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Cover Page Footnote

Professor of Law, Santa Clara University School of Law. A.B., Princeton University; J.D., Stanford Law School; J.S.M., Stanford Law School. The author extends deep thanks to the following people for support and assistance; symposium organizer Sheila Foster; symposium co-panelists Anthony Alfieri, Sherrilyn Ifill, and Terry Smith; research assistants Rowena Joseph and Ram Fletcher (both of the Santa Clara University School of Law, Class of 2005); research assistant Daniel Lam (Georgetown University Law Center, Class of 2006); Lee Halterman; Kimiko Russell-Halterman; Donald Polden; and Stephanie Wildman. The following entities deserve special praise for sponsoring the symposium; the Fordham Law Review and Fordham University School of Law's Louis Stein Center for Law & Ethics. Finally, I am grateful to the Santa Clara University School of Law, particularly the Center for Social Justice & Public Service, for supporting the research project that produced this Essay. The author dedicates this Essay to the memory of Herman Levy, colleague extraordinaire.

REOPENING THE EMMETT TILL CASE: LESSONS AND CHALLENGES FOR CRITICAL RACE PRACTICE

*Margaret M. Russell**

INTRODUCTION

Oh, what sorrow,
Pity, pain,
That tears and blood
Should mix like rain
In Mississippi!
And terror, fetid hot,
Yet clammy cold
Remain.¹

On May 10, 2004, the United States Department of Justice and the Mississippi District Attorney's Office for the Fourth District

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1. Langston Hughes, *Mississippi—1955* (1955), *reprinted in* *The Lynching of Emmett Till: A Documentary Narrative* 294 (Christopher Metress ed., 2002) [hereinafter *The Lynching of Emmett Till*]; *see also* Christopher Metress, *Langston Hughes's "Mississippi—1955": A Note on Revisions and an Appeal for Reconsideration*, 37 *Afr.-Am. Rev.* 139 (2003). A slightly different version of Hughes's poem was first published less than a month after Till's murder as part of Hughes's weekly column in the *Chicago Defender*, a leading African-American newspaper. Hughes's column called for a Congressional investigation into Till's murder and criticized Congress for neglecting to investigate other Southern lynchings. *See* Langston Hughes, Editorial, *Langston Hughes Wonders Why No Lynchings Probes*, *Chi. Defender*, Oct. 1, 1935 [hereinafter Langston Hughes, Editorial]. For further examples of the enormous, and continuing, impact of the murder on American literature and culture, *see infra* note 20 and accompanying text, and *see also* generally *The Lynching of Emmett Till, supra*.

announced the opening of a new investigation into the 1955 murder of Emmett Till.² This internationally known case involved a fourteen year old African-American boy from Chicago who was visiting relatives in Mississippi when he was abducted from his bed at gunpoint in the middle of the night.³ Three days later, a boy on a fishing trip in the Tallahatchie River found his corpse—battered, mutilated, shot, and weighted down with a seventy-five pound cotton gin fan. Based on eyewitness testimony about Till's abduction and an identification of his body by his uncle and mother, Tallahatchie County tried two local white men, Roy Bryant and J.W. Milam, for the murder. After five days of trial, a jury of twelve white men deliberated for sixty-seven minutes and voted to acquit. Shortly thereafter, the freed Bryant and Milam sold their "confession" to the murder, in the form of a detailed, gloating testimonial, to *Look* magazine for \$4000.

2. Press Release, U.S. Department of Justice, Justice Department to Investigate 1955 Emmett Till Murder (May 10, 2004), available at http://www.usdoj.gov/opa/pr/2004/May/04_crt_311.htm. The announcement of the reopening was widely reported. See, e.g., *Department of Justice Briefing with R. Alexander Acosta, Assistant Attorney General for Civil Rights Re: Reopening of the Investigation into the 1955 Murder of Emmett Till*, Federal News Service, May 10, 2004, LEXIS, News Library, FEDNEW file [hereinafter Acosta Briefing]; *Justice Department to Investigate 1955 Emmett Till Murder*, Jet, May 24, 2004, at 4; Editorial, *What Happened to Emmett Till?*, N.Y. Times, May 12, 2004, at A22; Ellen Barry, *Counting on Time to Break a Silence; Justice Department's Reopening of the 1955 Murder Case of Emmett Till Hinges on Black and White Witnesses Telling Long-Kept Secrets*, L.A. Times, May 18, 2004, at A12; Justin Ewers, *In Pursuit of Justice*, U.S. News & World Rep., May 24, 2004, at 64; Eric Lichtblau & Andrew Jacobs, *U.S. Reopens '55 Murder Case, Flashpoint of Civil Rights Era*, N.Y. Times, May 11, 2004, at A1.

3. Certain basic facts of the Till case, as outlined briefly here, have long been well known and are extensively documented. This summary of the case is drawn generally from two sources. The Lynching of Emmett Till, *supra* note 1; Stephen J. Whitfield, *A Death in the Delta: The Story of Emmett Till* (1988). A particularly detailed account of the case and its historical context is a 1963 unpublished master's thesis. Hugh Stephen Whitaker, *A Case Study in Southern Justice: The Emmett Till Case* (1963) (unpublished M.A. thesis, Florida State University), available at <http://etd.lib.fsu.edu/theses/available/etd-05272004-140932>; see also Chris Crowe, *Getting Away with Murder: The True Story of the Emmett Till Case* (2003); John Dittmer, *Local People, the Struggle for Civil Rights in Mississippi* (1994); David Halberstam, *The Fifties* (1993); Paul Hendrickson, *Sons of Mississippi: A Story of Race and Its Legacy* (2003); Clenora Hudson-Weems, *Emmett Till: The Sacrificial Lamb of the Civil Rights Movement* (1994); Nicholas Lemann, *The Promised Land: The Great Black Migration and How It Changed America* (1991); Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (1998); Bill Minor, *Eyes on Mississippi: A Fifty-Year Chronicle of Change 190-97* (2001); Howell Raines, *My Soul Is Rested: Movement Days in the Deep South Remembered* (1977); Mamie Till-Mobley & Christopher Benson, *Death of Innocence: The Story of the Hate Crime that Changed America* (2003); Juan Williams, *Eyes on the Prize: America's Civil Rights Years, 1954-1965*, at 37 (1987) (companion volume to the PBS television series). Other facts about the case—most notably, exactly *what* happened when Till was in the convenience store with Carolyn Bryant—are in dispute. See *infra* notes 70-73 and accompanying text.

The killers' admission, published only five months after the slaying, was generally consistent with the theory presented at trial: that they had murdered Emmett Till for flirting with Bryant's wife, Carolyn, as she worked at the Bryants' convenience store in Money, Mississippi. Roy Bryant had been out of town at the time, but when he returned and heard the story, he enlisted his half-brother Milam to exact revenge. In their admission, Bryant and Milam said that their initial intention in kidnapping Till was to "just whip him . . . and scare some sense into him."⁴ However, Till's apparent fearlessness, even after severe beatings, irked the men into going further. Milam explained that:

Well, what else could we do? He was hopeless. I'm no bully; I never hurt a nigger in my life. I like niggers—in their place—I know how to work 'em. But I just decided it was time a few people got put on notice. As long as I live and I can do anything about it, niggers are gonna stay in their place. Niggers ain't gonna vote where I live. If they did, they'd control the government. They ain't gonna go to school with my kids. And when a nigger even gets close to mentioning sex with a white woman, he's tired o' livin'. I'm likely to kill him. Me and my folks fought for this country, and we've got some rights. I stood there in that shed and listened to that nigger throw that poison at me, and I just made up my mind. "Chicago boy," I said, "I'm tired of 'em sending your kind down here to stir up trouble. Goddam you, I'm going to make an example of you—just so everybody can know how me and my folks stand."⁵

According to Milam and Bryant, they then drove Till to a steep bank of the Tallahatchie River, ordered him to strip, shot him in the head, barb-wired the gin fan to his neck, and rolled him into twenty feet of water.⁶

Given the clear-cut finality of the acquittal and post-acquittal admission, why would federal and state prosecutors decide to reopen the case nearly fifty years later? Bryant and Milam are long gone;⁷ their culpability is not in question. What motivates the prosecutors' decision that something new can and should be accomplished? The answers to these questions are both simple and complex. On a conventional, legalistic level, the prosecutorial decision to reopen is based on newly discovered evidence of additional eyewitnesses and living potential defendants.⁸ Two filmmakers, Stanley Nelson⁹ and

4. William Bradford Huie, *The Shocking Story of Approved Killing in Mississippi*, Look, Jan. 24, 1956, reprinted in 1 *Reporting Civil Rights: American Journalism 1941-1963*, at 238 (Clayborne Carson et al. eds., 2003).

5. *Id.* at 239.

6. *Id.* at 239-40.

7. Milam died in 1981, and Bryant died in 1994. See Hendrickson, *supra* note 3, at 11.

8. In his work on the ethical exercise of prosecutorial discretion in cases of racial violence, Anthony Alfieri categorizes this type of reopening as the "easy," evidence-

Keith Beauchamp,¹⁰ separately identified new eyewitnesses while making their respective documentaries about the Till case. Beauchamp's investigative efforts over a nine-year period proved particularly salient in locating individuals whose recollections suggest the involvement of several additional observers or participants; he noted that, at a certain point, "I realized that I wasn't doing interviews—I was taking depositions."¹¹ Beauchamp's evidence proved to be the ultimate catalyst for the decision to reopen.¹²

A more complex set of reasons for the reopening stems from the emblematic significance of the case itself. In announcing the involvement of federal prosecutors, Assistant Attorney General R. Alexander Acosta noted that "[t]he murder of Emmett Till stands at the crossroads of the American civil rights movement," and was a "brutal murder and grotesque miscarriage of justice [that] moved this nation."¹³ He observed that the Till case helped "launch[] the modern [American] civil rights movement."¹⁴ At the end of his statement, Acosta concluded that "[w]e owe it to Emmett Till, we owe it to his mother and to his family, and we owe it to ourselves to see if, after all these years, any additional measure of justice is still possible."¹⁵

driven case: "Under standard discretion, easy cases for retrial emerge from supervening events material to the outcome of prior prosecutions, such as the discovery of new physical evidence, the identification of new witnesses, and the belated proffer of inculpatory confessions." Anthony V. Alfieri, *Retrying Race*, 101 Mich. L. Rev. 1141, 1142 (2003). Alfieri contrasts these cases with "hard" cases in which prosecutors, lacking new evidence, nevertheless "grasp the elusive opportunity to right historical wrongs committed in aborted or failed criminal and civil rights prosecutions." *Id.* The Till reopening seems to be an example of both categories.

9. Nelson's hour-long documentary, *The Murder of Emmett Till*, was first broadcast in January 2003 as part of the PBS American Experience series. See American Experience, *The Murder of Emmett Till, The Film & More*, at <http://www.pbs.org/wgbh/amex/till/filmmore/index.html> (last visited Feb. 14, 2005) (transcript and related materials on the Till case).

10. Beauchamp's slightly longer documentary, *The Untold Story of Emmett Louis Till*, was screened as a "work-in-progress" for several years beginning in 2001 in connection with Beauchamp's advocacy efforts to reopen the case; it is now complete. See *The Untold Story of Emmett Louis Till*, at <http://www.emmettillstory.com/index2.html> (last visited Feb. 14, 2005) (website of Beauchamp's Till Freedom Come Productions with details about the documentary and reopening advocacy efforts).

11. David Van Biema, *Revisiting a Martyrdom*, Time, May 24, 2004, at 57 (internal quotations omitted).

12. See *id.*; see also Shelia Hardwell Byrd, *Documentary Starting Point for Latest Till Probe*, Democrat-Herald (Albany, N.Y.), May 12, 2004, available at <http://www.democratherald.com/articles/2004/05/12/news/nation/nat04.prt>; Lichtblau & Jacobs, *supra* note 2.

13. Acosta Briefing, *supra* note 2.

14. *Id.*

15. *Id.*

While some have questioned the timing and motivations of the Justice Department's proclamation,¹⁶ there is no disagreement with its assessment of the historic consequence of the death of Emmett Till. Till's murder is one of the most infamous acts of racial violence in the history of the United States; it arose from events "that would forever change the way we talk about race in America."¹⁷ His death and the ensuing trial attracted worldwide attention and outrage. His funeral drew mourners in numbers estimated to range from ten thousand to one hundred thousand,¹⁸ and his mother's memorable insistence on an open-casket viewing resulted in widespread circulation of an unforgettable *Jet* magazine photo of his pulverized face.¹⁹ A generation has grown up with the tragic image of Emmett Till's defaced corpse etched in its memory. That image and its racial meaning have engendered countless works in politics, history, journalism, and the arts from the 1950s to the present.²⁰ Till's mother, Mamie Till-Mobley, aided by scores of civil rights leaders, politicians,

16. Some suggested that the timing may have been a self-serving, election-year tactic for Ashcroft's Justice Department. See Lichtblau & Jacobs, *supra* note 2; Margaret Kimberley, *Freedom Rider: Emmett Till and Abu Ghraib*, *The Black Commentator*, No. 91, May 20, 2004, available at http://www.blackcommentator.com/91/91_freedom_rider.html. Others pointed out similarities between the state-sponsored brutality of the South in Till's era and the state-sponsored violence at Abu Ghraib prison in 2003-2004. See, e.g., Patricia J. Williams, *Slow Motion*, *The Nation*, June 14, 2004, at 14.

17. The Lynching of Emmett Till, *supra* note 1, at xiii.

18. *Id.* at 31.

19. See Hendrickson, *supra* note 3, at 6.

20. In addition to Langston Hughes's poem cited *supra* note 1 and the works cited *supra* note 3, many other works respond to the Till case. See Gwendolyn Brooks, *A Bronzeville Mother Loiters in Mississippi*. Meanwhile, *A Mississippi Mother Burns Bacon* (1960), reprinted in *The Lynching of Emmett Till*, *supra* note 1, at 313; Audre Lorde, *Afterimages* (1981), reprinted in *The Lynching of Emmett Till*, *supra* note 1, at 323; Anthony Walton, *The Lovesong of Emmett Till* (1996), reprinted in *The Lynching of Emmett Till*, *supra* note 1, at 339. There were also a number of songs written in response to the Till case. See Bob Dylan, *The Death of Emmett Till* (1962), reprinted in *The Lynching of Emmett Till*, *supra* note 1, at 318; Langston Hughes & Jobe Huntley, *The Money, Mississippi, Blues* (1955), reprinted in *The Lynching of Emmett Till*, *supra* note 1, at 296; Russell Malone, *Flowers for Emmett Till*, on Russell Malone (Sony Records 1992); DJ Nasty Knock, *Emmett Till, on Sex* (Street Street Records 1996). As mentioned in *The Lynching of Emmett Till*, *supra* note 1, at 289-90, the Till case inspired many plays, including James Baldwin, *Blues for Mister Charlie* (1964); David Barr, *The State of Mississippi vs. Emmett Till* (2000); Richard Davidson, *Mississippi* (1955); Ossie Davis & Ruby Dee, *What Can You Say to Mississippi?* (1956); and Toni Morrison, *Dreaming Emmett* (1986). Novels and fictional treatments include Bebe Moore Campbell, *Your Blues Ain't Like Mine* (1992); Chris Crowe, *Mississippi Trial, 1955* (2002); and Lewis Nordan, *Wolf Whistle* (1993). Memoirs and essays include Eldridge Cleaver, *Soul on Ice* (1968); Mrs. Medgar Evers & William Peters, *For Us, the Living* (1967); William Bradford Huie, *Wolf Whistle and Other Stories* (1959), excerpted in *The Lynching of Emmett Till*, *supra* note 1, at 235; Anne Moody, *Coming of Age in Mississippi* (1968); Michael Eric Dyson, *Remembering Emmett Till* (1991), reprinted in *The Lynching of Emmett Till*, *supra* note 1, at 266; and John Edgar Wideman, *The Killing of Black Boys* (1997), reprinted in *The Lynching of Emmett Till*, *supra* note 1, at 278.

and artists, devoted the rest of her life to preserving her child's legacy through public education and lobbying to reopen the case.²¹ By the time that those efforts finally proved fruitful, the case of Emmett Till had become a symbol not only of this nation's history of brutality against African-Americans, but also of the inadequacies of the American legal system in redressing past racial injustices.

Using the Justice Department's language as a starting point, it is useful to ask just what "additional measure of justice" is possible after so many years.²² What notions of "justice" could be fulfilled today to compensate for such a grievous wrong? Could any outcome be meaningful in light of the passage of time?²³ Even, and perhaps especially, among the community that most ardently supported the reopening, there is a bittersweet sense of accomplishment. On the one hand, the decision is seen as a long-delayed opportunity for truth, justice, and closure. This viewpoint is reflected in the optimistic comments of public figures who urged reopening: "It is never too late for justice."²⁴ "The sun of justice is shining bright."²⁵ "I think that the time is always ripe to do right."²⁶ "[N]ow, almost fifty years later, we have a chance to have justice done for Emmett Till."²⁷ Others reacted to the reopening with more sobering, doubtful assessments: "Justice this delayed is justice denied. Fifty years later is an injustice."²⁸ "[J]ustice unreasonably delayed is most likely justice miscarried."²⁹ This spectrum of reactions reflects a common ambivalence in movements to revive long-dormant racial justice claims.³⁰ Aspirations

21. *Chicago Rep. Bobby L. Rush Calls for Emmett Till Murder Investigation*, Jet, Mar. 8, 2004, at 36; *Emmett Till: Blacks React to Reopening of Tragic Case*, Jet, May 31, 2004, at 6. Mamie Till-Mobley died in January 2003. *Id.* at 7.

22. Acosta Briefing, *supra* note 2.

23. These questions are also core concerns of the emerging transitional justice movement. *See, e.g.*, *Breaking the Cycles of Hatred: Memory, Law, and Repair* (Martha Minow & Nancy L. Rosenblum eds., 2002); *Impunity and Human Rights in International Law and Practice* (Naomi Roht-Arriaza ed., 1995); Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (1998); Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2004); *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Neil J. Kritz ed., 1995); *Transitional Justice and the Rule of Law in New Democracies* (A. James McAdams ed., 1997); *Truth v. Justice: The Morality of Truth Commissions* (Robert I. Rotberg & Dennis Thompson eds., 2000); Richard Lewis Siegel, *Transitional Justice: A Decade of Debate and Experience*, 20 Hum. Rts. Q. 431 (1998).

24. *Emmett Till: Blacks React to Reopening of Tragic Case*, *supra* note 21, at 8 (quoting U.S. Congressman Bobby L. Rush).

25. *Id.* at 61 (quoting Alvin Sykes, president of the Emmett Till Justice Campaign, Inc.).

26. *Id.* (quoting television and radio talk show host Tavis Smiley).

27. *Id.* at 10 (quoting U.S. Congressman Charles Rangel).

28. *Id.* at 8 (quoting the Reverend Jesse Jackson).

29. Williams, *supra* note 16.

30. For a consideration of typical objections to reviving such claims, see Martha Minow, Foreword, *Why Retry? Reviving Dormant Racial Justice Claims*, 101 Mich. L. Rev. 1133 (2003).

to repair the past must always be tempered by the knowledge that deep memories prevail and that some injuries are irreparable.³¹ In revisiting past racial injustices, it is important to remember that even the “cleansing moments” of new trials and convictions cannot wash away the residue of the past.³²

This pragmatic tension also lies at the heart of critical race theory, the literature of which reflects a multivalent set of dichotomies: racial optimism versus racial realism; idealism versus materialism; and racial healing versus sheer survival strategies.³³ Much of critical race theory literature aims to acknowledge and dissect the ostensible contradictions of a liberation movement for social justice through law. Throughout critical race scholarship, one can discern modes of inquiry that are simultaneously skeptical and hopeful, practical and theoretical, deconstructionist and ultimately reconstructionist.³⁴ A central goal is the development of different contexts and methodologies to reopen and revive questions of race. In a sense, the reopening and reconsideration of long-dormant cases such as Emmett Till’s can serve as a paradigm for the re-examination of broader questions that lie at the heart of critical race theory and practice.

This Symposium marks a rare and noteworthy opportunity to explore the collaborative possibilities between critical race theory and lawyering practice: critical race lawyering, or, critical race practice. Eric Yamamoto uses the terms “race praxis” and “critical race praxis”³⁵ to discuss the methods by which the concepts of critical race

31. For discussions of the impact of war crimes and other state atrocities on the possibilities for forgiveness and repair, see generally Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2001); Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (1998); and Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2d ed. 2001).

32. When white supremacist Byron de la Beckwith was finally convicted in 1994 of the 1964 murder of civil rights leader Medgar Evers, Evers’ widow Myrlie Evers referred to the successful re prosecution as a “cleansing moment.” Ed Vulliamy, *Deep South Confronts Murderous Past*, *Observer* (London), Nov. 14, 1999, at 26; see also Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 *Mich. L. Rev.* 1225, 1226-27 (2003).

33. Now in its third decade, the literature of critical race theory is both voluminous and eclectic. See, e.g., *Critical Race Feminism: A Reader* (Adrien Katherine Wing ed., 1997); *Critical Race Theory: An Introduction* (Richard Delgado & Jean Stefancic eds., 2001); *Critical Race Theory: The Cutting Edge* (Richard Delgado ed., 1995); *Critical Race Theory: The Key Writings that Formed the Movement* (Kimberlé Crenshaw et al. eds., 1995); *Crossroads, Directions, and a New Critical Race Theory* (Francisco Valdes et al. eds., 2002).

34. For discussions of these characteristics of critical race theory, see generally Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 *Ala. L. Rev.* 483 (2003); Angela P. Harris, Foreword, *The Jurisprudence of Reconstruction*, 82 *Cal. L. Rev.* 741 (1994); and Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *Yale L. J.* 1329 (1991).

35. In his book, *Interracial Justice*, Eric Yamamoto proposed the following working definition of critical race lawyering or “race praxis”:

theory are tested in practice. We can also use these terms to describe the array of presentations at this Symposium; the goals that animate the many educators, students, activists, and policymakers also in attendance; and the vision captured in Gerald López's eloquent keynote remarks about his own community-based practice in New York.³⁶ Critical race practice is very much a work-in-progress. It encompasses foundational work in legal, political, and educational theory, as well as diverse strategies in organizing and lawyering for social change.³⁷ It pushes critical race theorists to keep in mind the material conditions of clients and communities; it urges practitioners to contemplate the theoretical presumptions and possibilities of their approaches to problem solving.³⁸ The growing literature of critical race practice focuses on the ways in which race fundamentally affects the practice, formulation, interpretation, and application of law. Its ultimate goal is to provide a series of strategies to achieve social justice through the analysis and debunking of racist myths and practices.³⁹

As part of the symposium panel on "*Re-Trying Racial Injustices*," I devote this Essay to an expansion of themes addressed in my earlier work on the reopening of civil rights era prosecutions.⁴⁰ I draw upon this work, as well as upon the insights of my co-panelists Anthony Alfieri and Sherrilyn Ifill,⁴¹ to examine the reopening of the Emmett

Race praxis combines critical pragmatic analysis with political lawyering and community organizing to practice justice by and for racialized communities. Its central idea is racial justice as antisubordination practice. . . .

Race praxis provides structure to justice practice. It means understanding justice in terms of both process (experience-rethinking-translation-engagement) and norms (first principles of antisubordination and rectification of injustice).

Eric K. Yamamoto, *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America* 129 (1999).

36. Gerald P. López, *Living and Lawyering Rebelliously*, 73 *Fordham L. Rev.* 2041 (2005).

37. For examples of the latter, see Vanita Gupta, *Critical Race Lawyering in Tulia, Texas*, 73 *Fordham L. Rev.* 2055 (2005).

38. Eric Yamamoto refers to this dynamic as "reflective action": infusing antiracism practice with aspects of critical inquiry and pragmatism and then recasting theory in light of practical experience. Yamamoto, *supra* note 35, at 130.

39. Few works in the field of critical race theory comprehensively bridge the divide between theory and lawyering practice. Prominent among the few are Derrick A. Bell's pioneering casebook, *Race, Racism and American Law* (5th ed. 2004), originally published in 1973, and *Race and Races: Cases and Resources for a Diverse America* (Juan F. Perea et al. eds., 2000).

40. See Russell, *supra* note 32; see also Alfieri, *supra* note 8, at 1159-66 (discussing the re prosecution of criminal and civil rights actions from the 1950s and 1960s).

41. See Anthony V. Alfieri, Transcript of Remarks, Panel III: *Re-Trying Racial Injustices*, Critical Race Lawyering Symposium, Fordham University School of Law (Nov. 5, 2004) (on file with author); Sherrilyn Ifill, Transcript of Remarks, Panel III: *Re-Trying Racial Injustices*, Critical Race Lawyering Symposium, Fordham University School of Law (Nov. 5, 2004) (on file with author).

Till case and its critical race practice possibilities. In an earlier essay, I posited that the successful reopening of cases provided catalytic “cleansing moments” that perhaps led to deeper truths:

[T]he 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.⁴²

In this Essay, I consider other aspects of these “cleansing moments.” Are they illusory? Do they provide a misleading sense of closure at the expense of the ongoing hard work of racial justice that leads up to—and must proceed from—those moments? What lessons or “teaching moments” might these cases create for critical race lawyers in their ongoing social justice work?⁴³ In notable respects, the impetus to reopen long-dormant cases shares with critical legal theory a justified skepticism of the construct of finality and an idealistic vision of the possibilities for ultimate justice. Procedural and substantive bulwarks of finality may be necessary in a legalistic sense, but they do not signify closure or justice, particularly when structural inequality persists. Reopening, with its promise of restorative justice through racial healing and reconciliation, has the potential to provide the closure that mere finality lacks, but only if that restorative justice is authentic and far-reaching.

This Essay proceeds to address the above concerns as follows. In Part I, I discuss the Emmett Till case in greater detail, with brief contextual reference to two historical eras that frame it chronologically and thematically: lynching in the late nineteenth to mid-twentieth centuries, and the civil rights movement of the mid-to-late 1950s. In Part II, I focus on the significance of the 2004 Till case reopening and lessons that it may offer for critical race practice. These lessons dovetail with recurrent questions in the literature of critical race theory and offer suggestions for fostering the integration of theory and practice (race praxis). Finally, I conclude that the Till case and other similar reopenings⁴⁴ will yield transcendent meaning

42. Russell, *supra* note 32, at 1268.

43. This Essay is part of a larger research project concerning the reopening of dormant racial justice claims. The project examines additional legal and ethical questions beyond the scope of this Essay, including concerns about: due process; use of legal resources; and the efficacy of reprosecutions versus other legal and extralegal restorative justice remedies.

44. In January 2005, a Mississippi grand jury indicted Edgar Ray Killen, a former Ku Klux Klan leader and an ordained Baptist minister, for the 1964 murders of civil rights workers James Chaney, Michael Schwerner, and Andrew Goodman. Manuel Roig-Franzia, *40 Years On, Murder Charges Filed*, Wash. Post, Jan. 8, 2005, at A7. The State of Mississippi had never before sought a murder prosecution in the case; in 1967, a federal civil rights conspiracy trial resulted in the convictions of seven

and “closure” only if a self-reflective approach propels them past the transitory “cleansing moments” toward a deeper commitment to restorative justice.

I. EMMETT TILL IN CONTEXT

A. Lynching

The things that influenced my conduct as a Negro did not have to happen to me directly; I needed but to hear of them to feel their full effects in the deepest layers of my consciousness. Indeed, the white brutality that I had not seen was a more effective control of my behavior than that which I knew.⁴⁵

In order to understand the resonance of the Emmett Till case in American law and letters, it is useful to see it in the context of the history of lynching.⁴⁶ The term “lynch law” originated during the Revolutionary War to describe Colonel Charles Lynch’s use of extralegal means to deal with Tory enemies and criminal elements; since then, the definition of the term has evolved numerous times, always retaining its core connotations of social control through vigilantism, mob violence, and summary punishment.⁴⁷ After the Civil War, these mechanisms merged inextricably with the long-standing history of violence against slaves, resulting in a common definition of lynching as a specifically anti-black ritual of terror.⁴⁸ During Reconstruction, the lynching of blacks in the South increased

individuals, the acquittal of eight, and hung jury verdicts on three (including Killen). For a discussion of the Chaney/Schwerner/Goodman murders, see Russell, *supra* note 32, at 1241-45.

45. Richard Wright, *Black Boy* 172 (HarperCollins Perennial Classics 1993) (1945) [hereinafter *Black Boy*]. Lynching and other forms of racial violence figure prominently in Wright’s work. See Richard Wright, *The Long Dream* (1958); Richard Wright, *Native Son* (HarperCollins Perennial Classics 1991) (1940); Richard Wright, *Between the World and Me*, *Partisan Rev.*, July-Aug. 1935, at 18 (a poem written as a first-person account by a lynching victim).

46. Histories of American lynching include: Jesse D. Ames, *The Changing Character of Lynching* (1942); James E. Cutler, *Lynch-Law: An Investigation into the History of Lynching in the United States* (1905); Ralph Ginzburg, *100 Years of Lynchings* (1962); Christopher Waldrep, *The Many Faces of Judge Lynch: Extralegal Violence and Punishment in America* (2002); Walter White, *Rope & Faggot: A Biography of Judge Lynch* (1929); Robert L. Zangrando, *The NAACP Crusade Against Lynching, 1909-1950* (1980).

47. See Robert L. Zangrando, *About Lynching*, in *The Reader’s Companion to American History* 684-86 (Eric Foner & John A. Garraty eds., 1991). In recent years, the term “high-tech lynching” was employed by then-U.S. Supreme Court nominee Clarence Thomas to suggest that he was unfairly subjected to allegations of sexual harassment as an attempt to punish him for his conservative views. For a critique of this use of the term “lynching,” see Anita Hill, *Speaking Truth to Power* 201-03 (1997).

48. Lynchings commonly involved burning, torture, hanging, and dismemberment. Zangrando, *supra* note 47, at 685.

dramatically as whites retaliated against blacks' attainment of economic, social, and political power.⁴⁹ As my co-panelist Sherrilyn Ifill has written, the practice of Reconstruction and post-Reconstruction lynching functioned as an attack on black citizenship, reinforced by the U.S. Supreme Court's narrow interpretation of Congressional authority to enact legislation to protect the constitutional rights of newly freed blacks.⁵⁰ African-American journalist Ida B. Wells-Barnett, a key force behind the anti-lynching movement of the 1890s, noted that lynching linked the economic and political subordination of blacks with the reinforcement of the sexual taboo against relations between black men and white women.⁵¹ Lynching and the threat of lynching emerged as tools of terror to maintain racial and sexual hierarchies. By the turn of the century, lynching was so prevalent that Mark Twain coined the phrase "The United States of Lyncherdom" to describe its commonality.⁵²

Many lynchings were never recorded or reported. Between 1882 (when reliable records were first collected) and 1968, however, an estimated 4743 persons were victims of lynching; 3446 of these were black men and women.⁵³ With 539 black and 42 white victims, Mississippi had the largest recorded number, followed by Georgia (492 blacks, 39 whites), Texas (352 blacks, 141 whites), Louisiana (335

49. Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 *Law & Ineq.* 263, 272-73 (2003).

50. *Id.* at 276-80.

51. Ida B. Wells-Barnett, *Lynch Law in America*, *The Arena*, Jan. 1900, at 15-24, available at <http://courses.washington.edu/spcmu/speeches/idabwells.htm>. Wells-Barnett emphasized that lynching was intentional, not accidental or impulsive:

Our country's national crime is *lynching*. It is not the creature of an hour, the sudden outburst of uncontrolled fury, or the unspeakable brutality of an insane mob. It represents the cool, calculating deliberation of intelligent people who openly avow that there is an "unwritten law" that justifies them in putting human beings to death without complaint under oath, without trial by jury, without opportunity to make defense, and without right of appeal.

Id.

52. In *The United States of Lyncherdom*, Twain wrote:

[P]icture the scene in their minds, and soberly ponder it; then multiply it by 115, add 88; place the 203 in a row, allowing 600 feet of space for each human torch, so that there may be viewing room around it for 5,000 Christian American men, women, and children, youths and maidens; make it night, for grim effect; have the show in a gradually rising plain, and let the course of the stakes be uphill; the eye can then take in the whole line of twenty-four miles of blood and flesh bonfires unbroken

Mark Twain, *The United States of Lyncherdom* (1901), reprinted in *The Portable Mark Twain* 584, 592 (Bernard DeVoto ed., 1946). The essay was published posthumously. See L. Terry Oggel, *Speaking Out About Race: "The United States of Lyncherdom" Clemens Really Wrote*, 25 *Prospects: An Annual of American Cultural Studies* 115 (2000); see also *American Lynching*, *Literary References & Bibliography*, at <http://www.americanlynching.com/literary-old.html> (last visited Feb. 14, 2005) (website of source materials about lynching).

53. Zangrando, *supra* note 47, at 685.

blacks, 56 whites), and Alabama (299 blacks, 48 whites).⁵⁴ Lynchings were often public events, supported by prominent community members and advertised in newspapers. Sometimes people brought their children to observe. With the advent of cameras, many lynching “parties” resulted in macabre photographs and postcards of people who posed with corpses and body parts as “souvenirs.”⁵⁵ In many instances, lynching occurred with the acquiescence and even endorsement of government actors such as elected officials, sheriffs, prosecutors, and judges.⁵⁶

The history of lynching is relevant to an understanding of the Till case in several respects. First, the supremacist fanaticism underlying lynching explains in part why Till’s few moments of interaction with a white woman in a grocery store would provoke such outrage and vicious retaliation. In the eyes of Bryant and Milam, Till’s behavior was not just rude or crude; as Milam complained, it was “poison,” a threat to their “rights.”⁵⁷ To his killers, Till, a “Chicago boy,”⁵⁸ had not learned the requisite lessons of fearfulness and submission; he represented to them exactly the kind of menace historically targeted by lynch mobs. Although the recorded number of lynchings in Mississippi and other Southern states had declined by the mid-twentieth century,⁵⁹ a pervasive threat of lynching continued to operate as a form of interracial social control. As noted by Richard Wright and other artists of the early twentieth century, lynching was still deeply intertwined with the fabric of Southern life.⁶⁰ Milam and Bryant proved that lynchings still could occur as revenge for nearly any act that threatened white authority.⁶¹ In the history of lynching, the brutality wrought upon Till was shocking and tragic, but hardly unique.

54. *Id.*

55. *Id.*; see also James Allen et al., *Without Sanctuary: Lynching Photography in America* (2000) (collection gathered by Allen in the 1980s and the 1990s from antique shops, flea markets, and private dealers). Many of the images explicitly depict the victims’ bodies and the murderers’ (and spectators’) contentment. The collection, later the basis of a touring exhibit and related events, was a controversial pivot point in the recent resurgence of scholarly and public interest in the history of lynching.

56. Ifill, *supra* note 49, at 268.

57. Huie, *supra* note 4, at 238.

58. *Id.*

59. Zangrando, *supra* note 47, at 686.

60. See, e.g., David Margolick, *Strange Fruit: Billie Holiday, Café Society, and an Early Cry for Civil Rights* (2000) (detailing the history of *Strange Fruit*, the famous anti-lynching ballad written by Abel Meeropol (a.k.a. “Lewis Allan”) and made famous by Billie Holiday).

61. As a black resident of rural Georgia recounted, describing his memory of community life in the mid-20th century: “You know there was fear, . . . [n]ineteen-forties, -fifties, and -sixties, it was nothing for them to take a man out and beat him half to death. Or beat him to death. Or hang him. And nothing was ever said.” Melissa Fay Greene, *Praying for Sheetrock* 21 (1991).

Second, the context of lynching history helps to explain why Till's death, as well as his killers' acquittal and subsequent admission, attained such looming significance in the emerging civil rights movement of the 1950s. In certain respects, Till's murder differed from the lynchings discussed above: it was hidden and private rather than an open, public display; it occurred at the hands of Milam and Bryant (and perhaps a few others) rather than in the midst of mob violence; and it was followed by a search for the body and a trial in a court of law, both of which were closely watched by reporters from around the world. Completely consistent with earlier lynching history, however, the killers went free and gloated about their lawlessness. Legal process had made no difference save its creation of a charade, an appearance of legitimacy. This stunning arc of events reinforced the growing belief of many in the civil rights movement that law itself—and not just the flouting of law represented by lynching—was an impediment to racial justice.

Finally, lynching history offers a context in which to consider the meaning and merits of reopening the Emmett Till case now, nearly fifty years later. In proposing a truth and reconciliation commission for lynching, Sherrilyn Ifill seeks to address what she terms a "largely unhealed wound in many American communities,"⁶² one that affects the lives of perhaps thousands of blacks and whites today. Do similar objectives underlie the decision to reopen the Till case? Can the wound of the original miscarriage of justice be healed, and if so, under what circumstances? These are among the questions addressed below.

B. *Emmett Till (1941-1955)*

1. The Photographs: "I want the whole world to see what they did to my boy."⁶³

For most Americans of a certain age (for those born around 1950), the memory of Emmett Till can be distilled into a single, searing image: the photograph of his macerated face and upper torso as he lay in his casket. For African-Americans of that same certain age, the image of his bloated, decomposed body was more than disturbing; it

62. Ifill, *supra* note 49, at 265.

63. See American Experience, *The Murder of Emmett Till*, Transcript [hereinafter Transcript], at <http://www.pbs.org/wgbh/amex/till/filmmore/pt.html> (last visited Feb. 14, 2005). This now-famous remark was voiced when Mamie Till insisted that her son's hammered-shut casket be opened and on display at his funeral. *Id.*; see also Hendrickson, *supra* note 3, at 9; Mamie Till Bradley & Ethel Payne, *Mamie Bradley's Untold Story*, Chi. Defender, Apr.-June 1956, in *The Lynching of Emmett Till*, *supra* note 1, at 227.

was profoundly frightening, even life-changing.⁶⁴ The fact that *Jet* magazine, at Mamie Till's request, featured the photographs in its September 15, 1955 issue, was enormously significant to African-Americans.⁶⁵ *Jet*, along with *Ebony*, were the trusted national magazines "of record" for black America. They were black-owned periodicals that took the time to cover matters that mainstream (white) magazines would not: blacks' achievements and activities in education, entertainment, politics, religion, sports, society, fashion, and the professions.⁶⁶ With their glossy, photo-filled pages, they were in some respects a shared family album for the extended family of black middle-class America. In publishing the Till photographs, *Jet* opened its album to show the world a painful family history.

The State of Mississippi had planned to keep Emmett's visage hidden. When his casket arrived in Chicago for the funeral, Mamie Till noticed that its lid had been screwed down, padlocked, and marked with a state seal.⁶⁷ She insisted that it be opened so that she could examine her son's body:

I kept on up until I got to his chin and then I—I was forced to deal with his face. I saw that his tongue was choked out. I noticed that the right eye was lying . . . midway [on] his cheek, I noticed that his nose had been broken like somebody took a meat chopper and chopped his nose in several places. As I kept looking, I saw a hole, which I presumed, was a bullet hole and I could look through that

64. African-Americans from all walks of life have described their viewing of the Till photo as a traumatic and transformative event. See, e.g., Wideman, *supra* note 20, at 288 ("I cannot wish away Emmett Till's face. The horrific death mask of his erased features marks a place I ignore at my peril. The sight of a grievous wound. A wound unhealed because untended."); see also *60 Minutes: Justice, Delayed But Not Denied* (CBS television broadcast, Oct. 21, 2004) (quoting filmmaker Keith Beauchamp: "After seeing the photograph, it shocked me tremendously and my parents came in and sat me down and explained to me at that time the story of Emmett Till. And it hit me hard. It really hit me hard."), at <http://www.cbsnews.com/stories/2004/10/21/60minutes/main650652.shtml>. Another account is from Mississippi activist Margaret Block:

I remember just not being able to sleep when I saw [the photos]. Can you imagine being 11 years old and seeing something like that for the first time in your life and it's close to home? The death of Emmett Till touched us, it touched everybody. And we always said that if we ever got a chance to do something, we were going to change things around here.

Jet Magazine's Publication of Pictures of Emmett Till's Body (National Public Radio broadcast, June 23, 2004) [hereinafter NPR Broadcast], available at <http://www.npr.org/templates/story/story.php?storyId=1969702>.

65. See NPR Broadcast, *supra* note 64.

66. *Jet*, founded in 1951 by John H. Johnson of Chicago's Johnson Publishing Company, is a small, "pocket-sized" weekly with short articles; *Ebony*, founded in 1945 (also by Johnson) is a larger, monthly magazine. For greater details about the historical and cultural significance of *Jet* and *Ebony*, see John H. Johnson, *Succeeding Against the Odds* (1989); and Roland E. Wolseley, *The Black Press, USA* (1990).

67. Transcript, *supra* note 63.

hole and see daylight on the other side. And I wondered was it necessary to shoot him?⁶⁸

Mamie Till's decision to let the world see the brutality wrought upon her son's corpse was a radical act. Whereas white supremacists traditionally used photographs and other public displays of lynching as tools of terror, her insistence that "the whole world see" subversively used a graphic display as a tool of confrontation and resistance.

2. Life and Death: From Chicago, Illinois to Money, Mississippi

Before Emmett Till's life became a symbol of the horrors of racial hatred, it was unconnected to civil rights, white supremacy, or the South itself. Born in Chicago in 1941 to Mamie Carthan and Louis Till, Emmett Louis Till never got to know his father, an Army private who was shipped to Europe in 1943 and died two years later.⁶⁹ In the summer of 1955, Mamie Till, a Chicago civil service employee, planned to take Emmett on a summer vacation to Nebraska to visit relatives. Emmett asked if he could instead join his young cousins in Money, Mississippi. On August 20, Mamie Till put her son on a train from Chicago to Money to stay with his cousins at the home of his great uncle Moses Wright. As a going-away present, she gave Emmett his father's old ring, which was inscribed with his initials "L.T."⁷⁰

Testimony about exactly what happened between August 24 through August 28 (the end of Emmett's life) is not available from trial transcripts; for unknown reasons, they no longer exist.⁷¹ However, facts gathered through contemporaneous documents, the aforementioned documentaries, and other sources piece together the story that follows. On August 24, Emmett and a group of teenagers (seven boys and one girl) ended a day of picking cotton by going to a local convenience store in Money to buy candy, gum, and drinks. Bryant's Grocery and Meat Market was owned by Roy and Carolyn Bryant, a young white couple who lived on the premises with their two

68. *Id.* In *The Lynching of Emmett Till*, Metress reports a less-cited and even more disturbing detail about the murder; he quotes the separate recollections of two men that the hole in Till's head came not from a bullet, but from the use of a drill bit and brace. Christopher Metress, *Introduction to The Lynching of Emmett Till*, *supra* note 1, at 6-7.

69. American Experience, *The Murder of Emmett Till*, Timeline: The Murder of Emmett Till, 1921-1954 [hereinafter *Timeline*, 1921-1954], at www.pbs.org/wgbh/amex/till/timeline/index.html (last visited Feb. 14, 2005).

70. Transcript, *supra* note 63.

71. American Experience, *The Murder of Emmett Till*, Timeline: The Murder of Emmett Till, 1955-2003 [hereinafter *Timeline*, 1955-2003], at www.pbs.org/wgbh/amex/till/timeline/timeline2.html (last visited Feb. 14, 2005). The best source of the original texts of contemporaneous news coverage of the Till murder, trial, and immediate post-trial aftermath is *The Lynching of Emmett Till*, *supra* note 1. Whitaker's unpublished thesis, *supra* note 3, draws upon the now-lost trial transcripts. See *supra* note 3.

small children. The grocery's clientele consisted primarily of black sharecroppers and their families; it was not unusual for a group of black children to enter the store.⁷² Wheeler Parker, a cousin who did not testify at trial but who is interviewed extensively in the 2002 Stanley Nelson documentary, recalled that Emmett entered the store to buy bubble gum, and that he talked to and whistled at Carolyn Bryant. Parker recounted:

We all got a-scared and someone said, "She's going to get a pistol." That's when we became afraid. Said, "She's going to the car to get a pistol." And as she went to the car, we all jumped in my uncle's car. . . . And, of course, Emmett Till begged us not to tell my grandfather [Moses Wright] what had took place. And we didn't. This was on a Wednesday. And we didn't tell him what had taken place. Ah, so Wednesday went by, Thursday went by, nothin.' Friday. We forgot about it.⁷³

The Nelson documentary also features an interview with Moses Wright, Emmett's great uncle, who did testify at trial. He recalled that on Sunday, August 28, at about 2:30 a.m., he heard a voice at the door: "And it said this is Mr. Bryant. And said they wanted the boy that did the talk at Money. And when I opened the door there was a man standing with a pistol in one hand and a flashlight in the other."⁷⁴ Two men then entered the house and insisted that Wright take them to Emmett. Wright begged the two men to relent, explaining that Emmett was only fourteen and was "from up north." He said, "[w]hy not give the boy a whipping, and leave it at that?"⁷⁵ The men forced Wright to take them to Emmett; when they found him, they woke him up and told him to put on his clothes. According to Wright, one of the men (whom he identified at trial as J.W. Milam) turned to him and asked, "[h]ow old are you, preacher?" Wright replied, "[s]ixty-four." Milam said, "[y]ou make any trouble, you'll never live to be sixty-five." Wright then recalled: "Near to the car they asked a question, 'Is this the right one?' And I heard a voice say, 'Yes,' and they drove off toward Money with him."⁷⁶

72. Transcript, *supra* note 63.

73. *Id.* The exact nature of what Till said or did while in the store remains unknown. Contemporaneous news accounts of Carolyn Bryant's trial testimony quote her as saying that Till made "obscene remarks," touched her, and whistled. See *Mrs. Bryant Tells How Northern Negro Grabbed Her, "Wolf Whistled" in Store*, Jackson Daily News, Sept. 23, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 93-96; *Woman in Lynching Case Weaves Fantastic Story*, Wash. Afro-Am., Sept. 24, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 96-97. However, even the most famous detail—that he allegedly "wolf-whistled" at Carolyn Bryant—has long been in dispute. Some sources posit that Till may have been making a whistling sound to bring his stuttering under control. See, e.g., Rick Bragg, *Emmett Till's Long Shadow*, N.Y. Times, Dec. 1, 2002, § 4, at 4.

74. Transcript, *supra* note 63.

75. *Id.*

76. *Id.*; see also Ralph Hutto, *Slain Boy's Uncle Identifies Bryant, Milam on Stand*,

Nelson's documentary features interviews with several others with recollections of what happened later in the day on August 28. One witness remembered seeing Milam in his truck and hearing someone yelling inside; another heard beating and crying coming from a barn and saw Milam emerge; a third saw an employee of Milam's washing blood out of Milam's truck. The third witness related: "I said, 'What all that blood come from?' He laughed. The boy laughed. That's what he did. He said, 'There a shoe here. There's one of his shoes here.' I said 'Who!?' That's the way I said it. I say 'Who?' 'Emmett Till's shoe.'"⁷⁷

That same day, Mamie Till learned of her son's kidnapping from her family in Mississippi. The family contacted the authorities, who began to search for Emmett near riverbanks and bridges—"where black folks always look when something like this happens," said Moses Wright.⁷⁸ On August 29, Milam and Bryant were arrested and charged with the kidnapping in Greenwood, Mississippi. On August 31, a boy fishing in the Tallahatchie River found a decomposed body caught on a twisted root; it was weighted down with a cotton gin fan and badly disfigured. Moses Wright identified the corpse as Emmett Till based on the initials "L.T." on the boy's ring.⁷⁹ On September 2, Emmett Till's casket arrived in Chicago to be received by his mother, who insisted that it be opened and displayed at the September 3 funeral. The public funeral drew worldwide attention and thousands of mourners. Emmett Till was buried on September 6, at the end of the summer of his fourteenth year.⁸⁰

3. Trial and Acquittal: "[I]t was almost like a 4th of July celebration."⁸¹

On the day of Emmett Till's burial, a Mississippi grand jury indicted Milam and Bryant for his kidnapping and murder.⁸² The two men admitted they had taken Till but insisted that they had let him go.⁸³ By the time that the trial began in the small town of Sumner on September 19, more than seventy reporters and thirty photographers were in attendance. Journalist David Halberstam noted that "[t]he murder of Emmett Till and the trial of the two men accused of murdering him became the first great media event of the civil rights

Jackson St. Times, Sept. 21, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 71-75; Sam Johnson, *Uncle of Till's Identifies Pair of Men Who Abducted Chicago Negro*, Greenwood Commonwealth (Miss.), Sept. 21, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 68-70.

77. Transcript, *supra* note 63.

78. *Id.*

79. *Id.*

80. Timeline, 1955-2003, *supra* note 71.

81. Transcript, *supra* note 63 (remark of Mamie Till).

82. Timeline, 1955-2003, *supra* note 71.

83. Transcript, *supra* note 63.

movement.”⁸⁴ Milam and Bryant enjoyed broad local support; every lawyer in the county offered support to their defense team, and local stores raised ten thousand dollars for their legal fees.⁸⁵ Contemporaneous accounts describe the courtroom as humid, crowded, and rigidly segregated. All blacks involved in the trial and trial coverage (Mamie Till, journalists, counsel, and a U.S. Congressman) sat at a small card table to the side of the courtroom; every morning, the local sheriff greeted the table by saying, “[g]ood morning, niggers!”⁸⁶

The jury consisted of twelve white men.⁸⁷ Outside of the jury’s presence, Carolyn Bryant testified that Emmett Till had entered the store, bought two cents’ worth of bubble gum, made “obscene remarks” to her, and whistled at her.⁸⁸ Milam and Bryant did not take the stand.⁸⁹ Remarkably, given the intimidating courtroom atmosphere, several blacks testified, including: Mamie Till; Moses Wright; a teenager named Willie Reed; and Reed’s grandfather Ed (Add) Reed.⁹⁰ Mamie Till testified that the corpse that she had examined was her son; on cross-examination, the defense attorneys suggested that she and the NAACP were lying as part of a northern conspiracy.⁹¹ In the Nelson documentary, Mamie Till recalled:

They summed up by saying, “Isn’t it true that you and the NAACP got your heads together and you came down here and with their help, you all dug up a body and you have claimed that body to be your son? Isn’t it true that your son is in Detroit, Michigan with his grandfather right now?”⁹²

84. The Lynching of Emmett Till, *supra* note 1, at 44.

85. Transcript, *supra* note 63.

86. *Id.* Other examples abound of the open hostility of the community. In contemporaneous news coverage, one “man on the street” interviewee expressed scorn of Mamie Till: “I can’t understand how a civilized mother could put a dead body of her child on public display.” Another person suspected a “communistic front.” Still another joked: “Isn’t that just like a nigger to swim across the Tallahatchie with a gin fan around his neck?” *Id.*

87. *Id.*

88. *Mrs. Bryant Tells How Northern Negro Grabbed Her, “Wolf Whistled” in Store*, Jackson Daily News, Sept. 23, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 93-96; *Woman in Lynching Case Weaves Fantastic Story*, Wash. Afro-Am., Sept. 24, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 96-97.

89. See *id.* (neglecting to mention testimony from the defendants); Transcript, *supra* note 63 (same).

90. Transcript, *supra* note 63. Ed (Add) Reed’s testimony is discussed in materials available online. See *The Emmett Till Murder*, at <http://www.emmettillmurder.com> (last visited Feb. 14, 2005). There is no extant trial transcript; the only copies have vanished, their whereabouts unknown since the early 1960s. The source of the most accurate account of the trial proceedings is probably the unpublished 1963 master’s thesis of Hugh Stephen Whitaker, *supra* note 3. Whitaker had access to the transcript and quotes directly from it. He also interviewed many key participants. *Id.*

91. Transcript, *supra* note 63.

92. *Id.*

This outlandish strategy laid the foundation for Milam and Bryant's defense: that the corpse in question was not Till.

The prosecution presented two witnesses who testified that they had seen Milam and/or Bryant with Till on August 28. Willie Reed testified that he had seen Bryant, Milam, and one other white man with Till, and had heard the sounds of a beating coming from Milam's barn.⁹³ It was rare for a black man at that time to testify against whites. After testifying, Reed quietly slipped out of town to Chicago, where he was hospitalized for a nervous breakdown.⁹⁴ Moses Wright, Till's uncle, endured death threats for his role as the key prosecution witness. During his testimony, Wright literally stood up in open court to point his finger in identification of Milam and Bryant as the men who had kidnapped Till from his house. He too had to be smuggled out of the state after his testimony.⁹⁵

The defense's summation consisted of openly inflammatory supremacist rhetoric. The lead defense attorney warned that if the jury did not free Milam and Bryant, their "ancestors would turn over in their graves," and exhorted, "[e]very last Anglo-Saxon one of you . . . has the courage to free these men."⁹⁶ After sixty-seven minutes of deliberations, the jury acquitted the men on September 23.⁹⁷ One juror later commented that the jury had waited that long to "make it look good," and had paused to drink soda pop before returning with its verdict.⁹⁸ The jury foreman explained that the State

93. *Id.*; see also James L. Hicks, *Youth Puts Milam in Till Death Barn*, Wash. Afro.-Am., Sept. 24, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 87-88; Ralph Hutto, *Mother, "Surprise Witness" Give Dramatic Testimony: Mamie Bradley Says Corpse Was That of Her Slain Son* (pt.1), Jackson State Times, Sept. 22, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 81-83.

94. Transcript, *supra* note 63.

95. *Id.*

96. *Id.*; see also Sam Johnson, *Jury Hears Defense and Prosecution Arguments As Testimony Ends in Kidnap-Slaying Case*, Greenwood Commonwealth (Miss.), Sept. 23, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 100. The defense attorney summation went as follows:

There are people in the United States who want to destroy the way of life of Southern people.

....

There are people . . . who will go as far as necessary to commit any crime known to man to widen the gap between the white and colored people of the United States.

....

They would not be above putting a rotting, stinking body in the river in the hope that it would be identified as Emmett Till.

Id. (quotation marks omitted).

97. Transcript, *supra* note 63.

98. *Id.*

had failed to prove that the murder victim found was indeed Emmett Till.⁹⁹

Contemporaneous news footage shows Milam and Bryant reacting to the verdict by lighting up cigars, kissing their wives, and grinning for news photographers.¹⁰⁰ There was a celebratory atmosphere at the courthouse. Mamie Till recalled: "You could hear guns firing. I mean it was almost like a 4th of July celebration, or it was almost as if the White Sox had won the pennant in the city of Chicago."¹⁰¹ Sheriff H. C. Strider told reporters, "I hope the Chicago niggers and the NAACP are satisfied."¹⁰² Although Milam and Bryant still faced kidnapping charges, in November the grand jury heard testimony from both Wright and Reed and failed to indict.¹⁰³

4. The Immediate Aftermath: "Perhaps, an Opening of Consciousness"?¹⁰⁴

In the United States and abroad, the trial and acquittal garnered much scrutiny and controversy. Defenders of the verdict, particularly in the white and colored southern press, described the trial process as fair and the evidence as weak.¹⁰⁵ Leading Mississippi newspapers strongly criticized the NAACP and its "sympathizers" for their presence in Sumner, and blamed them for the worldwide condemnation of Mississippians and their justice system.¹⁰⁶ On the

99. *Id.* Whitaker's thesis asserts that the jurors, when polled, all said that they believed that Milam and Bryant had murdered Till; only one doubted the identity of the corpse retrieved from the Tallahatchie River. Whitaker, *supra* note 3, at 155.

100. James L. Kilgallen, *Defendants Receive Handshakes, Kisses*, Memphis Com. Appeal, Sept. 24, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 105-06.

101. Transcript, *supra* note 63.

102. *Id.*

103. See Crowe, *supra* note 3, at 114; Murray Kempton, *2 Face Trial As "Whistle" Kidnappers—Due to Post Bond and Go Home*, N.Y. Post, Sept. 25, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 107.

104. The quote is the headline of a post-verdict article, dated September 27, 1955, in the French daily newspaper, *Le Monde: The Sumner Trial Marks, Perhaps, an Opening of Consciousness*. See Timeline, 1955-2003, *supra* note 71.

105. See, e.g., *Acquittal*, Delta Democrat-Times, Sept. 23, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 115; *Fair Trial Was Credit to Mississippi*, Greenwood Morning Star (Miss.), Sept. 23, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 115-16; *The Verdict at Sumner*, Jackson Daily News, Sept. 25, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 116-17.

106. In *Fair Trial Was Credit to Mississippi*, the editors of the *Greenwood Morning Star* of September 23, 1955 defended the verdict:

This was one of those cases where the radicals and NAACP sympathizers were hoping that Miss. would give them occasion to lambaste our state because of its being a segregation stronghold. They were alert to every possibility and played every angle. Sometimes they wore your patience thin, but Miss. people rose to the occasion and proved to the world that this is a place where justice in the courts is given to all races, religions, and classes. *Fair Trial Was Credit to Mississippi*, *supra* note 105 at 115. Other editors acknowledged the acquittal as a failure, but blamed the NAACP for the state's failure

other hand, the acquittal galvanized those who viewed it as both a failure of the American legal system and a pivotal event in race relations. The African-American press, northern press organizations, and many other groups denounced the verdict and called for nationwide protests and boycotts.¹⁰⁷

International criticism of the verdict was ample and harsh. As legal historian Mary Dudziak notes, European public opinion was acutely critical of United States domestic race relations in the Cold War era; the European press pointed out the dissonance between U.S. proclamations of liberty in the international sphere and its own shameful record of racial injustice at home.¹⁰⁸ Headlines characterized the verdict as: the “Judicial Scandal” (*Le Peuple*); the “Scandalous Acquittal in Sumner” (*L’Aurore*); the “Shame of the Sumner Jury” (*Le Figaro*); and the “Mockery of Justice in Mississippi” (*L’Humanite*).¹⁰⁹ In an October 1955 memorandum summarizing European reaction, the Paris Office of the American Jewish Committee reported: “Europe’s condemnation came from all sections of public opinion, all political directions, and was expressed immediately and spontaneously. . . . These protestations were expressed in hundreds of newspaper editorials, statements by public

to secure a conviction; the *Delta Democrat-Times* of September 23, 1955 observed:

For without their blanket accusations of decent people, their studied needling of the citizens who had to decide a matter of local justice, and their indifference to truth in favor of propaganda-making, those local officials, put on the defensive from the outset, might otherwise have made an honest effort to do more than what resulted in an effective cover-up.

Acquittal, *supra* note 105, at 116.

107. See Editorial, *Double Murder in Mississippi*, *Christian Century*, Oct. 5, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 130-31; Chester Himes, Editorial, *Letter to the Editor*, *N.Y. Post*, Sept. 25, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 117; Langston Hughes, Editorial, *supra* note 1, at 124-26; Roi Ottley, Editorial, *Southern Style*, *Chi. Defender*, Oct. 8, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 131-33; Eleanor Roosevelt, Editorial, *I Think the Till Jury Will Have Uneasy Conscience*, *Memphis Press-Scimitar*, Oct. 11, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 136-37; Editorial, *The Shame of Our Nation*, *Daily Worker*, Sept. 26, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 118-19; Editorial, *The State of Mississippi Still Carries the Burden*, *Atlanta Const.*, Sept. 26, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 119-20; Editorial, *The Till Case Verdict*, *Jackson Advoc.*, Oct. 1, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 126-27; Dan Wakefield, *Justice in Sumner*, *The Nation*, Oct. 1, 1955, in *The Lynching of Emmett Till*, *supra* note 1, at 120-24; Editorial, *What You Can Do About the Disgrace in Sumner*, *Chi. Defender*, in *The Lynching of Emmett Till*, *supra* note 1, at 127-28; Press Release, Congressman Adam Clayton Powell, Jr., Congressman Powell Speaks at Labor Rally Held at Seventh Avenue and 37th Street (Oct. 11, 1955), in *The Lynching of Emmett Till*, *supra* note 1, at 133-36; see also *The Lynching of Emmett Till*, *supra* note 1, at 143-52 (quoting letters to the editors of the *Washington Afro-American*, *Cleveland Call and Post*, *Memphis Commercial Appeal*, and the *Atlanta Constitution* in response to the Till case).

108. Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (2000).

109. Timeline, 1955-2003, *supra* note 71.

leaders in every country of Western Europe, and by men in the street.”¹¹⁰

In January 1956, *Look* magazine, a top-selling weekly periodical, published *The Shocking Story of Approved Killing in Mississippi*, Milam and Bryant’s first-person account of how they had murdered Emmett Till.¹¹¹ In exchange for \$4000, Milam and Bryant had consented to an interview with journalist William Bradford Huie.¹¹² Huie recalled:

I met Milam and Bryant. We had this strange situation. We’re meeting in the library of this law firm. Milam and Bryant are sitting on one side of the table, [lawyer] John Whitten and I sitting on the other side. I’m not doing the questioning. Their own lawyer is doing the questioning. And he’s never heard their story. Not once. He becomes as interested in the story as I am. I said, “Now, I’m going to take notes and then during the day I’m going to do two things. I’m going to be roughing out this story, and I’m also going where you say you went, and I’m going to find evidence.”¹¹³

The admission and accompanying story by Huie are startling historical artifacts in several respects. Most important, of course, is that the admission exists at all. Lured by money and publicity, Milam and Bryant provided minute details of their thoughts, motivations, and actions during the kidnapping, killing, and disposal of the body. They offer extended recreations of their confrontations with Moses Wright, Moses Wright’s wife Elizabeth, and especially Emmett Till.¹¹⁴ Whether their statements are entirely true or embellished with self-serving braggadocio, they are shocking in their hubris and lurid detail. The juxtaposition of their remorseless tale with their acquittal only months before was a mockery of the justice system, a confirmation of blacks’ worst fears about white supremacist lawlessness.

A second notable aspect of the story is journalist Huie’s presentation. In contrast to the details of the killing, it is odd and unsettling to read Huie’s descriptions of the Bryants’ small-town, plain “American” values. He describes their social life as “visits to their families, to the Baptist church and, whenever they can borrow a

110. See The American Jewish Committee, Memo on the European Action to the Till Case (Oct. 7, 1955), in *The Lynching of Emmett Till*, *supra* note 1, at 138. In a speech at a labor rally in October 1955, U.S. Congressman Adam Clayton Powell, Jr., commented: “I can objectively report that the lynch murder of Emmett Till in Mississippi was, in the eyes of Europe, a lynching of the Statue of Liberty. No single incident has caused as much damage to the prestige of the United States on foreign shores as what has happened in Mississippi.” Press Release, *supra* note 107, at 133.

111. Timeline, 1955-2003, *supra* note 71; see also Huie, *supra* note 4, at 200-08.

112. Huie, *supra* note 4, at 200-08.

113. American Experience, *The Murder of Emmett Till*, Special Features, Killers’ Confession, at http://www.pbs.org/wgbh/amex/till/sfeature/sf_look.html (last visited Feb. 14, 2005) (materials relating to the confession in *Look*).

114. See Huie, *supra* note 1, at 205-08.

car, to a drive-in, with the kids sleeping in the back seat."¹¹⁵ They are "poor: no car, no T.V. . . . They sell 'snuff-and-fatback' to Negro field hands on credit; and they earn little because, for one reason, the government has begun giving the Negroes food they formerly bought."¹¹⁶ A southern writer, Huie conveys an air of eerie inevitability in his descriptions of rural white Mississippi and the rigid taboos of race and gender threatened by Emmett Till. In describing the Milam/Bryant family, he notes:

This is a lusty and devoted clan. They work, fight, vote and play as a family. . . . For years, they have operated a chain of cotton-field stores, as well as trucks and mechanical cotton pickers. In relation to the Negroes, they are somewhat like white traders in portions of Africa today; and they are determined to resist the revolt of colored men against white rule.¹¹⁷

Huie's combination of blunt expose and Southern parable only underscores the reader's sense that Milam and Bryant's status of impunity was far from aberrational in Southern white-black relations. Huie concludes that "[t]he majority—by no means *all*, but the *majority*—of the white people in Mississippi 1) either approve Big Milam's action or else 2) they don't disapprove enough to risk giving their 'enemies' the satisfaction of a conviction."¹¹⁸ But ultimately, what distinguished this case from countless other unpunished lynchings was the convergence of worldwide exposure and a ripening civil rights movement.

C. Emmett Till and the Growth of the Civil Rights Movement

Many scholars of the civil rights movement of the late 1950s view the Emmett Till case as a crucial moment in the struggle for black freedom.¹¹⁹ The murder of a fourteen year old boy for a single cavalier act was hardly an isolated event; it occurred in a context that bridged the history of Southern lynching with the emerging civil rights revolution. Fifteen months before Till's murder, the U.S. Supreme Court had decided *Brown v. Board of Education*,¹²⁰ which was met with staunch opposition from southern segregationists.¹²¹ Mississippi

115. *Id.* at 201.

116. *Id.*

117. *Id.* at 202.

118. *Id.* at 208.

119. *See, e.g.*, Taylor Branch, *Parting the Waters: America in the King Years, 1954-63*, at 209 (1988); Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change 29-30, 147* (1984); Harvard Sitkoff, *The Struggle for Black Equality, 1954-1992*, at 44 (1993); Williams, *supra* note 3, at 38-57.

120. 347 U.S. 483 (1954).

121. Constance Baker Motley, a member of the *Brown* legal team, notes:

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

in particular emerged as a cauldron of race hatred; two months after the *Brown* decision, Mississippi supremacists founded the Citizens' Council to "preserve" the white race from the "mongrelization" of desegregation.¹²² In May 1955, two African-American men active in voter registration drives were shot and killed in two separate incidents in Mississippi; no one was arrested in connection with either murder.¹²³

Even though Emmett Till's actions in Bryant's Grocery were hardly political in an overt sense, Milam and Bryant saw them as the integrationist, rabble-rousing "poison" of an impudent northerner. The fact that Till was a visitor from Chicago only underscored their anger; his actions became "political" the moment he stepped off the train in Money, Mississippi. It mattered little to Milam and Bryant that he was a fourteen year old boy trying to buy bubble gum; to them, he was a black predator who threatened their way of life.¹²⁴

The year 1955 marked a turning point for the Southern way of life for several important and interlocking reasons. As the first post-*Brown* year, it fueled not only segregationist backlash, but also further integrationist resistance to Jim Crow laws and institutions. As the year of Till's murder and his killers' acquittal, it awakened in many Americans a sense that the whole world had seen not only the death of Emmett Till, but also the brutality of lynching and the disintegration of Jim Crow's legal and political legitimacy. As the year ended, the unraveling continued. On December 5, 1955, one hundred days after Till's murder, Rosa Parks refused to give up her seat on a city bus in Montgomery, Alabama; in the ensuing days, the Montgomery bus boycott began.¹²⁵

constitutional right to nullify the effectiveness of any federal law or federal court decision with which it disagreed and to interpose its sovereignty between that decision or law and the federal government In some state capitals in the Old South, the Confederate flag was still flying or had been raised anew.

Constance Baker Motley, *Equal Justice Under Law: An Autobiography* 134-35 (1998).

122. See Timeline, 1921-1954, *supra* note 69.

123. Timeline, 1955-2003, *supra* note 71. Both men had been active in voter registration drives. The Reverend George Lee, a NAACP field worker in Belzoni, Mississippi, was shot at point blank range in his car after trying to vote. Lamar Smith was shot to death in broad daylight in front of the county courthouse. *Id.*

124. For an analysis of the Till case and its influence on contemporary attitudes about interracial relationships, see Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* (2003).

125. See Jo Ann Gibson Robinson, *The Montgomery Bus Boycott and the Women Who Started It* (1987); see also Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *Yale L.J.* 999 (1989).

II. LESSONS AND CHALLENGES FOR CRITICAL RACE PRACTICE

Among the many intriguing questions that arise from the reopenings of the Emmett Till murder investigation and other civil rights era cases are considerations of long-term meaning and suitability of remedy. Without a doubt, these were and are serious miscarriages of justice that demand reflection, remembrance, and re-examination. The horrors of these crimes linger and reverberate many decades later and through many communities, suggesting that admonitions to “move on” and “leave the past behind” are not only inadequate and unrealistic, but insulting to human dignity as well. As one famous son of the South wrote, “[t]he past is never dead. It’s not even past.”¹²⁶

These considerations notwithstanding, it is far from clear that individual reopenings and new prosecutions can sufficiently define or remedy the grievous harms inflicted by these events. New trials for the murder of Emmett Till might or might not result in the cleansing moment of conviction and incarceration; with either outcome, much harm remains not only unremedied, but perhaps irremediable. Of course, this is true with respect to murder prosecutions generally; however, the symbolic long-term significance of the Till case renders it categorically different in momentum and in meaning. If reopenings and new prosecutions fail to provide a sense of closure and justice, the fault may lie not in the outcome of new proceedings, but in the nature of conventional criminal proceedings and sanctions themselves. In this regard, Martha Minow, among others, has called for more study of systemic violence, as well as for a broader range of political and legal responses to it.¹²⁷ The emerging field of transitional justice draws upon the experiences of countries that have endured mass violence; it focuses attention not only on atomistic actors or events, but also on patterns of violence and their contextual meaning and effects.¹²⁸

Critical race literature also urges a broader contextual approach to conceptions of harm and remedy in the American legal system. In legal settings ranging from reparations¹²⁹ to affirmative action¹³⁰ to

126. William Faulkner, *Requiem for a Nun* 92 (1951). Faulkner published an open letter in newspapers throughout the nation during the trial of Milam and Bryant, calling for justice: “Because if we in America have reached that point in our desperate culture when we must murder children, no matter for what reason or what color, we don’t deserve to survive, and probably won’t.” *The Lynching of Emmett Till*, *supra* note 1, at 43 (quotation marks omitted).

127. *See generally* *Breaking the Cycles of Hatred: Memory, Law, and Repair*, *supra* note 23.

128. *See* *Impunity and Human Rights in International Law and Practice*, *supra* note 23.

129. *See* Alfred L. Brophy, *Reconstructing the Dreamland: The Tulsa Riot of 1921: Race, Reparations, and Reconciliation* (2002); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in Reparations Debate in America*, 38 *Harv. C.R.-C.L.*

wrongful convictions,¹³¹ many critical race writings address both the philosophical and pragmatic underpinnings of the concept of redress for racial injustice. These writings are part of a larger body of social justice scholarship that aims to generate innovative legal theories and strategies for the next generation of lawyers.¹³² A noteworthy characteristic of both critical race literature and the social justice scholarship that it is a part of is a concerted effort to unite legal theory with practice: to create a dynamic where theoreticians and practitioners learn from and influence each other in addressing specific problems of injustice. In this part, I address two key areas where the Till reopening (as it has unfolded thus far) can both influence and be affected by critical race practice: questions of harm, and questions of remedy. Each of these areas presents an example of the ways in which the concerns underlying reopenings dovetail with core themes of critical race praxis.

A. Questions of Harm: Defining the Scope of Injustice

A first lesson from the Till reopening is the importance of non-lawyers, non-legal approaches, and non-legal sources in defining the scope of harms suffered. Five decades of organizing, investigation, research, and artistic expression preceded the legal decision to reopen. Throughout this process, non-lawyers were the agents of inquiry, protest, and change. Certainly, some lawyers were instrumental in the reopening—for example, Kenneth Thompson, a former prosecutor who supported Keith Beauchamp's efforts.¹³³ But before the

L. Rev. 279 (2003); Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 Rutgers L. Rev. 309 (2003); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. Rev. 429 (1998); Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 Mich. L. Rev. 1269 (2003); Rhonda V. Magee, Note, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 Va. L. Rev. 863 (1993).

130. Joel Dreyfuss & Charles Lawrence III, *The Bakke Case: The Politics of Inequality* (1979); Charles R. Lawrence III & Mari J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* (1997); William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 Berkeley La Raza L.J. 173 (2001); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 Cal. L. Rev. 1449 (1997).

131. See, e.g., Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 Santa Clara L. Rev. 1 (1986).

132. See generally *Cases and Materials on Social Justice: Professionals, Communities, and Law* (Martha R. Mahoney et al. eds., 2003) (groundbreaking casebook of cases and materials about social justice lawyering).

133. Press Release, Senator Charles E. Schumer, *Schumer and Rangel Launch New Campaign to Force US Justice Department to Reopen Investigation into 1955 Murder of Emmett Till* (Apr. 13, 2004), available at

movement to reopen the case reached the venues of the district attorney's office, Congress, and the U.S. Department of Justice, it gained momentum in homes, community halls, churches, and screening rooms. The primary arena in which Till's story was preserved was not the courtroom, but collective memory.

These differences greatly affect the way in which questions of harm have been framed in our historical memory of what happened to Emmett Till. The scope of injustice is now defined not by the parameters of the original legal proceedings, but by what historical memory tells us happened in 1955 and in the five decades since then. In a sense, the Justice Department tacitly acknowledged this more capacious definition when it announced that "we owe it to ourselves" as well as to Emmett Till to address a case that stands "at the crossroads of the modern American civil rights movement."¹³⁴

Similarly, many critical race theorists urge that lawyers consider a broader context in defining the nature of injustice. This tenet is described in the literature in several ways. Pivotal critical race writings underscore the importance of "looking to the bottom"¹³⁵ and of "counter-storytelling" to "help us understand what life is like for others, and invite the reader into a new and unfamiliar world."¹³⁶ More recent scholarship displays a continuing emphasis on the need for critical race practitioners to listen to previously unheard voices and communities in formulating strategies for political empowerment and racial justice.¹³⁷ Sharon K. Hom and Eric K. Yamamoto write:

Who frames injustice in the law's eye and the public's mind?
How and with what societal effects? . . . [F]raming injustice is about
social memory.

. . . .

In an era characterized by a conservative "retreat from justice," many progressive lawyers and activists seeking legal justice define injustice narrowly. They focus on legal doctrine and its definition of

http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/PR02568.Till041304.html.

134. Acosta Briefing, *supra* note 2.

135. See generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, in *Critical Race Theory: The Key Writings that Formed the Movement*, *supra* note 33, at 63-79.

136. *Critical Race Theory: An Introduction*, *supra* note 33, at 41. Also, see Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values* 6 (1997), in which Davis uses the novel structure of "stories" to develop a theory of family rights. Davis observes: "All legal doctrines are stories, structured upon formal but ambiguous texts and nourished by history and culture. They owe their existence to collective recognition which comes as a result of their resonance with the culture and traditions of the people who announce and live by their terms." *Id.*

137. See generally Lani Guinier & Gerald Torres, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* (2002); Ian F. Haney López, *Racism on Trial: The Chicano Fight for Justice* (2003).

a civil rights claim. . . . That framing, while legally apt, narrows public imagination and debate. In its search for “relevant facts” and crisp argument, it relegates history and community agitation to back-up roles in civil rights struggles.¹³⁸

Hom and Yamamoto urge practitioners to consider broader theories of harm, to “expand the law’s narrow framing of injustice and focus on historical facts to more fully portray what happened and why it was wrong.”¹³⁹

These prescriptions suitably describe a way to frame the many injustices of the Till case and its aftermath; a broader definition of the scope of harms is very helpful in understanding the impact of this case on the landscape of the American civil rights movement. However, complexities arise when applying this broader framework to the question of whether reopening would sufficiently address the harms. Consider the reopening at three levels. First, consider the reopening in its most elemental legal function: a chance to address the murder of Till. If the reopening results in one or more prosecutions, one must keep in mind that in all likelihood these prosecutions would be, at most, the trial of a few minor “accomplices” (if sufficient evidence shows that Milam and Bryant did not act alone). According to the research of documentarian Keith Beauchamp and others, these individuals could include whites and blacks; these “accomplices” may have been handymen in the employ of Milam.¹⁴⁰

Without intending to diminish or excuse in any way the culpability of accomplices, one might still ask: would securing convictions of these individuals effectively address the harm of Till’s murder?¹⁴¹ Milam and Bryant, the acknowledged culprits, have been dead for decades. They went to their graves without convictions and without any public accountability for the enormity of their actions.¹⁴² That fundamental injustice can never be corrected.

Next, consider the reopening through the lens of a second level of harm, again broadly defined: the delegitimation of the legal system fostered by the miscarriage of justice of the original trial. Could a

138. Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. Rev. 1747, 1756-57 (2000) (citations omitted).

139. *Id.* at 1757.

140. See Lichtblau & Jacobs, *supra* note 2; Van Biema, *supra* note 11; David T. Beito & Linda Royster Beito, *Why It’s Unlikely the Emmett Till Murder Mystery Will Ever Be Solved*, History News Network, at <http://www.hnn.us/articles/4853.html> (Apr. 26, 2004). Thus far, it is not entirely clear from the public record which individuals would be defendants if new prosecutions ensue, nor is it clear whether Carolyn Bryant is among those under investigation.

141. For a discussion of constitutional and other legal limitations on the prosecution of long-dormant murder charges, see Russell, *supra* note 32, at 1255-61.

142. Hendrickson, *supra* note 3, at 11. Hendrickson notes that Bryant, when interviewed by a journalist in the mid-1980s, attempted to deny that he had murdered Till and commented: “You mean do I wish I might wouldn’t have done it? I’m just sorry that it happened.” *Id.*

reopening ameliorate this harm? Can the successful revival of long-dormant claims correct the warping effect on the legal system of the original legal injustices? Should the reopening of the Till case be viewed in this way?

At this point, my answer is no. One reopening, even amid a spate of reopenings, does not signify structural transformation. Fortunately, there are an increasing number of examples of concrete positive legal change through reopenings: for example, re-prosecutions and convictions of the murderers of Medgar Evers, the Birmingham Church bombing victims, and others,¹⁴³ the reversal of numerous wrongful convictions;¹⁴⁴ the success of the *coram nobis* litigation on behalf of Fred Korematsu;¹⁴⁵ and the grant of a presidential pardon for one of the Port Chicago prisoners.¹⁴⁶ These efforts illustrate both the deep flaws in our legal system and its capacity to withstand challenges. However, it would be misleading to suggest that these exceptional, relatively high-profile examples of self-correction prove the legitimacy of the system itself.

Critical race practice offers several analytical insights with regard to this second level of harm. In response to arguments that individual case reopenings provide an opportunity to alter structures of legal injustice, the literature sounds a few notes of caution. In its critiques of liberalism, critical race literature challenges mainstream beliefs about the legal system—namely, that it is premised on values of neutrality, colorblindness, and incremental social change.¹⁴⁷ Critical race literature argues instead that these supposed “values” are in fact myths that mask deep truths about the persistence of systemic racism and the majoritarian tendency to accept change only when it converges with majoritarian interests (interest convergence).¹⁴⁸ These

143. See Russell, *supra* note 32, at 1236-41.

144. See Barry Scheck et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (2000); Santa Clara Univ. Sch. of Law, Northern Innocence Project at Santa Clara University, at http://www.scu.edu/law/socialjustice/ncip_home.html (last visited Feb. 14, 2005).

145. See Yamamoto, *supra* note 131; see also Race, Rights and Reparation: Law and the Japanese American Internment 280-84 (Eric K. Yamamoto et al. eds., 2001).

146. The Port Chicago incident stemmed from a munitions explosion at the Port Chicago naval base in northern California in 1944. After the explosion killed several hundred sailors (many of them African-Americans) in the worst home-front military disaster of World War II, a group of remaining sailors refused to continue working in the unsafe conditions of the base. They were court-martialed. A movement to reopen an investigation into the incident resulted in ongoing efforts to secure pardons for the few remaining living sailors. See Robert L. Allen, *The Port Chicago Mutiny* (Amistad Press, Inc. 1993) (1989). In December 1999, President Bill Clinton issued a pardon for one of the surviving men. Richard Goldstein, *Freddie Meeks, 83, Ex-Sailor Who Was Pardoned, Dies*, N.Y. Times, June 30, 2003, at A19.

147. See generally Critical Race Theory: An Introduction, *supra* note 33.

148. See, e.g., Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (1992); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980); Derrick A. Bell, *Racial Realism*,

tenets suggest that reopenings represent at most only superficial, transitory improvements.

Finally, consider a third, and most broad, conception of harm present in the Till case. This definition of injustice is perhaps the most elusive, yet pervasive of all: the harm that Richard Wright wrote of when he referred to the effects of white brutality on the deepest levels of consciousness.¹⁴⁹ Although Wright wrote *Black Boy* in 1935, his description of the invisible “policing” effect of supremacist violence upon African-Americans is compellingly contemporary; it is an apt evocation of the meaning of racial subordination through the exercise of terror. Contemporary writers John Edgar Wideman and Michael Eric Dyson have drawn analogies between the treatment of Emmett Till and the dehumanizing violence suffered by young black men today.¹⁵⁰ Wideman writes: “Disfigured by drugs, crime, disease, homelessness, pathological poverty, drenched in hot-blooded or cold-blooded statistics, the brutalized Black body displayed in the media loses all vestiges of humanity.”¹⁵¹ Dyson decries the “young black Emmett Tills who are killed by other young black Emmett Tills in a culture of crime and violence.”¹⁵² Yet he also comments:

The unspeakable horror of Emmett’s death caused shock to ripple through the entire nation. More importantly, his death galvanized a people perched on the fragile border between heroism and fear to courageously pursue meaningful and complete equality. In the curious mix of fortuity and destiny that infuse all events of epic meaning, Emmett’s death gained a transcendent metaphoric value.¹⁵³

This third and deepest level of harm is perhaps the most meaningful legacy of the Till case: a sense that the most craven manifestation of race hatred, reinforced through an unprincipled legal process, served as the catalyst for a vigorous social change movement. This interpretation suggests that the reopening of the Till case—like the death of Emmett Till himself—has gained a “transcendent metaphoric value” in the eyes of those who equate reopening with reconciliation.

B. *Questions of Remedy: Can Law Provide a Solution?*

With these conceptions of harm in mind, is it possible for reopening to provide a satisfactory remedy?

Given the parameters of what is possible if the Till investigation results in new prosecutions, I conclude that the reopening is

in Critical Race Theory: The Key Writings that Formed the Movement, supra note 33.

149. See *Black Boy, supra* note 45.

150. See Dyson, *supra* note 20, at 266-70; Wideman, *supra* note 20, at 278-88.

151. Wideman, *supra* note 20, at 280.

152. Dyson, *supra* note 20, at 269.

153. *Id.* at 268.

problematic not because it demands too much, but rather because it demands too little. The nature of the framework in which the case is being re-examined is necessarily limited to questions of evidentiary sufficiency, prosecutorial discretion, and legal viability. The impetus to reopen the case through these channels (both state and federal) is laudable and worthy. However, given that Till's murderers are long deceased and that their mockery of justice is irreversible, the reopening should focus on broader issues than the identification of new witnesses and possible suspects. Unlike other civil rights era reprosecutions (such as Byron de la Beckwith and Edgar Ray Killen), Till's is not a case in which the "real culprits" or co-conspirators can still be prosecuted. The lack of closure in the case cannot be ameliorated through criminal proceedings. Moreover, unlike recent reparations efforts through state commissions and civil lawsuits,¹⁵⁴ this is not a case where reopening will lead to redress of a compensatory or equitable nature. The "narrowest," most literal conception of harm (the grievous loss of Emmett Till) will forever be an irreparable tragedy; the broadest conception of harm invoked by the case cannot be addressed in the context of new criminal prosecutions.¹⁵⁵

CONCLUSION

If the law can create miscarriages of justice yet provide no mechanism for correction of them, reopenings can serve another purpose: they can remind communities (and their lawyers) that the law often operates not as an arc of justice,¹⁵⁶ but rather as a web of power requiring analysis, navigation, and often resistance. Lucie White, embracing the notion of "law's deeper function in stimulating progressive change,"¹⁵⁷ proposes that critical lawyers use their positions to engage in a public conversation about social justice. She notes: "[S]uccess is measured by such factors as whether the case widens the public imagination about right and wrong, mobilizes

154. Compare the meaning of reopening in this case with, for example, recent reparations efforts to compensate survivors of the 1921 Tulsa race riot. See Brophy, *supra* note 129; see also James S. Hirsch, *Can Justice Be Done in Tulsa?*, Wash. Post, Mar. 16, 2003, at B2.

155. Professor Ifill's proposal for truth and reconciliation commissions for lynching is premised on a broader definition of harm—namely, the continuing damage that histories and collective memories of lynching inflict on multiracial communities. Ifill, *supra* note 49. In the case of Emmett Till, the tragedy affected not only Sumner/Money and Chicago, but the nation itself.

156. See Kevin Boyle, *Arc of Justice: A Saga of Race, Civil Rights, and Murder in the Jazz Age* (2004).

157. Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 Wis. L. Rev. 699, 758.

political action behind new social arrangements, or pressures those in power to make concessions.”¹⁵⁸

If the Emmett Till reopening is to have any lasting meaning, its success must be measured not only by prosecutions won or lost, but by the respect and dignity with which we approach the task of understanding why it remains important to revisit the events of August/September of 1955. This may or may not be a legal task, but it is surely a moral one—as is, ultimately, any search for justice.

158. *Id.* at 758-59.