result in legal accountability for both government and private malfeasance. The murders discussed in Part II occurred not only because of the criminal acts of private individuals, but also because of the complicity of law enforcement and other government actors. Moreover, the history of failed or unfiled murder prosecutions in these cases — despite strong evidence pointing toward the culpability of public and private actors — magnifies the need to "correct the record" so that the legitimacy of the legal system itself is not further undermined.

In her recent work on legal and extralegal responses to collective

81. *Church Bombing Trial in Birmingham, Alabama, and Civil Rights Era Hate Crimes*, *supra* note 64.

82. *Id.*

83. *See generally* Southern Poverty Law Center, at www.splcenter.org/intelligence/project/ip-index.html (last visited July 7, 2003). The Southern Poverty Law Center publishes a quarterly report of bias crimes, the "Intelligence Report," that is listed on the Center's site.

atrocities, Martha Minow considers a range of choices facing societies as they emerge from histories of mass violence. Analyzing the experiences of nations in Europe, Latin America, and Africa in dealing with the aftermath of widespread societal violence, Minow raises a series of important questions regarding the role of prosecutions in securing justice and truth:

Perhaps there simply are two purposes animating societal responses to collective violence: justice and truth. Justice may call for truth but also demands accountability. And the institutions for securing accountability — notably, trial courts — may impede or ignore truth. Democratic guarantees protecting the rights of defendants place those rights at least in part ahead of truth-seeking; undemocratic trials may proceed to judgment and punishment with disregard for particular truths or their complex implications beyond particular defendants. Then the question becomes: Should justice or truth take precedence? Of what value are facts without justice? If accountability is the aim, does it require legal proceedings and punishment? Do legal proceedings generate knowledge?⁸⁴

Although differences certainly exist between the regimes examined by Minow and American anti-black violence in the 1960s, similar issues of accountability and retrospective justice arise in dealing with the aftermath of state-sanctioned malfeasance. Reopening civil rights era cases is an important public response to collective violence and atrocities against blacks, such as those discussed in Part II of this Essay. By aiming to foster justice, truth, and accountability, these proceedings generate lasting records of both specific misdeeds and less tangible harms. I refer to these categories of accountability as government malfeasance and individual malfeasance in Parts III.A.1 and III.A.2 below.

84. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 9 (1998) (internal citations omitted). In this work, Minow cites an organization, Facing History and Ourselves, which supports continuing awareness and exploration of “possible institutional responses to collective violence, genocide, apartheid, and torture.” *Id.* at 6-7. She asks a series of questions that could usefully be applied to awareness of civil rights era atrocities in the United States:

What lessons can be learned — and what should be taught — to young people growing up in a world that has known, and still produces incomprehensible patterns of violence and torture? Would it be better to shield young people from the fact of those patterns until they grow up? The wager made by programs like Facing History and Ourselves is that young people would do better to learn about the horrors that have occurred at the hands of adults than to be subject to silence about the events that still shape their world. Young people, understandably, want to know what has been done, and what can be done, to respond, redress, and prevent future occurrences. They ask whether it is possible to find a stance between vengeance and forgiveness, a stance for survivors, bystanders, and the next generations.

Id. at 7.

1. *Government Malfeasance*

Government malfeasance — whether stemming from complicity in the failure to prosecute or in prosecutorial overreaching — fundamentally skews the nature of the criminal process and reinforces skepticism in the validity of its outcomes. If accountability is achievable in such cases, there must be opportunities to reopen investigations, even decades later, to question the government's role.⁸⁵ Although the imperatives of individual defendants' rights warrant respect for the values of finality and closure, there must be options in extraordinary cases to recognize and counteract the malfeasance of the state.

The prosecutions of Byron De La Beckwith for the murder of Medgar Evers constituted one such extraordinary case, rooted in the misconduct of Mississippi officials. The historical record now clearly establishes that Mississippi in the 1950s and 1960s was — politically and institutionally — a white supremacist state, dominated by two major segregationist organizations: the Citizens' Council and the Sovereignty Commission.⁸⁶ The Citizens' Council, founded a mere two months after the issuance of the *Brown* decision in May 1954,⁸⁷ reflected the intensity of whites' fears of integration; it was “the greatest force we have in this battle to save the white race from amalgamation, mongrelization, and destruction,” noted Walter

85. A compelling example of the value of reopening cases to investigate prosecutorial overreaching is the *coram nobis* litigation in the case of *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Court upheld the conviction of Fred Korematsu for violation of a civilian exclusion order issued as part of the government's internment of Japanese Americans in 1942; the Court based its decision on government representations of “military necessity” and the dangers posed by Japanese Americans on the West Coast. In the 1980s, legal historian Peter Irons — in the course of conducting research for a book on the wartime internment cases — discovered government documents establishing that key officials in the Justice Department had lied to the Supreme Court about the existence of a national security threat posed by Japanese-Americans. This discovery led to the formation of a team of civil rights lawyers and the reopening of the prosecutions of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui through the filing of writs of error *coram nobis*. The *coram nobis* litigation resulted in the reversal of the Korematsu, Hirabayashi, and Yasui convictions. See PETER IRONS, *JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES* (1989); see also OF CIVIL WRONGS AND RIGHTS: THE FRED KOREMATSU STORY (Korematsu Film Project, 2000). According to Eric K. Yamamoto, a member of the *coram nobis* legal team: “One woman in her sixties stated that she always felt the internment was wrong, but that, after being told by the military, the President, and the Supreme Court that it was a necessity, she had come seriously to doubt herself. Redress and reparations and the successful court challenges, she said, had freed her soul.” ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS, AND REPARATIONS: LAW AND THE JAPANESE AMERICAN INTERNMENT* 280 (2001) [hereinafter YAMAMOTO ET AL., *RACE, RIGHTS, AND REPARATIONS*].

86. See NOSSITER, *supra* note 51, at 90-97; VOLLERS, *supra* note 51, at 48-53.

87. Thomas P. Brady, a Mississippi judge who was instrumental in the formation of the Citizens' Council, published a fiery segregationist speech in June 1954; it was entitled *Black Monday*, a reference to the date of issuance of the *Brown* decision. VOLLERS, *supra* note 51, at 51.

Sillers, the speaker of the state House of Representatives, in 1956.⁸⁸ Byron De La Beckwith was a charter member.⁸⁹

The Council “became virtually an arm of government and received state funds It had developed into a quasi-political party along the lines of those in totalitarian states, with ordinary citizens and public officials uniting to enforce a common ideology, white supremacy, through fear and intimidation.”⁹⁰ Unsurprisingly, their chief enemy was the NAACP, the organization responsible for *Brown* and for the vibrant leadership of field secretary Medgar Evers.⁹¹

In 1956, Mississippi instituted the Sovereignty Commission with the following law: “It shall be the duty of the Commission to do and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the state of Mississippi . . . from encroachment thereon by the Federal Government or any branch, department or agency thereof; and to resist the usurpation of the rights and powers reserved to this state”⁹² From 1956 until its closure in 1973, the Commission operated officially as a public relations agency for the state of Mississippi and its “traditions,” including segregation. Unofficially, the Commission evolved into an elaborate and well-funded spy agency, conducting a “paranoid, dirty war against suspicious outsiders, civil rights workers, blacks seeking their rights, and men and women suspected of carrying on interracial liaisons.”⁹³ The Commission diverted funds to the Citizens’ Council,⁹⁴ interfered with voter registration drives, and advised police officers on how to break the law without getting caught.⁹⁵ As with the Citizens’ Council, the Commission attracted the attention and loyalty of Byron De La Beckwith.⁹⁶

The unlawful, extremist, and even tawdry aspects of the Commission’s work remained officially secret from 1956 through 1989, in part because of a 1977 decision of the Mississippi legislature to seal the Commission’s records for 50 years.⁹⁷ After public pressure and

88. NOSSITER, *supra* note 51, at 90.

89. *Id.* For further background on Beckwith’s life, see REED MASSENGILL, *PORTRAIT OF A RACIST: THE MAN WHO KILLED MEDGAR EVERS?* (1994); R.W. SCOTT, *GLORY IN CONFLICT: A SAGA OF BYRON DE LA BECKWITH* (1991).

90. NOSSITER, *supra* note 51, at 93.

91. VOLLERS, *supra* note 51, at 51.

92. MISS. CODE ANN. § 3-1-11 (1972) (repealed 1977); VOLLERS, *supra* note 51, at 52.

93. NOSSITER, *supra* note 51, at 96.

94. VOLLERS, *supra* note 51, at 53.

95. NOSSITER, *supra* note 51, at 96. For further information about the Commission, see VOLLERS, *supra* note 51, at 74-77. See also JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* (1994); ERLE JOHNSTON, *MISSISSIPPI’S DEFIANT YEARS: 1953-1973* (1990).

96. VOLLERS, *supra* note 51, at 53.

97. NOSSITER, *supra* note 51, at 96.

litigation by civil rights activists to unseal the records in 1989, however, the Honorable William Barbour ordered their release:

The state of Mississippi acted directly through its State Sovereignty Commission and through conspiracy with private individuals to deprive the plaintiffs of rights protected by the Constitution to free speech and association, to personal privacy, and to lawful search and seizure, and statutes of the United States The final act of this tragedy was to cloak state actions in secrecy until those who had been harmed by these acts had died.⁹⁸

Significantly, these records also provided evidence of the Sovereignty Commission's long-term surveillance of Medgar Evers and of its collusion in the second Beckwith trial in 1964.⁹⁹ In 1989, journalist Jerry Mitchell of the Jackson *Clarion-Ledger* obtained a Sovereignty Commission file entitled "Medgar Evers: Race Agitator," which revealed that the Commission had investigated the background of potential jurors in the second trial; Mitchell's subsequent journalistic investigations of the Commission's possible jury tampering triggered the momentum that eventually resulted in the reopening of the Evers case in 1990.¹⁰⁰ These disclosures, along with additional breakthroughs such as the discovery of the murder weapon, critical new witnesses, and a boastful confession, contributed to the successful outcome of the 1994 Beckwith trial.¹⁰¹

The successful reopening of the Medgar Evers case inspired and reinvigorated efforts to reopen other high-profile cases whose histories reflected government misconduct and neglect.¹⁰² For example, a primary impetus of the movement to reopen the Chaney/Schwerner/Goodman case is the aim to expose the involvement of government officials in the murders and in their delayed prosecutions. Rita Schwerner noted:

I believe that there should be a trial so there is a public recognition of the state and individuals who didn't want to get their hands dirty in the reign of terror. The reasons I think that's important is so that we can teach our children and grandchildren what can happen if government is complicit.¹⁰³

The well-documented historical record of Freedom Summer — the summer of the three civil rights workers' murders — contains numerous instances of federal, state, and local governmental intransi-

98. *Id.* at 235 (internal quotation marks omitted).

99. VOLLERS, *supra* note 51, at 264.

100. *Id.* at 264-72.

101. DELAUGHTER, *supra* note 50, at 195-220.

102. David Snyder, *Evers Case Inspires Others: Hopes Renewed for New Trials*, *TIMES-PICAYUNE*, Feb. 14, 1994, at A1.

103. Mitchell, *supra* note 72, at 1A (internal quotation marks omitted).

gence and racial hostility.¹⁰⁴ Segregationists and racial supremacists not only worked hand-in-hand with governmental actors — they *were* governmental actors, determined to use public authority and resources to obliterate racial progress. For example, the mayor of Jackson, Mississippi, embarked on the following preparations for the arrival of activists:

“This is it . . . [t]hey are not bluffing, and we are not bluffing. We are going to be ready for them . . . They won’t have a chance.” The mayor expanded the city’s police force from 200 to more than 300 officers. He purchased 250 shotguns and a 13,000-pound armored personnel carrier called “Thompson’s tank,” which had steel walls and bulletproof windshields. He had oversized paddy wagons built, brought in two-and-a-half ton searchlight trucks, and arranged to use the fairgrounds as a makeshift prison. The state legislature approved a request from the governor to hire 700 additional state highway patrolmen.¹⁰⁵

To further solidify their attempts at control, the legislature outlawed the distribution of flyers urging boycotts and erected barriers to the issuance of permits to operate the planned “freedom schools” for activists.¹⁰⁶ In response to requests for assistance in protecting activists during what promised to be a dangerous summer, FBI Chief J. Edgar Hoover asserted that his agency was not a protection force and that accordingly it would not “wet-nurse” student activists in Mississippi.¹⁰⁷

Government malfeasance in the Chaney/Schwerner/Goodman case continued throughout the subsequent arrest, incarceration, disappearance, and murder of the young men. Even after the bodies were unearthed and the young men’s parents expressed the desire that they be buried side by side, state segregation laws forbade such an interment.¹⁰⁸ Unsurprisingly, further government delay and inaction resulted in the dismissal of state charges against the twenty-one men eventually arrested and in the small number of individuals convicted under federal civil rights laws.¹⁰⁹ In the face of damning governmental involvement and a paltry record of successful prosecutions, reopening the case could serve as the necessary catalyst for reexamination of the government’s accountability for such murders.

As discussed in Part II, widespread violence against blacks and other people of color has flourished in this nation’s history, sometimes with the government’s imprimatur and sometimes even at the hands of

104. See *supra* notes 66-68 and accompanying text; see also SALLY BELFRAGE, *FREEDOM SUMMER* (1965); WILLIAMS, *supra* note 7, at 228-35.

105. WILLIAMS, *supra* note 7, at 229-30.

106. *Id.* at 230.

107. *Id.*

108. *Id.* at 231-35.

109. *Id.* at 235.

the designated “protectors” themselves. This type of intimidation and terror — whether actively encouraged or merely condoned by the government — *is* government malfeasance. If permitted to remain dormant and unchallenged, it generates repercussions not just with respect to the past but also very much with respect to the present and future. Contemporary manifestations of police brutality, hate crimes, and government cover-ups are reinforced and indeed encouraged if the historical record reflects a lack of recognition of and punishment for past wrongs.¹¹⁰ Reopening cases to obtain legal accountability for public malfeasance — even in the context of individual prosecutions — enhances respect for the rule of law and signals that the state itself is not beyond the reach of the law.

2. *Individual Malfeasance*

Martha Minow notes that individual prosecutions are “slow, partial, and narrow,” and that they fail to capture “larger patterns of atrocity and complex lines of responsibility and complicity.”¹¹¹ Undoubtedly, reopening cases in which the historical records reflect failed or unfiled prosecutions presents similar shortcomings; reopening can neither undo the past nor adequately provide redress for long-standing harms. Nevertheless, such prosecutions (and convictions) loom large in significance as markers of accountability — certainly not “justice” in a comprehensive, restorative sense, but a kind of “justice” nevertheless. Perhaps even starker significance would lie in the failure to prosecute such cases; as one surviving family member of James Chaney noted: “The perpetrators are walking the streets, and we all know who they are. By not prosecuting, it’s saying to the individuals, ‘You can go home and tell your friends about it, and nothing will be done.’”¹¹²

In the Evers case, Byron De La Beckwith epitomized this sense of “scot-free” gloating. For nearly three decades after the Evers murder, Beckwith responded to inquiries about the assassination with a gleeful, remorseless defense of the murder and of white supremacy generally. For example, in October 1987, Beckwith wrote to the Hinds County District Attorney’s office to express thanks that his case was not being reopened:

110. Alfieri proposes a way to address this need through the articulation of prosecutorial race- and community-based duties to investigate and prosecute cases of racially motivated violence. Alfieri, *supra* note 13, at 1228-58. Alfieri explores the model of prosecutor as “heroic moral witness . . . to confront injustice,” and points out that this model is useful in that it “militates against the denunciation of the prosecutorial function as a blunt instrument of white dominance.” *Id.* at 1228.

111. MINOW, *supra* note 84, at 9.

112. Mitchell, *supra* note 72, at 1A.

Surely, a 3rd trial of me would turn Jackson, and indeed much Of Hines [sic] County, into a huge “Roman Circus fiesta” filling the air and streets with the bitterness and blackness of beasts, topped off and stirred with a vast multitude of trash of the white variety, and every afore named [sic] participant among the multitudes of legal Leaders//??! dragging their empty purses behind them like a passell [sic] of “pickers” going to ‘de cotton patch to empty a vast veritable fortune of funds (4 ‘dey services) out of the pockets of the responsible, white, Christian tax paying public — of them who like thee and me and our people for generations WHO BUILT THIS REPUBLIC.¹¹³

When asked in the early 1990s whether the murderer of Medgar Evers should be punished, he replied: “[I]t depends on why he was killed. If he was killed in defense of the preservation of this white Christian republic, that’s not murder, that’s self-defense.”¹¹⁴

These comments, particularly when considered in light of the ample evidence presented in the first and second Beckwith trials in 1964, fostered the widespread assumption that Beckwith had “gotten away with” Evers’s murder. Moreover, Beckwith’s gloating taunts suggested that he and other white supremacist defendants could act with impunity in perpetuating their hateful ideologies. Ironically, even when Hinds County prosecutor Bobby DeLaughter reopened the case and developed substantial new evidence against Beckwith, he encountered skepticism among those who thought that Beckwith was a guilty, raving lunatic but that it was simply too late to go back and correct the past:

I also received calls and letters from people on the opposite end of the spectrum, who hoped we were not considering reopening the case, no matter what the law was or what evidence we ever amassed. The decision to prosecute any case should be based upon the law and the evidence, but to this group, Beckwith’s guilt was not the issue. I was repeatedly told, “We know he’s guilty, everybody knows that; but that’s not the point. . . . So, I would ask, “What *is* the point?” Without exception, I got one of four responses: “He’s too old”; “The case is too old”; “It will cost the taxpayers too much money”; “It will open up an old wound.”¹¹⁵

Despite these concerns, there is a compelling reason to pursue such cases: namely, the recognition that individual prosecutions, for all their limitations, are all that our criminal justice system affords as a mechanism for legal redress.

In addition to accountability for, and acknowledgement of, the government’s role in these murders, there should be accountability for, and acknowledgement of, individual acts as well. Minow links these concepts of accountability to positive dimensions underlying the

113. DELAUGHTER, *supra* note 50, at 27.

114. *Id.* at 160; *see also* VOLLERS, *supra* note 51, at 280.

115. DELAUGHTER, *supra* note 50, at 24-25.

notion of “vengeance”: “Although this word may sound pejorative, it embodies important ingredients of moral response to wrongdoing. We should pursue punishment because wrongdoers should get what is coming to them; this is one defense — or perhaps restatement — of vengeance.”¹¹⁶

As discussed in Part II, the specifics of the murders at issue are almost breathtakingly galling and cruel. Accountability for individual wrongdoing can also serve as a way of “correcting the record” and honoring the memories of the lives lost through civil rights era violence.¹¹⁷

B. *Due Process Concerns*

Although legal accountability is the most commonly invoked objective in the reopening of civil rights era cases, significant countervailing interests require careful consideration of the rights of individuals who may be prosecuted or re-prosecuted many years after the murders in question. Federal constitutional guarantees under the Fifth Amendment’s Double Jeopardy Clause, the Sixth Amendment’s Speedy Trial Clause, and the Fifth and Fourteenth Amendment’s Due Process Clauses — as well as analogous state constitutional rights — should be implemented vigorously to ensure fairness to these defendants. It is beyond the scope of this Essay to address fully the history and complexity of these issues in the context of constitutional and criminal jurisprudence; rather, I aim to emphasize options that strive to balance the rights of defendants with the valid imperatives in favor of reopening. In my view, these considerations are countervailing but not contradictory, and legal accountability can be established in long-dormant cases without sacrificing defendants’ rights. Below, I briefly address these concerns in the context of cases that have been reopened successfully.

In reopening cases, a paramount concern is affording due process to the individuals who may be named or renamed as defendants. In the cases outlined in Part II, any surviving individuals who might be named or renamed in future prosecutions are now elderly. When he was convicted in 1994, Beckwith was seventy-three years old.¹¹⁸ In the Sixteenth Street Baptist Church bombing case, Blanton was sixty-two years old when he was tried in 2001; Cherry was seventy-two years old

116. MINOW, *supra* note 84, at 10. Minow cautions, however, against the deterioration of vengeance into “a downward spiral of violence, or an unquenchable desire that traps people in cycles of revenge, recrimination, and escalation.” *Id.*

117. For thoughtful analyses of the role of victims and the valuation of victims’ lives in criminal jurisprudence, see Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994); Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937 (1985).

118. DELAUGHTER, *supra* note 50, at 129.

when he was tried in 2002.¹¹⁹ Although it is a well-known tenet of criminal jurisprudence that murder has no statute of limitations,¹²⁰ both pragmatic concerns and abstract principles affect decisions of whether to prosecute decades-old cases. Despite powerful demands for legal accountability, equally important countervailing interests exist: these can range from practical prosecutorial burdens (expense; availability of witnesses; preservation of evidence; competence of the defendant to stand trial) to individual constitutional rights under the Double Jeopardy, Speedy Trial, and Due Process Clauses. The latter concerns are briefly addressed below.

1. *Double Jeopardy Clause*

The Double Jeopardy Clause of the Fifth Amendment of the U. S. Constitution commands that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.”¹²¹ At first glance, this language suggests that re prosecutions would be entirely prohibited, and that only first-time prosecutions resulting from reopened investigations of long-dormant cases would be permitted. A closer examination of Supreme Court precedent and commentary, however, reveals otherwise.

With regard to being “twice put in jeopardy” “for the same offence,” the Court’s dissection of the text can be divided into two major parts. First, the Court has stated that double jeopardy bars any criminal prosecution for the same offense for which the defendant has already been acquitted, convicted, or pardoned.¹²² This interpretation excludes mistrials and hung juries, thereby clearly allowing re prosecutions such as Beckwith’s, whose first two trials ended in hung juries.¹²³

A second strand of double jeopardy textual analysis and Supreme Court jurisprudence is both more complex and more controversial. For over eighty years, the Court has applied a “dual sovereignty doctrine” in interpreting the “same offence” language in the context

119. *All Things Considered: Man Goes to Trial for Crime Committed in 1963* (National Public Radio broadcast, Apr. 20, 2001).

120. WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 18.5(a) (3d ed. 2000).

121. U.S. CONST. amend. V. Many states afford analogous protections in their own constitutions. *See, e.g.*, CAL. CONST., art. I, § 15, cl. 5; TEX. CONST., art. I, § 14; N.Y. CONST., art. I, § 6.

122. *United States v. Scott*, 437 U.S. 82, 87 (1978); *United States v. Wilson*, 420 U.S. 332, 340 (1975).

123. In both interlocutory and post-conviction appeals, Beckwith unsuccessfully challenged his 1994 trial as a violation of the Double Jeopardy Clause. Each time, the Court held that the Double Jeopardy Clause was inapplicable because of the hung jury verdict and subsequent order of nolle prosequi. *See Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), *cert. denied*, 525 U.S. 880 (1998); *Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992); *see also State v. Shumpert*, 723 So. 2d 1162 (Miss. 1998); *State v. Thornhill*, 171 So. 2d 308 (Miss. 1965).

of multiple prosecutions; under this doctrine or “exception,” successive prosecutions by different sovereigns are permitted because different governments’ laws by definition cannot define the “same offence.”¹²⁴ The Court has justified this exception as rooted in federalism concerns. Without the doctrine, the Court has surmised, the separation of powers between state and federal governments might be jeopardized, leaving different jurisdictions in a “race to the courthouse” to conduct the initial or exclusive prosecution of a defendant whose act violated both state and federal law.¹²⁵ Other federalism-based concerns delineated by the Court include the protection of: a state’s power to enforce its criminal laws;¹²⁶ the federal government’s power to prosecute fully an offense that violates both federal and state laws;¹²⁷ and the balance of prosecutorial powers between the state and federal governments.¹²⁸

In the past thirteen years, the Court has zigzagged in its approach to defining “same offence”;¹²⁹ however, it is clear that the dual sovereignty doctrine is viable for a broad range of re prosecutions. In summary, the Court’s jurisprudence permits the re prosecution of a defendant whose alleged act violates both federal and state law, regardless of which government has conducted the initial prosecution and regardless of the outcome of that first prosecution.¹³⁰

124. *United States v. Lanza*, 260 U.S. 377, 382-85 (1922) (upholding a federal prosecution for violation of the National Prohibition Act after a state conviction for violation of state Prohibition Laws); see also *Abbate v. United States*, 359 U.S. 187, 190-95 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 132 (1959); *Blockburger v. United States*, 284 U.S. 299 (1932). For further background and commentary on the origins of the dual sovereignty doctrine, see Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995) (noting that the Court had articulated the doctrine in dicta as early as the mid-1800s in *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); and *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852)), and Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU’s Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693 (1994).

125. *Heath v. Alabama*, 474 U.S. 82, 93 (1985).

126. *Id.*

127. *Lanza*, 260 U.S. 377 (1922).

128. *Bartkus*, 359 U.S. 121 (1959).

129. In *Blockburger*, 284 U.S. at 304, the Court held that a successive prosecution is not for the “same offence” if the crime on which each prosecution is based has an element not included in the other. In *Grady v. Corbin*, 495 U.S. 508, 516 (1990), overruled by *United States v. Dixon*, 509 U.S. 688, 704 (1993), the Court adopted a new test, holding that the “same offence” was one resting on the same conduct. This test, however, was short-lived; in *Dixon*, the Court reinstated the old *Blockburger* test. *Dixon*, 509 U.S. 688 (1993).

130. Kevin J. Hellman, *The Fallacy of Dual Sovereignities: Why the Supreme Court Refuses to Eliminate the Dual Sovereignty Doctrine*, 2 J.L. & POL’Y 149, 150-51 (1994). In February 2003, the state of Mississippi secured a conviction in a federal murder trial of a civil rights era slaying; the case was a re prosecution following a lapse of over thirty years after the original prosecution. Defendant Ernest Avants, charged in the Ku Klux Klan’s 1966 killing of Ben Chester White as part of a plot to assassinate Dr. Martin Luther King, Jr., was acquitted of state murder charges in 1966. Federal authorities resurrected the case in 1999 after an

Many scholars have argued for the abolition of the dual sovereignty doctrine as inconsistent with the underlying purposes of the Double Jeopardy Clause.¹³¹ Susan N. Herman notes:

A great deal has been written about the Supreme Court's dual sovereignty doctrine, almost all of it critical. Commentators have virtually uniformly argued against the dual sovereignty theory the Court has forged, advocating its abolition or at least its limitation. About half of the state legislatures have declined the broad power to re prosecute afforded by the Supreme Court. . . . The influential Model Penal Code advocates limiting the dual sovereignty exception to prohibit second prosecutions by a separate jurisdiction in those circumstances in which a successive prosecution would be prohibited in the same jurisdiction under the Double Jeopardy Clause as it is currently interpreted. Several state courts have found the dual sovereignty doctrine to violate their state constitutional protections against double jeopardy.¹³²

Criticism of the doctrine encompasses a broad range of constitutional, historical, textual, and policy concerns. These include arguments that this "two bites at the apple" approach may encourage vindictive prosecutions, undermine public faith in the judicial system, ignore defendants' rights at the expense of law enforcement imperatives, and diminish critical values of finality and closure.¹³³

In civil rights cases, some reject a broad dual sovereignty exception in favor of a limited "civil rights exception" to allow federal criminal civil rights prosecutions after state proceedings have resulted in acquittals or insufficiently lengthy sentences.¹³⁴ As Paul Hoffman points out, the Reconstruction-era federal civil rights statutes, particularly 18 U.S.C. Sections 241 and 242, were intended to express

ABC News producer pointed out to them that the alleged killing had taken place on federal property, the Homochitto National Forest. See Reed Branson, *Jury Convicts Avants in 1966 Murder*, COM. APPEAL, Mar. 1, 2003, at A1; Jerry Mitchell, *Avants Found Guilty in '66 Klan Killing*, CLARION-LEDGER, Mar. 1, 2003, at 1A.

131. Amar & Marcus, *supra* note 124, at 11-27; Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Walter T. Fisher, *Double Jeopardy, Two Sovereignities and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994); Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of Garcia v. San Antonio Metropolitan Transit Authority*, 22 NEW ENG. L. REV. 31 (1987); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383, 408-33 (1986); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions*, 34 S. CAL. L. REV. 252 (1961); see also Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception"*, 41 UCLA L. REV. 649 (1994)

132. Herman, *supra* note 131, at 618-20 (citations omitted).

133. Hellman, *supra* note 130, at 153-55.

134. See, e.g., Hoffman, *supra* note 131, at 661-71.

the ultimate authority of the federal government to protect fundamental rights, particularly when state institutions failed.¹³⁵ In the South of the 1960s, there were many such failures of state authority — the cases of Viola Liuzzo, James Chaney, Michael Schwerner, Andrew Goodman, to name a few — and federal criminal civil rights prosecutions stepped in to repair the breach.

Even when counterbalanced with the primary concerns addressed in this Essay — that is, the strong arguments that militate in favor of reopening and reprosecuting cases — the rights of individual defendants must be carefully considered. In its present form, the broad dual sovereignty exception permits re prosecutions, but arguably at the expense of these individuals' rights. Given these policy and constitutional tensions, perhaps the fairest and most viable approach to reopening these cases is to focus on re prosecutions following mistrials and hung juries (such as in the Beckwith case), and initial prosecutions of individuals (such as in the Blanton and Cherry trials). These choices raise different due process concerns, as discussed below.

2. *Speedy Trial Clause*

The Sixth Amendment of the U. S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."¹³⁶ The U.S. Supreme Court has held that a defendant's speedy trial rights attach upon arrest and continue until conviction, acquittal, or a formal entry is made on the record that the person is no longer under indictment. "[T]he Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges."¹³⁷ Based on these strictures, Speedy Trial Clause challenges in most reopened cases are either inapplicable or readily resolved if the second prosecution proceeds from the arrest through trial phases sufficiently expeditiously. The significant lapse of time in these cases is typically not while an individual is under indictment, but rather between successive prosecutions or between the crime and the initial prosecution.¹³⁸

135. *Id.* at 661, n.49. Hoffman notes: "The failure of state court juries to convict those responsible for racist violence was one of the reasons public officials and private white supremacists acted with impunity against the African-American population in the South for nearly a century after Reconstruction ended." *Id.* at 661. Hoffman also cites *United States v. Guest*, 383 U.S. 745 (1966), the landmark federal criminal civil rights prosecution of Klansmen in the murder of Lemuel Penn, an African American, in Athens, Georgia, in 1964, after two defendants were acquitted by state court juries. See Michal R. Belknap, *The Legal Legacy of Lemuel Penn*, 25 *HOW. L.J.* 467 (1982).

136. U.S. CONST. amend. VI.

137. *United States v. MacDonald*, 456 U.S. 1, 7 (1982).

138. See, e.g., *Caston v. State*, 823 So. 2d 473, 503-05 (Miss. 2002) (rejecting a Speedy Trial Clause challenge by defendants who had been reindicted, tried, and convicted thirty

A notable exception is Beckwith's 1994 reprosecution, in which he raised a Speedy Trial Clause challenge based on the five-year delay between the hung jury verdict in the second trial in 1964 and the entry of a *nolle prosequi* in 1969. The Mississippi Supreme Court rejected Beckwith's claim for three primary reasons: that Beckwith had not asserted his right to a speedy trial during the relevant time period; that his complicity with the Mississippi Sovereignty Commission's activities fostered the delay; and that he had not been prejudiced by the delay because all material evidence had been preserved from the earlier trials.¹³⁹

3. *Passage of Time*

The third and final major due process concern in the reopening of cases involves the lapse of time between the underlying act and the final indictment and prosecution. Although the lack of a statute of limitations for murder clearly reflects both the seriousness of the crime and the desire that prosecutions should not be barred by the mere passage of time, it is daunting to consider the possible effects of gaps of twenty or thirty years on the viability of a case. In the civil rights era cases discussed herein, the impetus for reopening involved not so much an abstract sense that "justice must be done," but usually a breakthrough in the discovery of new evidence or witnesses. Given that key witnesses and defendants themselves are aged and possibly in frail health, is it possible to guarantee due process after so much time has elapsed? At what point, if any, does the passage of time eliminate the ultimate possibilities for truth and justice?

The answer to this difficult question surely must be that each case presents a unique path. In reviewing Beckwith's due process challenge to his final prosecution, the Mississippi Supreme Court applied a two-part test to determine whether the thirty-year passage of time between the first and third trials was inconsistent with due process. First, the court asked, has the final preindictment delay caused actual prejudice; and second, was the lapse in time intentionally used by the government to gain a tactical advantage over the defendant?¹⁴⁰ In analyzing the first prong, the court noted that Beckwith had not been precluded in his third trial from presenting any facts or testimony that he could have offered in his earlier trials; the court observed that the previous testimony of the now-deceased witnesses had been read into the record at trial. The court also was unconvinced that Beckwith's claimed memory loss was insurmountable, given that the original trial

years after the original indictment, because the case had been dismissed in the same year as the original indictment.).

139. *De La Beckwith v. State*, 707 So. 2d 547, 565-67 (Miss. 1997).

140. *Id.*

records contained detailed testimony of his contemporaneous recollections: “‘Vague assertions of lost witnesses, faded memories, or misplaced documents are insufficient to establish a due process violation from preindictment delay.’”¹⁴¹

With regard to the second prong, the court found that the delay was not attributable to any government attempt to gain an “upper hand” over Beckwith due to the passage of time; in fact, the court found, the delay was more likely caused by complicity between the state Sovereignty Commission and Beckwith in obfuscating the connection between the Commission and possible jury tampering in the earlier trials.¹⁴² It is likely that a similar analysis would apply to other reopened cases in which defendants assert that the mere passage of time should render their prosecutions invalid under the Due Process Clause.

C. *Racial Healing*

In addition to fostering some measure of legal accountability for both public and private wrongdoing, reopening these cases may facilitate a kind of racial healing of communities and individuals harmed by the intractable, systemic violence of the era. Recognition of the need for broad-based racial healing requires acknowledgement of broad-based racial injury; in this context, reopening individual cases signifies that these murders inflicted long-term, devastating blows to the health, safety, and welfare of black communities.

Harlon Dalton describes racial healing as involving “candidly confronting the past, expressing genuine regret, carefully appraising the present in light of the past, agreeing to repair that which can be repaired, accepting joint responsibility for the future, and refusing to be derailed by setbacks and short-term failure.”¹⁴³ To achieve this healing, Eric Yamamoto urges the use of “praxis”, “a pragmatic search for healing understandings that resonate with racial communities . . . understandings [that] emerge in bits and pieces from the disciplines of law, theology, social psychology, political theory (particularly peace studies), and indigenous healing practices.”¹⁴⁴

Can these objectives be consistent with the process and goals of reopening cases? In some ways, yes. Minow notes, “Prosecution may be essential . . . for the healing of social wounds caused by serious violations, on the theory that a society cannot forgive what it cannot

141. *Id.* at 570 (citations omitted).

142. *Id.*

143. HARLON L. DALTON, *RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES* 100 (1995).

144. YAMAMOTO, *supra* note 1, at 153-54 (1999).

punish.”¹⁴⁵ This concept of racial healing would also embrace Alfieri’s description of the prosecutor’s role as “heroic moral witness . . . to confront injustice.”¹⁴⁶ In this light, reopening also represents an acknowledgement that coming to terms with the past is necessary for racial progress. Public scrutiny can in turn lead to recognition of the long-term harms — psychological, economic, legal, and political — inflicted by the reign of supremacist terror.

The decades-long efforts of Myrlie Evers, Rita Schwerner, and others represent the hope that racial healing will result from reopening old wounds and exposing them to the fresh air of investigation. Imagery of injuries and healing is pervasive in these efforts; for example, with regard to the Evers case, Bobby DeLaughter asks:

[I]f justice has never been finalized in such a despicable and immoral atrocity and pursuing it will open an old wound, is it not a wound that needs to be reopened and cleansed, instead of continuing to fester over the years, spreading its poison to future generations?¹⁴⁷

It is far from clear, however, that criminal prosecution itself yields the kind of broad-based healing needed to address long-term racial harms. Criminal prosecution focuses on matters of adversarialism, proof, culpability, and punishment; racial healing requires collaboration, a lack of fingerpointing, confession, and forgiveness. As Minow observes in evaluating the role of prosecutions as a response to mass atrocities:

The trial itself steers clear of forgiveness It announces a demand not only for accountability and acknowledgment of harms done, but also for unflinching punishment. . . . Reconciliation is not the goal of criminal trials except in the most abstract sense. We reconcile with the murderer by imagining he or she is responsible to the same rules and commands that govern all of us; we agree to sit in the same room and accord the defendant a chance to speak, and a chance to fight for his or her life. But reconstruction of a relationship, seeking to heal the accused, or indeed, healing the rest of the community, are not the goals in any direct sense.¹⁴⁸

Ultimately, the goal of racial healing may be better served through another mechanism, for example, a kind of “truth commission” as discussed below, or through a combination of truth commission and prosecution.

145. MINOW, *supra* note 84, at 58.

146. See Alfieri, *supra* note 13, at 1228.

147. DELAUGHTER, *supra* note 50, at 25.

148. MINOW, *supra* note 84, at 26.

IV. TRUTH AND RECONCILIATION COMMISSIONS: COMPLEMENTS OR ALTERNATIVES TO PROSECUTION?

In the movement to reopen these cases, traditional adversarial goals of legal accountability coexist — sometimes ill-fittingly — with nonadversarial goals of healing, reconciliation, and psychological closure. While the former goals are usually effectuated within the specific, narrow confines of individual prosecutions, the latter objectives are broader, more abstract, and usually more difficult to achieve in a legal context. Accordingly, some have suggested that an “American-style Truth and Reconciliation Commission” — modeled in part on post-apartheid South Africa’s Truth and Reconciliation Commission — is needed to allow more full redress for the long-term harms caused by anti-black violence and intimidation.¹⁴⁹

Although other models for truth commissions exist,¹⁵⁰ South Africa’s Truth and Reconciliation Commission is both the most famous and most pertinent in terms of significance to U.S. civil rights history. Following the historic transition from an apartheid government to democratic rule, culminating in the peaceful election of Nelson Mandela as the nation’s first black president and the African National Congress as the governing party in 1994, the Parliament created a Truth and Reconciliation Commission (“TRC”) in July 1995 to address the effects of South Africa’s stark past of racial oppression and other human rights violations. In establishing the TRC, the Parliament drew upon the experiences of truth commissions elsewhere, as well as extensive public input.¹⁵¹

President Mandela, himself a political prisoner for twenty-seven years under the White National Party’s regime, joined hands with former President F. W. de Klerk in urging an end to racial animus and an embrace of a long-term reconciliation process.¹⁵² Accordingly, he signed the bill establishing the TRC as a seventeen-member Commission to include lawyers, psychologists, and scholars; he named

149. *Church Bombing Trial in Birmingham, Alabama, and Civil Rights Era Hate Crimes*, *supra* note 64, at 2 (describing a “Transformative Justice” conference sponsored by the Birmingham Civil Rights Institute in 2002, at which South African Archbishop Desmond Tutu, former President F. W. de Klerk, and others discussed post-apartheid South Africa’s establishment of a Truth and Reconciliation Commission).

150. See MINOW, *supra* note 84, at 52-90 for an extensive discussion of the various roles of truth commissions. See also Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT’L L. 497 (1994); Priscilla B. Hayner, *Fifteen Truth Commissions — 1974-1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994); Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 262 (Neil J. Kritz ed., 1995).

151. MINOW, *supra* note 84, at 53.

152. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATIONS, *supra* note 85, at 433 (quoting Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER, RACE & JUST. 47, 49-52 (1997)).

Nobel Peace Laureate Archbishop Desmond Tutu to be its head.¹⁵³ With a 150-person staff and a \$40 million budget, the TRC was comprised of three committees: one to investigate gross human rights violations (the Committee on Human Rights Violations); one to consider amnesty for those confessing to those violations (the Committee on Amnesty); and one to consider nonmonetary reparations to victims of those violations (the Committee on Reparation and Rehabilitation).¹⁵⁴

The overarching objective of the TRC was to initiate and facilitate an interracial reconciliation process in the context of a bloody, bitter past of black oppression and terror; as noted by one of its architects, Justice Minister Dullah Omar, “There is a need for understanding, but not for vengeance, a need for reparation, but not for retaliation.”¹⁵⁵ A related goal was to provide redress for the failures of the South African legal system. Yamamoto notes:

Commission proponents believe that healing is achievable and that South African society can move beyond apartheid if those who inflicted racial wounds acknowledge the suffering they wrought and accept appropriate responsibility. The Commission’s work is deemed to be especially important by many in light of the perceived failure of the current South African courts and criminal laws to bring apartheid abusers to justice — as evidenced by the recent acquittal of former apartheid Defense Minister Magnus Malan and others on charges of ordering a massacre in a black township.¹⁵⁶

Certainly, there exist many differences between the South African and American stories of racial oppression and civil rights era abuses; moreover, it is still far too early in post-apartheid South Africa’s own history to ascertain whether the TRC was the best model for reconciliation and redress.¹⁵⁷ It is beyond the scope of this Essay to examine the benefits and drawbacks of the TRC in terms of South African society; some aspects of the TRC model may, however, be useful in devising ways to address the need for racial healing and reconciliation

153. *Id.* at 434.

154. *Id.*; see also MINOW, *supra* note 84, at 53.

155. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATIONS, *supra* note 85, at 434.

156. *Id.*

157. For more detailed background on and critiques of the TRC, see ANTIJE KROG, COUNTRY OF MY SKULL (1998); John Dugard, *Retrospective Justice: International Law and the South African Model*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 269-90 (A. James McAdams ed., 1997); Wilhelm Verwoerd, *Justice After Apartheid? Reflections on the South African TRC*, in WHEN SORRY ISN’T ENOUGH 479 (Roy L. Brooks ed., 1999); Eric K. Yamamoto & Susan K. Serrano, *Healing Racial Wounds? The Final Report of South Africa’s Truth and Reconciliation Commission*, in WHEN SORRY ISN’T ENOUGH 492 (Roy L. Brooks ed., 1999); *African National Congress Statement to the Truth and Reconciliation Commission* (August 1996), reprinted in WHEN SORRY ISN’T ENOUGH 451 (Roy L. Brooks ed., 1999); Mark Gevisser, *The Witnesses*, N.Y. TIMES, June 27, 1997 (Magazine), at 32; Tina Rosenberg, *A Reporter at Large: Recovering from Apartheid*, NEW YORKER, Nov. 18, 1996, at 86-87.

in the context of reopening civil rights era cases. Assuming that any one model is without problems would be both simplistic and unrealistic. Therefore, my limited goal in this discussion is to suggest ways in which parts of the TRC model may be translatable to the context of American racial progress.

Of the three TRC committee functions — investigation of human rights violations; apologies from, and amnesty for, wrongdoers; and reparations for victims — perhaps the most immediately useful function to examine in this regard is the first.¹⁵⁸ This nation's tragic history of racial terror, particularly as manifested in the cases discussed in this Essay, is a record of human rights violations woefully underinvestigated and underaddressed. Despite efforts to reopen particular cases, there still exist long-term harms — not only to individuals, but to communities as well; some have suggested that there is a link between these injuries and present-day racial disparities in education, health, housing, and employment in Southern communities.¹⁵⁹ An investigatory forum would allow far broader latitude than a legal forum in focusing on these issues and fostering solutions.

Critical to the investigatory function of the TRC was the catharsis of personal storytelling by survivors, witnesses, and wrongdoers. According to Archbishop Tutu and others, storytelling as the articulation of suffering is therapeutic, rehabilitative, and educational; it was the first step toward forgiveness and reconciliation.¹⁶⁰ Moreover, the

158. Of the three functions, amnesty for, and confession by, wrongdoers poses the greatest inconsistencies with the option of reopening cases with an eye toward prosecution. The TRC aimed “to encourage political criminals on all sides to confess in detail their acts,” hoping to assure “perpetrators of human-rights abuses a kind of giant national plea bargain.” YAMAMOTO ET AL., *RACE, RIGHTS, AND REPARATIONS*, *supra* note 85, at 434. Although the TRC was careful to define its amnesty provisions as conditional upon confession and apology, these provisions were controversial and their long-term utility is still an open question. In any event, in the U.S. context, it seems highly unlikely that either government entities or intransigent perpetrators such as Beckwith would be amenable to confession and amnesty as a viable approach.

In contrast, the concept of reparations, while not inconsistent with the goals of criminal prosecution, is still a nascent concept in American jurisprudence and is unlikely to be implemented in the context of repairing the harms in question. For further discussion of reparations in the U.S. context, see BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973); MITCHELL T. MAKI ET AL., *ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS* (1999); RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000); WHEN SORRY ISN'T ENOUGH 365-89 (Roy L. Brooks ed., 1999).

159. *Church Bombing Trial in Birmingham, Alabama, and Civil Rights Era Hate Crimes*, *supra* note 64, at 2. For recent analyses of continuing racial disparities in American life and their genesis in pre-civil rights America, see ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY* (1997); GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996).

160. YAMAMOTO ET AL., *RACE, RIGHTS, AND REPARATIONS*, *supra* note 85, at 434.

process of individual storytelling and “truth-telling” in the presence of sympathetic witnesses even further enhances its restorative potential; it empowers the speaker and calls attention to the significance of the narratives being related. Psychological and political literature about the nature of mass trauma further suggest that speaking out can be a healing experience; Minow notes, “Coming to know that one’s suffering is not solely a private experience, best forgotten, but instead an indictment of a social cataclysm, can permit individuals to move beyond trauma, hopelessness, numbness, and preoccupation with loss and injury.”¹⁶¹

Quite possibly, there could be enormous potential for healing, reconstruction, reconciliation, and education if survivors of the terrors of the civil rights era had public opportunities to come forward to discuss the past. These survivors could include the families and other loved ones of murder victims; they could also include people of all races who may have witnessed or condoned anti-black violence, and even those who survived growing up in segregationist, hostile communities. Given the passage of nearly four decades since the worst anti-black violence of those times, the numbers of survivors who can testify to these harms are fewer and fewer; moreover, an argument could be made that healing and reconciliation are unlikely to occur now if it has not already occurred. The experiences of those who persisted in reopening the 1990s prosecutions of Beckwith, Blanton, Cherry, Frank, and others, however, suggest that the psychological, emotional, and even spiritual benefits are as great as the legal achievements. The language of “cleansing moments” and “healed wounds” connotes a deeper sense of closure than guilty verdicts and punishment would accord. In discussing the benefits of the TRC’s reconciliation objectives, Tutu remarked: “Retributive justice is largely Western. The African understanding is far more restorative — not so much to punish as to redress or restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people.”¹⁶² Perhaps an American-style TRC would evoke similarly restorative responses.

With this more expansive focus of storytelling and truth-telling in mind, an American-style TRC could adopt broader objectives with regard to the usefulness of its testimony and findings. In addition to serving as valuable histories of the civil rights movement, these narratives could provide the bases for curricular reform in primary and secondary education, legislative proposals, and other policy initiatives. These goals may seem far removed from the initial impetus to reopen cases for prosecutorial purposes, but they are not inconsistent

161. MINOW, *supra* note 84, at 67.

162. Rosenberg, *supra* note 157, at 90 (quoting Archbishop Desmond Tutu).

with prosecuting individual cases; in fact, they may aid the task by encouraging political momentum and personal courage. Both the 1993 South African Interim Constitution and TRC leaders explicitly invoked the African concept of “ubuntu,” or humane interconnectedness, to explain their preferred approach to achieving justice through community healing. As Yamamoto explains:

Ubuntu is the idea that no one can be healthy when the community is sick. “Ubuntu says I am human only because you are human. If I undermine your humanity, I dehumanise myself.” It characterizes justice as community restoration — the rebuilding of the community to include those harmed or formerly excluded.¹⁶³

V. CONCLUSION

It is tempting to view the movement to reopen civil rights murder cases as attributable to an interesting but ultimately quaint preoccupation with the past. As this nation moves thirty, forty, and more years away from the era of Emmett Till, James Chaney, Michael Schwerner, and Andrew Goodman, collective memories and outrage fade. For those who still cling to the anachronistic hope of finding justice and closure in these cases, the ever-dwindling availability of witnesses and resources serves as a painful reminder that America has entered a new century with different priorities and politics. In this light, is the search for cleansing moments and retrospective justice an irrelevancy?

A closer look at the racial realities of today suggests otherwise. White supremacists¹⁶⁴ and other hate groups continue to proliferate, now focusing their attention not only on the old familiar targets of racial and religious minorities, but also on lesbians and gays, abortion providers, immigrants, and the U.S. government itself.¹⁶⁵ With the rise of the Internet and other technological resources, right-wing extremist groups can now organize and disseminate their ideological weaponry quickly and vividly to a wide variety of consumers, including children.¹⁶⁶ The proliferation of bias and hate crimes underscores the fact that we are not a nation that has left behind the challenges of a generation ago; we are a nation still riven by racial and economic divisions.

163. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATIONS, *supra* note 85, at 435.

164. Loretta J. Ross & Mary Ann Mauney, *The Changing Faces of White Supremacy*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 552-57 (Richard Delgado & Jean Stefancic eds., 1997).

165. *Id.* at 556; see also NANCY MACLEAN, BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN (1994).

166. Peter Stills, *Dark Contagion: Bigotry and Violence Online*, PC/COMPUTING, Dec. 1989.

In this light, the concept of reopening cases to come to terms with the past appears not anachronistic and irrelevant, but compelling and promising. Imperatives of legal accountability — combined with moral concerns of healing, truth, and reconciliation — drive us to consider whether coming to terms with America's racial past may provide the key to a just future. Reopening cases to achieve *ubuntu* — community restoration through humane interaction — may very well be the best path to retrospective as well as forward-looking justice.